

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Peter J. Fink,
Appellant,

v.

Douglas County Board of Equalization,
Appellee,

Case No: 11C-266

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

For the Appellant:

John M. Walker,
Lamson Dugan & Murray LLP

For the Appellee:

Sandra K. Connolly,
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 at 1801 S. 54th Street, Omaha, Douglas County, Nebraska. The Subject Property is improved with a 106,435 square foot building, constructed in 1952, located on 167,727 square feet of land.¹ The legal description of the parcel is found at Exhibit 2, page 5, and the property record card for the Subject Property is found at Exhibit 2.

II. PROCEDURAL HISTORY

The Douglas County Assessor determined that the assessed value of the Subject Property was \$2,564,000 for tax year 2011.² Peter J. Fink (the Taxpayer) protested this assessment to the Douglas County Board of Equalization (the County Board) and requested an assessed valuation of \$1,900,000.³ The County Board determined that the assessed value for tax year 2011 was \$2,564,000.⁴

¹ E2:2.

² E1:1. The assessment consisted of \$128,500 for the land and \$2,435,500 for the improvement.

³ E12:1. The Taxpayer requested a value of \$128,500 for the land and \$1,771,500 for the improvement at the time of the Protest proceeding.

⁴ E1:1. The County Board determination consisted of \$128,500 for the land and \$2,435,500 for the improvement.

The Taxpayer appealed the decision of the County Board to the Tax Equalization and Review Commission (Commission). Prior to the hearing, the parties exchanged exhibits and submitted a Pre-Hearing Conference Report, as ordered by the Commission. In the Pre-Hearing Conference Report, the parties stipulated to the receipt of twelve exchanged exhibits. The Commission held a hearing on January 7, 2013.

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 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

⁵ 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). "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.*

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); *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).

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 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

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 *Id.*

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).

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

The determination of value by the County Board relied upon the assessed value as determined by the Douglas County Assessor (Assessor). Greg Weisheipl testified on behalf of the County Board. Weisheipl stated he was the Senior Commercial Appraisal Manager for the Assessor and that he was also a licensed appraiser, holding the Certified General appraisal certificate.

Weisheipl testified that the Assessor valued the Subject Property using the income approach. The Assessor's "Commercial Income Worksheet" is found at Exhibit 2 page 16, and indicates that the Assessor determined that the actual value of the Subject Property was \$2,564,000, based upon a rental rate of \$3 per square foot, a vacancy and collection loss rate of 10%, with 20% expenses, and a 9% unloaded capitalization rate.²⁰ He testified that he used an unloaded capitalization rate based upon a triple net lease, where the tenant paid the property taxes and the rental rate was adjusted accordingly. Weisheipl testified that the capitalization rate was based upon a study performed by Kenneth Voss & Associates, LLC of Atlanta, Georgia.²¹ He further testified that the capitalization rate was based upon sales prior to January 1, 2010.²²

Weisheipl admitted that the Assessor's income approach did not take into account the land-to-building ratio or low ceiling heights of the Subject Property. He conceded that a lower land-to-building ratio would probably affect the market value of the Subject Property.

The Commission finds that Weisheipl's testimony was credible as it related to the market value of the Subject Property.

Peter J. Fink, owner of the Subject Property, testified at the hearing and described the Subject Property as being used as a machine shop and for storage. He testified that the functionality of

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

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

²⁰ Exhibit 2:16. An unloaded capitalization rate does not include the effective tax rate, which is included in the expenses.

²¹ Exhibit 2:15.

²² See, *Id.*

the Subject Property was limited by: (1) small loading and unloading dock space that could not readily fit an 18-wheel vehicle; (2) only 30 off-street parking stalls for approximately 100 employees; and (3) low ceiling heights measuring only 15 feet, which are not ideal for palette racking or for an effective mezzanine.

Nicholas J. Dizona, a Certified General Appraiser, testified on behalf of the Taxpayer regarding a fee appraisal he completed for the Subject Property.²³ Dizona testified that his appraisal was retrospective to the effective date of January 1, 2011.²⁴ He testified that he considered both the sales comparison approach and the income approach to value the Subject Property, but that the income approach was given minimal weight. The cost approach was not considered.

Using the sales comparison approach, Dizona valued the Subject Property at \$1,970,000, and under the income approach he valued the Subject Property at \$1,935,000.²⁵ He testified that his reconciled opinion of value for the Subject Property was \$1,950,000 as of January 1, 2011.

Dizona specifically asserted that the land-to-building ratio of the Subject Property was 1.57 to 1,²⁶ and that in order to operate without significant limitations, the Subject Property would need to have a land-to-building ratio of 2.5 to 1. He testified that the current ratio limited effectiveness and productivity of the Subject Property in three critical areas: shipping and receiving, available parking, and ability to expand the improvement.

The admissibility of expert testimony is based on four factors: (1) whether the witness is qualified as an expert; (2) whether the testimony is relevant; (3) whether the testimony will assist the trier of fact; and (4) whether the probative value of the testimony, even if relevant, is outweighed by the danger of unfair prejudice or other considerations.²⁷ The weight to be given to expert testimony, and the credibility of witnesses, is a question to be decided by the fact finder.²⁸

²³ The Dizona fee appraisal was received as Exhibit 3.

²⁴ E3:2.

²⁵ See E3:10.

²⁶ See also, E3:49.

²⁷ *Seeber v. Howlette*, 255 Neb. 561, 566, 586 N.W.2d 445, 449, (1998). (Citations Omitted).

²⁸ *Cabela's, Inc. v. Cheyenne Cty. Bd. of Equalization*, 8 Neb. App. 582, 596-97, 597 N.W.2d 623, 635 (Neb. App. 1999) (citing *Coffey v. Mann*, 7 Neb. App. 805, 585 N.W.2d 518 (1998)).

Dizona asserted that his appraisal report was prepared in conformity with the *Uniform Standards of Professional Appraisal Practice (USPAP)*.²⁹ The Taxpayer has, therefore, through competent evidence, rebutted the presumption that the County Board faithfully performed its duties and had sufficient competent evidence to make its determination.³⁰ Because the Taxpayer has rebutted the presumption, “the reasonableness of the valuation fixed by the board of equalization becomes a question of fact based upon all of the evidence presented.”³¹ The burden remains on the Taxpayer to show by clear and convincing evidence that the County Board’s decision was arbitrary or unreasonable.³²

As discussed above, Dizona testified that he gave the most weight to the sales comparison approach. The alleged comparable properties utilized in the appraisal are found at Exhibit 3, page 49. The sales comparison approach used only one sale which occurred prior to January 1, 2011, and five sales which occurred after the effective date of January 1, 2011.³³ Retrospective appraisals are permitted under *USPAP*, however, [i]n the absence of evidence in the market that data subsequent to the effective date were consistent with and confirmed market expectations as of the effective date, the effective date should be used as the cut-off date for data considered by the appraiser.”³⁴ Further,

[I]n a retrospective appraisal the analysis should reflect the market conditions that existed on the effective date of the appraisal. Only using comparable sales information that was not available to the market place, or did not exist as of the effective date of the appraisal could be misleading because it would not reflect information available to the marketplace during that time period.³⁵

Since Dizona’s sales comparison approach utilized five sales that occurred after the effective date of January 1, 2011, it is necessary to determine whether these five sales, which did not exist as of January 1, 2011, reflect information available to the marketplace as of January 1, 2011. On

²⁹ E3. With retrospective appraisals, the appraiser must comply with the edition of USPAP in effect as of the date of the report, not as of the effective date. *Uniform Standards of Professional Appraisal Practice, 2012-2013 Edition* (effective January 1, 2012 through December 31, 2013), *Appraisal Development – Appraisal Dates, Question & Response 143, F-66*.

³⁰ See, *JQH La Vista Conf. Ctr. v. Sarpy Cty. Bd. Of Equal.*, 285 Neb. 120, 127, --- N.W.2d --- (2013).

³¹ *Id.*

³² See Generally, *Id.*

³³ E3:49. The sale dates, listed chronologically, were 1/1/09, 3/10/11, 7/13/11, 8/20/11, 1/4/12, and 3/28/12. One comparable was used which listed a contract price rather than a sale date.

³⁴ *Uniform Standards of Professional Appraisal Practice, 2012-2013 Edition* (effective January 1, 2012 through December 31, 2013) (*USPAP*), *Statement 3, U-85*. See also *USPAP Appraisal Development – Appraisal Dates, Question & Response 144, F-66-67*. The Commission notes that the *Question & Response* from the FAQ’s of USPAP “do not establish new Standards or interpret existing Standards,” but instead “illustrate the applicability of the Standards in specific situations and offer advice... for the resolution of specific appraisal issues and problems.” *USPAP, Foreword, U-i*.

³⁵ *USPAP, Appraisal Development – Appraisal Dates, Question & Response 144, F-66*.

this point, *USPAP* provides further guidance: “While the effective date is not an absolute cut-off point for market data, the appraiser must use particular caution in applying it in these assignments.”³⁶

Dizona testified at some length about the market conditions both before and after January 1, 2011. Dizona stated that there was very little market activity (few sales) in 2010, and that the properties being marketed in January of 2011 were the unsold properties from 2010. He opined that the market in July and August of 2011 would have been about the same as it was in January of 2011. Regarding the five 2011 and 2012 sales that he used for comparison, Dizona asserted that they were “the best sales that were around,” and that some of the sales were at asking price, while others were as low as one-third of asking price. No adjustments were made to the sales that occurred after January 1, 2011, to relate those sales prices to the assessment date at issue.³⁷

Dizona concluded, therefore, that the five sales were an excellent indicator of market value for January 1, 2011. We disagree. The Commission is not persuaded that there was “evidence in the market that data subsequent to the effective date were consistent with and confirmed market expectations as of the effective date” of January 1, 2011. We find that the inclusion of the five comparables which sold subsequent to January 1, 2011, was misleading in terms of indicating the market value of the Subject Property for January 1, 2011. Therefore, there is not clear and convincing evidence to show that the County Board’s decision was 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. However, the Commission finds there is not clear and convincing evidence to show that the County Board’s determination was arbitrary or unreasonable.

For all of the reasons set forth above, the decision of the County Board should be affirmed.

³⁶ *Id.* at F67.

³⁷ See Exhibit 3:65.

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 is affirmed.
2. The assessed value of the Subject Property for tax year 2011 is:

Land	\$ 128,500
<u>Improvement</u>	<u>\$2,435,500</u>
Total	\$2,564,000

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 2011.
7. This Decision and Order is effective for purposes of appeal on March 21, 2013.

Signed and Sealed: March 21, 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.