

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

Resort Lifestyle Communities, Inc,  
Appellant,

v.

Douglas County Board of Equalization,  
Appellee.

Case Nos: 12C 062 & 12C 063

Decision and Order Affirming Douglas  
County Board of Equalization

**For the Appellant:**

Resort Lifestyle Communities, Inc,  
Matthew Maude, CFO & General Counsel.

**For the Appellee:**

Malina M. Dobson,  
Deputy Douglas County Attorney.

This appeal was heard before Commissioners Thomas D. Freimuth and Nancy J. Salmon.

**I. THE SUBJECT PROPERTY**

The Subject Property consists of two commercial parcels located in Omaha, Douglas County, Nebraska. The parcel that is the subject of appeal in Case No. 12C-062 is improved with a 163,500 square foot senior independent living facility located at 3525 North 167<sup>th</sup> Circle. The parcel that is the subject of appeal in Case No. 12C-063 is improved with a 145,131 square foot senior independent living facility located at 4901 South 153<sup>rd</sup> Street. The legal descriptions and Property Record Files for each parcel are found at Exhibits 3 and 4.

**II. PROCEDURAL HISTORY**

The Douglas County Assessor determined that the assessed value of the Subject Property parcel that is the subject of appeal in Case No. 12C-062 was \$12,584,500 for tax year 2012.<sup>1</sup> Resort Lifestyle Communities, Inc (herein referred to as the “Taxpayer”) protested this assessment to the Douglas County Board of Equalization (herein referred to as the “County Board”) and requested an assessed valuation of \$9,865,203.<sup>2</sup> The County Board determined that the taxable value for tax year 2012 was \$12,584,500.<sup>3</sup>

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<sup>1</sup> E1.

<sup>2</sup> E3:51.

<sup>3</sup> E1.

The Douglas County Assessor determined that the assessed value of the Subject Property parcel that is the subject of appeal in Case No. 12C-063 was \$11,170,600 for tax year 2012.<sup>4</sup> The Taxpayer protested this assessment to the County Board and requested an assessed valuation of \$7,901,425.<sup>5</sup> The Douglas County Board determined that the taxable value for tax year 2012 was \$11,170,600.<sup>6</sup>

The Taxpayer appealed the decision of the County Board to the Tax Equalization and Review Commission (herein referred to as 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 consolidated hearing on November 20, 2014.

### 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> E2.

<sup>5</sup> E4:57.

<sup>6</sup> E2.

<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**

Mark Jenkins, a commercial appraiser employed by the Douglas County Assessor’s Office, testified at the hearing before the Commission. Assessment Reports prepared by Jenkins for each Subject Property parcel were received in evidence by the Commission and are found at Exhibits 3 and 4. The Taxpayer called Jenkins as a witness, but did not submit documentary evidence.

The Subject Property parcel that is the subject of appeal in Case No. 12C-062 located at 3525 North 167<sup>th</sup> Circle operates under the name Maple Ridge Independent Living (“Maple Ridge”).<sup>23</sup> The Subject Property parcel that is the subject of appeal in Case No. 12C-063 located at 4901 South 153<sup>rd</sup> Street operates under the name Walnut Grove Independent Living (“Walnut Grove”).<sup>24</sup> Maple Ridge and Walnut Grove are both categorized by the County Assessor under Abstract Code 1350 “Multiple Unit” and Occupancy Code 351 “Multiple – Senior Citizens.”<sup>25</sup>

The Assessment Reports for Maple Ridge and Walnut Grove use an income approach to derive the values relied upon by the County Board for its tax year 2012 determinations.<sup>26</sup> The County’s income approach uses the following estimates: (1) Rental Rate - \$12 per square foot; (2) Vacancy and Collection Loss Rate - 6%; (3) Total Expense - 42%; and (4) Capitalization Rate - 8.5%. Jenkins testified that the County’s income approach estimates were derived from a model that consists of apartment complexes with 72 or more units.

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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> E3:11.

<sup>24</sup> E4:15.

<sup>25</sup> E3:11, E4:15.

<sup>26</sup> E3:19 – E3:26, E4:25 – E4:32.

Jenkins testified that there are 14 parcels in Douglas County that operate under Occupancy Code 351 “Multiple – Senior Citizens.” The evidence is unclear whether the County’s income approach model includes any of these operations.

The Assessment Reports for Maple Ridge and Walnut Grove generally reference income approach documentation submitted by the Taxpayer for consideration at the protest level before the County Board in 2012.<sup>27</sup> These Assessment Report references indicate that the Taxpayer’s income approach analysis, which was not received in evidence by the Commission, uses market rents for multi-family apartment complexes.<sup>28</sup> The Assessment Reports also indicate that the Taxpayer did not provide actual income and/or expense data to the County Assessor or at the protest level before the County Board in 2012.<sup>29</sup>

### C. Analysis

*Mass Appraisal of Real Property*, published by the International Association of Assessing Officers, states that for purposes of mass appraisal and the income approach to valuation, “gross incomes, 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.”<sup>30</sup> Additionally, to avoid reflecting differences in management, it is acceptable for an appraiser to use median vacancy, collection loss ratio and other income per unit when valuing a property.<sup>31</sup> Whether the appraiser uses actuals or estimated income/expense medians is “a matter of appraiser judgment” based upon whether the reported actual figures appear reasonable or typical when compared to the median figure for the model.<sup>32</sup>

The County’s Assessment Reports for the Subject Property parcels submitted at the hearing before the Commission contain an income approach introductory page, which states as follows: “[t]he basic steps in the Income Approach to value for commercial properties in mass appraisal are based on a landlord-tenant situation and not on the income of the actual business. In using

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<sup>27</sup> E3:25, E4:31 (the Taxpayer’s income approach documentation referenced in the County’s Assessment Reports for each Subject Property parcel was not received in evidence by the Commission).

<sup>28</sup> E3:25, E4:31.

<sup>29</sup> E3:25, E4:31.

<sup>30</sup> *Mass Appraisal of Real Property*, International Association of Assessing Officers, 1999, at p. 132.

<sup>31</sup> *Mass Appraisal of Real Property*, International Association of Assessing Officers, 1999, at p. 158.

<sup>32</sup> *Mass Appraisal of Real Property*, International Association of Assessing Officers, 1999, at p. 158.

this approach, it eliminates the possibility of valuing management as opposed to potential income of the structure.”<sup>33</sup>

*Mass Appraisal of Real Property* and the County’s Assessment Report state 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 income/expense figures instead of actual figures for each business is intended to prevent the inappropriate taxation of management.<sup>34</sup>

The Taxpayer in this case did not report actual expense figures to the County Assessor prior to the valuation of the Subject Property by the County Board. Under these circumstances, it is appropriate for the County Assessor to value the Subject Property utilizing the median market-derived income approach estimates.<sup>35</sup>

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. The Taxpayer must show something more in the form of clear and convincing evidence that the County Assessor 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/or 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”<sup>36</sup> or evidences that there is “no room for differences of opinion among reasonable minds.”<sup>37</sup>

It is an acceptable mass appraisal technique for the County Assessor to use either actuals or market derived median estimates under the income approach.<sup>38</sup> Mr. Jenkins testified that County Assessor relied on market derived medians under the income approach because the Taxpayer did not provide actual income or expense information. Additionally, the Taxpayer did not provide a

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<sup>33</sup> E3:19, E4:25.

<sup>34</sup> *Mass Appraisal of Real Property*, International Association of Assessing Officers, 1999, at p. 158.

<sup>35</sup> *Mass Appraisal of Real Property*, International Association of Assessing Officers, 1999, at pgs. 158-159.

<sup>36</sup> *Phelps Cty. Bd. of Equal. v. Graf*, 258 Neb 810, 606 N.W.2d 736 (2000) (citations omitted) (defining “arbitrary”).

<sup>37</sup> See, *Pittman v. Sarpy Cty. Bd. of Equal.*, 258 Neb 390, 401-02, 603 N.W.2d 447, 455-56 (1999) (defining “unreasonable”).

<sup>38</sup> See, *Mass Appraisal of Real Property*, International Association of Assessing Officers, 1999, 158.

certified appraisal or other market/actual income approach information for the Commission to consider. Therefore, the Commission finds that the Taxpayer has not provided sufficient clear and convincing evidence that the County's income approach valuation for each Subject Property parcel is unreasonable or arbitrary.

## 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>39</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>40</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>41</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>42</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>43</sup>

The constitutional requirement of uniformity in taxation extends to both rate and valuation.<sup>44</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>45</sup> "There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity."<sup>46</sup>

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<sup>39</sup> *Neb. Const.*, Art. VIII, §1.

<sup>40</sup> *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).

<sup>41</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>42</sup> *Banner County v. State Board of Equalization*, 226 Neb. 236, 411 N.W.2d 35 (1987).

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

<sup>45</sup> *Newman v. County of Dawson*, 167 Neb. 666, 670, 94 N.W.2d 47, 49-50 (1959) (Citations omitted).

<sup>46</sup> *Id.* at 673, 94 N.W.2d at 50.

“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.”<sup>47</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>48</sup>

“Misclassifying property may result, ... in a lack of uniformity and proportionality. In such an event the taxpayer is entitled to relief.”<sup>49</sup>

## **B. Summary of Evidence & Analysis**

As indicated above, an order for equalization requires evidence that either: (1) similar properties were assessed at materially different values;<sup>50</sup> 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;<sup>51</sup> or (3) similar properties were assessed at materially different values due to misclassification of components of the Subject Property or similar components of other properties.<sup>52</sup>

The County’s Assessment Reports generally reference documentation submitted by the Taxpayer for consideration at the protest level before the County Board in 2012 to support the assertion that the Subject Property parcels were not equalized with other properties in Douglas County.<sup>53</sup> The Taxpayer, however, did not provide the Property Record Files for these alleged comparable properties. As a result, the Commission is unable to determine (1) whether the Subject Property and the alleged comparable were similarly situated; or (2) whether the assessed to actual value ratio for the Subject Property was excessive when compared with the alleged comparable property; or (3) whether the Subject Property or other properties were misclassified.

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<sup>47</sup> *Scribante v. Douglas County Board of Equalization*, 8 Neb.App. 25, 39, 588 N.W.2d 190, 199 (1999).

<sup>48</sup> *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).

<sup>49</sup> *Beynon Farm Products Corporation v. Board of Equalization of Gosper County*, 213 Neb. 815, 819, 331 N.W.2d 531, 534 (1983).

<sup>50</sup> See, *Scribante v. Douglas County Board of Equalization*, 8 Neb.App. 25, 39, 588 N.W.2d 190, 199 (1999).

<sup>51</sup> See, *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623, 635 (1999).

<sup>52</sup> See, *Beynon Farm Products Corporation v. Board of Equalization of Gosper County*, 213 Neb. 815, 819, 331 N.W.2d 531, 534 (1983).

<sup>53</sup> E3:25, E4:31 (the Taxpayer's equalization documentation referenced in the County's Assessment Reports for each Subject Property parcel was not received in evidence by the Commission).

Paragraph 10 of the Commission's "Order For Hearing And Notice of Hearing" for each appeal herein requires parties to provide the Commission "[c]opies of the County's Property Record File for any parcel a party will assert is a comparable parcel." Additionally, the Commission notes that paragraph 10 provides that "[a] screen shot or print out of a 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."

The Commission finds that the Taxpayer has not adduced clear and convincing evidence to obtain equalization relief for tax year 2012.

## **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 determinations. The Commission also finds that there is not clear and convincing evidence that the County Board's decisions were arbitrary or unreasonable.

For all of the reasons set forth above, the appeals of the Taxpayer are denied.

## **VII. ORDER**

IT IS ORDERED THAT:

1. The decisions of the Douglas County Board of Equalization determining the value of the Subject Property for Case Nos. 12C-062 and 12C-063 for tax year 2012 are affirmed.<sup>54</sup>
2. The assessed value of the Subject Property Case No. 12C-062 for tax year 2012 is:  
\$12,584,500.
3. The assessed value of the Subject Property Case No. 12C-063 for tax year 2012 is:  
\$11,170,600.
4. 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.).

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<sup>54</sup> Assessed value, as determined by the County Board, was based upon the evidence at the time of the Protest proceeding. At the appeal hearing before the Commission, both parties were permitted to submit evidence that may not have been considered by the County Board of Equalization at the protest proceeding.

5. Any request for relief, by any party, which is not specifically provided for by this decision and order is denied.
6. Each party is to bear its own costs in this proceeding.
7. This decision and order shall only be applicable to tax year 2012.
8. This decision and order is effective for purposes of appeal on January 22, 2015.

Signed and Sealed: January 22, 2015.

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Thomas D. Freimuth, Commissioner

SEAL

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Nancy J. Salmon, Commissioner

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.