

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Ross Electric, Inc,
Appellant,

v.

Custer County Board of Equalization,
Appellee,

Case No: 12C 211

Decision and Order Reversing the
Determination of the Custer County Board
of Equalization

For the Appellant:

Christopher Wickham,
Sennett Duncan & Jenkins, PC, LLO

For the Appellee:

Steve Bowers,
Custer County Attorney

This appeal was heard before Commissioners Nancy J. Salmon and Thomas D. Freimuth.

I. THE SUBJECT PROPERTY

The Subject Property is a commercial parcel located in Custer County. The parcel is improved with a mixed used building containing an equipment shop and office space. The legal description and the property record card for the Subject Property are found at Exhibit 7.

II. PROCEDURAL HISTORY

The Custer County Assessor (the County Assessor) determined that the assessed value of the Subject Property was \$107,993 for tax year 2012. Ross Electric, Inc (the Taxpayer) protested this assessment to the Custer County Board of Equalization (the County Board) and requested an assessed valuation of \$46,468. The Custer County Board determined that the taxable value for tax year 2012 was \$97,328.¹

The Taxpayer appealed the decision of the County Board to the Tax Equalization and Review Commission (Commission). The Commission held a hearing on October 3, 2013.

¹ E1.

III. STANDARD OF REVIEW

The Commission's review of the determination by a County Board of Equalization is de novo.² When the Commission considers an appeal of a decision of a County Board of Equalization, 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

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 Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.⁶

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 The County Board need not put on any evidence to support its valuation of the property at issue unless the taxpayer establishes the Board's valuation was unreasonable or arbitrary.⁸

In an appeal, the commission "may determine any question raised in the proceeding upon which an order, decision, determination, or action appealed from is based. The commission may consider all questions necessary to determine taxable value of property as it hears an appeal or

² 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). "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 been held in the first place, and evidence is taken anew as such evidence is available at the time of the trial on appeal." *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 *Botdorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).

cross appeal.”⁹ The commission may also “take notice of judicially cognizable facts and in addition may take notice of general, technical, or scientific facts within its specialized knowledge...,” and may “utilize its experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to it.”¹⁰

IV. EQUALIZATION

A. Law

“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.”¹¹ Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value.¹² 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.¹³ 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.¹⁴ 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.¹⁵ 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.¹⁶ The constitutional requirement of uniformity in taxation extends to both rate and valuation.¹⁷ 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

⁹ Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.).

¹⁰ Neb. Rev. Stat. §77-5016(6) (2012 Cum. Supp.).

¹¹ *Neb. Const.*, Art. VIII, §1.

¹² *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).

¹³ *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).

¹⁴ *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).

¹⁵ *Banner County v. State Board of Equalization*, 226 Neb. 236, 411 N.W.2d 35 (1987).

¹⁶ *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).

¹⁷ *First Nat. Bank & Trust Co. v. County of Lancaster*, 177 Neb. 390, 128 N.W.2d 820 (1964).

error of judgment [sic].”¹⁸ There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity.¹⁹ “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.”²⁰

B. Summary of the Evidence

Johnny Ross, President of the Taxpayer, testified that the Taxpayer purchased the Subject Property in November of 2010, for approximately \$107,000. He further asserted that the Subject Property has not been improved since the date of purchase. When the Subject Property was purchased in 2010, it was used as an office building divided by two garages,²¹ but Ross changed the use of the Subject Property to a warehouse by January 1, 2012. Ross testified that other than adding shelves he did not make any physical changes to the Subject Property. For tax year 2011, the Subject Property had an assessed value of land value of \$7,920 and an assessed improvement value of \$38,548, for a total assessed value of \$46,468.²² The total assessed value of the Subject Property increased to \$107,993 in 2012, with \$100,073 being attributed the improvement component of the actual value.²³ Ross calculated a 132% increase in total actual value and a 159.61% increase in the assessed value of the improvements.

Ross provided a list of three alleged comparable properties.²⁴ Ross testified that: (1) the alleged comparable property owned by James R. and Sharon M. Franssen (the Franssen Property) is a working shop;²⁵ (2) the alleged comparable property owned by Edwin Datus (the Datus Property) consists of storage space;²⁶ and (3) the alleged comparable property owned by Gregory and Yolanda Spanel (the Spanel Property) consisted of a working shop and warehouse.²⁷

¹⁸ *Newman v. County of Dawson*, 167 Neb. 666, 670, 94 N.W.2d 47, 49-50 (1959) (Citations omitted).

¹⁹ *Id.* at 673, 94 N.W.2d at 50.

²⁰ *Scribante v. Douglas County Board of Equalization*, 8 Neb.App. 25, 39, 588 N.W.2d 190, 199 (1999).

²¹ See, E7:2.

²² E7.

²³ E1.

²⁴ See, E6.

²⁵ See, E8 (property record card of alleged comparable property).

²⁶ See, E9 (property record card of alleged comparable property).

²⁷ See, E10 (property record card of alleged comparable property).

The Franssen Property had a total assessed value of \$48,357 in 2011.²⁸ In 2012, the assessed value of the Franssen Property increased to \$61,739.²⁹ Ross calculated this amounted to a 27.67% increase in total assessed value for the Franssen Property, with a 57.44% increase in the assessed value of the improvements. Ross stated that the Franssen Property includes some office space and a restroom, but less finish than the Subject Property. The Commission notes that the Franssen Property is identified by the County Assessor as a service garage and has a greater total area than the Subject Property.³⁰

The Datus Property had a total assessed value of \$107,172 for tax year 2011.³¹ In 2012, the assessed value of the Datus Property increased to \$141,062.³² Ross calculated this amounted to a 31.62% increase in total assessed value for the Datus Property, with a 42.35% increase in the assessed value of the improvements. Ross testified that the Datus Property is strictly a warehouse and has more area than the Subject Property.³³

The Spanel Property had total assessed value of \$109,859 for tax year 2011.³⁴ In 2012, the assessed value of the Spanel Property increased to \$118,352.³⁵ Ross calculated this amounted to a 7.73% increase in total assessed value for the Spanel Property, with a 9.75% increase in the assessed value of the improvements. Ross testified that the Spanel Property has some office space and has more area than the Subject Property.³⁶

Ross asserted that because the Subject Property had a greater percentage increase in assessed value in tax year 2012 than any of the alleged comparable properties that the Subject Property was not equalized with the alleged comparable properties.

C. Analysis

The Taxpayer generally asserted that the Commission could determine that the Subject Property was not equalized with the alleged comparable properties by comparing the percentage

²⁸ See, E8:1.

²⁹ See, E8:2.

³⁰ See, E8:2.

³¹ See, E9:1.

³² See, E9:2.

³³ See, E9:2.

³⁴ See, E10:1.

³⁵ See, E10:2.

³⁶ See, E10:2.

increase of assessed valued values of the Subject Property and the alleged comparable properties. The assessed value for real property may be different from year to year, dependent upon the circumstances.³⁷ For this reason, a prior year's assessment is not relevant to the subsequent year's valuation.³⁸ The Taxpayer's burden is not met by merely showing that the assessed value of the Subject Property has increased. Instead, equalized relief may be based on a comparison of the levels of value of comparable properties and the Subject Property,³⁹ or a comparison of the level of value for other properties, other than agricultural property, and the Subject Property.⁴⁰ 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 is compelled to pay a disproportionate part of the taxes.⁴¹

The Subject Property and the alleged comparable properties are all mixed used properties, meaning that portions of the property were built and finished with structural and physical components intended for vastly different uses as part of a single commercial building. The County Assessor determined the assessed value of the Subject Property and the alleged comparable properties by conducting a cost approach. 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;
- (5) 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

³⁷ See, *Affiliated Foods Coop. v. Madison Co. Bd. Of Equal.*, 229 Neb. 605, 613, 428 N.W.2d 201, 206 (1988).

³⁸ See, *DeVore v. Bd. Of Equal.*, 144 Neb. 351, 13 N.W.2d 451 (1944), *Affiliated Foods*, 229 Neb. at 613, 428 N.W.2d at 206 (1988).

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

⁴⁰ See generally, *Krings v. Garfield County Board of Equalization*, 286 Neb. 352, 835 N.E.2d 750 (2013).

⁴¹ *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).

primary improvements, accessory improvements, and site improvements, to arrive at a value indication by the cost approach.⁴²

The property records cards for the Subject Property and the alleged comparable properties contain the cost details used to calculate the assessed value of the properties.⁴³ The Commission notes that the County Board adopted the County Assessor's recommendation to adjust the depreciation factor applied to the equipment shop portion of the Subject Property to be uniform with the depreciation factor applied to the equipment shop portion of the Franssen Property.⁴⁴

None of the Taxpayer's alleged comparable properties are substantially similar in their entirety to the Subject Property, and thus a comparison of the total assessed values of the Subject Property and the alleged comparable properties is inappropriate. However, portions of the Subject Property are similar to portions of the alleged comparable properties, and since the assessed values of the Subject Property and the alleged comparable properties were determined through the cost approach, which determines the replacement cost new less depreciation of each different component of construction and then adds the component values together to determine a total actual value of all improvements, if any one component that is present in both the Subject Property and any other property is valued at a materially different level then the properties are not equalized.

The Commission examined the components that make up the Subject Property: office space, equipment shop, and utility building.⁴⁵ None of the alleged comparable properties have a utility building.⁴⁶ The Commission finds that there is not clear and convincing evidence that the utility building's assessed value was grossly excessive.

The Franssen Property is the only alleged comparable property that has an equipment shop component.⁴⁷ The equipment shop portion of the improvements located on the Subject Property has an area of 875 square feet with a calculated replacement cost new before depreciation of

⁴² International Association of Assessing Officers, *Property Assessment Valuation*, at 230 (3rd ed. 2010).

⁴³ See, E7:2, E8:2, E9:2, and E10:2.

⁴⁴ See, E1.

⁴⁵ See, E7:2.

⁴⁶ See, E8, E9, and E10.

⁴⁷ See, E8.

\$17,482, which results in a per square foot replacement cost new of \$19.98.⁴⁸ The equipment shop portion of the improvements located on the Franssen Property consist of 720 square feet with a calculated replacement cost new before depreciation of \$14,825, which results in a per square foot replacement cost new of \$20.59.⁴⁹ While the County Assessor originally assigned a different physical depreciation factor for the equipment shop portions of the Subject Property and the Franssen Property, the Commission finds that the determination of the County Board corrected this issue as recommended by the County Assessor.⁵⁰ The Commission finds that there is not clear and convincing evidence that the assessed value of the equipment shop component of the Subject Property was grossly excessive when compared to similar properties. It is also apparent from the property record cards that the remainder of the area of the Franssen Property consists of a service repair garage and is not comparable to the Subject Property.⁵¹ The Commission finds that the differences in assessed values between the Subject Property and the Franssen Property are a direct result of physical differences between the properties.

The Spanel Property is the only alleged comparable property that has an office space component.⁵² The County Assessor assigned a per square foot replacement cost new of \$94.76 to the office space in the Subject Property.⁵³ The County Assessor assigned a per square foot replacement cost new of \$95.06 to the office space area in the Spanel Property.⁵⁴ The Commission notes that the quality and condition of the office space are the same, the year built is fairly similar, but that the wall height and class of property are different.⁵⁵ The County Assessor assigned a depreciation of 5% to the office space of the Subject Property,⁵⁶ and 64% to the office space at the Spanel Property.⁵⁷

The County Board did not put on a case in chief, and did not provide any evidence to explain the difference in physical depreciation assigned to office space in the Subject Property and office space in the Spanel Property. The purpose of equalization of assessments is to bring the

⁴⁸ See, E7:2 (\$17,482 (RCN) / 875 sq. ft. (area) = \$19.98per sq. ft.).

⁴⁹ See, E8:2 (\$14,825 (RCN) / 720 sq. ft. (area) = \$20.59per sq. ft.).

⁵⁰ See, E1.

⁵¹ See, E7:2; See also, E8:2.

⁵² See, E10.

⁵³ See, E7:2 (\$42,642 (RCN) / 450 sq. ft. (area) = \$94.76 per sq. ft.).

⁵⁴ See, E10:2 (\$98,387 (RCN) / 1,035 sq. ft. (area) = \$95.06 per sq. ft.).

⁵⁵ See, E7:2 and E10:2.

⁵⁶ See, E7:2.

⁵⁷ See, E10:2.

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.⁵⁸ Here the uncontroverted evidence is that substantially similar office space was valued at materially different levels. The Commission finds that the assessed value of the office space in the Subject Property, when compared with the assessed value of the office space in the Spanel Property, is grossly excessive, and a failure of the plain legal duty to value all similar properties in the same taxing district at the same relative standard. The Commission finds that significant differences in depreciation assigned to office space with the same quality and condition rating, without any evidence explaining the difference, is unreasonable and arbitrary.

The Commission finds that the office space in the Subject Property should receive the same physical depreciation factor as the office space in the Spanel Property: 64%. The Commission finds that the replacement cost new after depreciation for the office space associated with the Subject Property is \$56,098.⁵⁹

The remaining areas of the Spanel Property are built as warehouse/storage space, and are not comparable to the Subject Property.⁶⁰ The Commission also finds that the Datus Property has no office space or equipment shop space,⁶¹ and is not comparable to the Subject Property based on these differences.

Given the foregoing analysis, the Commission finds that the assessed value of the Subject Property is \$75,751.⁶²

V. CONCLUSION

The Commission finds that there is competent evidence to rebut the presumption that the County Board faithfully performed its duties and had sufficient competent evidence to make its determination. The Commission also finds that there is clear and convincing evidence that the County Board's decision was arbitrary or unreasonable. The Commission also finds that there is

⁵⁸ *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).

⁵⁹ $(\$42642 \text{ (RCN)} + \$45,011 \text{ (RCN)}) * .64 = \$56,098 \text{ (RCNLD)}$.

⁶⁰ See, E10:2.

⁶¹ See, E9:2.

⁶² $\$56,098 \text{ (office space)} + \$11,539 \text{ (equip shop with 66\% depreciation)} + 194 \text{ (utility building)} + \$7,920 \text{ (land)} = \$75,751$.

clear and convincing evidence that the valuation placed on the office space in the Subject Property is materially different than the valuation placed on similar office space in other mixed used properties in the same taxing district.

For all of the reasons set forth above, the appeal of the decision of the County Board is vacated and reversed.

VI. ORDER

IT IS ORDERED THAT:

1. The decision of the Custer County Board of Equalization determining the value of the Subject Property for tax year 2012 is vacated and reversed.⁶³
2. The assessed value of the Subject Property for tax year 2012 is:

Land	\$7,920
<u>Improvements</u>	<u>\$67,831</u>
Total	\$75,751

3. This Decision and Order, if no appeal is timely filed, shall be certified to the Custer County Treasurer and the Custer 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.

⁶³ Assessed value, as determined by the County Board, was based upon the evidence at the time of the Protest proceeding. At the appeal hearing before the Commission, both parties were permitted to submit evidence that may not have been considered by the County Board of Equalization at the protest proceeding.

7. This Decision and Order is effective for purposes of appeal on June 13, 2014.

Signed and Sealed: June 13, 2014

Nancy J. Salmon, Commissioner

SEAL

Thomas D. Freimuth, Commissioner

Appeals from any decision of the Commission must satisfy the requirements of Neb. Rev. Stat. §77-5019 (2012 Cum. Supp.) and other provisions of Nebraska Statutes and Court Rules.