

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Bradley T. Masterson,
Appellant,

v.

Douglas County Board of Equalization,
Appellee.

Case No: 12R 1191

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

1. A Single Commissioner hearing was held on January 21, 2014, at the Tax Equalization and Review Commission Hearing Room, Sixth Floor, Nebraska State Office Building, 301 Centennial Mall South, Lincoln, Nebraska, before Commissioner Salmon.
2. Bradley T. Masterson (the Taxpayer) was present at the hearing.
3. Larry Thomsen, Appraiser for Douglas County Assessor’s Office, was present for the Douglas County Board of Equalization (the County).
4. The Subject Property (Subject Property) is residential parcel improved with a 2,827 square foot dwelling, with a legal description of: Lot 32 Ex Irr Sestrly 4.06 Ft Lot 32, Block 0, Indian Creek, Douglas County, Nebraska.

Background

5. The Douglas County Assessor assessed the Subject Property at \$ 766,400 for tax year 2012.
6. The Taxpayer protested this value to the Douglas County Board of Equalization and requested an assessed value of \$535,000 for tax year 2012.
7. The Douglas County Board of Equalization determined that the assessed value of the Subject Property was \$766,400 for tax year 2012.
8. The Taxpayer appealed the determination of the County to the Tax Equalization and Review Commission (the Commission).

Issues & Analysis

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

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

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

10. When considering an appeal a presumption exists that the “board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action.”³ That presumption “remains until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence adduced on appeal to the contrary. From that point forward, the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon all the evidence presented. The burden of showing such valuation to be unreasonable rests upon the taxpayer on appeal from the action of the board.”⁴
11. The order, decision, determination or action appealed from shall be affirmed unless evidence is adduced establishing that the order, decision, determination, or action was unreasonable or arbitrary.⁵
12. Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.⁶
13. A Taxpayer must introduce competent evidence of actual value of the Subject Property in order to successfully claim that the Subject Property is overvalued.⁷
14. “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.”⁸ Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value.⁹ 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.¹⁰
15. 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.¹¹ 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.¹² 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

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

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

⁴ *Id.*

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

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

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

⁸ *Neb. Const.*, Art. VIII, §1.

⁹ *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).

¹⁰ *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).

¹¹ *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).

¹² *Banner County v. State Board of Equalization*, 226 Neb. 236, 411 N.W.2d 35 (1987).

value.¹³ The constitutional requirement of uniformity in taxation extends to both rate and valuation.¹⁴

16. 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].”¹⁵ There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity.¹⁶ “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.”¹⁷
17. The Taxpayer asserted that the land value of the Subject Property was not equalized with lot 30 in Indian Creek Subdivision. He asserted that he viewed both lots in 2005 prior to purchasing the Subject Property and that the two lots were similar. The Taxpayer asserted that the 2012 valuation of the alleged comparable property was \$78,000. The Taxpayer provided the Commission with the property record card showing an assessed value of \$78,000 for tax year 2012, and the \$170,000 August 2011, and May 2013, sale price of the alleged comparable property.
18. The Appraiser stated that vacant lots in the Subject Property’s subdivision are only assessed at 60% of actual value.
19. This practice has been used in other counties in Nebraska and reviewed by the Commission in previous orders. This discount has been generally called a developer’s discount, although some counties have extended the discount to vacant parcels owned by individuals or entities who are not developers.
20. The use of a developer’s discount to determine the actual value of real property for ad valorem tax purposes has not been addressed by Nebraska Courts. However, the issue has been addressed by several courts in other jurisdictions.¹⁸ Additionally, the

¹³ *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).

¹⁴ *First Nat. Bank & Trust Co. v. County of Lancaster*, 177 Neb. 390, 128 N.W.2d 820 (1964).

¹⁵ *Newman v. County of Dawson*, 167 Neb. 666, 670, 94 N.W.2d 47, 49-50 (1959) (Citations omitted).

¹⁶ *Id.* at 673, 94 N.W.2d at 50.

¹⁷ *Scribante v. Douglas County Board of Equalization*, 8 Neb.App. 25, 39, 588 N.W.2d 190, 199 (1999).

¹⁸ See, *Tramburelli Properties Association v. Borough of Creskill*, 308 N.J. Super. 326, 705 A.2d 1270 (N.J. Super.Add.Div. 1998) (holding that the use of an absorption discount did not violate New Jersey ad valorem real property tax scheme in the limited instances where the property was assessed at a highest and best use of residential but was currently used for another use, and where the parcel had yet to be legally subdivided into individual lots); *Board of Equalization of Salt Lake County v. Utah State Tax Commissioner ex re. Benchmark, Inc.*, 864 P.2d 882 (1993) (holding that use of an absorption discount violated both Utah Constitutional provisions for uniformity and the statutory scheme for the application of ad valorem taxes); *Mathais v. Department of Revenue of the State of Oregon*, 312 Or. 50, 817 P.2d 272 (1991) (holding that a statutory scheme which can best be described as permitting the use of a discounted cash flow analysis to value certain undeveloped properties for ad valorem tax purposes violated the Oregon Constitutional provisions for uniformity); *Edward Rose Building Company v. Independence Township*, 436 Mich. 620, 462 N.W.2d 325 (1990) (holding a wholesale discount would violate the states constitutional requirement for uniformity); *Hixon v. Lario Enterprises, Inc.*, 257 Kan. 377, 892 P.2d 507 (1995)

Commission has previously held that the use of a discounted cash flow analysis, or application of a developer's discount, to determine the assessed value of real property violated the principles and requirements of Nebraska Statute.¹⁹ The Commission recognizes that the holdings and reasoning from other jurisdictions are persuasive only, and not controlling. However, the Commission finds these holdings and reasoning instructive.

21. Nebraska Statutes require that real property subject to taxation be valued at its actual value unless the real property meets the definition of agricultural or horticultural land, or historically significant real property.²⁰ Nebraska Statutes section 77-112 defines "actual value":

Actual value of real property for purposes of taxation means the market value of real property in the ordinary course of trade. Actual value may be determined using professionally accepted mass appraisal methods, including, but not limited to, the (1) 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 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 consideration of the full description of the physical characteristics of the real property and an identification of the property rights being valued.

22. Nebraska Statutes further defines taxable value, "[t]axable value shall be as described in section 77-201 and shall have the same meaning as assessed value."²¹
23. Nebraska Statute requires the real property to be assessed at actual value. It is apparent from the evidence and testimony that the alleged comparable property was instead valued at an amount less than actual value.
24. While it is true that a discounted cash flow analysis is a generally accepted appraisal technique, the applicability of this technique is also limited. "The [subdivision development analysis] technique is most useful for reporting the market value for a group of subdivision lots, whether existing or proposed. The method uses what is known as a *bulk sales* scenario to develop the value of all lots to one purchaser."²² In other words, the discounted cash flow analysis, does not value a parcel individually, but instead determines the aggregate value of a group of parcels to a developer or investor. Nebraska Law requires an assessor to prepare an assessment roll each year.²³

(holding use of a developer's discount would violate the statutory scheme for valuing property for ad valorem tax purposes); *St. Leonard Shores v. Supervisor of Assessments of Calvet County*, 307 Md. 441, 514 A2d 1215 (1985) (rejecting the use of a developer's discount to value property for ad valorem tax purposes).

¹⁹ See, *CAE Enterprises LLC v Sarpy*, 08C-002 (July 14, 2009); *Palisades Development LLC v Sarpy*, 08R-863-68 (August 11, 2010); *Savanna Shores Development LLC v Sarpy*, 08R-276-87 (August 11, 2010). (Available on the Commission's website at terc.ne.gov).

²⁰ Neb. Rev. Stat. § 77-201 (Reissue 2009).

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

²² *The Appraisal of Real Estate*, 13th Ed., Appraisal Institute (2008) at 370.

²³ Neb. Rev. Stat. §77-1303 (2012 Cum. Supp.).

25. Nebraska Statute requires that the assessment roll list the number of lots comprising the parcel and the value of the parcel.²⁴ Nebraska Statutes define a “parcel:”

Parcel means a contiguous tract of land determined by its boundaries, under the same ownership, and in the same tax district and section. Parcel also means an improvement on leased land. If all or several lots in the same block are owned by the same person and are contained in the same tax district, they may be included in one parcel.²⁵

26. The Commission finds that Nebraska Statutes do not permit the valuation of non-congruous lots, or lots located in different blocks as a parcel, but instead requires these lots to be valued individually. The Commission finds that because the valuation of a single lot as a parcel is required by Nebraska Statute, that is was unreasonable and arbitrary for the County Board to adopt the County Assessor’s determination of value based upon a vacant lot discount which does not value the Subject Properties individually.
27. Additionally, when discussing the strength of a value indication derived from a discounted cash flow analysis, the literature states that, “[t]he value indication is most persuasive when the sales comparison method provides additional support.”²⁶ In other words, a discounted cash flow analysis should be supported by the sales comparison approach. The County Assessor’s determination of value of the alleged comparable property is not supported by the sales comparison approach. Instead the testimony and evidence presented indicates that the County Assessor first determined actual value as indicated by the sales comparison approach and then discounted it based upon a vacant lot discount.
28. While the Commission acknowledges that there may be some justifiable policy reasons for desiring a lower tax rate on undeveloped lots, this policy would not trump the requirement that all real property, other than agricultural and horticultural real property in Nebraska, be assessed at one hundred percent of actual or fair market value. Additionally, this Commissioner finds that the Commission has no authority or power in hearing and deciding a valuation appeal to implement this policy.
29. The evidence and assertions indicate both that the Subject Property and the alleged comparable property were valued at different ratios of assessed to actual value, and that the Subject Property was valued at a materially different level than the comparable properties.
30. The Commission finds that there is clear and convincing evidence that that valuation placed on the Subject 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..
31. The Commission finds that the Subject Property’s land value should be equalized with alleged comparable property to \$78,000.
32. The Taxpayer asserted that his improvement value was not equalized with several of the homes similar in his neighborhood. He provided a spreadsheet listing the square footage and improvement valuation for 5 alleged comparable properties. He averaged the per

²⁴ *Id.*

²⁵ Neb. Rev. Stat. §77-132 (Reissue 2009).

²⁶ The Appraisal of Real Estate, 13th Ed., Appraisal Institute (2008) at 370.

square foot costs. The Commission notes that he included the finished basement square feet in his total square footage.

33. The correct procedure is to use above grade square footage only. “[G]ross living area is the total area of finished, above-grade residential space, calculated by measuring the outside perimeter of the structure and includes only finished, habitable, above-grade living space. (Finished basements and attic areas are not generally included in the total gross living area.)”²⁷
34. The Commission also finds that finished area of the basement is assessed at a lesser value.²⁸
35. The Commission finds that the alleged comparable properties are not truly comparable. A determination of actual value may be made for mass appraisal and assessment purposes by using approaches identified in Nebraska Statutes.²⁹ The approaches identified are the sales comparison approach, the income approach, the cost approach and other professionally accepted mass appraisal methods.³⁰ The comparison of assessed values of dissimilar parcels is not recognized as an appropriate approach. Without quantified adjustments to the comparable property for all of the different physical characteristics, the Taxpayer’s assertions based upon the comparison of the alleged comparable property and the Subject Property are given little weight.
36. The Commission finds that the taxable value of the Subject Property as of January 1, 2012, is \$724,400. (Land value \$78,000 + Imp Value \$646,400 = \$724,400)
37. The Taxpayer has produced competent evidence that the County Board failed to faithfully perform its duties and to act on sufficient competent evidence to justify its actions.
38. The Taxpayer has 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 vacated.

ORDER

IT IS ORDERED THAT:

1. The Decision of the Douglas County Board of Equalization determining the value of the Subject Property for tax year 2012 is Vacated and Reversed.
2. The taxable value of the Subject Property for tax year 2012 is:

²⁷ The Appraisal of Real Estate, 13th Ed., Appraisal Institute (2008) at 237.

²⁸ An examination of the Cost Detail for comparable properties found within the County Assessor’s Assessment Report indicates that basement finish was assessed at \$20-25 per square foot while other finished living area was assessed at \$45-50 per square foot.

²⁹ Neb. Rev. Stat. §77-112 (Reissue 2009).

³⁰ *Id.*

Land	\$ 78,000
<u>Improvements</u>	<u>\$646,400</u>
Total	\$724,400

3. This Decision and Order, if no further action is taken, shall be certified to the Douglas County Treasurer and the Douglas County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (2012 Cum. Supp.)
4. Any request for relief, by any party, which is not specifically provided for by this Decision and Order is denied.
5. Each Party is to bear its own costs in this proceeding.
6. This Decision and Order shall only be applicable to tax year 2012.
7. This Decision and Order is effective on January 28, 2014.

Signed and Sealed: January 28, 2014

Nancy J. Salmon, Commissioner