

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

Papillion Building, LLC,  
Appellant,

v.

Sarpy County Board of Equalization,  
Appellee,

Case No: 12C 090

Decision and Order Affirming the  
Determination of the Sarpy County Board of  
Equalization

**For the Appellant:**  
Jennifer Smith,  
Tax Manager, Papillion Building, LLC.

**For the Appellee:**  
Michael Smith,  
Deputy Sarpy 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 1020 E. 1<sup>st</sup> Street, Papillion, Sarpy County, Nebraska. The parcel is improved with a 176,033 square foot commercial building. The legal description and property record file for the Subject Property are found at Exhibit 2.

**II. PROCEDURAL HISTORY**

The Sarpy County Assessor (the Assessor) determined that the assessed value of the Subject Property was \$15,000,000 for tax year 2012.<sup>1</sup> Papillion Building, LLC (the Taxpayer) protested this assessment to the Sarpy County Board of Equalization (the County Board) and requested an assessed valuation of \$12,281,470.<sup>2</sup> The County Board determined that the taxable value of the Subject Property for tax year 2012 was \$15,000,000.<sup>3</sup>

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<sup>1</sup> E1:1.

<sup>2</sup> E2:2

<sup>3</sup> E1:1.

The Taxpayer appealed the decision 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. The Commission held a hearing on December 16, 2014.

### III. STANDARD OF REVIEW

The Commission's review of the determination by a County Board of Equalization is de novo.<sup>4</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>5</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>6</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 arbitrary.<sup>7</sup> Proof that the order, decision, determination, or action was arbitrary or unreasonable must be made by clear and convincing evidence.<sup>8</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>9</sup> The County Board need not

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<sup>4</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>5</sup> *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted).

<sup>6</sup> *Id.*

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

<sup>8</sup> *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

<sup>9</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).

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>10</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>11</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>12</sup> The Commission’s Decision and Order shall include findings of fact and conclusions of law.<sup>13</sup>

#### IV. VALUATION

##### A. Applicable 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>14</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 77-1371, (2) income approach, and (3) cost approach.”<sup>15</sup> “Actual value, market value, and fair market value mean exactly the same thing.”<sup>16</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>17</sup> All real property in Nebraska subject to taxation shall be assessed as of

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<sup>10</sup> *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).

<sup>11</sup> Neb. Rev. Stat. §77-5016(8) (2014 Cum. Supp.).

<sup>12</sup> Neb. Rev. Stat. §77-5016(6) (2014 Cum. Supp.).

<sup>13</sup> Neb. Rev. Stat. §77-5018(1) (2014 Cum. Supp.).

<sup>14</sup> Neb. Rev. Stat. §77-112 (Reissue 2009).

<sup>15</sup> *Id.*

<sup>16</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>17</sup> Neb. Rev. Stat. §77-131 (Reissue 2009).

January 1.<sup>18</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>19</sup>

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

The property record file for the Subject Property indicates that the Assessor conducted both a cost approach and an income approach for the Subject Property and then reconciled the two values.<sup>20</sup> The County Board affirmed the Assessor's opinion of value after the protest proceedings.<sup>21</sup>

Bob Weigel<sup>22</sup> testified on behalf of the Taxpayer that the cost approach is typically used for a newer facility or a facility with unique characteristics. He asserted that the Subject Property was not a new facility and that the Assessor's cost approach was not the best approach to determine the actual value of the Subject Property. He asserted that the sales comparison approach also had limited utility because there were no sales of Class C Office Buildings with greater than 100,000 square feet in the Subject Property's market area. He asserted that the income approach was the most applicable approach to determine the actual value of the Subject Property, even though the Subject Property was owner occupied. He asserted that the Assessor's income approach did not reflect market value. He acknowledged that per Nebraska law all three approaches are applicable to the valuation of a commercial property like the Subject Property.

Cory Morris, a senior property tax consultant in the state of Texas,<sup>23</sup> testified that the Subject Property was a one-story concrete Class C building, with 16 feet ceiling heights including exposed rafters similar to large box stores, and with 81% of the floor area occupied with cubicles.<sup>24</sup> He testified that the interior walls were lined with offices for private meetings. The Subject Property was built in 1998 and was expanded in 2006.

Morris asserted that the best method to value the Subject Property was the income approach. He asserted that the Assessor's income approach was based upon incorrect factors. Several

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<sup>18</sup> See, Neb. Rev. Stat. §77-1301(1) (Reissue 2009).

<sup>19</sup> Neb. Rev. Stat. §77-201(1) (Reissue 2009).

<sup>20</sup> See, E2.

<sup>21</sup> See, E1.

<sup>22</sup> See, E29; Weigel was not a licensed appraiser in Nebraska.

<sup>23</sup> See, E30. At the hearing, Morris indicated that he was not a licensed appraiser in Nebraska and would not express an opinion of value for the Subject Property.

<sup>24</sup> See, E22.

documents were offered into evidence to support Morris' assertion including; (1) descriptions of alleged comparable properties and corresponding income approach factors;<sup>25</sup> (2) a single page from a publication authored by the Institute of Real Estate Management (IREM) listing income approach factors for suburban office buildings in the Omaha, Nebraska market;<sup>26</sup> (3) a single page from the Costar Office Report indicating the vacancy and collection loss rates and rental rates for Class C Offices in the Omaha/Council Bluffs Office Market;<sup>27</sup> (4) a real estate listing for vacant office space at Southroads;<sup>28</sup> (5) a single page from the Commercial Real Estate Digest, March 2012 edition, indicating vacancy rates for classes of buildings in Omaha's "office market";<sup>29</sup> (6) a single page listing of Winter 2012 occupancy rates in Omaha submarkets from a publication by Investors Realty, Inc. and (7) the actual expenses of the Subject Property.<sup>30</sup>

The Taxpayer submitted an income approach worksheet, indicating an actual value of the Subject Property of \$10,858,703.<sup>31</sup> At the hearing, Morris posited that the correct income approach factors for the Subject Property should be a \$12.46 rental rate,<sup>32</sup> a 17.7% vacancy and collection loss rate,<sup>33</sup> an expense ratio of 42%,<sup>34</sup> and a 10% capitalization rate. The factors as indicated by Morris would derive an income approach determination of actual value of \$10,469,840 rounded.<sup>35</sup>

Morris testified that the Subject Property was used as an office building, and that the Subject Property's physical characteristics were not atypical for an office building. Morris asserted that the Subject Property was similar to big box stores because of the zoning and size and style of the walls. He also testified that the Subject Property was similar in construction to a box store. He

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<sup>25</sup> See, E20-21.

<sup>26</sup> See, E23:1.

<sup>27</sup> See, E24. At the hearing there was considerable discussion concerning whether or not the income characteristics listed for Class C properties included all properties with Class C construction regardless of use, or only Class C office buildings. The page indicates that the report only examined the Omaha/Council Bluffs Office Market.

<sup>28</sup> See, E25:1.

<sup>29</sup> See, E26:1.

<sup>30</sup> See, E27:1.

<sup>31</sup> See E31:2.

<sup>32</sup> See, E23.

<sup>33</sup> See, E23. Morris calculated the vacancy and collection loss rate based upon the reported vacancy and collection loss rate in E23 and the derived \$12.46 rental rate.

<sup>34</sup> See, E23. Morris calculated the expense ratio by adding all expenses listed on the IREM report except for real estate taxes, other taxes and permit fees, and net operating costs, and then dividing the per square foot expenses by the derived \$12.46 rental rate.

<sup>35</sup> 176,033 square feet x \$12.46 = \$2,193,371 Potential Gross Income (PGI). \$2,193,371 PGI x .823 after 17.7% vacancy and collection loss = \$1,805,144. Effective Gross Income (EGI). \$1,805,144 EGI x .58 after 42% expense ratio = \$1,046,840 Net Operating Income (NOI). \$1,046,840 / .1 capitalization rate = \$10,469,840.

testified, however, that the ceiling heights were 16 feet, similar to a Target store. Morris conceded that the Subject Property had finished details, including data infrastructure, that are dissimilar to box stores. Even though the Taxpayer used a 17.7% vacancy rate in its income approach, Morris asserted that the vacancy rate of 6% was the appropriate rate according to the IREM report.<sup>36</sup>

Morris testified that he had examined property record files for other commercial parcels in Sarpy County and had determined that the Assessor had assigned different income factors to other parcels. Morris asserted that his findings indicated that other income factors could have been appropriately applied to the Subject Property.<sup>37</sup>

### **C. Analysis**

The Commission notes that the Taxpayer's comparable properties are twelve properties that have significant differences from the Subject Property in use, size, class, and age.<sup>38</sup> Only four of the alleged comparable properties have corresponding property record files in evidence: (1) 712 N. Washington;<sup>39</sup> (2) 1001 Fort Crook Road ;<sup>40</sup> (3) 1408 Fort Crook Road;<sup>41</sup> and (4) 1406 Fort Crook Road.<sup>42</sup> The Commission's Order for Continuance with Extension of the Exhibit and Exchange Deadlines and Amended Order for Hearing dated September 29, 2014, stated that any provisions of the Commission's Order for Hearing and Notice of Hearing dated August 4, 2014, which were not modified by the September 20, 2014, order remained in effect.<sup>43</sup> The Commission's Order for Hearing and Notice of Hearing dated August 4, 2014, requires all parties to provide copies of the County's Property Record File for any parcel that a party will assert is a comparable property.<sup>44</sup> The Commission will not consider as a comparable property any parcels that do not have a corresponding Property Record File in evidence.

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<sup>36</sup> The Taxpayer utilized a vacancy rate of 17.7% in its income approach worksheet. See E31:2.

<sup>37</sup> See E20.

<sup>38</sup> See E20.

<sup>39</sup> See, E15.

<sup>40</sup> See, E17.

<sup>41</sup> See, E19.

<sup>42</sup> See, E16.

<sup>43</sup> See, Continuance with Extension of the Exhibit and Exchange Deadlines and Amended Order for Hearing dated September 29, 2014 (Case File).

<sup>44</sup> See, Order for Hearing and Notice of Hearing dated August 4, 2014, Paragraph 10 (Case File).

Comparable properties share similar use (residential, commercial industrial, or agricultural), physical characteristics (size, shape, and topography), and location.<sup>45</sup> Of the four comparable properties in evidence only two share the same use as the Subject Property: (1) 1408 Fort Crook Road;<sup>46</sup> and (2) 1406 Fort Crook Road.<sup>47</sup> However, the Commission notes that each of these two properties was less than a third of the size of the Subject Property.<sup>48</sup> The Commission finds that none of these parcels are comparable to the Subject Property.

The appraisal of real property is not an exact science.<sup>49</sup> Because appraisal is not an exact science it is possible for intelligent professionals to disagree. The assertions of Weigel and Morris combined with the various income approach factors utilized by both parties indicate that multiple professionals have significantly varying opinions of the income approach factors for office buildings in the market area relating to the Subject Property. In fact, the sources do not agree on the applicable boundaries of the market area that should be examined in the context of the valuation of the Subject Property. Morris asserted that the IREM report was the most inclusive source and was limited to larger properties more similar to the Subject Property. The Commission also notes that the Costar Office Report utilized by the Taxpayer was not limited to the Subject Property's market but also included office properties in the central business district and Council Bluffs. Further, Morris was unable to explain whether reported rental rates in the different sources had triple net rents or full service rents.

The burden is on the Taxpayer to show by clear and convincing evidence that the County Board's determination was arbitrary or unreasonable. "Clear and convincing evidence means that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved."<sup>50</sup> A mere difference of opinion does not satisfy the burden imposed on the Taxpayer unless the Subject Property is not equalized with other similar properties within the same taxing district.<sup>51</sup> The Commission finds that the evidence in this appeal constitutes mere differences of opinion. The Commission finds that the Taxpayer has not

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<sup>45</sup> See generally, International Association of Assessing Officers, *Property Assessment Valuation*, at 169-79 (3rd ed. 2010).

<sup>46</sup> See, E19; See also, E20.

<sup>47</sup> See, E16; See also, E20.

<sup>48</sup> See, E19 & E16; See also, E20.

<sup>49</sup> *Matter of Bock's Estate*, 198 Neb. 121, 124, 251 N.W.2d 872, 874 (1977).

<sup>50</sup> *In Re Interest of Zachary D. and Alexander D.*, 289 Neb. 763 (2015).

<sup>51</sup> See, *JQH La Vista Conference Center Development LLC v. Sarpy County Board of Equalization*, 285 Neb. 120, 124-25, 825 N.W.2d 447, 452 (2013) (quoting *Brenner v. Banner County Bd. Of Equal.*, 276 Neb. 275, 284, 276 N.W.2d 802, 812 (2008)).

met the burden of proving by clear and convincing evidence that the County Board's determination of the taxable value of the Subject Property was arbitrary or unreasonable. Therefore, the Commission finds that the evidence received is not clear and convincing evidence that the determination made by the County Board was arbitrary or unreasonable.

## V. EQUALIZATION

### A. Applicable 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>52</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>53</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>54</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>55</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>56</sup> 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>57</sup> The constitutional requirement of uniformity in taxation extends to both rate and valuation.<sup>58</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

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<sup>52</sup> *Neb. Const.*, Art. VIII, §1.

<sup>53</sup> *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).

<sup>54</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>55</sup> *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).

<sup>56</sup> *Banner County v. State Board of Equalization*, 226 Neb. 236, 411 N.W.2d 35 (1987).

<sup>57</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>58</sup> *First Nat. Bank & Trust Co. v. County of Lancaster*, 177 Neb. 390, 128 N.W.2d 820 (1964).



error of judgment [sic].”<sup>59</sup> There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity.<sup>60</sup>

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

The Taxpayer asserted that similar commercial properties in the Omaha market had been valued using different income approach factors.<sup>61</sup> At least two tests exist for determining whether property within a taxing district is equalized: (1) are substantially similar properties valued at materially different levels of value,<sup>62</sup> and (2) does a comparison of the ratio of assessed to actual value indicate that properties are assessed at different levels of value;<sup>63</sup>

To determine if substantially similar properties are valued at materially different levels of value the Commission may review the assessed value per square foot of the area of the Subject Property and comparable properties.<sup>64</sup> The Commission has previously found in this order that the alleged comparable properties in evidence are not truly comparable to the Subject Property. Without comparable properties, the Taxpayer cannot satisfy the first test.

Second, no evidence was received indicating any ratios of the assessed values to the market values for any comparable properties. Again, without comparable properties, the Taxpayer cannot satisfy the second test.

The Commission finds that there is not clear and convincing evidence that the Subject Property’s assessed value as compared to valuations placed on similar properties was grossly excessive.

## **VI. 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

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<sup>59</sup> See, *JQH La Vista Conference Center Development LLC v. Sarpy County Board of Equalization*, 285 Neb. 120, 124-25, 825 N.W.2d 447, 452 (2013) (quoting *Brenner v. Banner County Bd. Of Equal.*, 276 Neb. 275, 284, 276 N.W.2d 802, 812 (2008)).

<sup>60</sup> *Id.* at 673, 94 N.W.2d at 50.

<sup>61</sup> See, E20.

<sup>62</sup> *Scribante v. Douglas County Board of Equalization*, 8 Neb.App. 25, 39, 588 N.W.2d 190, 199 (1999).

<sup>63</sup> *Cabela’s Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).

<sup>64</sup> See, *Scribante v. Douglas County Board of Equalization*, 8 Neb.App. 25, 39, 588 N.W.2d 190, 199 (1999).

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 County Board's determination of the taxable value of the Subject Property should be affirmed.

## VII. ORDER

IT IS ORDERED THAT:

1. The decision of the Sarpy County Board of Equalization determining the taxable value of the Subject Property for tax year 2012 is affirmed.
2. The taxable value of the Subject Property for tax year 2012 is \$15,000,000.
3. This Decision and Order, if no appeal is timely filed, shall be certified to the Sarpy County Treasurer and the Sarpy 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 year 2012.
7. This Decision and Order is effective for purposes of appeal on January 23, 2015.<sup>65</sup>

Signed and Sealed: January 23, 2015

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Robert W. Hotz, Commissioner

SEAL

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Nancy J. Salmon, Commissioner

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<sup>65</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.