

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

BRE/LQ Properties, LLC,
Appellant,

v.

Douglas County Board of Equalization.
Appellee.

Case Nos: 11C-264 & 12C-048

Order Reversing the Determinations of the
Douglas County Board of Equalization

For the Appellant:
William E. Peters,
Peters & Chunka, PC LLO

For the Appellee:
Matthew J. Boever,
Deputy Douglas County Attorney.

Appeals were heard before Commissioners Robert W. Hotz and Nancy J. Salmon.

I. THE SUBJECT PROPERTY

The Subject Property is a commercial parcel located at 10760 M. Street, in the city of Omaha, Douglas County, Nebraska. The parcel is improved with a 93 room limited services hotel, known as the La Quinta Inn (Southwest). The legal description of the parcel is found at Exhibit 3, page 5. The property record card for the subject property is found at Exhibit 3.

II. PROCEDURAL HISTORY

The Douglas County Assessor determined that the assessed value of the subject property was \$3,803,400 for tax year 2011 and \$3,355,300 for tax year 2012.¹ BRE/LQ Properties, LLC (BRE) protested these assessments to the Douglas County Board of Equalization (the County Board) and requested assessed values of \$2,292,000 and \$2,403,000 respectively.² The County Board determined that the assessed value was \$3,803,400 for tax year 2011, and \$3,355,300 for tax year 2012.³

The Taxpayer appealed the decisions of the County Board to the Tax Equalization and Review Commission (Commission). Prior to the hearing, the parties exchanged exhibits and

¹ E1:1 and E2:1.

² E6:1 and E7.

³ E1:1 and E2:1.

submitted a Pre-Hearing Conference Report, as ordered by the Commission. In the Pre-Hearing Conference Report, the parties stipulated to the receipt of exchanged exhibits. The Commission held a hearing on October 16, 2012.

III. STANDARD OF REVIEW

The Commission's review of the determination by a County Board of Equalization is de novo.⁴ 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."⁵

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.⁶

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.⁷ Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.⁸

A Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued.⁹ 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.¹⁰

⁴ 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 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).

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

⁶ *Id.*

⁷ Neb. Rev. Stat. §77-5016(8) (2010 Cum. Supp.).

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

⁹ 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).

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

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.”¹¹ 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.”¹²

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.¹³

“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.”¹⁴ “Actual value, market value, and fair market value mean exactly the same thing.”¹⁵ 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.¹⁶ All real property in Nebraska subject to taxation shall be assessed as of January 1.¹⁷ All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.¹⁸

¹¹ Neb. Rev. Stat. §77-5016(8) (2011 Supp.).

¹² Neb. Rev. Stat. §77-5016(6) (2011 Supp.).

¹³ Neb. Rev. Stat. §77-112 (Reissue 2009).

¹⁴ *Id.*

¹⁵ *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).

¹⁶ Neb. Rev. Stat. §77-131 (Reissue 2009).

¹⁷ See, Neb. Rev. Stat. §77-1301(1) (Reissue 2009).

¹⁸ Neb. Rev. Stat. §77-201(1) (Reissue 2009).

B. Summary of the Evidence

The subject property is improved with a La Quinta Inn hotel.¹⁹ Mark Jenkins, a commercial staff appraiser employed by the Assessor since 2008, testified on behalf of the County Board.²⁰ Jenkins stated that the Assessor valued the Subject Property using the income approach.

The Income Approach can be defined as “a set of procedures through which an appraiser derives a value indication for an income-producing property by converting its anticipated benefits (cash flows and reversion) into property value. This conversion can be accomplished in two ways. One year’s income expectancy can be capitalized at a market-derived rate or at a capitalization rate that reflects a specified income pattern, return on investment, and change in the value of the investment. Alternatively, the annual cash flows for the holding period and the reversion can be discounted at a specified yield rate.”²¹ The steps required for use of the income approach with direct capitalization may be summarized as (1) estimate potential gross income; (2) deduct estimated vacancy and collection loss to determine effective gross income; (3) deduct estimated expenses to determine net operating income; (4) divide net operating income by an estimated capitalization rate to yield indicated value.²² A variety of techniques may be used to quantify various components of any application of the approach.²³

Jenkins testified that estimated potential gross income, vacancy and collection loss rates, and expenses were determined for all three years by the collection and analysis of market data included in the Assessor’s mass appraisal model.²⁴ Jenkins testified that the model was constructed following a reappraisal of commercial property in 2009. He further testified that the model utilized market data collected prior to January 1, 2009, and that he had not supplemented the model with market data illustrating the current market activity for any of the tax years at issue. Jenkins testified that actual expense data was very limited, and that he had relied upon industry standard information. Jenkins further testified that for tax years 2010 and 2011, the

¹⁹ E5:10.

²⁰ Jenkins testified that he was not a licensed appraiser, but that he has completed relevant appraisal coursework, including coursework on the income approach to valuation and a hotel valuation seminar.

²¹ *The Dictionary of Real Estate Appraisal*, Fourth Edition, Appraisal Institute, p.143, (2002).

²² See, *The Appraisal of Real Estate*, 13th Edition, The Appraisal Institute, 2008, 466.

²³ *Id.* at chs 20-24.

²⁴ Jenkins further testified that his model did not make adjustments for properties ages, amenities, or the franchise rights or brand associations of the hotels.

subject property had been classified as a motel, but that the designation was changed to a limited services hotel for tax year 2012.²⁵ In sum, Jenkins testified that the model used to value the Subject Property for 2010 and 2011 used market data collected prior to January 1, 2009, and classified the Subject Property as a motel, and that the model used to value the Subject Property for 2012 again used market data collected prior to January 1, 2009, but classified the Subject Property as a limited services hotel. The evidence offered by the County Board indicates that the County's mass appraisal model was not supplemented with data collected after 2009. As such, the Commission finds that the Assessor effectively ignored market activity and data most relevant to the tax years at issue.

Nuresh Maredia, a Certified General Appraiser, testified on behalf of BRE.²⁶ The Commission also received Exhibit 5, Maredia's appraisal report for the Subject Property. Maredia testified that he prepared the appraisal report. Maredia testified that his opinion of actual value for the Subject Property was \$1,800,000 as of January 1, 2011, and \$1,800,000 as of January 1, 2012. Maredia testified that he considered all three approaches to value, but that he primarily relied upon the income approach because the subject property was an investment property.²⁷ In his income approach to value the Subject Property, Maredia utilized direct capitalization analysis.²⁸ The direct capitalization method produces an indication of value based on a single year's estimated income.²⁹ Maredia's income worksheets, labeled "Projected Financial Performance," are contained in Exhibit 5, pages 95-96 for 2011, and Exhibit 5, pages 97-98 for 2012.

The County Board also provided income worksheets at Exhibit 3, pages 12-13 for 2011, and Exhibit 4, pages 13-14 for 2012. A comparison of the income worksheet offered by the County Board, and Maredia's income approach follows:

²⁵ Jenkins described motels as having no amenities, typically one-story, with a drive up entrance to each room. He described limited service hotels as having meeting rooms, exercise rooms, and offering business services. He testified that he changed the designation because he determined that the Subject Property was best described as a limited service hotel.

²⁶ E5:134-36. During all relevant times of his appraisal, Maredia was certified as a temporary real property appraiser by the State of Nebraska Real Property Appraisal Board. E5:136.

²⁷ Maredia's income approach is provided for both tax years at issue in E5:76-98.

²⁸ E5:95, 97

²⁹ See, *The Appraisal of Real Estate*, 13th Edition, The Appraisal Institute, 2008, at 465.

2011 Valuation

	Maredia ³⁰	County Board ³¹
Rooms	93	96 ³²
Occupancy/Collection Loss Rate	47%	50%
Rate	\$57	\$61.75
Other Income	\$4,000	
EGI	\$914,000 (rounded)	\$1,081,860
Expenses	\$662,000	\$595,023 (55%)
NOI	\$252,000	\$486,837
Loaded Cap Rate	12.73%	12.80%
Market Value	\$1,800,000 (rounded)	\$3,803,414

2012 Valuation

	Maredia ³³	County Board ³⁴
Rooms	93	96 ³⁵
Occupancy/Collection Loss Rate	47.5%	50%
Rate	\$57	\$86.50
Other Income	\$4,000	
EGI	\$924,000 (rounded)	\$1,515,480
Expenses	\$665,000	\$1,060,836 (70%)
NOI	\$257,000	\$454,644
Loaded Cap Rate	12.23%	13.55%
Market Value	\$1,800,000 (rounded)	\$3,355,306

Maredia testified that he also considered the sales comparison approach and cost approach. He said, however, that he primarily relied upon the income approach because investors primarily rely upon the income approach, and it is difficult to adjust sales to reflect differences in management and property characteristics. Maredia provided the Commission with his sales comparison result conclusions and his reconciliation with the income approach.³⁶ He further testified that he did not make a deduction to the valuation of the Subject Property for business value, but that he did account for franchise fees and management fees in the expenses.

³⁰ Exhibit 5:95-96.

³¹ Exhibit 3:12-13.

³² At the hearing before the Commission, the County Board stipulated that the hotel had 93 rooms rather than 96 rooms.

³³ Exhibit 5:97-98.

³⁴ Exhibit 4:13-14.

³⁵ At the hearing before the Commission, the County Board stipulated that the hotel had 93 rooms rather than 96 rooms.

³⁶ E5:99-114; E5:110 (expressing sales comparison opinion of value for 2011 of \$2,050,000); E5:112 (expressing sales comparison opinion of value for 2012 of \$2,140,000); E5:113-114 (reconciliation).

The Commission finds that Maredia's appraisal, which takes into account differences in market conditions for different tax years, is sufficient competent evidence to rebut the presumption in favor of the determinations by the County Board. The Commission also finds that Maredia's opinion of value is clear and convincing evidence that the determinations by the County Board are arbitrary 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 clear and convincing evidence that the County Board's decision was arbitrary or unreasonable.

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

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 2011 and tax year 2012 is vacated and reversed.³⁷
2. The assessed value of the subject property for tax year 2011 and 2012 is:

2011 Total: \$1,800,000

2012 Total: \$1,800,000

3. This 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.

³⁷ 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. The combination of de novo review and a taxpayer burden of proving by clear and convincing evidence that the County Board's determination was arbitrary or unreasonable inherently creates a situation where the reasonableness of the County Board's determination is reviewed in light of new evidence offered at a hearing before the Commission.

5. Each party is to bear its own costs in this proceeding.
6. This Order shall only be applicable to tax years 2011 and 2012.
7. This Order is effective for purposes of appeal on November 14, 2012.

Signed and Sealed: November 14, 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.