

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Paul J. Johanek,
Appellant,

v.

Douglas County Board of Equalization,
Appellee.

Case No: 12R 357

Decision and Order Affirming the
Determination of the Douglas
County Board of Equalization

GENERAL BACKGROUND AND PROCEDURAL HISTORY

1. The real property subject to appeal (herein referred to as the “Subject Property”) is a residential parcel located at 6611 Fern Lake Circle, Omaha, NE, with a legal description of: FERN LAKES ESTATES LOT 5 BLOCK 0 IRREG 1.00 AC.
2. The Douglas County Assessor assessed the Subject Property at \$463,800 for tax year 2012.
3. Paul J. Johanek (herein referred to as the “Taxpayer”) protested this value to the Douglas County Board of Equalization (herein referred to as the “County Board”).
4. The County Board determined that the assessed value of the Subject Property was \$463,800 for tax year 2012.
5. The Taxpayer appealed the determination of the County Board to the Tax Equalization and Review Commission (herein referred to as the “Commission”).
6. A Single Commissioner hearing was held on September 6, 2013, at the Omaha State Office Bldg., 1313 Farnam, Rm. 227, Omaha, NE, before Commissioner Thomas D. Freimuth.
7. Paul J. Johanek was present at the hearing.
8. Larry Thomsen and Kevin Corcoran, assessors with the Douglas County Assessor’s Office, were present for the County Board.

STANDARD OF REVIEW

9. The Commission’s review of the determination of the County Board of Equalization is de novo.¹ “When an appeal is conducted as a ‘trial de novo,’ as opposed to a ‘trial de novo on the record,’ it means literally a new hearing and not merely new findings of fact based upon a previous record. A trial de novo is conducted as though the earlier trial had not

¹ See, Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.), *Brenner v. Banner Cty. Bd. of Equal.*, 276 Neb. 275, 286, 753 N.W.2d 802, 813 (2008).

been held in the first place, and evidence is taken anew as such evidence is available at the time of the trial on appeal.”²

10. When considering an appeal a presumption exists that the “board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action.”³ That presumption “remains until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence adduced on appeal to the contrary. From that point forward, the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon all the evidence presented. The burden of showing such valuation to be unreasonable rests upon the taxpayer on appeal from the action of the board.”⁴
11. The order, decision, determination or action appealed from shall be affirmed unless evidence is adduced establishing that the order, decision, determination, or action was unreasonable or arbitrary.⁵
12. Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.⁶
13. A Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued.⁷

SUMMARY OF HEARING DOCUMENTS & STATEMENTS

14. The Subject Property is located in the Fern Lake Development, which consists of seven improved properties. The improvements located on the Subject Property were constructed in 2008.⁸
15. The Taxpayer asserted that the total cost of construction was \$428,000.⁹ The Taxpayer asserted that the total cost of construction included 10-15% commission for the builder,¹⁰ and \$100,000 attributable to the purchase of the land associated with the Subject Property.¹¹ The Taxpayer asserted that the Subject Property’s actual value should be equal to the construction price of the improvements and the purchase price of the land component.
16. The Taxpayer provided the Commission with a list of the assessed value per square foot of alleged comparable properties located in lake developments in close proximity to the

² *Koch v. Cedar Cty. Freeholder Bd.*, 276 Neb. 1009, 1019 (2009).

³ *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted).

⁴ *Id.*

⁵ Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.).

⁶ *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

⁷ Cf. *Josten-Wilbert Vault Co. v. Board of Equalization for Buffalo County*, 179 Neb. 415, 138 N.W.2d 641 (1965) (determination of actual value); *Lincoln Tel. and Tel. Co. v. County Bd. Of Equalization of York County*, 209 Neb. 465, 308 N.W.2d 515 (1981)(determination of equalized taxable value).

⁸ See, Assessment Report, pg. 2.

⁹ See, Hearing Notes (indicating cost to construct).

¹⁰ See, Hearing Notes.

¹¹ *Id.*

Subject Property. The Taxpayer asserted that the alleged comparable properties were not equalized with the Subject Property because they were assessed at a different per square foot value.¹²

17. The Taxpayer provided screen shots or listings for the alleged comparable properties.
18. The Taxpayer asserted that larger parcels should receive a positive adjustment of \$50,000.¹³ The Taxpayer adjusted the value of the alleged comparable properties for these factors.¹⁴
19. The County Assessor provided an Assessment Report for the Subject Property. The Assessment Report indicates that the Subject Property was valued using a cost approach.¹⁵ It also indicates that the cost approach is generally used for newer properties.¹⁶
20. The Assessment Report contains a comparison of the Subject Property and the County Assessor's alleged comparable properties,¹⁷ as well as the property record cards for the County Assessor's alleged comparable properties.¹⁸

GENERAL VALUATION LAW

21. A Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued.¹⁹
22. "Actual value, market value, and fair market value mean exactly the same thing."²⁰
23. Taxable value is the percentage of actual value subject to taxation as directed by Nebraska Statutes section 77-201 and has the same meaning as assessed value.²¹
24. All real property in Nebraska subject to taxation shall be assessed as of January 1.²²
25. All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.²³
26. Nebraska Statutes section 77-112 defines actual value as follows:

Actual value of real property for purposes of taxation means the market value of real property in the ordinary course of trade. Actual value may be determined using professionally accepted mass appraisal methods, including, but not limited to, the (1)

¹² *Id.*

¹³ See, Taxpayer letter.

¹⁴ *Id.*

¹⁵ See, Assessment Report, pgs. 14-19.

¹⁶ See, *Id.* at 9.

¹⁷ See, *Id.* at 13.

¹⁸ See, *Id.* at 21 – 39.

¹⁹ Cf. *Josten-Wilbert Vault Co. v. Board of Equalization for Buffalo County*, 179 Neb. 415, 138 N.W.2d 641 (1965) (determination of actual value); *Lincoln Tel. and Tel. Co. v. County Bd. Of Equalization of York County*, 209 Neb. 465, 308 N.W.2d 515 (1981) (determination of equalized taxable value).

²⁰ *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).

²¹ Neb. Rev. Stat. §77-131 (Reissue 2009).

²² See, Neb. Rev. Stat. §77-1301(1) (Reissue 2009).

²³ Neb. Rev. Stat. §77-201(1) (Reissue 2009).

sales comparison approach using the guidelines in section 77-1371, (2) income approach, and (3) cost approach. Actual value is the most probable price expressed in terms of money that a property will bring if exposed for sale in the open market, or in an arm's length transaction, between a willing buyer and a willing seller, both of whom are knowledgeable concerning all the uses to which the real property is adapted and for which the real property is capable of being used. In analyzing the uses and restrictions applicable to real property the analysis shall include a full description of the physical characteristics of the real property and an identification of the property rights valued.²⁴

VALUATION ANALYSIS

27. Other than the actual cost to construct the Subject Property in 2008, the Taxpayer did not submit other evidence to refute the cost approach rendered by the County Assessor and relied upon by the County Board.
28. The cost approach includes six steps:
 - (1) Estimate the land (site) value as if vacant and available for development to its highest and best use; (2) Estimate the total cost new of the improvements as of the appraisal date, including direct costs, indirect costs, and entrepreneurial profit from market analysis; (3) Estimate the total amount of accrued depreciation attributable to physical deterioration, functional obsolescence, and external (economic) obsolescence; (4) Subtract the total amount of accrued depreciation from the total cost new of the primary improvements to arrive at the depreciated cost of improvements; (5) Estimate the total cost new of any accessory improvements and site improvements, then estimate and deduct all accrued depreciation from the total cost new of these improvements; (6) Add site value to the depreciated cost of the primary improvements, accessory improvements, and site improvements, to arrive at a value indication by the cost approach.²⁵
29. The cost approach should be based on relevant and current market quantifications of its factors.²⁶ Construction costs and prices for land vary from year to year.²⁷
30. Using current market data indicates the cost to construct the improvement components in close proximity to the date of assessment, which in this case is January 1, 2012. In contrast, use of 2008 actual building costs precedes the date of assessment by four years. Additionally, actual costs of construction may be influenced by differences between individual contractors' costing models and practices.²⁸
31. The Commission finds that the actual cost to construct the Subject Property in 2008 by itself is not clear and convincing evidence that the County Board's determination, which relied upon the County Assessor's cost approach is unreasonable or arbitrary.

²⁴ Neb. Rev. Stat. § 77-112 (Reissue 2009).

²⁵ *Property Assessment Valuation*, International Association of Assessing Officers, at 230 (3rd ed. 2010).

²⁶ *Id.* at 386-398.

²⁷ *Id.* at 396-398.

²⁸ *Id.* at 386-388.

GENERAL EQUALIZATION LAW

32. "Taxes shall be levied by valuation uniformly and proportionately upon all real property and franchises as defined by the Legislature except as otherwise provided in or permitted by this Constitution."²⁹ Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value.³⁰ The purpose of equalization of assessments is to bring the assessment of different parts of a taxing district to the same relative standard, so that no one of the parts may be compelled to pay a disproportionate part of the tax.³¹
33. In order to determine a proportionate valuation, a comparison of the ratio of assessed value to market value for both the subject property and comparable property is required.³²
34. Uniformity requires that whatever methods are used to determine actual or taxable value for various classifications of real property that the results be correlated to show uniformity.³³ Taxpayers are entitled to have their property assessed uniformly and proportionately, even though the result may be that it is assessed at less than the actual value.³⁴
35. The constitutional requirement of uniformity in taxation extends to both rate and valuation.³⁵ If taxable values are to be equalized it is necessary for a Taxpayer to establish by "clear and convincing evidence that valuation placed on his or her property when compared with valuations placed on similar property is grossly excessive and is the result of systematic will or failure of a plain legal duty, and not mere error of judgment [sic]."³⁶ "There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity."³⁷
36. "To set the valuation of similarly situated property, i.e. comparables, at materially different levels, i.e., value per square foot, is by definition, unreasonable and arbitrary, under the Nebraska Constitution."³⁸

EQUALIZATION ANALYSIS

37. As indicated previously, an order for equalization requires evidence that either: (1) similar properties were assessed at materially different values;³⁹ or (2) a comparison of

²⁹ *Neb. Const.*, Art. VIII, §1.

³⁰ *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).

³¹ *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991); *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623, (1999).

³² *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).

³³ *Banner County v. State Board of Equalization*, 226 Neb. 236, 411 N.W.2d 35 (1987).

³⁴ *Equitable Life v. Lincoln County Bd. of Equal.*, 229 Neb. 60, 425 N.W.2d 320 (1988); *Fremont Plaza v. Dodge County Bd. of Equal.*, 225 Neb. 303, 405 N.W.2d 555 (1987).

³⁵ *First Nat. Bank & Trust Co. v. County of Lancaster*, 177 Neb. 390, 128 N.W.2d 820 (1964).

³⁶ *Newman v. County of Dawson*, 167 Neb. 666, 670, 94 N.W.2d 47, 49-50 (1959) (Citations omitted).

³⁷ *Id.* at 673, 94 N.W.2d at 50.

³⁸ *Scribante v. Douglas County Board of Equalization*, 8 Neb.App. 25, 39, 588 N.W.2d 190, 199 (1999).

the ratio of assessed value to market value for the Subject Property and other real property **regardless of similarity** indicates that the Subject Property was not assessed at a uniform percentage of market value.⁴⁰

38. The Taxpayer provided a list of alleged comparable properties which the County Assessor generally indicated were located in developments comparable to the Subject Property. However, the screen shots provided for some of comparable properties indicate they are subject to different factors as compared to the Subject Property,⁴¹ including actual value deductions for excess land.⁴²
39. The Taxpayer gave positive adjustments to the alleged comparable properties with large lots, while the screen shots indicate that the larger lots should receive a negative adjustment for excess land.⁴³ The Assessment Report indicates that the Subject Property was valued similarly to the County Assessor's alleged comparable properties.⁴⁴
40. A comparison of alleged comparable properties to determine if the Subject Property's assessed valuation is grossly excessive requires sufficient documentation to ascertain whether the Subject Property and alleged comparable properties are truly comparable but valued at materially different levels, or whether differences in assessed values are directly attributable to differences between the Subject Property and the alleged comparable properties.
41. The Taxpayer did not provide property record cards for any of his alleged comparable properties.
42. The Commission notes that section 8 of the Order for Single Commissioner Hearing issued to the parties in this matter at least 30 days prior to the hearing provides as follows:

NOTE: Copies of the County's Property Record File for any parcel you will present as a comparable parcel should be provided so that your claim can be properly analyzed. The information provided on the County's web page is not a property record file. A Property Record File is only maintained in the office of the County Assessor and should be obtained from that office prior to the hearing.

43. The screen shots and listings provided by the Taxpayer do not contain all of the information available to determine the comparability of the properties. The Commission is unable to properly evaluate similarity because Property Record Files were not submitted for the three properties offered by the Taxpayer for consideration.

³⁹ See, *Scribante v. Douglas County Board of Equalization*, 8 Neb.App. 25, 39, 588 N.W.2d 190, 199 (1999).

⁴⁰ See, *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623, 635 (1999).

⁴¹ See, screen shots and listings of alleged comparable properties.

⁴² See, Screen Shot Ginger Cove Property.

⁴³ *Id.*

⁴⁴ See, Assessment Report, pg.13.

44. The Commission further finds that the Taxpayer did not produce sufficient evidence of the market value of the properties submitted for comparison, in order to determine whether the ratio of one or more assessed to market values was less than 100% for tax years 2012. Thus, the Commission is unable to determine whether the Subject Property was assessed at an excessive percentage of market value in comparison to the properties presented for consideration by the Taxpayer.

CONCLUSION

45. The Taxpayer has not produced clear and convincing evidence that the assessed value of the Subject Property is grossly excessive.
46. The Taxpayer has not produced competent evidence that the County Board failed to faithfully perform its duties and to act on sufficient competent evidence to justify its actions.
47. The Taxpayer has not adduced sufficient, clear and convincing evidence that the determination of the County Board is unreasonable or arbitrary and the decision of the County Board should be affirmed.

ORDER

IT IS ORDERED THAT:

1. The Decision of the Douglas County Board of Equalization determining the value of the Subject Property for tax year 2012 is Affirmed.
2. The taxable value of the Subject Property for tax year 2012 is \$463,800.
3. This Decision and Order, if no further action is taken, shall be certified to the Douglas County Treasurer and the Douglas County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (2012 Cum. Supp.).
4. Any request for relief, by any party, which is not specifically provided for by this Decision and Order is denied.
5. Each Party is to bear its own costs in this proceeding.
6. This Decision and Order shall only be applicable to tax year 2012.
7. This Decision and Order is effective on July 2, 2014.

Signed and Sealed: July 2, 2014

Thomas D. Freimuth, Commissioner