

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

St. Mary's, LLC,  
Appellant,

v.

Douglas County Board of Equalization,  
Appellee

Case No: 13C 326

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

**For the Appellant:**

David Paladino,  
Member, St. Mary's LLC.

**For the Appellee:**

Malina Dobson,  
Deputy Douglas County Attorney.

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

**I. THE SUBJECT PROPERTY**

The Subject Property is a commercial parcel improved with an eight unit apartment complex located at 123 North 36<sup>th</sup> Street, Omaha, Douglas County, Nebraska. The legal description and property record card for the Subject Property are found at Exhibit 306.

**II. PROCEDURAL HISTORY**

The Douglas County Assessor (the Assessor) determined that the assessed value of the Subject Property was \$100,000 for tax year 2013.<sup>1</sup> St. Mary's, LLC (the Taxpayer) protested this assessment to the Douglas County Board of Equalization (the County Board) and requested an assessed value of \$84,400.<sup>2</sup> The County Board determined that the taxable value for tax year 2013 was \$100,000.<sup>3</sup>

The Taxpayer appealed the decision of the County Board to the Tax Equalization and Review Commission (the Commission). The Commission held a hearing on November 17, 2014.

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<sup>1</sup> See, E146.

<sup>2</sup> See, E306:32.

<sup>3</sup> See, E146.

At the hearing, the Commission determined that MNM Properties, LLC was the owner of the Subject Property and that under a lease option St. Mary's, LLC had an obligation to reimburse all property taxes paid by MNM Properties, LLC for the Subject Property. Paladino was the only Member of St. Mary's, LLC. The Commission's Rules and Regulations define a party to include, "a person directly affected by the outcome of an appeal or petition[.]"<sup>4</sup> The Commission's Rules and Regulations further explain that, "[a] person who will be directly affected by the outcome of an appeal is one who has a real interest in the appeal or has a legal or equitable right, title, or interest in the subject of the appeal."<sup>5</sup> Therefore, since St. Mary's LLC had the obligation to pay the property taxes, and since David Paladino was the sole Member of St. Mary's LLC, Paladino is a person who will be directly affected by the outcome of this appeal.<sup>6</sup> The Commission finds that St. Mary's, LLC has standing, and that David Paladino may appear on its behalf at the hearing.<sup>7</sup>

### III. STANDARD OF REVIEW

The Commission's review of the determination by a County Board of Equalization is de novo.<sup>8</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>9</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>10</sup>

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<sup>4</sup> 442 Neb. Admin. Code, ch. 2 §001.36 (06/11).

<sup>5</sup> 442 Neb. Admin. Code, ch. 2 §001.36 (06/11).

<sup>6</sup> See, 442 Neb. Admin. Code, ch. 2 §001.38 (06/11).

<sup>7</sup> See, 442 Neb. Admin. Code, ch. 4 §010.02 (06/11).

<sup>8</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>9</sup> *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted).

<sup>10</sup> *Id.*

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>11</sup> Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.<sup>12</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>13</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>14</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>15</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>16</sup> The Commission’s Decision and Order shall include findings of fact and conclusions of law.<sup>17</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>18</sup>

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

<sup>12</sup> *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

<sup>13</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>14</sup> *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).

<sup>15</sup> Neb. Rev. Stat. §77-5016(8) (2014 Cum. Supp.)(2014 Cum. Supp.).

<sup>16</sup> Neb. Rev. Stat. §77-5016(6) (2014 Cum. Supp.)(2014 Cum. Supp.).

<sup>17</sup> Neb. Rev. Stat. §77-5018(1) (2014 Cum. Supp.)(2014 Cum. Supp.).

<sup>18</sup> Neb. Rev. Stat. §77-112 (Reissue 2009).

“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>19</sup> “Actual value, market value, and fair market value mean exactly the same thing.”<sup>20</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>21</sup> All real property in Nebraska subject to taxation shall be assessed as of January 1.<sup>22</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>23</sup>

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

David Paladino, Member of St. Mary’s, LLC, testified on behalf of the Taxpayer. He asserted that the County Board did not adequately account for the sales of comparable properties in the Subject Property’s market, including Assessor’s Comparable #2. He asserted that he took possession of the Subject Property from MNM Properties, LLC for \$85,000 in April 2011 under a lease purchase agreement, and further asserted that the assessed value of the Subject Property should be set at that sale price. He asserted that he would have paid more for the Subject Property in 2011 had the sale not been part of a lease option. Paladino testified that under the lease option contract St. Mary’s, LLC has made monthly payments on the principal, interest, taxes, and insurance for the Subject Property, and St. Mary’s collects the rents and performs the maintenance. However, title for the Subject Property had not passed from MNM Properties, LLC to St. Mary’s, LLC.

Mark Jenkins, a commercial staff appraiser with the Assessor, was called to testify by the Taxpayer.<sup>24</sup> He testified that generally multi-unit rental properties are valued by the Assessor using an income approach. However, he explained that the Subject Property was not valued using the income approach because the improvement was previously a single family residence that was converted to multi-unit residential use. The Subject Property was reappraised by the Assessor as a single family residence in 2007 for \$124,700. However, the Assessor did not

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<sup>19</sup> *Id.*

<sup>20</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>21</sup> Neb. Rev. Stat. §77-131 (Reissue 2009).

<sup>22</sup> See, Neb. Rev. Stat. §77-1301(1) (Reissue 2009).

<sup>23</sup> Neb. Rev. Stat. §77-201(1) (Reissue 2009).

<sup>24</sup> Jenkins testified he had previously been a licensed realtor and had previously worked 15 years as a real estate paralegal.

reappraise the Subject Property after the change in use to multi-unit residential.<sup>25</sup> Jenkins testified that both the assessment of \$100,000 and the County Board determination of \$100,000 were based upon the sales price of the Subject Property in 2010.<sup>26</sup>

Jenkins testified that according to mass appraisal principles, a single sale of the Subject Property would not be given more weight than other sales of similar conversion properties with a similar number of units. He asserted that the Assessor did not give more weight to the sale of the Assessor's Comparable #2 in 2012 than it did to the sale of the Subject Property in 2010.<sup>27</sup> Jenkins testified that at the time of the sale of the Subject Property in 2010 the market was worse than the market was as of January 1, 2013. He opined that the sale of the Subject Property in 2010 for \$100,000 would likely indicate that the Subject Property was worth more than \$100,000 as of January 1, 2013.

Jenkins testified that the mass appraisal model market calculation detail prepared by the Assessor used sales that occurred prior to 2007 to derive an improvement value of \$118,121 and a land value of \$6,600.<sup>28</sup> He stated that the sale of the Subject Property in 2010 would not have been included in the mass appraisal model used for tax year 2013. Jenkins testified that in his opinion, as of January 1, 2013, the Subject Property would sell at or above the market calculation detail derived actual value, because the market for the multi-unit properties had improved from 2010 to 2013.

Jenkins testified that he was unaware of the exact date when the Subject Property was converted from a single family home to a multi-unit property. He asserted that had the conversion occurred after the reappraisal in 2007, then the Assessor would have recharacterized the Subject Property as commercial rather than residential and would have waited until the next reappraisal date for commercial properties before reappraising the Subject Property. Jenkins asserted that this may have resulted in the Subject Property not being reappraised once every six years, as required by statute, and he conceded that due to the conversion of the Subject Property it appears that it was not reappraised within the required six year period.<sup>29</sup> Jenkins testified that if the Subject Property were sold it could attract investors for a single family home or for multi-unit residential use.

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<sup>25</sup> The Assessor reappraised the Subject Property in 2007.

<sup>26</sup> See, E306:5 and E306:16.

<sup>27</sup> See, E306:14.

<sup>28</sup> See, E306:12. See also E306:16.

<sup>29</sup> See, Neb. Rev. Stat. §77-1311.03 (2014 Cum. Supp.).

Jenkins opined that the lease option contract price of \$85,000 is not an accurate reflection of the actual value of the Subject Property for tax year 2013. Further, he testified that he had never seen any document effectuating a transfer of the Subject Property. He opined that if the previous owner was having problems selling the Subject Property, then any resulting transaction would likely be under duress and not an arm's length transaction. Jenkins testified that in his opinion the single sale of the Subject Property for \$100,000 in 2010 is a better indicator of value than the \$85,000 lease option contract.

### C. Analysis

The Taxpayer must overcome by competent evidence a presumption in favor of the determination of taxable value by the County Board.<sup>30</sup> Competent evidence is relevant and material evidence or that evidence, "which the very nature of the thing to be proven requires."<sup>31</sup> A taxpayer must introduce competent evidence of actual value in order to successfully claim that a property is overvalued.<sup>32</sup>

The County Board's determination was based on a single sale of the Subject Property in 2010 for \$100,000.<sup>33</sup> The Subject Property was converted from a single family residence to a multi-unit residence sometime between 2007 and the March 2010 sale.<sup>34</sup> Jenkins testified that the market for multi-unit residences had strengthened between March 2010, and January 1, 2013. He opined that the actual value of the Subject Property on January 1, 2013, would have exceeded the actual value of the Subject Property in March 2010. The Commission finds that Jenkins' testimony constitutes competent evidence sufficient to rebut the presumption in favor of the determination made by the County Board.

However, the Taxpayer must also meet its burden to show that the County Board's determination was arbitrary or unreasonable.<sup>35</sup> A mere difference of opinion is insufficient to meet this burden.<sup>36</sup>

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<sup>30</sup> See, *JQH La Vista Conference Center Development LLC v. Sarpy County Board of Equalization*, 285 Neb. 120, 825 N.W.2d 447 (2013).

<sup>31</sup> *Black's Law Dictionary 6th Edition*, West Group, p. 284 (1990).

<sup>32</sup> See, *Lincoln Tel. and Tel. Co. v. County Bd. Of Equalization of York County*, 209 Neb. 465, 308 N. W. 2d 515 (1981).

<sup>33</sup> See, E306:8.

<sup>34</sup> See, E306:8 Form 521 (indicating that the Subject Property was a multiple unit property at the time of sale).

<sup>35</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).

<sup>36</sup> See, *JQH La Vista Conference Center Development LLC v. Sarpy County Board of Equalization*, 285 Neb. 120, 125-26, 825 N.W.2d 447, 452 (2013).

Several opinions of value were presented at the hearing. The Commission has in evidence Paladino's assertion that the Subject Property should be assessed at the same value as the price of a lease option contract signed in 2011 for \$85,000. The Assessor and County Board relied upon and asserted as actual value the sale price of the Subject Property from a 2010 transaction. The Assessment Report prepared by the Assessor contains a market calculation detail that derives an opinion of value of \$124,600, based upon a reappraisal of the Subject Property as a single family residence in 2007, using sales that occurred prior to 2007. The credibility of each of these opinions of value was diminished by a lack of supporting market data relevant to tax year 2013. In addition, the methods used to derive the actual value of the Subject Property were not consistent with appraisal principles or statutory requirements.

The Commission notes that the Assessor is required to reappraise every parcel in the county at least once every six years.<sup>37</sup> The Subject Property has not been reappraised since 2007.<sup>38</sup> Pursuant to the statutory mandate, the Assessor was required to reappraise the Subject Property by tax year 2013.

Additionally, Jenkins indicated that the Assessor's sales comparison approach was based on the value of the Subject Property as a single family residence. The Assessor's sales comparison approach value is, therefore, not credible, since well before tax year 2013 the Subject Property had been converted to a multi-unit property.

Jenkins testified that multi-unit properties such as the Subject Property are generally assessed using the income approach, but because the Subject Property changed from a single family residential use to a multi-unit use sometime after the reappraisal in 2007, and similar commercial properties had been reappraised sometime prior to the conversion, the Subject Property had not been reappraised and therefore a new opinion of value based on the income approach had not been obtained for the Subject Property applicable to tax year 2013.

The County Board's determination rests upon a single sale. The Nebraska Supreme Court has consistently held that sales price is not synonymous with actual value.<sup>39</sup> Nebraska Statutes permit the County Assessor to value the Subject Property using the sales comparison approach, cost approach, income approach, or any commonly accepted mass appraisal technique

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<sup>37</sup> See, Neb. Rev. Stat. §77-1311.03 (2014 Cum. Supp.).

<sup>38</sup> See, E306:16.

<sup>39</sup> *Josten-Wilbert Vault Co. v. Board of Equalization*, 179 Neb. 415, 417, 138 N.W.2d 641, 643 (1965); *Potts v. Board of Equalization of Hamilton County*, 213 Neb. 37, 46, 328 N.W.2d 175, 180 (1982); *Dowd v. Board of Equalization*, 240 Neb. 437, 482 N.W.2d 583 (1992).

and define actual value.<sup>40</sup> The common law only requires that the Commission give the purchase price strong consideration.<sup>41</sup> An arm's length transaction is not conclusive of the actual value of the Subject Property.<sup>42</sup> When giving the sale consideration, the Commission may assign weight to the sale based upon the other evidence presented.<sup>43</sup> The mere fact that only a single sale is presented as evidence of actual value may be given weight by the trier of fact.<sup>44</sup> The Nebraska Court of Appeals in *Cabela's Inc.*, stated "the statutory measure of actual value is not what an individual buyer may be willing to pay for property, but, rather, its market value in the ordinary course of trade."<sup>45</sup>

The burden rests on the Taxpayer to produce clear and convincing evidence that the County Board's determination was arbitrary or unreasonable. The County Board's determination was unexplained, and was not supported by credible evidence. However, neither were any other opinions of value put forth in hearing. Therefore, there is no credible evidence of the actual value of the Subject Property based upon its actual characteristics as of January 1, 2013.

"Clear and convincing evidence is 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>46</sup> The evidence in this case has not produced a firm conviction that any of the opinions of value presented, including the County Board's determination, were either reasonable or unreasonable.

## V. CONCLUSION

The Commission finds that there is competent evidence to rebut the presumption that the County Board faithfully performed its duties and had sufficient competent evidence to make its 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 determination by the County Board should be affirmed.

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<sup>40</sup> Neb. Rev. Stat. § 77-112 (Reissue 2009).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Firethorn Inv. v. Lancaster County Bd. of Equalization*, 261 Neb. 231, 240, 622 N.W.2d 605, 611 (2001)(Citations Omitted) ("Rather, the fact that evidence of other sales is not presented goes to the weight of the evidence.")

<sup>45</sup> *Cabela's Inc. v. Cheyenne County Bd. Of Equalization*, 8 Neb.App. 582, 591, 597 N.W.2d 623, 632 (1999) (citations omitted).

<sup>46</sup> *State v. Payne-McCoy*, 284 Neb. 302, 308, 818 N.W.2d 608, 616 (2012) (Citing *State v. Floyd*, 277 Neb. 502, 763 N.W.2d 91 (2009)).



**VI. 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 2013 is affirmed.
2. The taxable value of the Subject Property for tax year 2013 is \$100,000.
3. This Decision and Order, if no appeal is timely filed, shall be certified to the Douglas County Treasurer and the Douglas County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (2014 Cum. Supp.).
4. Any request for relief, by any party, which is not specifically provided for by this Decision and Order, is denied.
5. Each party is to bear its own costs in this proceeding.
6. This Decision and Order shall only be applicable to tax year 2013.
7. This Decision and Order is effective for purposes of appeal on December 31, 2014.<sup>47</sup>

Signed and Sealed: December 31, 2014

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Robert W. Hotz, Commissioner

SEAL

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Nancy J. Salmon, Commissioner

<sup>47</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.