

**BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION**

Alford Partnership,  
Appellant,

v.

Douglas County Board of Equalization,  
Appellee,

Case Nos: 12C 557 & 13C 623

Decision and Order Reversing  
the Decisions of the Douglas County  
Board of Equalization

**For the Appellant:**

Mark Holmberg,  
Sean T. Mullen P.C., L.L.O.

**For the Appellee:**

Malina M. Dobson  
Deputy Douglas County Attorney

This appeal was heard before Commissioners Robert W. Hotz and Nancy J. Salmon.

**I. THE SUBJECT PROPERTY**

The Subject Property is a commercial parcel located at 11818 W. Dodge Road in the city of Omaha, Douglas County, Nebraska. The 1.75 acre parcel is improved with a 22,972 square foot car wash, gas station, and automobile maintenance shop. 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 4.

**II. PROCEDURAL HISTORY**

The Douglas County Assessor (the County Assessor) determined that the assessed value of the Subject Property was \$2,022,500 for tax year 2012.<sup>1</sup> Alford Partnership (the Taxpayer) protested this assessment to the Douglas County Board of Equalization (the County Board) and requested a taxable value of \$1,317,540.<sup>2</sup> The County Board determined that the taxable value for tax year 2012 was \$2,022,500.<sup>3</sup>

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<sup>1</sup> Exhibit 1.

<sup>2</sup> Exhibit 3:10.

<sup>3</sup> Exhibit 1.

For tax year 2013, the County Assessor determined that the assessed value of the Subject Property was \$2,022,500.<sup>4</sup> The Taxpayer protested this assessment to the County Board and requested a taxable value of \$1,785,005.<sup>5</sup> The County Board determined that the taxable value for tax year 2013 was \$2,007,700.<sup>6</sup>

The Taxpayer appealed the decisions of the County Board to the Tax Equalization and Review Commission (the Commission). Prior to the hearing, the parties exchanged exhibits and submitted a Pre-Hearing Conference Report, as ordered by the Commission. In the Pre-Hearing Conference Report, the parties stipulated to the receipt of the exchanged exhibits. The Commission held a hearing on the merits of the appeals on January 21, 2016.

### III. STANDARD OF REVIEW

The Commission's review of the determination by a County Board of Equalization is *de novo*.<sup>7</sup> 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."<sup>8</sup>

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.<sup>9</sup>

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

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<sup>4</sup> Exhibit 2.

<sup>5</sup> Exhibit 4:9.

<sup>6</sup> Exhibit 2.

<sup>7</sup> See, Neb. Rev. Stat. §77-5016(8) (2014 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).

<sup>8</sup> *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted).

<sup>9</sup> *Id.*

arbitrary.<sup>10</sup> Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.<sup>11</sup>

A Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued.<sup>12</sup> 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.<sup>13</sup>

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 cross appeal.”<sup>14</sup> 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.”<sup>15</sup> The Commission’s Decision and Order shall include findings of fact and conclusions of law.<sup>16</sup>

## 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.<sup>17</sup>

“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

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<sup>10</sup> Neb. Rev. Stat. §77-5016(8) (2014 Cum. Supp.).

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

<sup>12</sup> 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).

<sup>13</sup> *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).

<sup>14</sup> Neb. Rev. Stat. §77-5016(8) (2014 Cum. Supp.).

<sup>15</sup> Neb. Rev. Stat. §77-5016(6) (2014 Cum. Supp.).

<sup>16</sup> Neb. Rev. Stat. §77-5018(1) (2014 Cum. Supp.).

<sup>17</sup> Neb. Rev. Stat. §77-112 (Reissue 2009).

77-1371, (2) income approach, and (3) cost approach.”<sup>18</sup> “Actual value, market value, and fair market value mean exactly the same thing.”<sup>19</sup> 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.<sup>20</sup> All real property in Nebraska subject to taxation shall be assessed as of January 1.<sup>21</sup> All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.<sup>22</sup>

## **B. Summary of the Evidence**

Peter Zekauskas testified on behalf of the Taxpayer. Zekauskas testified that he had leased the Subject Property for several years prior to purchasing the property on December 11, 2013 for \$3,500,000. Zekauskas testified that the purchase price was paid in the context of “getting out of” an onerous lease agreement. Despite the purchase price he paid, he opined that the Subject Property had a market value of \$1,500,000 as of the effective dates of January 1, 2012 and January 1, 2013.

Zekauskas testified that the value of the Subject Property was adversely affected by the construction of the nearby overpass at the intersection of 120<sup>th</sup> Street and Dodge Street. He testified as to specific revenue data, but he did not quantify that data by using an income approach to value.

## **C. Valuation Analysis**

Although the parties’ Pre-Hearing Conference Report indicated that the issue of contention in this appeal is equalization, the submitted evidence reveals certain mathematical errors in the Property Record Card for tax year 2012, entitled Cost Detail of Building (the Cost Detail).<sup>23</sup> No Cost Detail was included in the record for tax year 2013. However, according to a Referee<sup>24</sup> recommendation, the County Board determined for tax year 2013 that a canopy utilized by the Taxpayer in its business should have been categorized as personal property rather than as real

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<sup>18</sup> *Id.*

<sup>19</sup> *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).

<sup>20</sup> Neb. Rev. Stat. §77-131 (Reissue 2009).

<sup>21</sup> See, Neb. Rev. Stat. §77-1301(1) (Reissue 2009).

<sup>22</sup> Neb. Rev. Stat. §77-201(1) (Reissue 2009).

<sup>23</sup> Exhibit 3:6.

<sup>24</sup> Under Neb. Rev. Stat. §77-1502.01, the County Board of Equalization may appoint a referee to hear the protest and file findings and recommendations with the County Board of Equalization.

property.<sup>25</sup> The Commission finds that the Add On value for the canopy, which was determined by the County Board for tax year 2013 to be an item of personal property rather than real property, should also be removed from the actual value of the Subject Property for tax year 2012.

With the exception of the determination made regarding the canopy, the record indicates that the County Board relied upon the County Assessor's opinion of the actual value of the Subject Property as determined by the cost approach as shown in the Cost Detail. Additionally, Mark Jenkins, the County Assessor's representative, testified that the cost valuation was consistent with the Marshall & Swift Valuation Service.

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.<sup>26</sup>

The Commission's review of the Cost Detail for tax year 2012 reveals mathematical errors in the calculations by the County Assessor.<sup>27</sup> Specifically, it appears that a 54.88% rate of physical depreciation was applied to the Total Replacement Cost New without add ons (\$3,137,745).<sup>28</sup> Conversely, the Functional Obsolescence adjustment of 4.5% was applied to the Total Replacement Cost with add ons.

Recalculating the Cost Detail, the Commission determines that the correct cost approach detail (excluding the personal property additions as determined by the County Board for tax year 2013) is as follows:

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<sup>25</sup> See, Exhibit 4:12.

<sup>26</sup> International Association of Assessing Officers, *Property Assessment Valuation*, at 230 (3rd ed. 2010).

<sup>27</sup> Exhibit 3:6.

<sup>28</sup> Exhibit 3:6

<b>Total Replacement Cost new w/o Add ons</b>	<b>\$3,137,745</b>
<b>Add Ons:</b>	
<b>Ob Light Merc Wall Mtd Fld</b>	<b>\$1,200</b>
<b>Paving Asphalt Park</b>	<b><u>\$78,750</u></b>
<b>Total Cost with add Ons</b>	<b><u>\$3,217,695</u></b>
<b>Less Physical Depreciation (54.88%)</b>	<b><u>\$1,765,871</u></b>
<b>Total Replacement Cost after Depreciation</b>	<b><u>\$1,451,824</u></b>
<b>Less Functional Obsolescence (4.50%)</b>	<b><u>\$65,332</u></b>
<b>Replacement Cost after Functional Obsolescence Deduction</b>	<b><u>\$1,386,492</u></b>
<b>Neighborhood Adjustment (0.86)</b>	
<b>Replacement Cost New Less Depreciation (RCNLD)</b>	<b>\$1,192,383</b>

Based upon the foregoing, the Commission finds that under the cost approach, using the corrected Cost Detail, the actual value of the improvements component of the Subject Property is \$1,192,383.

## V. 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.”<sup>29</sup> Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value.<sup>30</sup> 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.<sup>31</sup> 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.<sup>32</sup> 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.<sup>33</sup> Taxpayers are entitled to have their property assessed uniformly and proportionately, even though the result

<sup>29</sup> *Neb. Const., Art VIII, Section 1*

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

<sup>31</sup> *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).

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

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

may be that it is assessed at less than the actual value.<sup>34</sup> The constitutional requirement of uniformity in taxation extends to both rate and valuation.<sup>35</sup> 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].”<sup>36</sup> There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity.<sup>37</sup>

## **B. Summary of the Evidence**

The Taxpayer asked the Commission to consider two properties in close proximity to the Subject Property for comparison purposes: 11910 W. Dodge Road, and 11815 Webster Street (the Comparable Properties). The Subject Property and the Comparable Properties were located on the Northeast corner of the intersection of 120<sup>th</sup> & Dodge Streets.<sup>38</sup> The Taxpayer argued that the valuation attributed to the value of the land component of the Subject Property was not equalized with the value attributed to the land component of the Comparable Properties.

The land component of the Subject Property was assessed at \$11 per square foot.<sup>39</sup> The land component of the parcel at 11910 W. Dodge Road was assessed at \$6 per square foot.<sup>40</sup> The land component of the parcel at 11815 Webster Street was assessed at \$5.50 per square foot.<sup>41</sup> Peter Zekauskas opined that the Subject Property and the Comparable Properties had similar utility and should have been assessed the same per square footage.

The Subject Property and the Comparable Properties vary substantially in comparison to the size of the land component of the Subject Property. The Subject Property land component measured 75,896 square feet. The land component of the parcel at 11910 W. Dodge Road was 182,541 square feet, and the measurement of the land component of 11815 Webster Street was only 19,362 square feet.

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<sup>34</sup> *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).

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

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

<sup>37</sup> *Id.* at 673, 94 N.W.2d at 50.

<sup>38</sup> See, aerial photograph, Exhibit 5.

<sup>39</sup> Exhibit 3:2, Exhibit 4:2.

<sup>40</sup> Exhibit 8:2, Exhibit 9:2.

<sup>41</sup> Exhibit 10:2, Exhibit 11:2.

Mark Jenkins, an employee of the County Assessor, testified that the highest and best use of the Subject Property as compared to the Comparable Properties would have been similar. He asserted that the County Assessor valued the land component of the Comparable Properties at 11815 Webster Street and 11910 W. Dodge Road together because they were contiguous and had the same owner. He also testified that had the parcel at 11815 Webster Street not been associated with the parcel at 11910 W. Dodge Road, it would have been assessed at a higher per square foot value due to typical economies of scale due to the fact that it was so much smaller than the Subject Property and the property at 11910 W. Dodge Road.

The Commission notes that the property record files for the Comparable Properties reveal that the parcels at 11815 Webster Street and 11910 W. Dodge Road were in fact not owned by the same owner.<sup>42</sup> Both Zekauskas and Jenkins testified that the highest and best use of the Subject Property and the Comparable Properties were similar. It would appear that when applying the principles of highest and best use and economies of scale, the land component of the parcel at 11815 Webster Street should have been assessed at a higher per square foot value than the Subject Property since that parcel has similar highest and best use but is approximately three times smaller. 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.<sup>43</sup>

The Taxpayer asserts that the Subject Property is not equalized with other parcels. 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].”<sup>44</sup> Based upon a comparison of the properties described above, the Commission finds that the Taxpayer has met its burden of persuasion.

## VI. 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

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<sup>42</sup> See, Exhibits 8, 9, 10, and 11. The parcel at 11910 W. Dodge Road was owned by Mary J. Anderson. The parcel at 11815 Webster Street was owned by Anderson Properties Co.

<sup>43</sup> *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).

<sup>44</sup> *Newman v. County of Dawson*, 167 Neb. 666, 670, 94 N.W.2d 47, 49-50 (1959) (Citations omitted).

determination. The Commission also finds that there is clear and convincing evidence that the County Board's decision was arbitrary or unreasonable.<sup>45</sup>

For all of the reasons set forth above, the decision of the Douglas County Board of Equalization should be vacated and reversed.

## VII. ORDER

IT IS ORDERED THAT:

1. The decision of the Douglas County Board of Equalization determining the taxable value of the Subject Property for tax years 2012 and 2013 is vacated and reversed.
2. The taxable value of the Subject Property for both tax years 2012 and 2013 is:

Land (Equalized @ \$5.50/SF):	\$ 417,428
Improvements:	<u>\$1,192,383</u>
Total Assessed Value:	\$1,609,811

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 (2014 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 2012 and 2013
7. This Decision and Order is effective for purposes of appeal on May 26, 2016.<sup>46</sup>

Signed and Sealed: May 26, 2016

SEAL

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Robert W. Hotz, Commissioner

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Nancy J. Salmon, Commissioner

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<sup>45</sup> Taxable 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 at the protest proceeding.

<sup>46</sup> Appeals from any decision of the Commission must satisfy the requirements of Neb. Rev. Stat. §77-5019 (2014 Cum. Supp.) and other provisions of Nebraska Statutes and Court Rules.