

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

TierOne Bank,
Appellant,

v.

Lancaster County Board of Equalization,
Appellee,

Case No: 09C-473

Decision and Order Reversing the
Determination of the Lancaster County
Board of Equalization

For the Appellant:

No appearance

For the Appellee:

Michael Thew and John Watson,
Deputy Lancaster County Attorneys

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

I. THE SUBJECT PROPERTY

The Subject Property is a commercial parcel located in Lincoln, Lancaster County, Nebraska. The parcel is improved with a 170,974 square foot commercial office building and a 78,000 square foot parking garage. The legal description of the parcel and the property record card for the Subject Property are found at Exhibit 5:1.

II. PROCEDURAL HISTORY

The Lancaster County Assessor determined that the assessed value of the Subject Property was \$9,586,400 for tax year 2009.¹ TierOne Bank (Taxpayer) protested this assessment to the Lancaster County Board of Equalization (County Board) and requested an assessed valuation of \$8,000,000.² The County Board determined that the taxable value for tax year 2009 was \$9,586,400.³

The Taxpayer appealed the decision of the County Board to the Tax Equalization and Review Commission (Commission). The Commission held a hearing on April 4, 2011, at which hearing

¹ E1.

² E2:27.

³ E1.

the Taxpayer did not appear, Exhibits 1-7 were received, and the County's motion for a recess was granted.

On March 4, 2013 the hearing was resumed following the recess. Prior to the hearing, the County Board, through its counsel, submitted a Prehearing Conference Report as was required by the Commission's Order. The Prehearing Conference Report indicated that the County Board was unable to contact the Appellant, but that the County Board had evidence and the testimony of Robert Stanley to present at the hearing. At the hearing held March 4, 2013, the Appellant failed to appear, the Commission waived the appearance of the Taxpayer,⁴ and the County Board elected to present evidence and testimony.

III. STANDARD OF REVIEW

The Commission's review of the determination by a County Board of Equalization is de novo.⁵ 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."⁶

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.⁷

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

⁴ An appellant must be present at a hearing on the merits to avoid dismissal or default unless the appellant's presence is waived by the Commission. 442 NAC Ch. 4, Section 010.

⁵ 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).

⁶ *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted).

⁷ *Id.*

arbitrary.⁸ Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.⁹

A Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued.¹⁰ 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.¹¹

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.”¹² 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.”¹³

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.¹⁴

"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."¹⁵ “Actual value, market value, and fair

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

⁹ *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

¹⁰ 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).

¹¹ *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).

¹² Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.).

¹³ Neb. Rev. Stat. §77-5016(6) (2012 Cum. Supp.).

¹⁴ Neb. Rev. Stat. §77-112 (Reissue 2009).

¹⁵ Neb. Rev. Stat. §77-112 (Reissue 2009).

market value mean exactly the same thing.”¹⁶ 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.¹⁷ All real property in Nebraska subject to taxation shall be assessed as of January 1.¹⁸ All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.¹⁹

B. Summary of the Evidence

Robert Stanley, a commercial property appraiser for the Lancaster County Assessor for the last 20 years, testified that he originally assessed the Subject Property for tax year 2009 using an income approach.²⁰ Stanley testified that he derived his figures from the market using commonly accepted mass appraisal techniques including surveying other commercial properties.

Stanley testified that the Subject Property sold in 2010, and that he subsequently preformed a revaluation of the Subject Property in 2012. He testified that the sale in 2010 included the Subject Property and two other properties, and that the total sale price for all three properties was \$9,300,000. He testified that his opinion concerning the value of the Subject Property as of January 1, 2009, had changed due to new information he acquired after the revaluation. Stanley gave a new opinion of value of \$7,187,945 as of January 1, 2009, based upon this new information.

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 determination of value was arbitrary or unreasonable.

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

¹⁶ *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).

¹⁷ Neb. Rev. Stat. §77-131 (Reissue 2009).

¹⁸ See, Neb. Rev. Stat. §77-1301(1) (Reissue 2009).

¹⁹ Neb. Rev. Stat. §77-201(1) (Reissue 2009).

²⁰ E5:7-8.

VI. ORDER

IT IS ORDERED THAT:

1. The decision of the Lancaster County Board of Equalization determining the value of the Subject Property for tax year 2009 is vacated and reversed.²¹
2. The taxable value of the Subject Property for tax year 2009 is \$7,187,945.
3. This Decision and Order, if no appeal is timely filed, shall be certified to the Lancaster County Treasurer and the Lancaster 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.
7. This Decision and Order is effective for purposes of appeal on March 8, 2013.

Signed and Sealed: March 8, 2013

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 (2012 Cum. Supp.) and other provisions of Nebraska Statutes and Court Rules.

²¹ 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, evidence was received that was not considered by the County Board at the protest proceeding.