

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Boardwalk Square, LLC,
Appellant,

v.

Douglas County Board of Equalization,
Appellee,

Case Nos: 12C 463 & 13C 503

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

For the Appellant:

James E. Lang,
Laughlin Peterson & Lang

For the Appellee:

Jimmie L. Pinkham III
Deputy Douglas County Attorney

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

I. THE SUBJECT PROPERTY

The Subject Property is a 278,220 square foot parcel improved with seven commercial buildings constituting a neighborhood shopping center located at 1324 S. 119th Street, Omaha, Douglas County, Nebraska. The legal description of the parcel is found at Exhibits 2 and 3. The property record cards for the Subject Property are found at Exhibits 5 and 6.

II. PROCEDURAL HISTORY

For both tax years 2012 and 2013, the Douglas County Assessor determined that the assessed value of the Subject Property was \$4,689,800.¹ Boardwalk Square, LLC (the Taxpayer) protested this assessment to the Douglas County Board of Equalization (the County Board) and requested an assessed valuation of \$3,006,213.² The County Board determined that the taxable value was \$4,689,800.³

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

¹ Exhibit 2:1, Exhibit 3:1.

² Exhibit 5:34, Exhibit 6:34.

³ Exhibit 2:1, Exhibit 3:1.

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 consolidated hearing on February 9, 2016.

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) (2014 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) (2014 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 *Bottomf 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 The Commission’s Decision and Order shall include findings of fact and conclusions of law.¹³

IV. EQUALIZATION

A. Law

“Taxes shall be levied by valuation uniformly and proportionately upon all real property and franchises as defined by the Legislature except as otherwise provided in or permitted by this Constitution.”¹⁴ Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value.¹⁵ The purpose of equalization of assessments is to bring the assessment of different parts of a taxing district to the same relative standard, so that no one of the parts may be compelled to pay a disproportionate part of the tax.¹⁶ In order to determine a proportionate valuation, a comparison of the ratio of assessed value to market value for both the subject property and comparable property is required.¹⁷ Uniformity requires that whatever methods are used to determine actual or taxable value for various classifications of real property that the results be correlated to show uniformity.¹⁸ Taxpayers are entitled to have their property assessed uniformly and proportionately, even though the result may be that it is assessed at less than the actual value.¹⁹ The constitutional requirement of uniformity in taxation extends to both rate and valuation.²⁰ If taxable values are to be equalized

¹¹ Neb. Rev. Stat. §77-5016(8) (2014 Cum. Supp.).

¹² Neb. Rev. Stat. §77-5016(6) (2014 Cum. Supp.).

¹³ Neb. Rev. Stat. §77-5018(1) (2014 Cum. Supp.).

¹⁴ *Neb. Const.*, Art. VIII, §1.

¹⁵ *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).

¹⁶ *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991); *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623, (1999).

¹⁷ *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).

¹⁸ *Banner County v. State Board of Equalization*, 226 Neb. 236, 411 N.W.2d 35 (1987).

¹⁹ *Equitable Life v. Lincoln County Bd. of Equal.*, 229 Neb. 60, 425 N.W.2d 320 (1988); *Fremont Plaza v. Dodge County Bd. of Equal.*, 225 Neb. 303, 405 N.W.2d 555 (1987).

²⁰ *First Nat. Bank & Trust Co. v. County of Lancaster*, 177 Neb. 390, 128 N.W.2d 820 (1964).

it is necessary for a Taxpayer to establish by “clear and convincing evidence that valuation placed on his or her property when compared with valuations placed on similar property is grossly excessive and is the result of systematic will or failure of a plain legal duty, and not mere error of judgment [sic].”²¹ There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity.²²

B. Summary of the Evidence

The Taxpayer put at issue only that the Subject Property (also referred to as Boardwalk Square) was not equalized as compared with comparable properties in Douglas County. The Taxpayer specifically pointed to a property at 2819 S. 125th Avenue (hereinafter referred to as the Westwood Property) as the property most comparable to the Subject Property.

Daniel J. Goaley testified on behalf of the Taxpayer. Goaley testified that he was the Vice President of Brokerage for World Group, LLC; a full-service commercial real estate company. He is a licensed real estate broker, with a focus on retail sales and leasing of commercial properties for the past twenty years. Goaley is not a licensed appraiser.

Goaley testified that World Group, LLC represented the ownership group of the Taxpayer, exercising the functions of property management and leasing. He asserted that he had been familiar with the characteristics of the property and with the rental arrangements relating to the property for several years. He also expressed his familiarity with the vacancy and collection loss rates, the expenses, and the appropriate income capitalization rate of the Subject Property and other properties in the same market. Goaley testified that the Subject Property had rental rates at \$9 to \$10 per square foot, triple net; meaning that the tenants paid a pro-rata share of taxes, insurance, and maintenance.

Income worksheets for each of the seven commercial buildings included in the Subject Property indicated that the County Assessor valued the parcel using an income approach.²³ For each building, the Worksheet shows the rental rate at \$9, the vacancy and collection loss rate at

²¹ *Newman v. County of Dawson*, 167 Neb. 666, 670, 94 N.W.2d 47, 49-50 (1959) (Citations omitted).

²² *Id.* at 673, 94 N.W.2d at 50.

²³ Exhibit 5:18-24.

10%, the expense rate at 20%, and the income capitalization rate at 9%. Goaley did not disagree with any of these rates.

The evidence in this appeal did not include a similar income approach worksheet for the Westwood property. In fact, the official property record file for the Westwood property was not in evidence. Without the property record file, the Commission is limited in its ability to make a direct comparison of the Westwood property and the Subject Property for purposes of an equalization analysis.

However, Goaley did testify about both properties, including a comparison of how the physical characteristics of the parcels compared and also about how each property functioned in the same retail neighborhood shopping center market. Goaley expressed his opinion that the Subject Property and the Westwood property were comparable and similar in many respects. Both were located in a residential neighborhood and had similar uses as neighborhood shopping centers. The properties had similar tenants, parking arrangements, street access, and building construction. Goaley emphasized that potential tenants would have considered both properties when looking for rental space.

Goaley also testified that both properties functioned similarly in the same market. They had similar rental rates, occupancy rates, and expenses. He also expressed his opinion that the same income capitalization rate would be applicable to both properties.

However, Goaley also attested to significant differences between the properties. The Subject Property site area was 278,220 square feet,²⁴ while the Westwood property land site area was 426,081 square feet.²⁵ Goaley asserted that this difference did not raise concerns regarding economies of scale.²⁶ The Subject Property consisted of seven buildings, with a total square footage of 65,135 square feet,²⁷ while the Westwood property consisted of two buildings, with a

²⁴ See, Exhibit 5:3, Exhibit 6:3.

²⁵ See, Exhibit 8:23, Exhibit 9:23.

²⁶ “Size differences can affect value and are considered in site analysis. Reducing sale prices to consistent units of comparison facilitates the analysis of comparable sites and can identify trends in market behavior. Generally, as size increases, unit prices decrease. Conversely, as size decreases, unit prices increase. The functional utility or desirability of a site often varies depending on the types of uses to be placed on the parcel. Different prospective uses have ideal size and depth characteristics that influence value and the highest and best use.” Appraisal Institute, *The Appraisal of Real Estate*, at 198 (14th ed. 2013).

²⁷ See, Exhibit 5:4-10, Exhibit 6:4-10.

total square footage of 141,002.²⁸ Goaley testified that a portion of one of the Westwood buildings had included a movie theatre a lower rental rate, and that one of the Westwood buildings was rented by an Office Depot, which he characterized as a “junior box store.” Further, each of the seven buildings of the Subject Property was rated by the County Assessor as having a good condition rating,²⁹ while both of the Westwood buildings were rated by the County Assessor as having a fair condition rating.³⁰ Because of these differences, the Commission finds that the Subject Property and the Westwood property, even though behaving similarly in the same market, are nevertheless not comparable for purposes of our equalization analysis.

The Taxpayer argues that our equalization analysis should allow for taking into consideration the ratio of assessed value to actual value of the Westwood Property and the Subject Property. However, this argument also fails. There was no persuasive evidence received that the actual value of the Westwood property was any amount less than its assessed value. When making such a uniformity argument, the Subject Property would get the benefit of the same ratio as the comparable property. In this case, the ratio of the assessed value to the actual value of the Westwood property is 1. Therefore, we must conclude that the Uniformity Clause has not been violated in the assessment of the Subject Property.

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 valuation placed on the Subject Property when compared with valuations placed on similar property is grossly excessive and is the result of systematic will or failure of a plain legal duty, and not mere error of judgment. The Commission further finds that there is not clear and convincing evidence that the County Board’s decision was arbitrary or unreasonable.

²⁸ Exhibit 8:24-25.

²⁹ Exhibit 5:4-10, Exhibit 6:4-10.

³⁰ Exhibit 8:24-25, Exhibit 9:224-25.

For all of the reasons set forth above, the decisions of the Douglas County Board of Equalization should be affirmed.

VI. ORDER

IT IS ORDERED THAT:

1. The decisions of the Douglas County Board of Equalization determining the value of the Subject Property for tax year 2012 and 2013 are affirmed.
2. The taxable value of the Subject Property for each tax year 2012 and 2013 is:

Land	\$1,836,300
Improvement	<u>\$2,853,500</u>
Total	\$4,689,800
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 (2014 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 years 2012 and 2013.
7. This Decision and Order is effective for purposes of appeal on February 18, 2016.³¹

Signed and Sealed: February 18, 2016

Robert W. Hotz, Commissioner

SEAL

Nancy J. Salmon, Commissioner

³¹ Appeals from any decision of the Commission must satisfy the requirements of Neb. Rev. Stat. §77-5019 (2014 Cum. Supp.) and other provisions of Nebraska Statutes and Court Rules.