

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Kermit R. Engh,
Appellant,

v.

Douglas County Board of Equalization,
Appellee.

Case No: 11C 504

Decision Affirming
County Board of Equalization

GENERAL BACKGROUND & PROCEDURAL HISTORY

1. The Subject Property is a commercial parcel improved with a 5,288 square foot dry-cleaning business located at 5007 Leavenworth Street, Omaha, Nebraska, with a legal description of: DODGES SUB DIV -HIMEBAUGH ADD- LOT 3 BLOCK 0 W 30 FT LOTS 36 & 36 1/2 BLK 1 HIMEBAUGH & PATTERSON ADD & ALL LOTS 2 & 3 30 X 62 & 71.75 X 109.5.
2. The Douglas County Assessor assessed the Subject Property at \$255,600 for tax year 2011.
3. Kermit R. Engh (herein referred to as the “Taxpayer”) protested this value to the Douglas County Board of Equalization (herein referred to as the “County Board”).
4. The County Board determined that the assessed value of the Subject Property was \$209,700 for tax year 2011.
5. The Taxpayer appealed the determination of the County Board to the Tax Equalization and Review Commission (herein referred to as the “Commission”).
6. A Single Commissioner hearing was held at the State Office Building, in Omaha, Nebraska, before Commissioner Thomas D. Freimuth, on June 24, 2013.
7. Kermit R. Engh, the Taxpayer, was present at the hearing.
8. No one was present for the County Board.

SUMMARY OF HEARING DOCUMENTS & STATEMENTS

9. The Taxpayer submitted four separate Property Profiles for the Subject Property issued by the Douglas County Assessor’s Office for tax years 2009 – 2012. The “PVAL” page contained in the 2011 Property Profile indicates that the County Board’s \$209,700 determination for that tax year includes \$34,000 for land and \$175,700 for the improvement component. The Commission notes that the PVAL page indicates that the County Board’s determinations for tax years 2006 through 2009 amounted to \$158,800 (land: \$34,000; improvement: \$124,800) and increased to \$170,400 (land: \$34,000; improvement: \$136,400) in tax year 2010 and then to 209,700 in tax year 2011.
10. The 2011 Property Profile states that the Subject Property’s 5,288 square foot improvement is classified by the County as “Laundry/Dry Cleaning” under “Occupancy” code 1499.

11. The Property Profile indicates that the County Board's \$209,700 determination for tax year 2011 rejected the County Assessor's \$255,600 income approach valuation.¹ The Property Profile does not contain explanation regarding the basis of the County Board's reduction of the \$255,600 notice value to \$209,700, and no verbal explanation was offered at the hearing because the County Board was not represented.

STANDARD OF REVIEW

12. The Commission's review of the determination of the County Board of Equalization is de novo.² "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."³
13. When considering an appeal a presumption exists that the "board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action."⁴ 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."⁵
14. 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.⁶
15. Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.⁷

GENERAL VALUATION LAW

16. A Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued.⁸
17. Nebraska Statutes section 77-112 defines actual value as follows:

Actual value of real property for purposes of taxation means the market value of real property in the ordinary course of trade. Actual value may be determined using professionally accepted mass appraisal methods,

¹ The 2011 Property Profile's "Income Worksheet" uses \$9 per square foot as the imputed rental rate for the 5,288 square foot dry-cleaning facility (\$255,600 total valuation).

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).

³ *Koch v. Cedar Cty. Freeholder Bd.*, 276 Neb. 1009, 1019 (2009).

⁴ *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted).

⁵ *Id.*

⁶ Neb. Rev. Stat. §77-5016(8) (2010 Cum. Supp.).

⁷ *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

⁸ 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).

including, but not limited to, the (1) sales comparison approach using the guidelines in section 77-1371, (2) income approach, and (3) cost approach. Actual value is the most probable price expressed in terms of money that a property will bring if exposed for sale in the open market, or in an arm's length transaction, between a willing buyer and a willing seller, both of whom are knowledgeable concerning all the uses to which the real property is adapted and for which the real property is capable of being used. In analyzing the uses and restrictions applicable to real property the analysis shall include a full description of the physical characteristics of the real property and an identification of the property rights valued.⁹

VALUATION ANALYSIS

18. The Taxpayer asserted that the County Board overvalued the Subject Property with the use of an unreasonable or arbitrary income approach model that increased the imputed rental rate from \$6 per square foot (\$170,400 total valuation, which is reflected on the Property Profile's "Income Worksheet" for tax year 2010) to \$9 per square foot (\$255,600 total valuation, which is reflected on the Property Profile's "Income Worksheet" for tax year 2011).¹⁰ In support of this assertion, the Taxpayer submitted documentation that included analysis of the assessment history of five nearby comparables. In further support of this assertion, the Taxpayer submitted documentation demonstrating that revenues generated by the Subject Property declined from tax years 2009 through 2011, and he stated that he pays \$5 per square foot to rent his dry-cleaning business located at 3305 South 66th Avenue.
19. The 2009 – 2012 Property Profiles submitted by the Taxpayer do not include an income worksheet for the County Board's \$209,700 determination for tax year 2011. Based on the Commission's calculation, however, the imputed rental rate associated with the County Board's \$209,700 determination amounts to \$7.38 per square foot for the dry-cleaning operation using the variables contained in the County Assessor's 2011 income worksheet.¹¹
20. The Taxpayer did not submit a fee appraisal of the Subject Property at the hearing before the Commission. The Commission also notes that the Taxpayer submitted screen-shots from the Douglas County Assessor's website regarding the five comparables referenced above (Property Profiles were not submitted).
21. Based on the Taxpayer's analysis, which included concern regarding the County's significant assessment increase in the aftermath of the economic crisis, the Taxpayer

⁹ Neb. Rev. Stat. § 77-112 (Reissue 2009).

¹⁰ The Commission notes that the Property Profile's "Income Worksheet" for tax year 2010 reflects a \$187,500 total valuation that uses a \$5 per square foot imputed rental rate.

¹¹ This \$7.38 imputed rental rate is derived from use of the variables contained in the County Assessor's 2011 income worksheet (i.e., 10% vacancy/collection loss rate; 25% expense ratio; and 9% cap rate) and produces a \$209,700 valuation for the 3,787 square foot dry-cleaning improvement component of the Subject Property. The Commission notes that the 2011 income worksheet uses 3,787 square feet, which according to the sketch contained in the Property Profile is the square footage of the first floor of the 5,288 square foot building. The Property Profile's sketch of the Subject Property indicates that the total 5,288 square foot improvement is comprised of the following components: (1) 3,787 sq. ft. first floor, which is used for the dry-cleaning business as indicated by the income worksheet; (2) 1,333 sq. ft. second floor; and (3) 168 sq. ft. "Porch." The sketch also indicates that the Subject Property includes 3,379 sq. ft. of "Basement Storage," although this square footage is not included in the 5,288 gross area referenced in the Property Profile.

asserted that the actual value of the Subject Property amounted to \$187,500 for tax year 2011, which amounts to a 10% increase over the 2010 assessment.

22. The Taxpayer's opinion of value relies in part on the use of assessed values of comparables in close proximity to the Subject Property. This approach is not a commonly accepted mass appraisal technique for determining the actual value of real property under Nebraska Statutes section 77-112.
23. The valuation approaches identified under Nebraska Statutes section 77-112 include the sales comparison approach, the income approach, the cost approach, and other professionally accepted mass appraisal methods. The Taxpayer's use of assessed values of properties in close proximity to the Subject Property is not identified as an appropriate approach under Nebraska Statutes section 77-112. Additionally, the Taxpayer did not provide evidence that this approach is a professionally accepted mass appraisal or fee appraisal technique. Therefore, while assessed values can provide the basis for relief in the equalization context as discussed below, the Commission is unable to place significant weight on the Taxpayer's opinion of value to the extent it relies on the use of assessed values of nearby properties.
24. The mass appraisal income capitalization model used by the County Assessor to derive its \$255,600 notice valuation for tax year 2011 requires the analysis and use of competitive market information.¹² In this regard, *The Appraisal of Real Estate* published by The Appraisal Institute states: "To derive pertinent income and expense data, an appraiser investigates comparable sales and rentals or competitive income-producing properties of the same type in the same market. ... Appraisers try to obtain all income and expense data from the income-producing properties used as comparables."¹³ "Vacancy and collection loss is commonly expressed as a percentage of potential annual gross income, and it should be based on market research, not the actual rental history of a property."¹⁴ "Published studies are useful, but the appraiser must still develop operating expense ratios from comparable properties in the subject property's market or verify the applicability of the published ratios to this market."¹⁵ Finally, *The Appraisal of Real Estate* states that the income approach "employs capitalization rates and multipliers extracted from market data."¹⁶
25. In addition to market data, the income approach also requires analysis of subject property income and expense information.¹⁷
26. With respect to the proper use of the income approach in the mass appraisal context, "gross income, allowable expenses, net incomes, gross income multipliers, and overall rates can all be estimated in one of two basic ways: by developing typical per-unit values through stratification, often using spreadsheet software, or through statistical models."¹⁸ In order to avoid reflecting differences in management, it is acceptable for an appraiser to use median vacancy, collection loss ratio and income per unit when valuing a property under the income approach.¹⁹ Whether the appraiser uses actual subject property income/expense information or estimated medians is "a matter of appraiser judgment"

¹² Fisher and Martin, *Income Property Valuation*, Dearborn Financial Publishing, Inc., 2004, at p. 43.

¹³ *The Appraisal of Real Estate*, 13th Edition, The Appraisal Institute, 2008, at p. 473.

¹⁴ *Mass Appraisal of Real Property*, International Association of Assessing Officers, 1999, at 404.

¹⁵ *The Appraisal of Real Estate*, 13th Edition, The Appraisal Institute, 2008, at p. 494.

¹⁶ *The Appraisal of Real Estate*, 13th Edition, The Appraisal Institute, 2008, at p. 499.

¹⁷ *The Appraisal of Real Estate*, 13th Edition, The Appraisal Institute, 2008, at p. 466.

¹⁸ *Mass Appraisal of Real Property*, International Association of Assessing Officers, 1999, at p. 132.

¹⁹ *Mass Appraisal of Real Property*, International Association of Assessing Officers, 1999, at p. 158.

based upon whether the reported actual figures appear reasonable or typical when compared to the median figure for the model.²⁰

27. *Mass Appraisal of Real Property* states the basic concept that for purposes of ad valorem taxation of real property, only the value of the real property and not that value of the business which is attributable to individual management style or experience is to be valued. The use of estimated figures instead of actual figures for each business is intended to prevent the inappropriate taxation of management.²¹
28. Because of these principles of mass appraisal, it is not enough to rebut the presumption in favor of the County Board for the Taxpayer to present evidence that there is a difference between the Subject Property's actual figures and the estimates utilized by the County Assessor and adopted by the County Board in its determination (as indicated previously, the County Board did not adopt the County Assessor's \$255,600 income valuation, and it is not clear based on a review of the hearing documentation how the County Board arrived at its \$209,700 determination). The Taxpayer must show something more in the form of clear and convincing evidence that the County Assessor or County Board inappropriately derived the estimated figures, or inappropriately included the Subject Property in a model comprised of incomparable properties, or any other error or calculation that evidences that the model or process utilized by the County Assessor and relied upon by the County Board determined the value of the Subject Property in such a way that the decision was "made in disregard of the facts or circumstances and without some basis which would lead a reasonable person to the same conclusion"²² or evidences that there is "no room for differences of opinion among reasonable minds."²³
29. In support of his opinion of value, the Taxpayer supplied the Commission with documentation that illustrates the decline of the actual gross income of the Subject Property for the years 2009 through 2012. The Taxpayer did not provide actual expense information.
30. While the Taxpayer's opinion of value also relies in part on his statement that he pays \$5 per square foot to rent his dry-cleaning business located at 3305 South 66th Avenue, the Commission finds that the Taxpayer did not present sufficient local market data and actual Subject Property income/expense information to demonstrate that the County Board's decision to reduce the County Assessor's notice value from \$255,600 to \$209,700 for tax year 2011 was unreasonable or arbitrary (as indicated previously, this \$209,700 determination results in a \$7.38 per square foot imputed rental rate using the 2011 Property Profile's income worksheet variables – i.e., 10% vacancy/collection loss rate; 25% expense ratio; and 9% capitalization rate).²⁴
31. The Commission notes that valuation guidance is widely available in the case where a Taxpayer determines that it is not cost effective to obtain a fee appraisal. For example, the Commission is allowed by statute and by its rules and regulations to consider many publications that provide guidance regarding the sales comparison approach and other valuation techniques. These publications, which are listed at the Commission's

²⁰ *Mass Appraisal of Real Property*, International Association of Assessing Officers, 1999, at p. 158.

²¹ *Mass Appraisal of Real Property*, International Association of Assessing Officers, 1999, at p. 158.

²² *Phelps Cty. Bd. of Equal. v. Graf*, 258 Neb 810, 606 N.W.2d 736 (2000) (citations omitted) (defining "arbitrary").

²³ See, *Pitman v. Sarpy Cty. Bd. of Equal.*, 258 Neb 390, 401-02, 603 N.W.2d 447, 455-56 (1999) (defining "unreasonable").

²⁴ The Taxpayer did not provide a Property Profile or income/expense documentation for his dry-cleaning business located at 3305 South 66th Avenue where he pays \$5 per square foot rent. Thus, the Commission is unable to adequately analyze whether the actual income and expense information for this property constitutes sufficient market data to support a reduction of the County Board's \$209,700 actual value determination.

“Rules/Regulations” website link (Chapter 5, section 031), can be found at area public libraries and law school libraries. Guidance regarding valuation techniques can also be found at the Commission’s “Decisions” website link.

32. The Commission also notes that section 8 of the Order for Single Commissioner Hearing issued to the parties in this matter at least 30 days prior to the hearing provides as follows:

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

33. Further, with respect to the Taxpayer’s concern regarding insufficient consideration of the economic crisis by the County, general guidance in this regard in the mass appraisal context is contained in *Property Assessment Valuation*, which is published by the International Association of Assessing Officers.²⁵ For example, *Property Assessment Valuation* states that assessment officials are required to review factors such as foreclosure rates and vacancy rates as a part of developing and maintaining market area databases.²⁶ Additionally, in addressing mass appraisal techniques such as the model used by the County to value the Subject Property, *Property Assessment Valuation* states as follows:

Although the structure of a mass appraisal model may be valid for many years, the model is usually recalibrated or updated 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.**²⁷

34. 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

²⁵ *Property Assessment Valuation*, 3rd Ed., International Association of Assessing Officers, 2010, at pgs. 73 - 83.

²⁶ *Property Assessment Valuation*, 3rd Ed., International Association of Assessing Officers, 2010, at pgs. 77 - 83.

²⁷ *Property Assessment Valuation*, 3rd Ed., International Association of Assessing Officers, 2010, at p. 417-18 (emphasis added).

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.²⁸

35. The Nebraska Supreme Court has also recently considered “current market conditions” in the aftermath of the economic crisis. 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 evidence of value for inheritance tax purposes.²⁹
36. This Commissioner is mindful that the events surrounding the economic crisis adversely affected business and real estate values throughout the United States. The Commission finds, however, that the Taxpayer did not provide sufficient clear and convincing evidence to quantify the impact of the economic crisis on the actual value of the Subject Property.³⁰

GENERAL EQUALIZATION LAW

37. “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.”³¹ Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value.³² 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.³³
38. 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.³⁴
39. 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.³⁵ 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.³⁶
40. The constitutional requirement of uniformity in taxation extends to both rate and valuation.³⁷ 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

²⁸ *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).

²⁹ *County of Lancaster v. Union Bank & Trust Co. (In re Estate of Craven)*, 281 Neb. 122, 794 N.W.2d 406 (Neb. 2011).

³⁰ The Commission notes that one purpose of the County’s use of market data-- assuming it is reliable and sufficient -- in its income approach model is to account for any adverse local consequences related to the worldwide economy.

³¹ *Neb. Const.*, Art. VIII, §1.

³² *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).

³³ *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).

³⁴ *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).

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

³⁶ *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).

³⁷ *First Nat. Bank & Trust Co. v. County of Lancaster*, 177 Neb. 390, 128 N.W.2d 820 (1964).

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].”³⁸ “There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity.”³⁹

41. “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.”⁴⁰

EQUALIZATION ANALYSIS

42. The Taxpayer asserted that the Subject Property was overvalued in comparison to the assessed valuations of five comparables located near the Subject Property. In support of this assertion, the Taxpayer submitted screen-shots from the Douglas County Assessor’s website for these properties.
43. As indicated previously, an order for equalization requires evidence that either: (1) similar properties were assessed at materially different values;⁴¹ or (2) a comparison of the ratio of assessed value to market value for the Subject Property and other real property **regardless of similarity** indicates that the Subject Property was not assessed at a uniform percentage of market value.⁴²
44. The Commission finds that the five properties submitted by the Taxpayer are not similarly situated or comparable for equalization analysis purposes in substantial part because none of the operations situated on these parcels engage in the dry-cleaning business.
45. The Commission further finds that the Taxpayer did not produce sufficient evidence of the market value of the properties submitted for comparison, in order to determine whether the ratio of one or more assessed to market values was less than 100% for tax year 2011. Thus, the Commission is unable to determine whether the Subject Property was assessed at an excessive percentage of market value in comparison to the properties presented for consideration by the Taxpayer.
46. The Commission notes that the Taxpayer’s hearing in connection with the 2011 valuation of the Subject Property was held contemporaneously with the 2011 hearing on his dry-cleaning operation located at 3031 Leavenworth, which is 20 blocks away from the Subject Property. Based on a review of the Property Profiles, photos and testimony relating to the Subject Property and this comparable, the Commission finds that the square footage of each parcel dedicated to the dry-cleaning business is similarly situated or comparable for equalization analysis purposes. An important factor in connection with this finding is that the 2009 – 2012 Property Profiles submitted by the Taxpayer for the Subject Property and the 3031 Leavenworth comparable contain income worksheets indicating that the County Assessor and the County Board have treated the parcels similarly for several years (e.g., the County Assessor’s 2011 and 2012 income worksheets for the parcels use identical income approach variables: \$9 rent; 10% vacancy/collection loss rate; 25% expense ratio; and 9% capitalization rate).

³⁸ *Newman v. County of Dawson*, 167 Neb. 666, 670, 94 N.W.2d 47, 49-50 (1959) (Citations omitted).

³⁹ *Id.* at 673, 94 N.W.2d at 50.

⁴⁰ *Scribante v. Douglas County Board of Equalization*, 8 Neb.App. 25, 39, 588 N.W.2d 190, 199 (1999).

⁴¹ See, *Scribante v. Douglas County Board of Equalization*, 8 Neb.App. 25, 39, 588 N.W.2d 190, 199 (1999).

⁴² See, *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623, 635 (1999).

47. The County Board's assessed valuation of the 3031 Leavenworth dry-cleaning improvement comparable for tax year 2011 under the County Assessor's income worksheet is \$42.50 per square foot ($\$212,200 \div 5,000$ sq. ft.; \$5.66 per square foot imputed rental rate), while the Subject Property's dry-cleaning component is valued at \$55.37 per square foot ($\$209,700 \div 3,787$ sq. ft.; \$7.68 per square foot imputed rental rate).⁴³ The Commission acknowledges that the improvement component of the 3031 Leavenworth comparable dedicated to the dry-cleaning operation is larger in comparison to the Subject Property (5,000 square feet vs. 3,787 square feet) and thus triggers possible application of the concept of economies of scale, whereby the per square foot value of a smaller property is often valued more than a larger property.⁴⁴ Based on a review of the income worksheets contained in the Property Profiles for the Subject Property and the 3031 Leavenworth comparable, however, the Commission finds that size does not impact the per square foot value of the parcels under the County Assessor's income model.⁴⁵ It should follow that, by failing to equalize the Subject Property with the 3031 Leavenworth comparable on a per square foot valuation basis, the County Board's determination for tax year 2011 was unreasonable or arbitrary because it treats similarly situated properties at materially different levels.⁴⁶
48. I use the word "should" in the preceding sentence because the documentation and statements submitted at the hearing do not indicate how or why the County Board reduced the County Assessor's notice value from \$255,600 to \$209,700. In other words, while I find that the square footage (3,787 sq. ft. at the Subject Property at 50th & Leavenworth and 5,000 sq. ft. at the 3031 Leavenworth comparable) dedicated to the dry-cleaning business at the Taxpayer's parcels on Leavenworth Street are similarly situated for equalization analysis purposes, I am unable to find that the County Board's determination was unreasonable or arbitrary because it is possible that the entity used an acceptable valuation approach other than the Commission's calculations referenced above. For example, it possible that the County Board assigned some value to the Subject Property's square footage other than the 3,787 square feet first floor area dedicated to the dry-cleaning business (i.e., the 1,333 sq. ft. second floor and/or the 168

⁴³ This \$5.66 imputed rental rate calculation for the 5,000 sq. ft. building that contains the dry-cleaning operation at the 3031 Leavenworth comparable assumes that the 2,400 square foot storage facility valuation at that location remains constant at \$34,100, using the County Assessor's \$2 per square foot "Storage Warehouse" imputed rental rate ($\$246,300 - \$34,100 = \$212,200$). In other words, use of a \$5.66 rent rate in combination with the other variables contained in the 2011 income worksheet produces a \$212,200 valuation for the dry-cleaning improvement component of the 3031 Leavenworth comparable ($\$212,200 \div 5,000 = \55.37 psf; \$5.66 rent rate).

⁴⁴ See, *The Appraisal of Real Estate*, Appraisal Institute, 13th Ed., 2008, 212 ("[r]educing sale prices to consistent units of comparison facilitates the analysis of comparable sites and can identify trends in market behavior. Generally, as size increases, unit prices decrease. Conversely, as size decreases, unit prices increase.")

⁴⁵ The County Assessor's income worksheet for the Subject Property uses the following values: (1) \$9 per square foot rent rate; (2) 10% vacancy & collection loss rate; (3) 25% expense ratio; and (4) 9% capitalization rate. The income worksheet for the parcel located at 3031 Leavenworth uses the same values to arrive at the County Assessor's \$371,600 notice value, which the County Board reduced to \$246,300. Thus, even though the Subject Property's dry-cleaning business size (3,787 sq. ft.) is smaller than the comparable (5,000 sq. ft.), the County used identical income values.

⁴⁶ See, *Scribante v. Douglas County Board of Equalization*, 8 Neb.App. 25, 39, 588 N.W.2d 190, 199 (1999); *Zabawa v. Douglas County Bd. of Equalization*, 17 Neb.App. 221, 228, 757 N.W.2d 522, 528 - 529 (2008) ("By adjudicating tax protests in greatly disparate amounts ... the Board failed to fulfill its 'plain duty' to equalize property valuations.") As indicated previously, in 2011 the County Board reduced the County Assessor's \$371,600 2011 notice value of the 3031 Leavenworth property to \$246,300 (\$33 per square foot based on 7,400 square foot gross size; \$42 per square foot based on the 5,000 square foot size used in the County Assessor's income model). The County Board, however, failed to equalize the Subject Property with it's the 3031 Leavenworth comparable.

sq. ft. "Porch" and/or the 3,379 sq. ft. "Basement Storage" area referenced on the Property Profile's sketch of the Subject Property).

49. Under Nebraska Statutes section 77-1502(5), the County Clerk and the County Assessor are required to maintain a record regarding the basis of the County Board's property valuation protest decisions.⁴⁷ In the case where this record is not provided to the Taxpayer by the County Clerk or County Assessor upon request, the Taxpayer can use the formal discovery process under the Commission's rules to request and obtain such documentation. In order to obtain information regarding the basis of County Board and/or County Assessor valuation decisions, the Taxpayer can also use subpoenas to require appearance of County Board members and/or County Assessor Office employees at a hearing before the Commission.
50. In the case where it is determined that the County Board's treatment of the Subject Property in comparison to the 3031 Leavenworth comparable or any other comparable was unreasonable or arbitrary, the Commission would be required to review the evidence and adopt the most reasonable per square foot value presented.⁴⁸ The Commission notes that one possible equalization value of the Subject Property for tax year 2011 is \$182,285 (\$42.50 dry-cleaning business value per sq. ft. of the 3031 Leavenworth comparable x 3,787 sq. ft. = \$160,948, plus \$21,337 value of the Subject Property's remaining 1,501 sq. ft. using the comparable's storage warehouse \$2 imputed rent income model -- 3,787 + 1,501 = 5,288).
51. Another possible equalization value involves use of the gross size of each parcel referenced in the Property Profiles (Subject Property: 5,288 sq. ft.; 3031 Leavenworth equalization comparable: 7,400 sq. ft.). Under this approach, the equalization value of the Subject Property for tax year 2011 is \$175,985 (5,288 x \$33.28, where \$33.28 = \$246,300 ÷ 7,400, and where \$246,300 is the County Board's 2011 determination for the 3031 Leavenworth equalization comparable).

CONCLUSION

52. The Taxpayer has not produced competent evidence that the County Board failed to faithfully perform its duties and to act on sufficient competent evidence to justify its actions.
53. The Taxpayer has not adduced sufficient, clear and convincing evidence that the determination of the County Board is unreasonable or arbitrary and the decision of the County Board should be affirmed.
54. The Commission is mindful that the County Board was not represented at the hearing. The County Board, however, 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.⁴⁹
55. Either party may request a rehearing of the decision herein before the full Commission.⁵⁰ In order to meet the requirements of any such request, a party must apply in writing to the

⁴⁷ Neb. Rev. Stat. § 77-1502(5) (2012 Cum. Supp.).

⁴⁸ See, *Scribante v. Douglas County Board of Equalization*, 8 Neb.App. 25, 39, 588 N.W.2d 190, 199 (1999). See also, *Garvey Elevators, Inc. v. Adams County Bd. of Equalization*, 261 Neb. 130, 621 N.W.2d 518 (2001).

⁴⁹ *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998). See, *Garvey Elevators, Inc. v. Adams County Bd. of Equalization*, 621 N.W.2d 518, 261 Neb. 130 (Neb. 2001).

⁵⁰ Neb. Rev. Stat. §77-5015.02(5) (2012 Cum. Supp.)

Commission for rehearing within thirty (30) days of the **date** of the Order issued herein.⁵¹ An appeal of a Single Commissioner decision before the full Commission is conducted as a “trial de novo.”⁵² As indicated in the “Standard of Review” section above, “[w]hen 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 Single Commissioner hearing 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.”⁵³

ORDER

IT IS ORDERED THAT:

1. The decision of the Douglas County Board of Equalization determining the value of the Subject Property for tax year 2011 is Affirmed.
2. That the taxable value of the Subject Property for tax year 2011 is:

Land	\$ 34,000
Improvements	\$175,700
Total	\$209,700

3. This decision and order, if no further action is taken, shall be certified to the Douglas County Treasurer and the Douglas County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (2012 Cum. Supp.)
4. Any request for relief, by any party, which is not specifically provided for by this order is denied.
5. Each Party is to bear its own costs in this proceeding.
6. This decision shall only be applicable to tax year 2011.
7. This order is effective on January 14, 2014.

Signed and Sealed: January 14, 2014.

Thomas D. Freimuth, Commissioner

⁵¹ Neb. Rev. Stat. §77-5005(4) (2012 Cum. Supp.)

⁵² Neb. Rev. Stat. §77-5005(4) (2012 Cum. Supp.); 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).

⁵³ *Koch v. Cedar Cty. Freeholder Bd.*, 276 Neb. 1009, 1019 (2009).