

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

5132 NWR, LLC,
Appellant,

v.

Douglas County Board of Equalization,
Appellee.

Case No: 10C 425

Order Affirming Douglas County Board of
Equalization

For the Appellant:

David J. Paladino,
Managing Member of 5132 NWR, LLC.

For the Appellee:

Matthew J. Boever,
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 improved with eight apartment buildings with 40 total units located at 5140 Northwest Radial Highway, Omaha, Douglas County, Nebraska. The legal description of the parcel is found at Exhibit 2, page 21. 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 \$852,000 for tax year 2010. 5132 NWR, LLC (herein referred to as the “Taxpayer”) protested this assessment to the Douglas County Board of Equalization (herein referred to as the “County Board”) and requested an assessed valuation of \$824,895. The County Board determined that the assessed value for tax year 2010 was \$852,000.¹ The Taxpayer 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 and stipulated to the receipt of exchanged Exhibits 2 and 3. The Commission held a hearing on October 30, 2012.

¹ E1.

III. STANDARD OF REVIEW

The Commission's review of the determination by a County Board of Equalization is de novo.² 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."³

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.⁴

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.⁵ Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.⁶

A Taxpayer must introduce competent evidence of actual value of the Subject Property in order to successfully claim that the Subject Property is overvalued.⁷ 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.⁸

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

² 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).

³ *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted).

⁴ *Id.*

⁵ Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.).

⁶ *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

⁷ 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).

⁸ *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).

cross appeal.”⁹ 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.”¹⁰

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.¹¹

“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.”¹² “Actual value, market value, and fair market value mean exactly the same thing.”¹³ 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.¹⁴ All real property in Nebraska subject to taxation shall be assessed as of January 1.¹⁵ All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.¹⁶

B. Summary of the Evidence

The County’s “Assessment Report” found at Exhibit 2 includes an income approach worksheet that contains the following market derived components to support the County Board’s determination that the actual value of the Subject Property amounted to \$852,000 on January 1,

⁹ Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.).

¹⁰ Neb. Rev. Stat. §77-5016(6) (2012 Cum. Supp.).

¹¹ Neb. Rev. Stat. §77-112 (Reissue 2009).

¹² *Id.*

¹³ *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).

¹⁴ Neb. Rev. Stat. §77-131 (Reissue 2009).

¹⁵ See, Neb. Rev. Stat. §77-1301(1) (Reissue 2009).

¹⁶ Neb. Rev. Stat. §77-201(1) (Reissue 2009).

2010: (1) potential gross income in the amount of \$170,063 (\$6.25 per sq. ft. rent times 27,210 sq. ft. living area); (2) 7% vacancy/collection rate; (3) 38% expense ratio amounting to \$60,100 in total expenses; and (4) 11.5% capitalization rate.¹⁷ The Assessment Report also includes a cost approach valuation in the amount of \$1,055,200.¹⁸

Greg Weisheipl, an employee of the County Assessor's Office, testified that the County's income approach valuation is based on market data. He stated that this market data is derived from real estate publications and information submitted by Taxpayers during the County Board protest process.

The potential gross income used by the County in its income worksheet amounts to \$354 monthly rent per unit based on 40 units. The Commission notes that the Referee notes included in the Assessment Report indicate that the County considered the Taxpayer's rent roll information for tax year 2010, but that the Taxpayer did not provide expense information during the protest process.¹⁹

The Taxpayer testified that the \$354 monthly rent per unit used by the County in its income approach worksheet submitted at the hearing before the Commission approximates actual rent roll information. The Taxpayer also testified that the \$158,159 effective gross income amount used by the County in its income approach, which includes a 7% vacancy and collection loss rate, closely approximates actual rent roll information.

The Taxpayer asserted that the County Board erred in its determination of the expenses (\$60,100 based on 38% expense ratio) used for income approach valuation purposes. In support of this assertion, the Taxpayer testified that actual expenses of the Subject Property amounted to 61% of effective gross income. The Taxpayer offered an opinion of value of the Subject Property in the amount of \$590,000, which is based on substitution of this 61% expense ratio in place of the County's 38% rate, an approximate \$7 per square foot rental rate, an 8% vacancy and collection loss rate, and an 11.5% capitalization rate.²⁰

The Taxpayer did not provide documentation to support its assertion that expenses amounted to 61% of effective gross income. The Taxpayer also testified that these expenses were not stabilized over a multi-year period.

¹⁷ E2:51

¹⁸ E2:54

¹⁹ E2:71.

²⁰ The \$7 per square foot rental rate and 8% vacancy and collection loss rate were derived from actual Subject Property information referenced in the Assessment Report's "Account Notes" found at Exhibit 2, page 34.

C. Analysis

Mass Appraisal of Real Property, published by the International Association of Assessing Officers, states that for purposes of mass appraisal and the income approach to valuation, “gross incomes, allowable expenses, net incomes, gross income multipliers, and overall rates can all be estimated in one of two basic ways: by developing typical per-unit values through stratification, often using spreadsheet software, or through statistical models.”²¹ Additionally, to avoid reflecting differences in management, it is acceptable for an appraiser to use median vacancy, collection loss ratio and other income per unit when valuing a property.²² Whether the appraiser uses actuals or estimated income/expense medians is “a matter of appraiser judgment” based upon whether the reported actual figures appear reasonable or typical when compared to the median figure for the model.²³

The County’s Assessment Report for the Subject Property submitted at the hearing before the Commission contains an income approach introductory page, which states as follows: “[t]he basic steps in the Income Approach to value for commercial properties in mass appraisal are based on a landlord-tenant situation and not on the income of the actual business. In using this approach, it eliminates the possibility of valuing management as opposed to potential income of the structure.”²⁴

Mass Appraisal of Real Property and the County’s Assessment Report state the basic concept that for purposes of ad valorem taxation of real property, only the value of the real property and not that value of the business which is attributable to individual management style or experience is to be valued. The use of estimated income/expense figures instead of actual figures for each business is intended to prevent the inappropriate taxation of management.²⁵

The Taxpayer in this case did not report actual expense figures to the County Assessor prior to the valuation of the Subject Property by the County Board. Under these circumstances, it is appropriate for the County Assessor to value the Subject Property utilizing the median expense ratio.²⁶

²¹ *Mass Appraisal of Real Property*, International Association of Assessing Officers, 1999, at p. 132.

²² *Mass Appraisal of Real Property*, International Association of Assessing Officers, 1999, at p. 158.

²³ *Mass Appraisal of Real Property*, International Association of Assessing Officers, 1999, at p. 158.

²⁴ E2:50.

²⁵ *Mass Appraisal of Real Property*, International Association of Assessing Officers, 1999, at p. 158.

²⁶ *Mass Appraisal of Real Property*, International Association of Assessing Officers, 1999, at pgs. 158-159.

Because of these principles of mass appraisal, it is not enough to rebut the presumption in favor of the County Board for the Taxpayer to present evidence that there is a difference between the Subject Property's actual figures and the estimates utilized by the County Assessor and adopted by the County Board in its determination. The Taxpayer must show something more in the form of clear and convincing evidence that the County Assessor inappropriately derived the estimated figures, or inappropriately included the Subject Property in a model comprised of incomparable properties, or any other error or calculation that evidences that the model or process utilized by the County Assessor and/or relied upon by the County Board determined the value of the Subject Property in such a way that the decision was "made in disregard of the facts or circumstances and without some basis which would lead a reasonable person to the same conclusion"²⁷ or evidences that there is "no room for differences of opinion among reasonable minds."²⁸

It is an acceptable mass appraisal technique for the County Assessor to use either actuals or market derived medians under the income approach.²⁹ The Commission is not persuaded that the Taxpayer provided sufficient clear and convincing evidence that the County's income approach valuation is unreasonable or arbitrary.

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 is affirmed and reversed.

²⁷ *Phelps Cty. Bd. of Equal. v. Graf*, 258 Neb 810, 606 N.W.2d 736 (2000) (citations omitted) (defining "arbitrary").

²⁸ See, *Pittman v. Sarpy Cty. Bd. of Equal.*, 258 Neb 390, 401-02, 603 N.W.2d 447, 455-56 (1999) (defining "unreasonable").

²⁹ See, *Mass Appraisal of Real Property*, International Association of Assessing Officers, 1999, 158.

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 2010 is affirmed.³⁰
2. The assessed value of the Subject Property for tax year 2010 is: \$852,000
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 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 2010.
7. This order is effective for purposes of appeal on January 28, 2014.

Signed and Sealed: January 28, 2014.

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 (2010 Cum. Supp.), other provisions of Nebraska Statute and Court Rules.

³⁰ 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.