

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

IRET-Whispering Ridge et al.,
Appellant,

v.

Douglas County Board of Equalization,
Appellee.

Case Nos: 15C 0783 & 17C 0459

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

For the Appellant:

Benjamin White,
Law Offices of White and Jorgensen

For the Appellee:

Shakil A. Malik,
Deputy Douglas County Attorney

These appeals were heard before Commissioners Steven A. Keetle and James D. Kuhn.

I. THE SUBJECT PROPERTY

The Subject Property is a commercial parcel located in Douglas County. The parcel is improved with eight multiple-unit apartment buildings and a clubhouse. The legal description and property record cards for the parcel are found at Exhibit 3 (tax year 2015) and Exhibit 4 (tax year 2017).

II. PROCEDURAL HISTORY

The Douglas County Assessor (the County Assessor) determined that the assessed value of the Subject Property was \$26,480,900 for tax year 2015. IRET-Whispering Ridge et al. (the Taxpayer) protested this assessment to the Douglas County Board of Equalization (the County Board) and requested an assessed valuation of \$12,000,000. The County Board determined that the taxable value of the Subject Property for tax year 2015 was \$26,480,900.¹

The County Assessor determined that the assessed value of the Subject Property was \$26,480,900 for tax year 2017. The Taxpayer protested this assessment to the County Board and

¹ Exhibit 1.

requested an assessed valuation of \$16,500,000. The County Board determined that the taxable value of the Subject Property for tax year 2017 was \$26,480,900.²

The Taxpayer appealed these decisions of the County Board to the Tax Equalization and Review Commission (the 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 exchanged Exhibits 1 through 7 and 12 through 26. The Commission held a hearing on March 6, 2018, with Commissioner Keetle presiding. In the course of the hearing, the Commission declined to admit Exhibits 5 through 7 despite the parties' stipulation, and did not admit Exhibits 8 through 11, for the reasons stated on the record.

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

² Exhibit 2.

³ See Neb. Rev. Stat. §77-5016(8) (2016 Cum. Supp.), *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 286, 753 N.W.2d 802, 813 (2008).

⁴ *Brenner* at 283, 811 (2008).

⁵ *Id.* (Citations omitted).

⁶ Neb. Rev. Stat. §77-5016(9) (2016 Cum. Supp.).

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

A Taxpayer must introduce competent evidence of the 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, and may consider all questions necessary to determine taxable value of property as it hears an appeal or cross appeal.¹⁰ The commission may also take notice of judicially cognizable facts as well as 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,

Actual 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, market value, and fair market value mean exactly the same thing.¹³ All real property in Nebraska subject to taxation shall be assessed as of January 1 (of the relevant tax year).¹⁴ All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.¹⁵

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).

¹⁰ Neb. Rev. Stat. §77-5016(8) (2016 Cum. Supp.).

¹¹ Neb. Rev. Stat. §77-5016(6) (2016 Cum. Supp.).

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

¹³ *Omaha Country Club*, supra.

¹⁴ See, Neb. Rev. Stat. §77-1301(1) (Reissue 2009).

¹⁵ Neb. Rev. Stat. §77-201(1) (Reissue 2009).

B. Summary of the Evidence

Three witnesses testified at the hearing. Nicola Jones testified that she worked as regional property manager for the Taxpayer during the 2015 and 2017 tax years. She testified that the Taxpayer has experienced problems with the construction of the buildings on the Subject Property: the roof leaks and the siding is not well attached. From 2013 to 2016, the Taxpayer incurred \$38,000 in repair and maintenance costs related to possible construction defects in the roof and siding. Additionally, a sinkhole developed in the parking lot of the property. Ms. Jones testified, and the documents in the record reflect, that the buildings were constructed recently, in 2010. However, she was unaware of any legal action the Taxpayer has considered against the builder as a remedy for the alleged defects in construction.

Ms. Jones also discussed Exhibits 15 through 22, profit and loss statements for the years 2012 through 2017. These documents provide a detailed record of the income and expenses, both projected and actual, for the Subject Property in each of those years.

Monte Bowman, a business consultant specializing in commercial real property taxation, testified on the Taxpayer's behalf about alleged statutory and due process violations in the protest process used by the County Board in the 2015 tax year, particularly the in-person meetings required by Neb. Rev. Stat. §77-1311. Mr. Bowman did not attend such a meeting on behalf of this Taxpayer for tax year 2015 or 2017. He also testified that he had provided copies of the profit and loss statements discussed above to the County Assessor's office and/or the referee who conducted the protest hearing on behalf of the County Board in both 2015 and 2017. Mr. Bowman asserted that the records were not used in determining the property value (2015) or were misplaced and unavailable to the hearing referee (2017).

Mark Jenkins, a real estate appraiser with the County Assessor's office, testified that the market data and statistical models used to determine the market value of the Subject Property for 2015 and 2017 were developed by an independent appraisal company under contract with the County Assessor's office. Mr. Jenkins explained that, under mass appraisal methodology, specific data for a particular commercial parcel is not used to determine its market value. Instead, rental, vacancy, expense, and capitalization rates that are reflective of the local market area and linked to the condition of the property are used to assess similar properties uniformly and

equally. Otherwise, the assessment risks conflating the “intangible” qualities of a particular business with the value of the real property owned by the business. Mr. Jenkins testified that if information such as the profit and loss statements offered by the Taxpayer is provided to the County Assessor and shows a significant difference between the income and expenses of a property and the model’s determination of value based on market rates, the County Assessor’s office may investigate further to discern whether a reduction in the assessed value of the property is warranted. Mr. Jenkins also maintained that his office did not receive or have access to the profit and loss statements prior to the completion of the County Board’s protest process for 2015 and 2017.

C. Analysis

The Taxpayer offered evidence and made argument regarding alleged errors and irregularities in the protest process used by the County Board in tax years 2015 and 2017.¹⁶ Specifically, the Taxpayer alleged that the individual who conducted the in-person meeting required by Neb. Rev. Stat. §77-1311 failed or would have failed to provide information required by statute or court order. The Taxpayer asserts that this failure constituted a deprivation of due process, and as a result, the “Assessment [of the Subject Property] is void. Because the Assessment is void, no presumption should operate in favor of the Assessor’s valuation and the Appellant’s taxes should be reduced to the extent that the Appellant can demonstrate that a lower valuation is appropriate.”¹⁷

The Commission finds there is no merit in this due process argument in relation to the in-person meeting, because Mr. Bowman testified unambiguously that he did not attend an in-person meeting pursuant to Neb. Rev. Stat. §77-1311 on behalf of the Taxpayer for tax years

¹⁶ The current statutory scheme provides for two separate in-person meetings between a protesting taxpayer and the assessing authorities in large counties (such as Douglas). Between January 15 and March 1, the protester is given the opportunity to meet with the county assessor or the assessor’s representative. “During such meetings, the county assessor or the county assessor’s designated representative shall provide a basis for the property valuation contained in the notice of preliminary valuation sent pursuant to section 77-1301 and accept any information the property owner provides relevant to the property value.” Then, some time prior to the deadline for completing hearings on protests in late July or early August, the protester must be given the opportunity to meet in person with the county board of equalization or with a referee, who may conduct a hearing on the protest pursuant to Neb. Rev. Stat. §77-1502.01 and submit a written report and recommendations to the county board. The Taxpayer in this case argues that its statutory rights were violated at the first meeting because the County Assessor did not provide information it was required to provide, and that its rights were violated again at the second meeting because the referee did not accept information it was required to accept. See Neb. Rev. Stat. §§ 77-1311, 77-1502, 77-1502.01.

¹⁷ Appellant’s Combined Brief at 10.

2015 or 2017. Having failed to request or attend such meetings, the Taxpayer cannot complain that it has been prejudiced by events that might have occurred had such meetings taken place. The Taxpayer's due process argument relating to the in-person meetings has no factual or legal basis in the present case, and we reject it without further discussion.

The Taxpayer also asserts that the referee who conducted the hearing on behalf of the County Board either failed to use or was unable to access the information submitted by the Taxpayer. At all material times, Nebraska law has required that "each protester shall be afforded the opportunity to meet in person with the county board of equalization or a referee appointed under section 77-1502.01 to provide information relevant to the protested property value" (emphasis added.)¹⁸ Mr. Bowman testified that he attempted to provide the profit and loss statements, but was subsequently advised by the County Board or its representative that the documents had not been accessible to the referees. However, his testimony about the County Board's statements and proceedings was hearsay, and the Taxpayer did not call any witnesses to provide direct, first-hand evidence on the question of whether the documents provided by the Taxpayer were misplaced or inaccessible, and if so, why.

The presumption the Taxpayer must rebut is not that the County Board had access to *all relevant evidence*, but rather, that it has acted upon *sufficient competent evidence* to make its determination. Mr. Jenkins testified that the information contained in the profit and loss statements would not have been effective in changing the valuation of the property, because the valuation was based on income and expenses typical of the broader market rather than the specific qualities of the Subject Property. Thus, even if the County Board misplaced the documents provided to the referee by Mr. Bowman, it was not deprived of material evidence that would have affected its decision. On this record, the Commission is not persuaded that the County Board failed to consider relevant evidence or that the purported failure constituted a deprivation of due process for the Taxpayer. Whatever may have occurred during the protest process for the tax years in question, the Taxpayer now has the opportunity for a de novo review of the valuation and equalization of the Subject Property before the Commission.¹⁹

¹⁸ Neb. Rev. Stat. §77-1502(3) (2016 Cum. Supp.).

¹⁹ As noted above, the appellate review conducted by the Commission is a de novo review. See Neb. Rev. Stat. §77-5016(8) (2016 Cum. Supp.). "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 issue under consideration in this appeal is the actual value of the Subject Property. 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 Neb. Rev. Stat. §77-1371, (2) income approach, and (3) cost approach.²⁰ In this case, the value of the Subject Property was determined using the income approach. The income approach calculates the value of real property based on a variety of factors including square footage, market rental rates, quality and condition, a market expense ratio, and market capitalization rates. The Taxpayer asserts, in essence, that the County Board should have employed the actual income and expenses for the Subject Property to determine its value, rather than using the market-based models developed for the County Assessor. However, the Commission is persuaded by the testimony of Mr. Jenkins that mass appraisal methodology does not consider only specific data for a single parcel to determine its market value; instead, rental, vacancy, expense, and capitalization rates that are reflective of the local market area and linked to the condition of the property are used to assess similar properties uniformly and equally.

In practice, one business may operate more efficiently than a competing business, thus producing higher income-to-expense ratios, but that difference reflects distinctions in the businesses' operations, not in the value of their real property. If the income-to-expense ratios for specific businesses were used in assessing their property taxation, efficient businesses would be taxed at higher rates on real property identical to that owned by their less-efficient competitors. Mass appraisal methodologies are designed to determine true market values for commercial properties regardless of how efficiently a specific business is operated. There is no evidence that the income or expenses presented by the Taxpayer were more typical of other properties in the market area than the statistical model used by the County Assessor (and, by extension, the County Board). Without information regarding market incomes and market expenses the Commission cannot determine if the use of the actual income and expenses for the Subject Property is appropriate.

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).

²⁰ Neb. Rev. Stat. §77-112 (Reissue 2009).

Ms. Jones pointed out negative conditions that she asserted would affect the market value of the Subject Property, but she did not quantify the impact of those conditions on the Subject Property's market value. The Nebraska Supreme Court has held that, in the absence of evidence through use of comparable sales or another assessment method showing how negative conditions affected the value of the property, and to what dollar amount, the taxpayer failed to meet its burden to overcome the presumption that the board of equalization acted reasonably.²¹ Viewing the record as a whole, the Taxpayer has presented insufficient evidence to rebut the presumption in favor of the County Board, and has also failed to demonstrate by clear and convincing evidence that the County Board's decisions were arbitrary or unreasonable.

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 determinations. The Commission also finds that there is not clear and convincing evidence that the County Board's decisions were arbitrary or unreasonable.

For all of the reasons set forth above, the appeal of the Taxpayer is denied.

VI. ORDER

IT IS ORDERED THAT:

1. The decision of the Douglas County Board of Equalization determining the taxable value of the Subject Property for tax year 2015 is affirmed.
2. The taxable value of the Subject Property for tax year 2015 is \$26,480,900.
3. The decision of the Douglas County Board of Equalization determining the taxable value of the Subject Property for tax year 2017 is affirmed.
4. The taxable value of the Subject Property for tax year 2017 is \$26,480,900.
5. 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 (2016 Cum. Supp.).

²¹ *Firethorn Inv. v. Lancaster Cty. Bd. of Equal.*, 261 Neb. 231, 622 N.W.2d 605 (2001).

6. Any request for relief, by any party, which is not specifically provided for by this Decision and Order is denied.
7. Each party is to bear its own costs in this proceeding.
8. This Decision and Order shall only be applicable to tax years 2015 and 2017.
9. This Decision and Order is effective for purposes of appeal on April 2, 2018.²²

Signed and Sealed: April 2, 2018.

Steven A. Keetle, Commissioner

SEAL

James D. Kuhn, Commissioner

²² Appeals from any decision of the Commission must satisfy the requirements of Neb. Rev. Stat. §77-5019 (2016 Cum. Supp.) and other provisions of Nebraska Statutes and Court Rules.