

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Bert W. Mehrer,
Appellant,

v.

Douglas County Board of Equalization,
Appellee.

Case Nos: 10R-437 & 11R-108

Decision and Order Affirming Douglas
County Board of Equalization

For the Appellant:

Bert W. Mehrer,
Pro Se

For the Appellee:

Theresia Urich,
Deputy Douglas County Attorney

The appeals were heard before Commissioners Nancy J. Salmon and Thomas D. Freimuth. Commissioner Nancy J. Salmon affirming, Commissioner Thomas D. Freimuth dissenting.

I. THE SUBJECT PROPERTY

The Subject Property is a residential parcel located in Douglas County. The parcel is improved with a 7,486 square foot home. The legal description of the parcel is found at Exhibit 1. The property record card for the Subject Property is found at Exhibits 3 and 5.

II. PROCEDURAL HISTORY

The Douglas County Assessor determined that the assessed value of the Subject Property was \$1,339,200 for tax years 2010 and 2011. Bert W. Mehrer (Taxpayer) protested this assessment to the Douglas County Board of Equalization (County Board) and requested an assessed valuation of \$1,103,270 for tax year 2010 and \$1,059,158 for tax year 2011. The County Board determined that the assessed value for tax years 2010 and 2011 was \$1,339,200. (E1, E2, E7, E8).

The Taxpayer appealed the decision of the County Board to the Tax Equalization and Review Commission (Commission). Prior to the hearing, the parties exchanged exhibits, and they stipulated to the receipt of exchanged Exhibits 1 through 13. The Commission held a hearing on August 29, 2012.

III. STANDARD OF REVIEW

The Commission's review of the determination by a County Board of Equalization is de novo.¹ 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."²

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.³

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.⁴ Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.⁵

A Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued.⁶ 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.⁷

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

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). "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).

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

³ *Id.*

⁴ Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.).

⁵ *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

⁶ 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).

⁷ *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).

cross appeal.”⁸ 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.”⁹

IV. VALUATION

A. Law

Under Nebraska law,

[a]ctual 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.¹⁰

"Actual value may be determined using professionally accepted mass appraisal methods, including, but not limited to, the (1) sales comparison approach using the guidelines in section 77-1371, (2) income approach, and (3) cost approach."¹¹ “Actual value, market value, and fair market value mean exactly the same thing.”¹² Taxable value is the percentage of actual value subject to taxation as directed by section 77-201 of Nebraska Statutes and has the same meaning as assessed value.¹³ All real property in Nebraska subject to taxation shall be assessed as of January 1.¹⁴ All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.¹⁵

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

⁹ Neb. Rev. Stat. §77-5016(6) (2012 Cum. Supp.).

¹⁰ Neb. Rev. Stat. §77-112 (Reissue 2009).

¹¹ Neb. Rev. Stat. §77-112 (Reissue 2009).

¹² *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).

¹³ Neb. Rev. Stat. §77-131 (Reissue 2009).

¹⁴ See, Neb. Rev. Stat. §77-1301(1) (Reissue 2009).

¹⁵ Neb. Rev. Stat. §77-201(1) (Reissue 2009).

B. Summary of the Evidence

A Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued.¹⁶ An owner's who knows the worth of a subject property is able to testify concerning the actual value of the real property.¹⁷ However, Mehrer expressly stated that he was unable to derive his own opinion of value for the Subject Property. Instead Mehrer presented as evidence of the actual value of the Subject Property: (1) the Commission decisions determining the actual value of the Subject Property for tax years 2008 and 2009; (2) assertions concerning a previous appraisal; and (3) the sale price of the Subject Property.

Mehrer asserted that the actual value of the Subject Property should remain at the same level as determined in the Commission's decision determining the actual value of the Subject Property for tax years 2008 and 2009. The Commission's determination for a prior year is neither controlling nor competent evidence of the actual value of the Subject Property for a subsequent year.¹⁸

Mehrer asserted that prior to his purchase of the Subject Property in 2007, an appraisal of the real property was conducted for purposes of obtaining financing. Mehrer could not remember the appraised value for the real property, but testified that to his best recollection it was approximately \$1,000,000 to \$1,050,000. An appraisal is competent evidence of the actual value of real property if it is entered into evidence and the appraiser certifies that the appraisal was performed under professional standards.¹⁹ Mehrer did not provide a copy of the appraisal to the Commission and there was no evidence that the appraisal was performed using professional standards. The Commission finds that Mehrer's assertion of the appraiser's final determination of actual value for the Subject Property is not competent evidence.

Mehrer closed on his purchase of the Subject Property on February 26, 2007.²⁰ The total sales price for the real property, items of personal property, loan origination fees, and home

¹⁶ 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).

¹⁷ See, *U. S. Ecology v. Boyd County Bd. Of Equal.*, 256 Neb. 7, 16, 588 N.W.2d 575, 581 (1999).

¹⁸ 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).

¹⁹ See, *JQH La Vista Conference Center Development LLC v. Sarpy County Board of Equalization*, 258 Neb. 120, 825 N.W.2d 447 (2013).

²⁰ E10.

repair escrow account totaled \$1,420,000.²¹ A Bill of Sale for alleged items of personal property asserted a sale price of \$223,430.²² The sale price minus the alleged items of personal property, loan origination fees, and repair reserve totaled \$1,184,070.²³ The Commission finds that the sale price is not competent evidence of the actual value of the Subject Property for tax years 2010 and 2011.

The Nebraska Supreme Court has held that sale price alone may not be sufficient to overcome the presumption in favor of the board of equalization.²⁴ The presumption is overcome by competent evidence.²⁵ The Commission must examine the circumstances and evidence surrounding a sale price to determine whether the sale price is competent evidence of actual value.²⁶

The Commission finds that the sale of the Subject Property was too remote in time to be probative of the actual value of the Subject Property as of January 1 in tax years 2010 and 2011 without some evidence quantifying changes in the market during this time and its impact on the actual value of the Subject Property. The remote nature of the sale sets this case apart from cases where it was determined that the sale price was the best evidence of actual value, including *In re Estate of Craven*.²⁷ Mehrer testified that the markets had changed since the date of purchase, and the County Assessor's opinion of value based on market data indicates that the market changed since the date of sale.²⁸ Mehrer asserted that the actual value of the Subject Property declined but could not quantify how much, and the County Assessor's opinion of value which was adopted by the County Board indicates that the actual value of the Subject Property had increased since 2007.²⁹

²¹ E10.

²² E9.

²³ E7.

²⁴ See, *Dowd v. Board of Equalization of Boone County*, 482 N.W.2d 583, 240 Neb. 437 (1992) (citing *Potts v. Board of Equalization*, 213 Neb. 37, 328 N.W.2d 175 (1982)).

²⁵ See, *JQH La Vista Conference Center Development LLC, v. Sarpy County Board of Equalization*, 285 Neb. 120, 825 N.W.2d 447 (2013).

²⁶ See, *Dowd v. Board of Equalization of Boone County*, 482 N.W.2d 583, 240 Neb. 437 (1992). See also, *Craven v. Union Bank and Trust Company*, 281 Neb. 122, 794 N.W.2d 406 (2011) (determinations of the probative value of a sales price is fact specific to each case).

²⁷ See, *County of Lancaster v. Union Bank & Trust Co. (In re Estate of Craven)*, 281 Neb. 122, 794 N.W.2d 406 (Neb. 2011).

²⁸ E3; E5.

²⁹ See, *Id.*

The Commission additionally finds that items of alleged personal property listed in the Bill of Sale are not considered personal property under Nebraska law. Nebraska Statutes includes fixtures, except trade fixtures, in the definition of real property.³⁰ Fixture is defined as:

[A]ny item of property that is:

Annexed or physically attached or incorporated into the real property;

Appropriate to the use of the real property to which it is annexed. If the property is a necessary or useful adjunct to the real property to which it is annexed, then it has been appropriated to the use or purpose of the real property; and

Intended to be annexed to the real property. Intention shall be inferred from the nature and extent of the annexation and appropriation, unless the owner of the item or the owner of the real property provides documentation that the intention is otherwise.

Examples of fixtures are items which are common to the maintenance and operation of structures such as central air conditioning, heating system, common lighting and plumbing. All of which add to the value of a structure or appreciably prolong the useful life of the structure and basically are considered a capital improvement since they would meet the criteria required in REGS 10-001.01A(1) through 10-001.01A(3).³¹

Specifically, the Commission finds that the following items are fixtures and real property:

(1) mechanical electric gate opener; (2) elevator, motor, and drive assembly; (3) garbage disposals; (4) security system; (5) chandeliers; (6) central vacuum; and (7) septic tank.³² The Commission finds that the exclusion of these items from the value of real property in the sale without an express opinion of value for each item makes it impossible to determine the amount of sale price actually attributable to real property. Additionally, when questioned, the Taxpayer was unable to definitively state the consideration paid for the real property in the sale.

The Taxpayer indicated that the actual value of the Subject Property is less than the County Board determination because the Taxpayer found latent defects after the purchase including: (1) rotting deck joists; (2) leaking concrete roof; (3) improperly installed furnace vents; (4) improperly sealed attic vents; and (5) there is some foundation shifting on part of the property. The Taxpayer provided an approximate cost to cure these defects,³³ but could not state definitively the cost to cure or the impact on the actual value of the real property of any of the

³⁰ Neb. Rev. Stat. §77-103 (Reissued 2009).

³¹ 350 Neb. Admin. Chapter 10, §001.01A.

³² See, E9 (Bill of Sale for alleged personal property).

³³ Mehrer testified the roof leaks cost approximately \$10,000 to repair, the deck joists cost approximately \$30,000 to replace, that he repaired the attic vents himself at little cost, the furnace cost approximately \$2,000, and he estimated the foundation would cost \$5,000 to \$10,000 but he had not received an estimate. The Taxpayer did not have any invoices or receipts for any of the defects, and could not produce an exact measure of the cost to repair.

defects. Further, Mehrer testified that the deck had been fixed prior to January 1, 2010, and therefore is not a consideration on the value of the Subject Property for tax years 2010 and 2011.

The County Assessor assigned the Subject Property a condition rating of Excellent and a quality rating of Excellent for tax years 2010 and 2011.³⁴ The Taxpayer asserted that the Subject Property should be assigned a condition rating of Average instead of Excellent because of the latent defects. The Taxpayer admitted that he had no knowledge of how the condition ratings were defined, and he did not quantify any impact on the actual value of the Subject Property if the condition rating was changed to Average. The Commission finds that without quantification, the Taxpayer's assertions concerning the defects are not clear and convincing evidence that the County Board was arbitrary or unreasonable, or competent evidence of the actual value of the Subject Property.

The Taxpayer was concerned that the Subject Property's assessed value increased from tax year 2009. The taxable value of the Subject Property was determined by the Commission for tax years 2008 and 2009 in orders issued December 31, 2009.³⁵ The Commission's orders were issued based on the evidence before it in the hearings concerning tax years 2008 and 2009 assessments, only affected tax years 2008 and 2009, and only determined the taxable value of the Subject Property as of January 1 for those tax years.³⁶ Orders determining the value of real property for a specific tax year are not relevant to the actual value of the real property in a subsequent year.³⁷

The Commission has reviewed the County Assessor's assessment reports submitted into evidence. The Commission finds that there is no evidence that the County Assessor did not value the property using professionally accepted mass appraisal techniques, or that the County Assessor ignored the impact of economic trends on the actual value of the Subject Property. The County Assessor used a sales comparison approach to value the Subject Property.³⁸ The market detail includes a field titled "Appr Date" with a value of "July 31, 2007."³⁹ There was no testimony concerning the meaning of this field or value, and no further information in the

³⁴ E3:4; E5:4.

³⁵ E12; E13.

³⁶ E12:14; E13:14.

³⁷ See, *Affiliated Foods Cooperative, Inc., v. County of Madison*, 229 Neb. 605, 428 N.W.2d 201 (1988); *Omaha Paxton Hotel Co. v. Board of Equalization*, 167 Neb. 231, 92 N.W.2d 537 (1958); *Devore v. Board of Equalization*, 144 Neb. 351, 13 N.W.2d 451 (1944).

³⁸ E3:10 and E5:10.

³⁹ *Id.*

assessment reports. The Commission finds that without further evidence it is unable to determine the meaning of this date. The Commission also notes that the valuation history contained in the assessment reports indicates that the County Assessor's determinations of the actual value of the Subject Property using its mass appraisal model relied on different data as appropriate.⁴⁰ The County Assessor arrived at different opinions of value from time to time.⁴¹ The Commission finds that this indicates that the model was being supplemented with new data, and that the County Assessor was not ignoring the market.

Evidence that the County Assessor appropriately examined the market area of the Subject Property is indicated from Mehrer's own testimony that the Subject Property is unlike neighboring properties, and the County Assessor's comments in the assessment reports that in order to find properties which were truly comparable to the Subject Property, the County Assessor expanded the search for comparable sales beyond the geographical boundaries used for properties in close proximity to the Subject Property.⁴² In other words, the County Assessor, recognizing that the Subject Property did not operate in the same market as neighboring properties, expanded the search to determine the actual value of the Subject Property based on truly comparable properties within a larger market area than smaller residential properties.

Finally, the Commission finds that the impact of economic events on the actual value of the Subject Property were appropriately considered in the County Assessor's sales comparison approach. Because the sales comparison approach uses sales from the market area to determine the actual value of the Subject Property, any impact of economic factors are considered. The assessment reports indicate that the County Assessor determined that no economic adjustment was necessary to the Subject Property's neighborhood.⁴³ While the Taxpayer asserted that the Subject Property's market area was experiencing decreasing real property values due to economic factors, he presented no evidence to support his allegations.

V. CONCLUSION

The Commission finds that there is not competent evidence to rebut the presumption that the County Board faithfully performed its duties and had sufficient competent evidence to make its

⁴⁰ E3:11 and E5:11.

⁴¹ *Id.*

⁴² E5:7 and E3:7.

⁴³ E3:4 and E5:4.

determination. The Commission also finds that there is not clear and convincing evidence that the County Board's decision was arbitrary or unreasonable.

For all of the reasons set forth above, the decision of the County Board is affirmed.

VI. ORDER

IT IS ORDERED THAT:

1. The decision of the Douglas County Board of Equalization determining the value of the Subject Property for tax years 2010 and 2011 is affirmed.⁴⁴
2. The assessed value of the Subject Property for tax years 2010 and 2011 is: \$1,339,200.
3. This Decision and Order, if no appeal is timely filed, 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 years 2010 and 2011.
7. This Decision and Order is effective for purposes of appeal on March 13, 2014.

Signed and Sealed: March 13, 2014.

SEAL

Nancy J. Salmon, Commissioner

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

Commissioner Thomas D. Freimuth, dissenting,

Bert W. Mehrer (herein referred to as the "Taxpayer") asserted that his \$1,420,000 ("1.42M") purchase of the Subject Property at the height of the real estate market in February

⁴⁴ 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.

2007 included personal property in the amount of \$223,430. Consequently, he asserted that the Commission's \$1,139,958 valuation Orders derived from the County Assessor's model for tax years 2008 and 2009 reflect actual value for tax years 2010 and 2011.⁴⁵

I would find that the County Board's \$1,339,200 determination for tax years 2010 and 2011, which reflects a 17.5% valuation increase in comparison to the \$1,139,958 valuation ordered by the Commission for tax years 2008 and 2009 that is based on the County Assessor's own model, is arbitrary and unreasonable in the aftermath of economic crisis. Thus, I would find that the Taxpayer's \$1,139,958 opinion of value is the best evidence of the Subject Property's actual value for tax years 2010 and 2011.

The Taxpayer's assertion is particularly convincing in this case where the County's \$1,339,200 valuation for tax years 2010 and 2011 relies solely on a sales comparison approach model, even though comparable sales in the Subject Property's market area were either limited or did not exist.⁴⁶ As discussed below, the County's documents received in evidence by the Commission to support its valuation are insufficient and/or problematic, and it offered no testimony to otherwise attempt to support or explain a 17.5% valuation increase in the aftermath of the economic crisis.

I. BACKGROUND

The Taxpayer purchased the Subject Property for \$1.42M on February 26, 2007.⁴⁷ Based on the Real Estate Transfer Statement and the Bill of Sale relating to this transaction, the \$1.42M total sale price included \$223,430 in personal property and a loan origination fee in the amount of \$7,500.⁴⁸ The Taxpayer testified that his work with the Securities and Exchange Commission in Washington, D.C. prevented him from appealing the County's \$1.42M valuation in tax year 2007. The Tax Equalization and Review Commission (herein referred to as the "Commission") considered the Taxpayer's appeals in 2008 and 2009, rendering identical decisions as charted below in Case No. 08R-327 and Case No. 09R-210:

⁴⁵ The Commission's Orders for tax years 2008 and 2009 were received in evidence as Exhibits 12 and 13, respectively.

⁴⁶ See, E3:6, E3:7, E5:6 and E5:7.

⁴⁷ E11.

⁴⁸ E9 and E11.

2008 & 2009 TERC Cases	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value	TERC Determined Value
Land	\$231,500	\$200,000	\$231,500	\$231,500
Improvement	\$1,188,500	\$984,070	\$1,188,500	\$908,458
Total	\$1,420,000	\$1,184,070	\$1,420,000	\$1,139,958

Based on Exhibits 1 and 7, the background relating to the Taxpayer's current appeal for tax year 2010 is charted below:

2010 TERC Appeal	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$231,500	\$231,500	\$231,500
Improvement	\$1,107,700	\$871,770	\$1,107,700
Total	\$1,339,200	\$1,103,270	\$1,339,200

Based on Exhibits 2 and 8, the background relating to the Taxpayer's current appeal for tax year 2011 is charted below:

2011 TERC Appeal	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$231,500	\$231,500	\$231,500
Improvement	\$1,107,700	\$827,658	\$1,107,700
Total	\$1,339,200	\$1,059,158	\$1,339,200

The Commission's \$1,139,958 Order for 2008 and 2009 is based on the County Assessor's sales comparison approach mass appraisal model derived from multiple regression analysis.⁴⁹ In reaching its decision, the Commission found that it was unreasonable for the County to disregard its mass appraisal model and rely on the \$1.42M total sale price without a discount for personal property.⁵⁰ The Commission also rejected the Taxpayer's \$1,184,070 asserted value that excluded the following from the purchase price: (1) personal property (\$223,400); (2) closing costs (\$7,500); and (3) remediation costs (\$5,000).⁵¹ In rejecting this valuation, the Commission found that remediation increased actual value, and that the Taxpayer's \$223,400 non-realty valuation was not reliable because it contained some real property.⁵²

⁴⁹ E12:13, E13:13.

⁵⁰ E12:11, E13:11.

⁵¹ E12:11, E13:11.

⁵² E12:11, E13:11.

II. THE TAXPAYER'S EVIDENCE

The Taxpayer testified that he is a certified public accountant and an attorney. He emphasized that he signed and filed the Real Estate Transfer Statement relating to the \$1.42M Subject Property purchase - which allocated \$223,430 of the purchase price to personal property - subject to legal penalties for misstatements.⁵³ He also stated that he possessed experience distinguishing real property from personal property stemming from his work as an accountant that involved investment tax credit requirements under the Internal Revenue Code.

The Taxpayer testified that his February 2007 purchase of the Subject Property occurred at the height of the market prior to the onset of the economic crisis later in 2007, and that the crisis adversely affected the valuations of higher-end homes in a disproportionate manner for purposes of tax years 2010 and 2011. In addition to an adjustment to account for the economic crisis, the Taxpayer asserted that his 1.42M purchase included a substantial personal property component that the County ignored in tax years 2007 through 2011. Thus, at the hearing before the Commission and in the attachment to his 2011 appeal, he asserted that the actual value of the Subject Property for tax years 2010 and 2011 equaled the \$1,139,958 value derived from the County Assessor's own model and effectuated by the Commission's Orders for tax years 2008 and 2009.⁵⁴

The Taxpayer testified that he obtained an appraisal in connection with the purchase transaction in 2007. Based on the \$990,000 amount financed disclosed in the Purchase Agreement found at Exhibit 10, he stated that the Subject Property appraisal amounted to approximately \$1,000,000 to \$1,050,000.

The Taxpayer asserted that the condition rating of the Subject Property should be lowered from excellent to average. In support of this assertion, the Taxpayer testified that the Subject Property required significant expenditures to address deferred maintenance with respect to the deck, roof and furnace system. While some of these expenditures were made prior to tax years 2010 or 2011, the Taxpayer indicated that foundation settling and many other problems had not been addressed at the time of the hearing before the Commission.

⁵³ E11.

⁵⁴ See, Case File. The Taxpayer's basis for lowering his protested value to \$1,059,158 in 2011 from \$1,103,270 in 2010 is unknown (see 2010 & 2011 charts above). Based on the Taxpayer's testimony, however, I assume that this drop relates in part to the continuing impact of the economic crisis on homes in the high-end market.

III. THE COUNTY'S EVIDENCE

The County chose not to supplement the documentary evidence that it offered and which was received by the Commission. The County Board based its valuation for tax years 2010 and 2011 on the County Assessor's sales comparison approach model derived from multiple regression analysis.⁵⁵ In other words, unlike tax years 2008 and 2009 when it relied on the total height-of-the-market sale price that erroneously included a significant portion of personal property as opposed to the lower model value, the County Board relied on the County Assessor's ambiguous model for tax years 2010 and 2011. The County Board took this action for tax years 2010 and 2011, even though the County Assessor's model for those tax years is subject to the following qualification: "Due to the lack of similar sales in the subject area, comparable sales search area was expanded."⁵⁶

The County's Assessment Reports for tax years 2010 and 2011 provide that the Subject Property's land component is valued at \$231,500 and its improvement component is valued at \$1,107,700 (\$1,339,200 total model valuation).⁵⁷ The County Board's \$1,107,700 improvement value determination is based on the County Assessor's sales comparison approach mass appraisal model.⁵⁸ The Assessment Reports contain a document entitled "Market Calculation Detail" that sets forth the value assigned to each of the various mass appraisal model characteristics of the Subject Property's improvement component.⁵⁹

The County's Property Record Card assigns an excellent condition rating to the Subject Property.⁶⁰ The Market Calculation Detail document contained in the Assessment Reports indicates that an excellent condition rating adds \$112,500 to the valuation of the Subject Property as compared to an average rating.⁶¹

IV. ANALYSIS

A. County's 17.5% Valuation Increase in Aftermath of Economic Crisis

The County chose not to supplement the documentary evidence that it offered and which was received by the Commission. Therefore, the following analyzes the County's Assessment Reports for tax years 2010 and 2011 to determine the merit of the Taxpayer's assertion that the

⁵⁵ E3:5, E3:6, E5:5, E5:6.

⁵⁶ E3:7, E5:7.

⁵⁷ E3:3, E5:3.

⁵⁸ E3:6, E5:6.

⁵⁹ E3:10, E5:10.

⁶⁰ E3:4, E5:4.

⁶¹ E3:10, E5:10.

County Board's 17.5% valuation increase is arbitrary or unreasonable because the economic crisis significantly affected the valuation of high-end residences like the Subject Property in an adverse manner.

The Assessment Reports provide that the County Board's \$1,107,700 improvement value determination is based on the County Assessor's sales comparison approach mass appraisal model.⁶² Guidance regarding consideration of the economic crisis by the County in the mass appraisal context is contained in *Property Assessment Valuation*, which is published by the International Association of Assessing Officers. Addressing mass appraisal models used in the residential context, *Property Assessment Valuation* states as follows:

Model calibration **is the process of adjusting** mass appraisal formulas, tables, and schedules **to the current market**. During model calibration, the relationships are quantified; that is, the coefficient (as an amount or percentage adjustment) for each independent variable is determined, for example, dollars per square foot of living area. The primary tool for calibration is multiple regression analysis (MRA). . . .

Although the structure of a mass appraisal model may be valid for many years, **the model is usually recalibrated every year**. To update for short periods, trending factors may suffice. Over longer periods, as the relationships among the variables in market value change, complete market analyses are required. **The goal is for mass appraisal equations and schedules to reflect current market conditions.**⁶³

The New Jersey Tax Court stated as follows regarding consideration of "current market conditions" in a 2013 opinion that reduced the assessed value of the Borgata casino from \$2.26 billion to \$880 million in tax year 2009 and to \$870 million in tax year 2010 due to the adverse impact of the national economic crisis and increased gaming competition (the \$2.26 billion assessment stemmed from a reappraisal for tax year 2008, similar to the experience of the Taxpayer herein):

The national economy began to soften in late 2007, primarily due to the subprime housing crisis. By October 1, 2008, the economy suffered a significant downturn triggered by the collapse of the mortgage markets and the failure of Bear Stearns and Lehman Brothers. The government-sanctioned bailout of Bear Stearns as a banking institution "too big to fail" set off alarms concerning the stability of the American banking system. The mid-September 2008 collapse of Lehman

⁶² E3:6, E5:6.

⁶³ *Property Assessment Valuation, 3rd Ed.*, International Association of Assessing Officers, 2010, pgs. 415, 417-18 (emphasis added).

Brothers led to a sharp drop-off in the stock market and the beginning of the worst recession since the Great Depression. . . .

By October 1, 2009, the national economic condition had further deteriorated. According to one expert who testified at trial “as of October 1, 2009, the macro economy had entered into what many commentators termed a ‘New Normal,’ meaning that the developed nations would enter into a prolonged period of low growth, high unemployment and a need for de-leveraging. This would add to the uncertainty surrounding the gaming industry in general and in Atlantic City specifically, as of the valuation date.” Unemployment rates started to increase significantly in 2008 and were still rising as of September 2009. This fact is significant because low unemployment rates are indicative of increased consumer spending on such discretionary items as gaming and entertainment. The perception that the nation’s economic trouble was not a transitory downturn, but a long-term recalibration of the economy, was hardening among the public and participants in the financial markets as of the second valuation date.⁶⁴

The Illinois Court of Appeal stated as follows regarding consideration of “current market conditions” in a 2012 opinion affirming a lower court’s approval of a \$300,000 judicial foreclosure sale of commercial real estate secured by a note with a principal balance in the amount of \$824,540:

Our courts today face a similar situation as that faced by the court in [1937] *Levy* during the Great Depression, in that many properties were purchased during a time when real estate values greatly increased (referred to as “the real estate bubble”) **and those same properties plummeted in value after 2006 [and] continuing to the present.** Consequently, many property owners owe much more to the lenders than what the property is worth. While this fact is unquestionably tragic, the value of a given piece of property must be determined by considering all of the pertinent factors as they exist at the time of the sale, whether such sale is made in the open market or through a judicial sale as a result of a foreclosure action.⁶⁵

The Nebraska Supreme Court has also recently considered “current market conditions” in the aftermath of the economic crisis. For instance, in *County of Lancaster v. Union Bank & Trust Co. (In re Estate of Craven)*, the Court upheld a ruling issued by the Lancaster County Court that the \$113,000 purchase price of property sold at an estate auction in a weak real estate market after the decedent’s death in 2008 stemmed from an arm’s length transaction and was the best

⁶⁴ *Marina District Development Co., LLC v. City of Atlantic City*, DOCKET NOS. 008116-2009, 008117-2009, 003188-2010, 003194-2010, at pgs. 1 – 2, 8 – 9 (New Jersey Tax Court 2013).

⁶⁵ *Sewickley, LLC v. Chicago Title and Trust Company*, 974 N.E.2d 397, 406 (Court of Appeal of Illinois, First District, Second Division 2012) (emphasis added).

evidence of value for inheritance tax purposes.⁶⁶ I note that the Court's holding in this case is based in part on testimony that "indicated that auctioning the property was a reasonable alternative to listing with a real estate agent."⁶⁷ This testimony included reference to the "slow real estate market" after the decedent's death on July 17, 2008, so I respectfully disagree with any implication contained in the majority opinion that the Court's holding did not rely in part on this factor.⁶⁸

With respect to consideration of current market conditions within the meaning of the above authorities, the Assessment Reports provide limited information regarding the County Assessor's model relied upon by the County Board for purposes of its \$1,107,700 improvement value determination for tax years 2010 and 2011.⁶⁹ In this regard, the Assessment Reports contain a brief half-page explanation stating that the County Assessor's sales comparison approach mass appraisal model is derived from the use of multiple regression analysis.⁷⁰ The Assessment Reports also contain a one-page Market Calculation Detail document that sets forth the value derived from multiple regression analysis that is assigned to 13 model characteristics.⁷¹

According to *Property Assessment Valuation*, which is published by the International Association of Assessing Officers, multiple regression analysis assigns value to physical and locational characteristics of real property based on correlation of such characteristics with market area sales.⁷² The Market Calculation Detail document contained in the Assessment Reports, which sets forth the value assigned to each of the Subject Property's 13 model characteristics, indicates that the County Assessor's appraisal occurred on July 31, 2007.⁷³ Additionally, the Assessment Reports contain a notation by the County Assessor that states as follows: "Due to the lack of similar sales in the subject area, comparable sales search area was expanded."⁷⁴ Thus, because the County's own evidence indicates that its model was constructed in 2007 prior to the impact of the economic crisis, and because a model update -- if any -- could not have included

⁶⁶ *County of Lancaster v. Union Bank & Trust Co. (In re Estate of Craven)*, 281 Neb. 122, 794 N.W.2d 406 (Neb. 2011).

⁶⁷ *Id.* at 129, 411.

⁶⁸ *Id.* at 124, 408.

⁶⁹ I note that the Property Record Cards for tax years 2010 and 2011 found at page 4 of Exhibits 3 and 5, respectively, indicate that the County Assessor did not adjust for current market conditions. In this regard, the number "1" next to "NBHD Adj" on the Property Record Cards indicates that the County Assessor did not adjust to a factor below "1" to address the aftermath of the economic crisis.

⁷⁰ E3:6, E5:6.

⁷¹ E3:10, E5:10.

⁷² *Property Assessment Valuation*, 3rd Ed., International Association of Assessing Officers, 2010, at pgs. 416, 427.

⁷³ E3:10, E5:10.

⁷⁴ E3:7, E5:7.

sufficient market area sales by its own admission -- I would find the County's 17.5% valuation increase in tax years 2010 and 2011 is unreasonable or arbitrary because current market conditions were not sufficiently considered.⁷⁵

Further, *Mass Appraisal of Real Property*, which is also published by the International Association of Assessing Officers, states as follows regarding the number of sales necessary to sufficiently calibrate a sales comparison approach model that includes 13 characteristics (i.e., independent variables) like the County's:

Although adding variables tends to improve accuracy, models should also be simple and *explainable*. In addition, increasing the number of variables increases proportionately the number of sales required to calibrate the model. As a general rule, the number of sales should be at least five times (fifteen times is desirable) the number of independent variables. For example, a model with twenty variables requires at least 100 sales (preferably 300 or more).⁷⁶

According to this guidance, the County's model should have been derived from 65 to 195 sales. The County's own Assessment Reports, however, contain a notation by the County Assessor which states as follows: "Due to the lack of similar sales in the subject area, comparable sales search area was expanded."⁷⁷ Thus, especially in the context of the aftermath of the economic crisis, I would find that the County's \$1,339,000 valuation is unreasonable or arbitrary because no evidence in the form of testimony or documentation **explains** whether this "lack of similar sales" compromised the validity of the model.

The County's Assessment Reports for each tax year at issue herein include a "Sales Comparables" chart that sets forth information concerning three parcels outside of the Subject Property's market.⁷⁸ The 2010 Assessment Report's alleged comparable sales include two transactions in 2009 and one in August 2008. These transactions generated sales prices amounting to \$1,525,000 in October 2009 (8585 No. 96th St, 15.2 acres vs. Subject Property's 4.63 acres); \$1,075,000 in August 2008 (9708 No. 225th St., 11.66 acres vs. Subject Property's 4.63 acres) and \$1,000,000 in June 2009 (6465 Northern Hills Drive, 13 acres vs. Subject Property's 4.63 acres).⁷⁹

⁷⁵ See, E3:4, E5:4. The Property Record Cards for tax years 2010 and 2011 indicate that the County Assessor's model did not adjust for current market conditions **at all**. In this regard, the number "1" next to "NBHD Adj" on these Property Record Cards indicates that the County Assessor's model was not adjusted to current market conditions in the aftermath of the economic crisis.

⁷⁶ *Mass Appraisal of Real Property*, International Association of Assessing Officers, 1999, p. 127 (emphasis in original).

⁷⁷ E3:7, E5:7.

⁷⁸ E3:9, E5:9.

⁷⁹ E3:9.

The alleged comparable sales included in the 2011 Assessment Report include the sales referenced above, except for the transaction involving 9708 No. 225th St. In place of that sale, the County's chart includes the November 2010 sale of 25630 West Dodge Road for \$800,000 (10.24 acres vs. Subject Property's 4.63 acres).⁸⁰

I note that the Subject Property, which is located north of Interstate 680 near the Missouri River at 11112 Canyon Road, is situated several miles from the County's alleged comparables noted above. I also note that the County's alleged comparables are significantly larger in terms of net land area as compared to the Subject Property. Finally, I note that most if not all of the sale prices of the County's alleged comparables do not support the validity of its 2010 and 2011 mass appraisal model as applied to the valuation of the Subject Property.

B. Condition Rating & Inspection

The Taxpayer asserted that the condition rating of the Subject Property should be lowered from excellent to average. Based on the County's Market Calculation Detail document for tax years 2010 and 2011, the excellent condition rating adds \$112,500 to the valuation of the Subject Property in comparison to an average rating.⁸¹

The Taxpayer testified regarding deferred maintenance issues that had yet to be addressed as of the date of the hearing before the Commission. Thus, because the County did not call any witnesses, it is possible that the Subject Property was less than excellent in terms of condition.

I note that the County's Assessment Reports assert that the Taxpayer refused inspections in May 2008 and April 2009.⁸² In denying the County's assertions with respect to these alleged inspection requests, the Taxpayer testified that he had telephone contact on at least a few occasions since 2007 with the County Assessor's office, and he indicated that communication was hindered because it was his perception that the County was unwilling to consider a personal property offset to the \$1.42M gross sales price.

While the County asserts that the Taxpayer refused inspections in May 2008 and April 2009, there is nothing in the record to indicate that the County attempted to inspect the Subject Property during tax years 2010 and 2011 or otherwise work with Taxpayer regarding the Commission's 2008 and 2009 Orders issued in May 2011 that voided reliance on the 2007 gross

⁸⁰ E5:9.

⁸¹ E3:10, E5:10.

⁸² E3:7, E5:7.

sales price due to inclusion of personal property. I also note that the County did not seek a discovery order requiring inspection for tax years 2010 and 2011 under 442 Neb. Admin. Code, ch. 12 (06/09).

Based on the testimony and documents presented at the hearing, I would find that the Taxpayer did not adduce clear and convincing evidence that the condition of the Subject Property should be lowered from excellent to average. Based on the evidence, however, the imposition of the adverse inference rule against the Taxpayer regarding inspection is not justified, especially in this case where the County did not supplement its documentary evidence. In this regard, I find it problematic that, rather than working with the Taxpayer to determine actual value for assessment purposes, the evidence shows that the Referee in connection with the Taxpayer's 2011 protest disregarded the Commission's 2008 in 2009 Orders that clearly state at least some items of personal property were included in the \$1.42M gross sale price in 2007.⁸³

V. CONCLUSION

It is difficult to comprehend the County Board's 17.5% Subject Property valuation increase in tax years 2010 and 2011 as compared to the \$1,139,958 valuation ordered by the Commission for tax years 2008 and 2009, especially in light of the fact that the latter valuation is based on the County Assessor's own model. For the reasons discussed above, I would find that the County Board's \$1,339,200 valuation determination for tax years 2010 and 2011 is unreasonable or arbitrary in the aftermath of economic crisis.⁸⁴

In the case where it is determined that the County Board's determination is unreasonable or arbitrary, the Commission must review the evidence and adopt the most reasonable estimate of actual value presented.⁸⁵ Thus, based on the Taxpayer's purchase of the Subject Property (which included a significant personal property component) at the height of the real estate market just prior to the economic crisis, together with his testimony that the 2007 appraisal amounted to

⁸³ E6:2.

⁸⁴ It is my understanding that real estate values in the Omaha area in the \$600,000 plus market declined as much as 30% in the aftermath of the economic crisis.

⁸⁵ See, *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted); *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002); *Garvey Elevators, Inc. v. Adams County Bd. of Equalization*, 261 Neb. 130, 621 N.W.2d 518 (2001).

\$1,000,000 to \$1,050,000, I would find that the best evidence in this case is the owner's \$1,139,958 opinion of value.⁸⁶

Thomas D. Freimuth, Commissioner

⁸⁶ It is my understanding that real estate values in the Omaha area in the \$600,000 plus market declined as much as 30% in the aftermath of the economic crisis.