

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Hillsborough Pointe, LLC,
Appellant,

v.

Douglas County Board of Equalization,
Appellee

Case No: 09C-335

Order Reversing the Determination
of the Douglas County
Board of Equalization

For the Appellant:

Natan Schwalb,
Managing Member, Hillsborough Pointe, LLC

For the Appellee:

Tom Barrett,
Deputy Douglas County Attorney

Heard before Commissioners Robert W. Hotz and Nancy J. Salmon.

I. THE SUBJECT PROPERTY

The Subject Property is a commercial parcel located in Douglas County, Nebraska. The parcel is improved with ten 24-unit apartment buildings. The legal description of the parcel is found at Exhibit 3, page 4.

II. PROCEDURAL HISTORY

The Douglas County Assessor determined that the assessed value of the subject property was \$15,746,100 for tax year 2009. Hillsborough Pointe, LLC, (Taxpayer) protested this assessment to the Douglas County Board of Equalization (County Board) and requested an assessed valuation of \$14,100,468. E6:1. The County Board determined that the assessed value for tax year 2009 was \$15,746,100. (E1). The Taxpayer appealed the decision of the County Board to the Tax Equalization and Review Commission (Commission).

III. STANDARD OF REVIEW

The Commission’s review of the determination by a County Board of Equalization is de novo.¹ When the Commission considers an appeal of a decision of a county board of

¹ See, Neb. Rev. Stat. §77-5016(8) (2010 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

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.”²

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.³

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.⁴ Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.⁵

A Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued.⁶ 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.⁷

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.

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).

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

³ *Id.*

⁴ Neb. Rev. Stat. §77-5016(8) (2010 Cum. Supp.).

⁵ *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

⁶ 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); **Error! Main Document Only.** *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).

⁷ *Botdorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).

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.⁸

"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."⁹ "Actual value, market value, and fair market value mean exactly the same thing."¹⁰ 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.¹¹ All real property in [Nebraska] subject to taxation shall be assessed as of January 1.¹² All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.¹³

B. Summary of the Evidence

The Taxpayer did not place at issue the market value of the subject property, but rather whether the subject property's taxable value was equalized with the taxable value of other similar properties.

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."¹⁴ Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value.¹⁵ The purpose of equalization of assessments is to bring the assessment of different parts of a taxing district to the same relative

⁸ Neb. Rev. Stat. §77-112 (Reissue 2009).

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

¹⁰ *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).

¹¹ Neb. Rev. Stat. §77-131 (Reissue 2009).

¹² See, Neb. Rev. Stat. §77-1301(1) (Reissue 2009).

¹³ Neb. Rev. Stat. §77-201(1) (Reissue 2009).

¹⁴ *Neb. Const.*, Art. VIII, §1.

¹⁵ *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).

standard, so that no one of the parts may be compelled to pay a disproportionate part of the tax.¹⁶ Equalization to obtain proportionate valuation requires a comparison of the ratio of assessed to actual value for the subject property and comparable property.¹⁷ 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.¹⁸ 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.¹⁹ The constitutional requirement of uniformity in taxation extends to both rate and valuation.²⁰ In the evaluation of real property for tax purposes, where buildings and improvements are taxable as a part of the real estate, the critical issue is the actual value of the entire property, not the proportion of that value which is allocated to the land or to the buildings and improvements by the appraiser.²¹ 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. There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity.²²

B. Summary of the Evidence

Natan Schwalb, a managing member of Hillsborough Pointe, LLC, testified on behalf of the Taxpayer. He testified that the Hillsborough Pointe apartment complex consisted of the subject property plus four additional parcels. Schwalb used a diagram, Exhibit 5, to describe the features of the apartment complex, including the subject property. He explained that the subject property consisted of ten apartment buildings, six one-bedroom and four two-bedroom. One of the other parcels in the same apartment complex consisted of six apartment buildings, three one-bedroom and three two-bedroom. And the other three parcels consisted of buildings with only one-bedroom apartments. Schwalb opined that all of the apartments within the apartment complex

¹⁶ *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).

¹⁷ See, *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).

¹⁸ *Banner County v. State Board of Equalization*, 226 Neb. 236, 411 N.W.2d 35 (1987).

¹⁹ *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).

²⁰ *First Nat. Bank & Trust Co. v. County of Lancaster*, 177 Neb. 390, 128 N.W.2d 820 (1964).

²¹ *Bumgarner v. Valley County*, 208 Neb. 361, 303 N.W.2d 307 (1981).

²² *Newman v. County of Dawson*, 167 Neb. 666, 94 N.W.2d 47 (1959).

were substantially similar and that the alleged comparable parcels were so similar to the subject property that no adjustments were necessary. Schwalb also testified regarding Exhibit 7, which was labeled “Appraiser’s Work Notes from Spreadsheet.” The exhibit contains information relating to the subject property and the other four parcels as prepared by an employee of the County Assessor’s office. Exhibit 7 indicates the quality and condition of the subject property and the comparable parcels, the year built, the assessed value, the number of units, the number of square feet per unit, and a net assessed value per square foot. Exhibit 7 indicates that the subject property improvements and the other parcels in the same apartment complex are all average in quality and condition. The County Board did not dispute the information listed in Exhibit 7.

The Taxpayer asserted that each of the five parcels within the Hillsborough Pointe apartment complex should have equalized values. We agree.

In Exhibit 2, the County Assessor used both the cost approach and the income approach to assess the value of the subject property.²³ However, in reaching a reconciled opinion of value, the County Assessor relied on the income approach to reach a final value conclusion of \$15,746,100.²⁴

Greg Weisheipl testified on behalf of the County Board. Weisheipl testified that he is a senior commercial property appraiser for the County Assessor and supervises commercial appraisers. He testified that he reviewed and signed Exhibit 2, the Assessment Report for the subject property. Exhibit 2 includes a “2009 Apartment Income Approach Worksheet” for the subject property.²⁵

Weisheipl testified that the median vacancy rate was utilized to determine the actual value for the properties within the Hillsborough Pointe apartment complex. He also verified that Exhibit 7 was an authentic document, and identified the handwriting on the bottom of the document as his own. He testified that this spreadsheet was prepared by an employee of the County Assessor in anticipation of this appeal hearing. Weisheipl testified that Exhibit 7 indicated that the County Assessor had included all five of the parcels from the apartment complex, including the subject property, in the same market area for purposes of valuation. He stated that he was familiar with the subject property and had reviewed the evidence concerning the property. Weisheipl testified

²³ Exhibit 2, as prepared by the County Assessor, indicated an estimated cost approach value of the subject property to be \$19,032,756 and an income approach value estimated to be \$15,746,100. Exhibit 2:46.

²⁴ Exhibit 2:46.

²⁵ Exhibit 2:45.

that when determining value using the income approach, square footage of the living area was calculated without regard to the number of bedrooms in each apartment or apartment building.

When asked specifically why the subject property had a higher valuation per square foot than the other parcels in the same apartment complex, Weisheipl stated that he was unable to actually determine why the parcels were valued differently. Weisheipl suggested that for purposes of equalization it would be most appropriate to compare the apartment complex as a whole to other apartment complexes. Weisheipl further testified that apartment buildings within the same complex are not normally equalized with each other. He further testified that the Taxpayer's method for determining the equalized value of the subject property, by determining the value of each one-bedroom and two-bedroom building and multiplying by the total number of buildings, was inappropriate.

Additionally, the County Board presented the Commission with an equalization analysis comparing the subject property to other parcels containing apartment complexes. E2:42. The income approach worksheet for each of these comparable properties is contained in the exhibits. (E2:171, E2:184, E2:192). The worksheets indicate that the comparable properties had similar rental rates per square foot, vacancy and collection rates, and expense rates. *Id.*

In its income approach, the County Assessor valued both two-bedroom apartment buildings and one-bedroom apartment buildings based upon the number of square feet of living area, without regard to the number of bedrooms in the apartments or the buildings. E2:45. Testimony from both the Taxpayer and Weisheipl, as well as testimony concerning the diagram found in Exhibit 5, indicates that the subject property contains four two-bedroom apartment buildings and six one-bedroom apartment buildings. The County Assessor arrived at an income value for all buildings considered together, and not for each building individually. E2:14. Thus, the County Assessor valued the subject property using the income approach, based upon the square footage of living area, and without regard to the fact that some of the apartment buildings had one bedroom apartments, and others had two bedroom apartments.

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.²⁶ The Commission finds that in this appeal, where an apartment complex consists of multiple parcels, each containing

²⁶ *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).

substantially similar apartment buildings that have been valued by the County Assessor based upon a determination of the net value per square foot, without regard to the number of bedrooms in each apartment or building, it is appropriate to compare the net value per square foot of the apartments for purposes of equalization. The Commission also finds that the subject property is substantially similar to the other parcels in the Hillsborough Pointe apartment complex.²⁷

The Commission further finds that the subject property's valuation should be equalized with other parcels comprising the Hillsborough Point apartment complex. One of those parcels was valued at \$40.54 per square foot. E7. In comparison, per Exhibit 7, Hillsborough Pointe was valued at \$51.31 per square foot ($\$15,748,100 / 306,894$). The subject property has 306,894 net square feet. Therefore, for tax year 2009, the equalized value of the subject property is \$12,441,483 ($306,894 \times \40.54). The Commission further finds that the contribution to value of the land component is \$978,400, with the remainder of the contribution to value (\$11,463,083) attributable to the improvements.

VI. CONCLUSION

The Commission finds that the Taxpayer has provided 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 the Taxpayer has provided clear and convincing evidence that the County Board's determination was arbitrary or unreasonable.

For all of the reasons set forth above, the decision of the County Board is vacated and reversed.

VII. 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 2009 is vacated and reversed²⁸.

²⁷ The improvements of the subject property, as well as each of the other four parcels in the same apartment complex, were assessed as having average quality and average condition. Exhibit 7.

²⁸ 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 at the protest proceeding.

2. The Assessed value of the Subject property for tax year 2009 is:

Land	\$978,400.00
<u>Improvements</u>	<u>\$11,463,083.00</u>
Total	\$12,441,483.00

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 (2011 Supp.)
4. Any request for relief, by any party, which is not specifically provided for by this order is denied.
5. Each Party is to bear its own costs in this proceeding.
6. This decision shall only be applicable to tax year 2009.
7. This order is effective for purposes of appeal on June, 21, 2012.

Signed and Sealed: June 21, 2012

Robert W. Hotz, Commissioner

SEAL

Nancy J. Salmon, Commissioner

Appeals from any decision of the Commission must satisfy the requirements of Neb. Rev. Stat. §77-5019 (2011 Supp.), other provisions of Nebraska Statute and Court Rules.