

**BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION**

RNR Legacy, LLC,  
Appellant,

v.

Douglas County Board of Equalization,  
Appellee.

Case No: 15C 0794

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

**For the Appellant:**

Benjamin White,  
Law Offices of White & Jorgensen

**For the Appellee:**

Shakil A. Malik,  
Deputy Douglas County Attorney

This appeal was 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 a 10,080 square foot day care center. The legal description and property record card for the parcel are found at Exhibit 2.

**II. PROCEDURAL HISTORY**

The Douglas County Assessor (the County Assessor) determined that the assessed value of the Subject Property was \$1,079,100 for tax year 2015. RNR Legacy, LLC (the Taxpayer) protested this assessment to the Douglas County Board of Equalization (the County Board). The County Board determined that the taxable value for tax year 2015 was \$1,079,100.<sup>1</sup>

The Taxpayer appealed the decision 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, 2, 5, 6, 7, and 10 through 16. The Commission held a hearing on March 8, 2018, with Commissioner Keetle

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<sup>1</sup> Exhibit 1.

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 3, 4, 8, and 9, 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.<sup>2</sup> 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.<sup>3</sup>

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.<sup>4</sup>

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

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

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

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<sup>2</sup> 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).

<sup>3</sup> *Brenner* at 283, 811.

<sup>4</sup> *Id.* (Citations omitted).

<sup>5</sup> Neb. Rev. Stat. §77-5016(9) (2016 Cum. Supp.).

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

<sup>7</sup> 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).

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

consider all questions necessary to determine taxable value of property as it hears an appeal or cross appeal.<sup>9</sup> The commission may take notice of judicially cognizable facts and general, technical, or scientific facts within its specialized knowledge, and may also utilize its experience, technical competence, and specialized knowledge in the evaluation of the evidence presented.<sup>10</sup>

## 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.<sup>11</sup>

Actual value, market value, and fair market value mean exactly the same thing.<sup>12</sup> All real property in Nebraska subject to taxation shall be assessed as of January 1.<sup>13</sup> All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.<sup>14</sup>

### B. Summary of the Evidence

Three witnesses testified at the hearing before the Commission. Monte Bowman, a business consultant specializing in commercial property taxation, testified that, in many of the in person meetings<sup>15</sup> he attended on behalf of his clients for tax year 2015, the County Assessor's representative did not provide documents he believed to be required by statute or court order. Mr. Bowman testified that he could not recall whether he attended such an in-person meeting on behalf of the Taxpayer for tax year 2015.

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<sup>9</sup> Neb. Rev. Stat. §77-5016(8) (2016 Cum. Supp.).

<sup>10</sup> Neb. Rev. Stat. §77-5016(6) (2016 Cum. Supp.).

<sup>11</sup> Neb. Rev. Stat. §77-112 (Reissue 2009).

<sup>12</sup> *Omaha Country Club*, supra.

<sup>13</sup> See, Neb. Rev. Stat. §77-1301(1) (Reissue 2009).

<sup>14</sup> Neb. Rev. Stat. §77-201(1) (Reissue 2009).

<sup>15</sup> The in-person meetings in question are those required by Neb. Rev. Stat. §77-1311, which will be discussed further below.

Mr. Bowman identified three other properties he regarded as comparable to the Subject Property.<sup>16</sup> Some of the properties have different quality ratings than the Subject Property, but the County Board's witness concurred with Mr. Bowman's opinion that they are comparable. In order to calculate an "equalized" value for the Subject Property, Mr. Bowman divided the value assigned to the improvement (i.e., the building) on each comparable property by its square footage. He averaged the resulting per-square-foot values, and then multiplied this amount by the square footage of the Subject Property. This resulted in a proposed value of \$809,127 for the Subject Property, representing an improvement value of \$676,927 and a land value of \$132,200.

Nathan Fichter, the president of the Taxpayer (an LLC), also testified. He indicated that the building had been built in 1998 as office space, but the Taxpayer purchased it in 2012 with the intent of converting it to a day care center. The building was vacant for two or three years prior to the purchase, and the asking price gradually declined from \$999,999 to approximately \$640,000, which was the price at which the Taxpayer acquired the property. After the purchase, the Taxpayer performed extensive renovations to transform the Subject Property into a day care center; many of these renovations were required by health and safety regulations. The renovations included moving walls, adding a storm shelter, modifying bathrooms, improving a kitchen, and replacing the sprinkler system. Mr. Fichter estimated the total cost of the renovations made prior to tax year 2015, and therefore completed as of the assessment date, excluding personal property in the kitchen, to be \$200,000 to \$225,000. Mr. Fichter also testified that the Subject Property is located at the edge of a low-income housing development, which he believes reduces its market value as a day care center. He detailed some negative conditions that might reduce the Subject Property's market value, such as poor drainage on the west side of the building, an outdated HVAC system (replaced since tax year 2015 at a cost of approximately \$50,000), and some erosion of the foundation.

Linda Rowe, a commercial supervisor appraiser with the County Assessor's office, testified that she was a certified assessor and that she had been involved in the assessment of the Subject Property for tax year 2015. She explained that the property had been assessed using the income method. This method involves the collection of market data and development of income models,

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<sup>16</sup> The property record cards for these properties and Mr. Bowman's analysis of their values are found at Exhibits 10 through 13.

which are then applied to all properties of the same type within a given neighborhood. Due to the relatively low number of sales of day care centers in Douglas County, the County Assessor divided the county into three or four neighborhoods for the purpose of assessing day care centers in tax year 2015.

Ms. Rowe agreed the properties selected by Mr. Bowman were comparable to the Subject Property, but she disagreed with his analysis. She explained that, under the income approach, the value of the parcel as a whole is calculated based on the amount of income it is expected to produce under conditions prevalent in the market area. The value of the land, which is determined based on location and type of parcel (i.e., commercial, residential, etc.), is subtracted from the total parcel value determined under the income approach; the result is listed as the value of the improvement. Ms. Rowe explained that each of Mr. Bowman's comparable properties had been assessed using the same income model, with a rental rate of \$12 per square foot, a vacancy and collection loss rate of 8%, an expense rate of 20%, and a capitalization rate of 8.25%. This resulted in the improvement to each property being valued at \$107 per square foot; the apparent discrepancies noted by Mr. Bowman were the result of varying amounts of the total valuation being allocated to land value for each comparable property.

### **C. Analysis**

The Taxpayer offered evidence and made argument regarding alleged errors and irregularities in the referee and protest process used by the County Board in tax year 2015. 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.<sup>17</sup> 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."<sup>18</sup>

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<sup>17</sup> Neb. Rev. Stat. §77-1311(6) requires that, "[d]uring 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."

<sup>18</sup> Appellant's Combined Brief at 10.

The Commission finds there is no merit in this due process argument, since the Taxpayer subsequently had the opportunity for both a protest hearing before the County Board and a de novo review of the valuation and equalization of the Subject Property before the Commission.<sup>19</sup> Moreover, Mr. Bowman testified that he was unable to recall whether he attended an in-person meeting pursuant to Neb. Rev. Stat. §77-1311 on behalf of the Taxpayer for tax year 2015. Since the witness cannot recall whether he attended the meeting, the Commission finds his testimony about what might have happened if he did attend unpersuasive. The Taxpayer's due process argument has no factual or legal basis in the present case, and we reject it without further discussion.

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.<sup>20</sup> 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.

Mr. Fichter pointed out conditions that might affect the market value of the Subject Property, including some maintenance issues and the property's proximity to a low income housing development, but he 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.<sup>21</sup>

The County Board presented compelling evidence in support of its assessment. Ms. Rowe addressed the alleged lack of equalization between the valuation of the Subject Property and

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<sup>19</sup> 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 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).

<sup>20</sup> Neb. Rev. Stat. §77-112 (Reissue 2009).

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

three similar properties; both parties presented witnesses who asserted that the properties were comparable for purposes of equalization. Ms. Rowe's testimony demonstrated that the apparent discrepancies between the properties was merely a function of the approach used to value the properties. Her un rebutted testimony was that each improvement was assessed using the same income model, with a rental rate of \$12 per square foot, a vacancy and collection loss rate of 8%, an expense rate of 20%, and a capitalization rate of 8.25%, which resulted in the improvement to each property being valued at \$107 per square foot.

In summary, the Taxpayer presented some evidence of negative conditions on and around the Subject Property, but failed to provide the Commission with sufficient evidence to show how these conditions affected the value of the property, and to what dollar amount. The County Board successfully rebutted the Taxpayer's assertion that the Subject Property was not properly equalized by presenting substantial evidence that the value placed on the Subject Property was consistent the values placed upon other similar properties in the market area.

## **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 appeal of the Taxpayer is denied.

## **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 2015 is affirmed.
2. The taxable value of the Subject Property for tax year 2015 is \$1,079,100.
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 (2016 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 2015.
7. This Decision and Order is effective for purposes of appeal on April 2, 2018.<sup>22</sup>

Signed and Sealed: April 2, 2018.

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Steven A. Keetle, Commissioner

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James D. Kuhn, Commissioner

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<sup>22</sup> 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.