

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Countryside Village Inc.,
Appellant,

v.

Douglas County Board of Equalization,
Appellee.

Case Nos: 16C 0057 & 17C 0075

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

For the Appellant:

Shaun M. James,
Smith Gardner & Slusky

For the Appellee:

Jennifer D. Chrystal-Clark,
Deputy Douglas County Attorney

These appeals were heard before Commissioners Robert W. Hotz and Steven A. Keetle.

I. THE SUBJECT PROPERTY

The Subject Property is a commercial parcel located in Omaha, Douglas County, Nebraska. The parcel is improved with a 60,000 square foot neighborhood shopping center. The legal description and property record cards for the Subject Property are found at Exhibit 3 (tax year 2016) and Exhibit 4 (tax year 2017).

II. PROCEDURAL HISTORY

The Douglas County Assessor determined that the assessed value of the Subject Property was \$5,233,100 for tax years 2016 and 2017.¹ Countryside Village, Inc. (the Taxpayer) protested these assessments to the Douglas County Board of Equalization (the County Board) and requested an assessed valuation of \$4,224,000 for both tax years.² The County Board determined that the taxable value of the Subject Property for tax years 2016 and 2017 was \$5,233,100.³

The Taxpayer appealed the decisions of the County Board to the Tax Equalization and Review Commission (the Commission). The Commission held a hearing on April 3, 2019. Prior to the hearing, the parties exchanged exhibits as ordered by the Commission. The parties stipulated to the receipt of exchanged exhibits 1 through 9.

¹ Exhibit 1, 2.

² Exhibit 5:2, 6:2.

³ Exhibit 1, 2.

III. STANDARD OF REVIEW

The Commission's review of the County Board's determinations is de novo.⁴ 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

The 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 that the County Board's valuation was unreasonable or arbitrary.¹⁰

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 take notice of judicially cognizable facts and 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

⁴ See Neb. Rev. Stat. § 77-5016(8) (Reissue 2018), *Brenner v. Banner County 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 County Freeholder Bd.*, 276 Neb. 1009, 1019 (2009).

⁵ *Brenner* at 283, 811.

⁶ *Id.*

⁷ Neb. Rev. Stat. § 77-5016(9) (Reissue 2018).

⁸ *Omaha Country Club v. Douglas County Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

⁹ Cf. *Josten-Wilbert Vault Co. v. Bd. of Equal. 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 Equal. of York County*, 209 Neb. 465, 308 N.W.2d 515 (1981) (determination of equalized taxable value).

¹⁰ *Bottorf v. Clay County Bd. of Equal.*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).

¹¹ Neb. Rev. Stat. § 77-5016(8) (Reissue 2018).

it.¹² The Commission's Decision and Order shall include findings of fact and conclusions of law.¹³

IV. VALUATION & EQUALIZATION

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.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 Neb. Rev. Stat. § 77-201 and has the same meaning as assessed value.¹⁷ All real property in Nebraska subject to taxation shall be assessed as of 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

Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value.²⁰ 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.²¹ If taxable values are to be equalized, it is necessary for the Taxpayer to establish by clear and convincing evidence that the valuation placed on the Subject Property, when compared with valuations placed on other similar properties, is grossly excessive and is the

¹² Neb. Rev. Stat. § 77-5016(6) (Reissue 2018).

¹³ Neb. Rev. Stat. § 77-5018(1) (Reissue 2018).

¹⁴ Neb. Rev. Stat. § 77-112 (Reissue 2018).

¹⁵ *Id.*

¹⁶ *Omaha Country Club* at 180, 829.

¹⁷ Neb. Rev. Stat. § 77-131 (Reissue 2018).

¹⁸ See Neb. Rev. Stat. § 77-1301(1) (Reissue 2018).

¹⁹ Neb. Rev. Stat. § 77-201(1) (Reissue 2018).

²⁰ *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).

²¹ *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).

result of systematic exercise of intentional will or failure of plain legal duty, and not mere errors of judgment.²² There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity.²³

B. Summary of the Evidence

James Myers, an officer of Countryside Village Inc., testified on behalf of the Taxpayer. Myers holds multiple degrees, but he has no formal education related to the appraisal of real property. He inherited the Subject Property in 2013 and began the largest structural and aesthetic renovation in the Subject Property's history since it was built in 1953. The renovations were comprehensive, ranging from roof to sidewalk. The major structural renovations were complete before January 1, 2016. As tenants left the Subject Property, the plumbing and electrical systems were upgraded to meet then-current code requirements. These latter renovations continued through the date of the hearing. The Subject Property had an actual vacancy rate of 50% as of January 1, 2016, and an actual vacancy rate of approximately 33% as of January 1, 2017.

The County Board provided property record files (PRFs) for properties it asserted were comparable to the Subject Property. The Taxpayer asserted that these properties were not truly comparable. Myers testified that Rockbrook Village²⁴ had no lower level, was located adjacent to Interstate I-680, and the buildings were approximately 2.5 times the size of the buildings on the Subject Property. He further testified that the demographics of Rockbrook's neighborhood were different from those of the Subject Property's neighborhood because the average income in Rockbrook's neighborhood was lower. On cross-examination, Myers testified that the Subject Property was located squarely within "District 66," the Omaha Westside school district. The Taxpayer asserted that "the location for the property is very good" in the documents submitted with its protest.²⁵ Parking in the neighborhood of the Subject Property is limited. Myers testified that Rockbrook's parking area was larger and more convenient than the Subject Property's parking area.²⁶

According to Myers, patrons of the Subject Property have experienced violence and threats of violence from students at a nearby high school who were parking in stalls on Shamrock Road,

²² *Newman v. County of Dawson*, 167 Neb. 666, 670, 94 N.W.2d 47, 49-50 (1959) (Citations omitted).

²³ *Id.* at 673, 94 N.W.2d at 50.

²⁴ The property record files for Rockbrook Village can be found at Exhibit 8:14-8:51.

²⁵ Exhibit 5:2.

²⁶ Myers made reference to an aerial photograph of Rockbrook found at Exhibit 8:59.

directly to the north of the Subject Property.²⁷ The Subject Property is located between these parking stalls and the high school, and students often drive or walk across the Subject Property. Disturbances involving students have included fights, threats of physical and sexual violence, drug activity, firearm possession, and the windows of a tenant being shot out.

Myers testified that the parking available at Seventy Four Pacific Plaza, another of the County Board's proffered comparable properties was "ample."²⁸ Myers testified that a business called First Data is located near Seventy Four Pacific Plaza, which results in visits from many of its employees.

The Taxpayer offered its own proposed comparable properties. Among these was Fort Plaza,²⁹ which the Taxpayer asserted was assessed at \$69.93 per square foot,³⁰ whereas the Subject Property was assessed at \$87.22 per square foot.³¹ The Taxpayer also offered 17801 Pierce Plaza, which is much newer construction, and which was assessed at \$80.67 per square foot.³² Myers acknowledged that he had no knowledge of the vacancy rates or criminal activity for the comparable properties offered by either party.

C. Analysis

An owner who is familiar with his property and knows its worth is permitted to testify as to its value,³³ but even an expert's unsupported opinion of value is not competent evidence of the actual value of real property.³⁴ The Taxpayer did not request any specific value for the Subject Property in the course of the hearing, did not explain the basis for the value requested in its protest to the County Board, and did not provide sufficient information to quantify the monetary impact of conditions such as fights or drug possession on or near the Subject Property. Accordingly, we understand the Taxpayer's argument to be that the value placed upon the Subject Property is not equalized with other comparable properties.

²⁷ Aerial photographs of the Subject Property can be found at Exhibits 3:16 and 4:16.

²⁸ See Exhibit 8:59 and 8:67 for aerial photographs of Seventy Four Pacific Plaza.

²⁹ See Exhibit 9:1-7.

³⁰ See Exhibit 9:2, 9:4. $\$2,721,900$ total value \div 38,923 square feet = \$69.93 per square foot.

³¹ See Exhibit 4:3-4:5. $\$5,223,100 \div 60,000$ square feet = \$87.22 per square foot.

³² See Exhibit 9:21-9:25. $\$3,374,300 \div 41,830$ square feet = \$80.67.

³³ *U. S. Ecology v. Boyd County Bd. of Equal.*, 256 Neb. 7, 16, 588 N.W.2d 575, 581 (1999).

³⁴ See *McArthur v. Papio-Missouri River Natural Resources District*, 250 Neb. 96, 105, 547 N.W.2d 716, 724 (1996) ("The value of an opinion of an expert witness, or any witness, must be dependent upon and is no stronger than the facts upon which it is predicated[.]").

A comparable real property is one that is similar to the property being assessed in significant physical, functional, and location characteristics and in their contribution to value.³⁵ The Nebraska Supreme Court has held that to set the valuation of similarly situated property, i.e. comparables, at materially different levels, i.e., value per square foot, is by definition, unreasonable and arbitrary.³⁶ However, appellate courts have affirmed the Commission's findings that properties were not comparable when the record supported such a determination.³⁷ Dissimilarities preventing properties from being comparable include style, quality, size, location, improvements, and age.³⁸

The Subject Property was constructed in 1953. It is improved with two 30,000 square foot buildings, which are of good quality and average condition.³⁹ Each of the buildings also includes 4,100 square feet of average quality wood canopy and a 30,000 square foot storage basement.⁴⁰ The lot size is 219,250 square feet.⁴¹ Of the four allegedly comparable properties addressed during the Taxpayer's case-in-chief, one has ten buildings totaling more than 165,000 square feet,⁴² one has two buildings totaling 26,684 square feet,⁴³ one has a single building of 38,923 square feet,⁴⁴ and the last has one building of 41,830 square feet.⁴⁵ The lot sizes for these four properties vary significantly, from one another and from the Subject Property. The comparables offered by the County Board are located in the same assessment neighborhood as the Subject Property, but the comparables offered by the Taxpayer are not.⁴⁶ The buildings on the properties, including the Subject Property, were built in different years spanning six decades, and some of the buildings have been remodeled. The properties, including the Subject Property, all have a wide variety of different features and amenities that contribute to value.

A licensed appraiser might be able to apply adjustments and perform analysis to show how these varying qualities affect the values of the alleged comparables and the Subject Property;

³⁵ *County of Webster v. Neb. Tax Equal. and Rev. Comm.*, 296 Neb. 751, 896 N.W.2d 887 (2017).

³⁶ *Scribante v. Douglas County Board of Equalization*, 8 Neb.App. 25, 39, 588 N.W.2d 190, 199 (1999).

³⁷ See, e.g., *Bottorf v. Clay County Bd. of Equal.*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).

³⁸ *Id.*, 72nd Property LLC v. Douglas County Bd. of Equal., 10 Neb.App. 826, 638 N.W.2d 872 (2002).

³⁹ Exhibits 3:4, 3:5, 4:4, 4:5. Notably, the Property Record File does not appear to reflect the renovations described in Myers's testimony as being complete as of January 2016, which might further improve the condition rating of the Subject Property.

⁴⁰ *Id.*

⁴¹ Exhibits 3:3, 4:3.

⁴² Exhibit 8:15-8:21.

⁴³ Exhibit 8:53-8:56.

⁴⁴ Exhibit 9:2-3.

⁴⁵ Exhibit 9:16-17.

⁴⁶ Exhibits 3:4-5, 8:15-21, 9:2-3, 9:16-17. The term "neighborhood" here means a grouping of properties for the purpose of mass appraisal; the properties in question are all located several miles away from the Subject Property.

alternatively, a licensed appraiser might be able to identify genuinely comparable properties to demonstrate whether the Subject Property is correctly valued. No such expert analysis was offered by the Taxpayer in these appeals. We find that none of the alleged comparable properties offered by either party is similar enough to the Subject Property to require an adjustment of the assessed value of the Subject Property for purposes of equalization. The Taxpayer has not demonstrated that the valuation placed on the Subject Property, when compared with valuations placed on other similar properties, is grossly excessive and is the result of systematic exercise of intentional will or failure of plain legal duty.⁴⁷

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 the reasons set forth above, the appeals of the Taxpayer are denied.

VI. ORDER

IT IS ORDERED THAT:

1. The decisions of the Douglas County Board of Equalization determining the taxable value of the Subject Property for tax years 2016 and 2017 are affirmed.⁴⁸
2. The taxable value of the Subject Property for tax years 2016 and 2017 is:

Land	\$1,060,800
<u>Improvements</u>	<u>\$4,172,300</u>
Total	\$5,233,100

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 (Reissue 2018).
4. Any request for relief, by any party, which is not specifically provided for by this Decision and Order is denied.

⁴⁷ See *Newman*, supra.

⁴⁸ Taxable 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.

5. Each party is to bear its own costs in this proceeding.
6. This Decision and Order shall only be applicable to tax years 2016 and 2017.
7. This Decision and Order is effective for purposes of appeal on August 20, 2020.⁴⁹

Signed and Sealed: August 20, 2020

Robert W. Hotz, Commissioner

SEAL

Steven A. Keetle, Commissioner

⁴⁹ Appeals from any decision of the Commission must satisfy the requirements of Neb. Rev. Stat. § 77-5019 (Reissue 2018) and other provisions of Nebraska Statutes and Court Rules.