

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

17810 Welch Plaza Omaha-NE
LLC c/o, Hy-Vee Food Stores
Real Estate Dept.,

Case Nos. 17C 0094 & 18C 0152

Hy-Vee, Inc.,

Case Nos. 17C 0095, 18C 0148,
19C 0031, 19C 0032, 19C 0033,
19C 0034, 19C 0035, 19 0036 &
19C 0037

10808 Fort St. Omaha LLC, c/o
Hy-Vee Food Stores Real Estate
Department,

Case No. 17C 0096,

WFC Applewood Station LLC,
c/o Westwood Financial Corp. &
Hy-Vee,

Case Nos. 17C 0097 & 18C 0149

8809 West Center Omaha, c/o
Hy-Vee Inc.,

Case Nos. 17C 0098 & 18C
0147

Omaha Gerp LLC, c/o Hy-Vee
Inc.,

Case Nos. 17C 0099 & 18C 0150

Cole GS Omaha NE LLC c/o
Hy-Vee Inc.,

Case No. 18C 0151

Appellants,

v.

Douglas County Board of
Equalization,

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

Appellee.

For the Appellant:
Max L. Rodenburg,
Rembolt Ludtke LLP

For the Appellee:
Jennifer D. Chrystal-Clark,
Deputy Douglas County
Attorney

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

I. THE SUBJECT PROPERTY

The Subject Property in Case Nos. 17C 0094, 18C 0152 and 19C 0031 is a commercial parcel located at 17810 Welch Plaza, Omaha, Douglas County, Nebraska. The parcel is improved with a 77,432 square foot supermarket. The legal description of the parcel and the property record files (PRF) for tax years 2017, 2018 and 2019 for the Subject Property are found at Exhibits 38, 39 and 40 respectively.

The Subject Property in Case Nos. 17C 0095, 18C 0148 and 19C 0036 is a commercial parcel located at 14591 Stony Brook Blvd, Omaha, Douglas County, Nebraska. The parcel is improved with an 84,242 square foot supermarket. The legal description of the parcel and the PRF for tax years 2017, 2018, and 2019 for the Subject Property are found at Exhibits 21, 22 and 27 respectively.

The Subject Property in Case Nos. 17C 0096, 18C 0151 and 19C 0034 is a commercial parcel located at 10808 Fort Street, Omaha, Douglas County, Nebraska. The parcel is improved with a 70,434 square foot supermarket. The legal description of the parcel and the PRF for tax years 2017, 2018, and 2019 for the Subject Property are found at Exhibits 29, 36, and 25 respectively.

The Subject Property in Case Nos. 17C 0097, 18C 0149, and 19C 0037 is a commercial parcel located at 9707 Q Street, Omaha, Douglas County, Nebraska. The parcel is improved with a 71,640 square foot supermarket. The legal description of the parcel and the PRF for tax years 2017, 2018, and 2019 for the Subject Property are found at Exhibits 30, 31, and 28 respectively.

The Subject Property in Case Nos. 17C 0098, 18c 0147, and 19C 0033 is a commercial parcel located at 8801 West Center Road, Omaha, Douglas County, Nebraska. The parcel is improved with a 62,808 square foot supermarket. The legal description of the parcel and the PRF for tax years 2017, 2018, and 2019 for the Subject Property are found at Exhibits 32, 33, and 24 respectively.

The Subject Property in Case Nos. 17C 0099, 18C 0150, and 19C 0035 is a commercial parcel located at 7910 Cass Street, Omaha, Douglas County, Nebraska. The parcel is improved with an 80,557 square foot supermarket. The legal description of the parcel and the PRF for tax years 2017, 2018, and 2019 for the Subject Property are found at Exhibits 34, 35, and 26 respectively.

The Subject Property in Case No. 19C 0032 is a commercial parcel located at 1000 s 178th Street, Omaha, Douglas County, Nebraska. The parcel is improved with an 85,198 square foot supermarket. The legal description of the parcel and the PRF for tax year 2019 is found at Exhibit 85.

II. PROCEDURAL HISTORY

In each of the appeals, the Douglas County Assessor (County Assessor) determined the assessed value of the Subject Properties and Hy-Vee, Inc (Taxpayer) protested that determination to the Douglas County Board of Equalization (County Board). The County Board then set the value of the Subject Properties following the protests by the Taxpayer. The following table summarizes the original determination by the County Assessor, the value requested by the Taxpayer, and the decision of the County Board in each appeal:

Case No.	Assessor	Taxpayer	County Board	Exhibits	
17C 0094	\$6,034,200	\$5,101,400	\$6,034,200	E1	E19:13
18C 0152	\$6,411,400	\$5,101,400	\$6,411,400	E2	E20:12
19C 0031	\$6,411,400	\$5,101,400	\$6,411,400	E3	E23:12
17C 0095	\$6,564,900	\$5,897,000	\$6,564,900	E4	E21:13
18C 0148	\$6,975,200	\$5,897,000	\$6,975,200	E5	E22:13

Case No.	Assessor	Taxpayer	County Board	Exhibits
19C 0036	\$6,975,200	\$5,550,100	\$6,975,200	E6 E27:13
17C 0096	\$5,488,900	\$4,030,400	\$5,488,900	E7 E29:12
18C 0151	\$5,831,900	\$4,030,400	\$5,831,900	E8 E36:15
19C 0034	\$5,831,900	\$3,678,200	\$5,831,900	E9 E25:15
17C 0097	\$5,582,800	\$4,340,500	\$5,582,800	E10 E30:11
18C 0149	\$5,931,800	\$4,340,500	\$5,931,800	E11 E31:13
19C 0037	\$5,931,800	\$4,340,500	\$5,931,800	E12 E28:13
17C 0098	\$4,282,800	\$3,594,000	\$4,282,800	E13 E32:13
18C 0147	\$5,200,500	\$3,594,000	\$5,200,500	E14 E33:13
19C 0033	\$5,200,500	\$3,594,000	\$5,200,500	E15 E24:13
17C 0099	\$7,274,300	\$5,517,900	\$7,274,300	E16 E34:17
18C 0150	\$7,357,900	\$5,517,900	\$7,357,900	E17 E35:19
19C 0035	\$7,357,900	\$5,517,900	\$7,357,900	E18 E26:19
19C 0032	\$7,054,400	\$5,613,000	\$7,054,400	E76 E85:11

The Taxpayer appealed the decisions of the County Board to the Tax Equalization and Review Commission (Commission). The Commission held a hearing on March 4, 2021. 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 85

III. STANDARD OF REVIEW

The Commission’s review of the determination by a County Board of Equalization is de novo.¹ When the Commission considers an appeal

¹ 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).

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.”²

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.³

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.⁴ Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.⁵

A Taxpayer must introduce competent evidence of actual value of the Subject Property in order to successfully claim that the Subject Property is overvalued.⁶ 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.⁷

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

² *Brenner* at 283, 811.

³ *Id.*

⁴ Neb. Rev. Stat. §77-5016(9) (Reissue 2018).

⁵ *Omaha Country Club v. Douglas County Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

⁶ 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).

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

questions necessary to determine taxable value of property as it hears an appeal or cross appeal.”⁸ 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.”⁹ The Commission’s Decision and Order shall include findings of fact and conclusions of law.¹⁰

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.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

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

⁹ Neb. Rev. Stat. §77-5016(6) (Reissue 2018).

¹⁰ Neb. Rev. Stat. §77-5018(1) (Reissue 2018).

¹¹ Neb. Rev. Stat. §77-112 (Reissue 2018).

¹² *Id.*

¹³ *Omaha Country Club* at 180, 829.

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 and Analysis

The Taxpayer offered the testimony of Thomas Scaletty, MAI,¹⁷ a General Certified Commercial Real Estate Appraiser in the states of Nebraska, Iowa, Kansas, Missouri, and Texas.¹⁸ Mr. Scaletty inspected and appraised each of the seven Subject Properties on behalf of the Taxpayer and prepared a Summary Appraisal Report with effective dates of January 1, for each of the tax years at issue.¹⁹ Mr. Scaletty testified that all of his reports were prepared in conformity with the requirements of the Uniform Standards of Professional Appraisal Practice (USPAP).

Mr. Scaletty has extensive experience appraising commercial properties and has previously appraised between seventy-five to one hundred Hy-Vee properties. For the appraisals of each of the Subject Properties, Mr. Scaletty performed and considered the cost approach, the sales comparison approach, and the income approach to value. Mr. Scaletty testified that he relied most heavily on the sales comparison approach when determining his opinion of value, relying next heavily on the income approach and placed little or no weight on the cost approach. In addition to inspecting the Subject Properties Mr. Scaletty testified that he reviewed sales data and market data, including data from the assessor's office, zoning information, lease data, floor plans, sales data services, interviews with property buyers and sellers; he also consulted with other appraisers in the area. During his testimony and in the appraisal reports, Mr. Scaletty stated that he did not rely on

¹⁴ Neb. Rev. Stat. §77-131 (Reissue 2018).

¹⁵ See Neb. Rev. Stat. §77-1301(1) (Reissue 2018).

¹⁶ Neb. Rev. Stat. §77-201(1) (Reissue 2018).

¹⁷ The MAI designation is the highest designation given by the Appraisal Institute.

¹⁸ See, E46:89

¹⁹ E37, E42, E46, E50, E54, E58, E84.

sales or rental rate data from the Subject Properties because they were influenced by the build-to-suit sale/leaseback structuring of the leases to Hy-Vee.

Based on his analysis of the relevant data, and relying primarily on the sales comparison with reference to the income and cost approaches, Mr. Scaletty appraised the Subject Properties as follows:

Case No	Address	Reconciled Value	Exhibit
17C 0094	17810 Welch Plaza	\$4,660,000	E37:90
18C 0152	17810 Welch Plaza	\$4,860,000	E37:90
19C 0031	17810 Welch Plaza	\$4,860,000	E37:90
17C 0095	14591 Stoney Brook	\$5,660,000	E81:89
18C 0148	14591 Stoney Brook	\$5,870,000	E42:89
19C 0036	14591 Stoney Brook	\$5,870,000	E42:89
17C 0096	10808 Fort	\$4,230,000	E78:88
18C 0151	10808 Fort	\$4,200,000	E46:87
19C 0034	10808 Fort	\$4,200,000	E46:87
17C 0097	9707 Q St.	\$4,300,000	E83:89
18C 0149	9707 Q St.	\$4,310,000	E50:88
19C 0037	9707 Q St.	\$4,320,000	E50:88
17C 0098	8801 W. Center	\$3,770,000	E80:89
18C 0147	8801 W. Center	\$3,870,000	E54:88
18C 0033	8801 W. Center	\$4,010,000	E54:88
17C 0099	7910 Cass	\$5,730,000	E82:91
18C 0150	7910 Cass	\$6,080,000	E58:91
19C 0035	7910 Cass	\$6,080,000	E58:91
19C 0032	100 S 178 th	\$5,920,000	E84:84

The County Board offered the testimony of Linda Rowe, the commercial real estate manager for the County Assessor. Ms. Rowe is responsible for the appraisal of commercial properties in Douglas County, including the Subject Property. Ms. Rowe holds a State Assessor's certificate and is a member of the International Association of Assessing Officials. Ms. Rowe is not a licensed appraiser. Ms. Rowe

testified about the methodology used in the assessments. Ms. Rowe testified that she relied on the income approach when assessing the Subject Properties. Ms. Rowe stated that she did not use the sales comparison approach because she did not have sufficient sales of comparable properties that would attract the same first-generation tenants that the Subject Properties would.

In valuation appeals to the Commission, a presumption exists that a county board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its actions.²⁰ The presumption disappears when competent evidence to the contrary is presented.²¹ When an independent appraiser using professionally approved methods of mass appraisal certifies that an appraisal was performed according to professional standards, the appraisal is considered competent evidence under Nebraska law.²² In the present appeals, the Taxpayer offered appraisals by an independent appraiser certified as being performed according to professional standards for tax years 2017, 2018 and 2019, and has overcome the presumption in favor of the determination of the County Board.

Ms. Rowe and Mr. Scaletty each performed a valuation of the Subject Properties using the income approach, although Mr. Scaletty relied primarily on the sales comparison approach. Comparing the income approach performed by Ms. Rowe to the income approach performed by Mr. Scaletty, the main difference was in the rental rate utilized for determining the potential gross income. The rental rates offered by the County Board range from \$8.00 per square foot to \$22.47 per square foot but Ms. Rowe testified that she had not seen any of the

²⁰ See Neb. Rev. Stat. § 77-5016(9); *JQH La Vista Conf. Ctr. v. Sarpy Cty. Bd. of Equal.*, 285 Neb. 120, 825 N.W.2d 447 (2013); *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283-284, 276 N.W.2d 802, 811 (2008) note 7 (citing *Ideal Basic Indus. v. Nuckolls Cty. Bd. of Equal.*, 231 Neb. 653, 654-55, 437 N.W.2d 501, 502 (1989)).

²¹ *JQH La Vista Conf. Ctr. v. Sarpy Cty. Bd. of Equal.*, 285 Neb. 120, 825 N.W.2d 447 (2013), note 34.

²² *JQH La Vista Conf. Ctr. Development LLC v. Sarpy Cty. Bd. of Equal.*, 285 Neb. 120, 825 N.W.2d 447 (2013). See also: *U.S. Ecology v. Boyd County Bd. of Equal.*, 256 Neb. 7, 588 N.W.2d 575 (1999).

leases upon which those rental rates were based.²³ Mr. Scaletty obtained rental rates from several different properties and adjusted them to account for differences between the Subject Properties and the rental comparables.²⁴ From the exhibits and testimony presented Ms. Rowe's determination of rental rate appears to be based on a conversation with a buyer in a sale leaseback transaction. The Commission finds the rental comparables analyzed by Mr. Scaletty to determine the appropriate rental rate more persuasive than the rental rates applied by Ms. Rowe.

We find Mr. Scaletty's reconciled values for the Subject Properties persuasive. His sales comparison analysis supports the reliability of his conclusions, and the cost and income approaches to value included in the appraisal reports further support his reconciled values. Additionally, his experience performing appraisals of stand-alone commercial retail facilities in the marketplace gives the Commission confidence in his ability to select comparable properties and to determine which values to utilize when data analysis yields a range of potential values. Further, his analysis and testimony regarding the unique nature of the sales and rental data for the Subject Properties persuades the Commission that without adjustment to account for the value of the leases they do not accurately reflect market values. The Commission finds that Mr. Scaletty's opinion accurately reflects the market value of the Subject Properties for tax years 2017, 2018 and 2019. These opinions, together with the appraisal reports, constitute competent evidence to rebut the presumption in favor of the County Board's determinations, and furthermore constitute clear and convincing evidence that the County Board's determinations were unreasonable for tax years 2017, 2018 and 2019, as to all of the Subject Properties.

²³ E74

²⁴ See, E46:75

V. CONCLUSION

The Commission finds that there is 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 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/the decision of the County Board is vacated and reversed.

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 2017, 2018 and 2019 are vacated and reversed.²⁵
2. The taxable values of the Subject Property for tax year 2017 are:

Case No	Taxable Value
17C 0094	\$ 4,660,000
17C 0095	\$ 5,660,000
17C 0096	\$ 4,230,000
17C 0097	\$ 4,300,000
17C 0098	\$ 3,770,000
17C 0099	\$ 5,730,000

3. The taxable values of the Subject Property for tax year 2018 are:

Case No	Taxable Value
18C 0147	\$ 3,870,000
18C 0148	\$ 5,870,000
18C 0149	\$ 4,310,000
18C 0150	\$ 6,080,000
18C 0151	\$ 4,200,000

²⁵ 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.

Case No	Taxable Value
18C 0152	\$ 4,860,000

4. The taxable values of the Subject Property for tax year 2019 are:

Case No	Taxable Value
19C 0031	\$ 4,860,000
19C 0032	\$ 5,920,000
19C 0033	\$ 4,010,000
19C 0034	\$ 4,200,000
19C 0035	\$ 6,080,000
19C 0036	\$ 5,870,000
19C 0037	\$ 4,320,000

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 (Reissue 2018).
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 year 2017, 2018 and 2019 respectively.
9. This Decision and Order is effective for purposes of appeal on December 1, 2022.²⁶

Signed and Sealed: December 1, 2022

Steven A. Keetle, Commissioner

SEAL

James D. Kuhn, Commissioner

²⁶ 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.