

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Frances Apartments LLC,
Appellant,

v.

Douglas County Board of Equalization,
Appellee.

Case No: 09C-525

Decision Affirming the Douglas County
Board of Equalization

For the Appellant:

Stephanie Johnson & Steve Borgmann,
Members of Frances Apartments, LLC.

For the Appellee:

Thomas J. Barrett,
Deputy Douglas County Attorney.

Heard before Commissioners Thomas D. Freimuth and Nancy J. Salmon.

I. THE SUBJECT PROPERTY

The Subject Property is a commercial parcel located in Douglas County. The parcel is improved with a 50,564 square foot apartment complex, which includes five apartment buildings with 69 units.¹ The legal description of the Subject Property is found on the property record card at Exhibit 2:14.

II. PROCEDURAL HISTORY

The Douglas County Assessor determined that the assessed value of the Subject Property was \$2,700,000 for tax year 2009. Robert I. Beber (herein referred to at times as the “previous owner”) protested this assessment to the Douglas County Board of Equalization (herein referred to as the “County Board”) and requested an assessed valuation of \$1,650,000. The County Board determined that the assessed value for tax year 2009 was \$2,006,000.²

Robert I. Beber 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 submitted to the Commission as required by Order (the Taxpayer did not submit exhibits). The Commission held a hearing on November 21, 2011, whereupon it was determined that Robert I. Beber sold the Subject Property to Frances Apartments LLC (herein referred to as the “successor Taxpayer” or the “Taxpayer”) in June of 2010. Stephanie Johnson,

¹ E2:2

² E1.

managing member of the Taxpayer, and Steve Borgmann, 25% owner of the Taxpayer, appeared at the hearing. Mr. Beber did not appear.

III. STANDARD OF REVIEW

The Commission's review of the determination by a county board of equalization is de novo.³ 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."⁴

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.⁵

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.⁶ Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.⁷

A taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued.⁸ 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.⁹

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

³ See, Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.), *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 286, 753 N.W.2d 802, 813 (2008).

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

⁵ *Id.*

⁶ Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.).

⁷ *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

⁸ 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).

⁹ *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).

cross appeal.”¹⁰ 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.”¹¹

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.¹²

"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."¹³ “Actual value, market value, and fair market value mean exactly the same thing.”¹⁴ 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.¹⁵ All real property in Nebraska subject to taxation shall be assessed as of January 1.¹⁶ All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.¹⁷

B. Summary of the Evidence

Stephanie Johnson, managing member of Frances Apartments LLC, testified that Frances Apartments LLC, the successor Taxpayer, purchased the Subject Property from Robert I. Beber for \$1,925,000 on June 18, 2010, and that this price was inflated because the successor Taxpayer placed a higher value on the Subject Property as compared to other prospective buyers due to its

¹⁰ Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.).

¹¹ Neb. Rev. Stat. §77-5016(6) (2012 Cum. Supp.).

¹² Neb. Rev. Stat. §77-112 (Reissue 2009).

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

¹⁴ *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).

¹⁵ Neb. Rev. Stat. §77-131 (Reissue 2009).

¹⁶ See, Neb. Rev. Stat. §77-1301(1) (Reissue 2009).

¹⁷ Neb. Rev. Stat. §77-201(1) (Reissue 2009).

ownership of the adjacent Williamsburg apartment property (herein referred to as the “Williamsburg Apartments”).¹⁸ She further testified that she had been attempting to purchase the Subject Property from the previous owner for eight years, and that she was contacted by the previous owner when he decided to sell.

Ms. Johnson testified that the County’s income approach valuation set forth at Exhibit 2, page 41 is reasonable, with the exception of the Potential Gross Income (“PGI”) category. She contended that the County’s use of \$547,762 for PGI is unreasonable in light of the Taxpayer’s stabilized income evidence over the period 2007 – 2009, wherein the maximum actual income amounted to \$327,393. She testified that the Williamsburg Apartments and the Subject Property have similar potential gross incomes and net gross incomes (within \$4,000 of one another).

Ms. Johnson asserted that the Subject Property had several deferred maintenance issues, including old soffit, but that the Subject Property does have new windows. She testified that the Williamsburg Apartments and the Subject Property were nearly identical and that the differences had little or no impact with respect to the value of the two properties. She asserted that the assessed value of the Williamsburg Apartments was greater than its actual value, and that the County Board’s determination to equalize the Subject Property with the Williamsburg Apartments for tax year 2009 therefore resulted in an excessive assessment.

Robert I. Beber, the previous owner, submitted the following in support of his appeal to the Commission:

“The reasons hereinafter set forth are in addition to those in my original appeal to the Douglas County Board of Equalization.

“The Douglas County Assessor’s Assessment Report to the Board of Equalization found 3 comparable properties. Notwithstanding the fact that the buildings on these properties are 12 to 18 years newer than the subject property, and are likely to have such amenities as dishwashers and central air conditioning which the subject property doesn’t have, the valuation of these newer properties is between \$5.43 and \$18.70, per square foot, lower than the subject property. If you use the highest valuation of the 3 properties the Assessor used as comparables, the valuation of the subject property would be \$1,735,520, which is significantly less than the \$2,006,000 determined by the Board of Equalization.

¹⁸ E2:24.

The Assessor's Assessment Report valued the subject property at \$1,886,828 using the Cost Approach."

Mr. Beber also submitted documentation entitled "Property Valuation Protest" with his appeal to the Commission. This documentation, which Mr. Beber submitted to the County Board as a part of his protest, includes the following:

1. Letter outlining the basis of his protest (2 pages);
2. Itemization of income and expenses for the subject property for 2007 and 2008 (2 pages);
3. Rent Roll for December 2007 (3 pages);
4. Rent Roll for December 2008 (3 pages).

Mr. Beber's itemization of income referenced above indicates actual rent in the amount of \$314,979 in 2007 and \$323,472 in 2008.

The County Board provided an Assessment Report signed by Greg Weisheipl, which the Commission received into evidence as Exhibit 2. The Assessment Report indicates that the Subject Property and the Williamsburg Apartments are of the same quality, condition, and number of units.¹⁹ Additionally, the report indicates the Subject Property and the Williamsburg Apartments are of extremely similar age, size, and location.²⁰

No other evidence of the actual value of the Williamsburg Apartments was provided to the Commission.

The County Board did not rely upon the County Assessor's \$2,700,011 income approach value found at Exhibit 2, page 41. Instead, based upon the revised recommendation of the County Assessor, the County Board decided that the Subject Property should be equalized with the Williamsburg Apartments, which was assessed at \$2,006,700 for tax year 2009.²¹ In instances where a comparison of similarly situated properties reveals that the valuation of the Subject Property was set at a materially different level than the comparable property, it is

¹⁹ E2:38.

²⁰ *Id.*

²¹ E2:43.

reasonable to adjust the value of the Subject Property in order to equalize the properties and thereby remove any obvious disparity.²²

The Taxpayer contended that the \$1,925,000 sale price of the Subject Property in June of 2010 indicated that the County Board's \$2,006,000 value for tax year 2009, while equalized with the Williamsburg Apartments, was still excessive. The Commission finds, however, that the sale was not an arm's length transaction because the Subject Property was not listed on the open market. Additionally, while the Commission notes that there is a cost approach value of \$1,886,828 for the Subject Property contained in the County Assessor's Assessment Report,²³ the Commission finds that this valuation method is not a good indicator of value because the Subject Property was 57-years-old at the date of assessment.

Relying upon the County Assessor's vacancy/collection rate, expense ratio and capitalization rate contained in the income approach calculation set forth at Exhibit 2, page 41, the Taxpayer asserted that the use of actual rents results in an opinion of the actual value of the Subject Property that is less than \$2,006,000. The County Board determined, however, that the County Assessor's income approach resulted in an unequalized valuation.²⁴ Additionally, the Commission is not persuaded that the Taxpayer provided clear and convincing evidence that the Subject Property's actual rents can be used with the County Assessor's income approach components for valuation purposes without adjustment.

Finally, while the valuation of the Subject Property increased from \$1,510,000 in 2008 to \$2,006,000 in 2009, the assessed value for real property may be different from year to year, dependent upon the circumstances.²⁵ For this reason, a prior year's assessment is not relevant to the subsequent year's valuation.²⁶ Additionally, the Commission notes that the Subject Property was subject to a reappraisal by the County Assessor in 2009.²⁷

The Commission finds that the Williamsburg Apartments are similarly situated to the Subject Property and are a comparable property, and without more evidence of a different actual value of

²² *Scribante v. Douglas County Board of Equalization*, 8 Neb.App. 25, 39, 588 N.W.2d 190, 199 (1999).

²³ E2:34.

²⁴ The County Board based this determination on the County Assessor's recommendation found at Exhibit 2, page 43.

²⁵ See, *Affiliated Foods Coop. v. Madison Co. Bd. Of Equal.*, 229 Neb. 605, 613, 428 N.W.2d 201, 206 (1988).

²⁶ See, *DeVore v. Bd. Of Equal.*, 144 Neb. 351, 13 N.W.2d 451 (1944), *Affiliated Foods*, 229 Neb. at 613, 428 N.W.2d at 206 (1988).

²⁷ E2:45

the Subject Property or the Williamsburg Apartments, it is reasonable for the County Board to equalize the Subject Property with the Williamsburg Apartments.

V. 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 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 decision of the County Board affirmed.

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 2009 is affirmed.²⁸
2. The assessed value of the Subject Property for tax year 2009 is:

Land	\$197,400
<u>Improvements</u>	<u>\$1,808,600</u>
Total	\$2,006,000
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 (2012 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 2009.

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 of equalization at the protest proceeding.

7. This Decision and Order is effective for purposes of appeal on July 11, 2013.

Signed and Sealed: July 11, 2013.

Thomas D. Freimuth, Commissioner

SEAL

Nancy J. Salmon, Commissioner

Appeals from any decision of the Commission must satisfy the requirements of Neb. Rev. Stat. §77-5019 (2012 Cum. Supp.), other provisions of Nebraska Statute and Court Rules.