

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

HV Grand Island Portfolio, L.P.,
Appellant,

v.

Hall County Board of Equalization,
Appellee.

Case Nos: 17C 0101 & 18C 0143

Decision and Order Reversing the Decisions
of the Hall County Board of Equalization

For the Appellant:
Max Rodenburg,
Rembolt Ludtke LLP

For the Appellee:
Sarah Carstensen,
Deputy Hall 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 Grand Island, Hall County, Nebraska. The parcel is improved with an 86,616 square foot Hy-Vee grocery store. The legal description and property record cards for the Subject Property are found at Exhibit 4 (tax year 2017) and Exhibit 5 (tax year 2018).

II. PROCEDURAL HISTORY

The Hall County Assessor determined that the assessed value of the Subject Property was \$6,072,863 for tax year 2017 and \$6,088,711 for tax year 2018.¹ HV Grand Island Portfolio, L.P. (the Taxpayer) protested this assessment to the Hall County Board of Equalization (the County Board) and requested an assessed valuation of \$5,624,400 for both tax years.² The County Board determined that the taxable value of the Subject Property was \$6,072,863 for tax year 2017 and \$6,088,711 for tax year 2018.³

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 1, 2019, with Commissioner Hotz presiding. Prior to the hearing, the parties exchanged exhibits and submitted a pre-hearing conference report, as ordered by the Commission. The parties stipulated to the admission of Exhibits 1 through 17. Exhibits 18 through 21 were offered by the County Board,

¹ Exhibit 1:1, 2:1.

² Exhibit 6:1, 7:1.

³ Exhibit 1:1, 2:1.

but they were not admitted because they were not exchanged in the manner required by the Commission's Order for Hearing, as discussed in full on the record.

III. STANDARD OF REVIEW

The Commission's review of the County Board's determinations is de novo.⁴ A presumption exists that the County Board "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 the 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,

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).

technical, or scientific facts within its specialized knowledge, and it 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. 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.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 section 77-201 of the Nebraska Statutes 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

B. Summary of the Evidence

Thomas Scaletty testified on behalf of the Taxpayer. Scaletty is a Certified General Appraiser in Nebraska and several other states. He has an MAI designation from the Appraisal Institute. He has been involved in the appraisal of commercial real estate for approximately 20 years, during which time he has appraised 40 to 50 Hy-Vee grocery stores, among other commercial buildings.

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).

Scaletty performed fee appraisals of the Subject Property in December 2018, with effective dates of January 1, 2017, and January 1, 2018.²⁰ Scaletty personally inspected the property on December 2, 2018; he also inspected the neighborhood and competitive properties.

Scaletty conducted a cost approach analysis, which operates by determining the replacement cost new (RCN) of a property and making deductions for depreciation caused by physical deterioration or functional and economic obsolescence. Scaletty determined that the land component of the Subject Property had an actual value of \$1,900,000 based on sales of unimproved lots in the market area of the Subject Property.²¹ He determined that the RCN was \$9,024,435.²² He then determined that the Subject Property had depreciation of \$860,625 for short-lived items, \$1,969,234 for long-lived items, and \$4,034,576 due to external obsolescence: a total of \$6,864,435 in depreciation and obsolescence.²³ Accordingly, the value indicated by Scaletty's cost approach was \$4,060,000.²⁴

Scaletty also utilized the sales comparison approach to value. He selected eight retail properties of similar use, size, and age for comparison.²⁵ These comparable properties were primarily located in communities with characteristics similar to Grand Island.²⁶ Scaletty made adjustments for changing market conditions, age and condition, community household income, proximity to other businesses, and "leakage" (loss of business to similar retailers in nearby communities).²⁷ The actual value indicated by Scaletty's sales comparison approach was \$3,900,000.²⁸

Scaletty also used the income approach to value. He selected market and contract rent comparables on the basis of similarity to the Subject Property. He calculated a total potential income of \$551,746 per year, an effective gross income of \$496,571 per year, and a net operating income of \$359,024 per year.²⁹ After analyzing market factors and risk, he applied a

²⁰ I.e., the effective dates of assessment for the tax years at issue. As such, the appraisals resulted in "the estimation of the retrospective market value for the subject property in fee simple estate" as of each effective date. See, Ex. 17:2.

²¹ Exhibit 17:49, testimony of Scaletty.

²² Id.

²³ Id.

²⁴ (\$9,024,435 RCN + \$1,900,000 land – \$6,864,435 depreciation).

²⁵ Exhibit 17:50-57.

²⁶ Exhibit 17:55.

²⁷ Exhibit 17:56.

²⁸ Exhibit 17:57.

²⁹ See Exhibit 17:68-70 for detail of the values and rates employed in Scaletty's income approach.

capitalization rate of 8.5%.³⁰ The actual value indicated by Scaletty's income approach was \$4,220,000.³¹

To reconcile the value indicated by the three approaches, Scaletty determined that the sales comparison approach was most indicative of value due to the single tenant nature of the Subject Property, and he gave the sales comparison approach 60% weight.³² He determined that the income approach was the most property specific, and gave the income approach 40% weight. He gave the cost approach "moderate consideration" but afforded it no weight as an indicator of value because of the age, market situation, and significant depreciation and obsolescence factors for the Subject Property.³³ Specifically, Scaletty observed:

[The cost approach] is particularly applicable when the property being appraised involves new improvements which represent the highest and best use of the land, or when relatively unique or specialized improvements are located on the site for which there exists no comparable properties in the marketplace. In this instance, the subject improvements were constructed in 2007 and there was adequate market data available for comparison.³⁴

Scaletty's final opinion of value for the Subject Property was \$4,030,000 for each of the two tax years at issue.³⁵

Kristi Wold, Hall County Assessor, testified on behalf of the County Board. Wold holds the State Assessor Certificate. She began working in the County Assessor's office in 2007. She subsequently served as Deputy County Assessor in Greeley County. She was appointed Hall County Assessor in October 2017, and she was elected to continue serving in the position of Hall County Assessor/Register of Deeds in November 2018.

Wold acknowledged in her testimony that the value set for the Subject Property in tax years 2017 and 2018 was identical to the value indicated by a cost approach analysis found in the Subject Property's property record file.³⁶ However, because Wold was working in Greeley County on and in the months prior to January 1, 2017, she had no direct knowledge of how the variables used in the cost approach (e.g., RCN, physical and functional depreciation, economic depreciation) were calculated for tax year 2017. Wold further testified that these values were "carried over" to tax year 2018. As a result, she had no direct knowledge of how the variables

³⁰ Exhibit 17:74.

³¹ Exhibit 17:76.

³² I.e., $\$3,900,000 \times 60\% + \$4,220,000 \times 40\%$, rounded. See Exhibit 17:78-79 for Scaletty's reconciliation analysis.

³³ Exhibit 17:78.

³⁴ Id.

³⁵ Exhibit 17:79.

³⁶ Exhibit 4:2 (2017), Exhibit 5:2 (2018).

were calculated for tax year 2018 either. Nonetheless, Wold believed that the values set for the Subject Property for both tax years was equalized with similar properties on the basis of an analysis of five sales from Grand Island, Columbus, and Norfolk, Nebraska.³⁷

Darrel Stanard (Stanard) also testified on behalf of the County Board. Stanard has been a licensed appraiser for more than 30 years; additionally, he has previously worked as a property manager and owned a grocery store. He is currently employed by Stanard Appraisal Company and holds the State Assessor Certificate. Stanard Appraisal has a contract with the County Board to perform the referee work associated with property tax valuation protests.³⁸ Darrel Stanard was not the referee for the Taxpayer's protests; the referee was Shane Stanard or Mark Stanard and the referee coordinator was Mark Stanard.³⁹ For both of the protests, the County Board followed the recommendations of the referee and referee coordinator.⁴⁰

Although he did not formally serve as referee, Stanard was involved in the review of the Taxpayer's protests for tax years 2017 and 2018. In each tax year, the Taxpayer's protest information was submitted by J.W. Chatam and Associates, "Real Estate Appraisers and Ad Valorem Tax Consultants" (Chatam).⁴¹ Chatam submitted information including comparable sales, primarily from out-of-state, and an income approach analysis indicating a value of \$5,624,400 for both tax years.⁴² However, both protests incorrectly listed the square footage of the improvement component of the Subject Property at 80,349 square feet⁴³ as opposed to 86,616 square feet.⁴⁴ Upon noticing this error, Stanard (or Mark Stanard) performed an income approach analysis using the rental rate, vacancy and collection loss rate, expenses, and capitalization rate proposed by Chatam, but with the correct square footage.⁴⁵ This analysis indicated a value of \$6,063,125 for both tax years, which was within \$25,000 of the assessed value for each tax year. After reviewing the results of this income approach and local sales data, the referees concluded that the Subject Property was correctly valued and equalized, so they recommended no

³⁷ The list of comparable sales is found at Exhibit 9:1.

³⁸ Neb. Rev. Stat. § 77-1502.01 authorizes county boards of equalization to appoint referees to conduct hearings on property assessment protests. After conducting the hearing, the referee transmits his or her findings or recommendations to the county board, which may adopt the referee's recommendation, make an alternative order, or order additional hearing.

³⁹ Exhibit 8:1, 8:14. The role of the referee coordinator is not defined by law, but counties that appoint referees commonly use a referee coordinator to review and approve the work of the referees.

⁴⁰ Compare Exhibits 1 and 2 with Exhibit 8.

⁴¹ Exhibit 6:5. Exhibit 6 is the 2017 protest information packet, and Exhibit 7 is the 2018 protest information packet.

⁴² Exhibit 6:4, 7:8.

⁴³ Exhibit 6:3, 7:3.

⁴⁴ The parties and the documentary evidence agreed that 86,616 was the correct square footage.

⁴⁵ Testimony of Stanard, see also Exhibit 8:19.

adjustment by the County Board for either tax year.⁴⁶ Stanard had no additional information on the methodology originally used by the County Assessor to determine the value of the Subject Property for tax years 2017 or 2018, but at the time of the hearing he continued to believe that the available information suggested that the assessed values were appropriate and equalized.

C. Analysis

As discussed above, the Taxpayer must meet a dual burden of persuasion to obtain relief. First, the Taxpayer must produce competent evidence to rebut the presumption in favor of the County Board's determination. Under Nebraska law, 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.⁴⁷ Accordingly, we find that the presumption has been rebutted. With the presumption rebutted, the burden remains on the Taxpayer to demonstrate that the County Board's decision was arbitrary or unreasonable.

The County Assessor relied upon the cost approach in determining the assessed value of the Subject Property, and the fact that neither Wold nor Stanard had direct knowledge of how the variables in the cost approach were determined significantly reduced the probative value of the County Assessor's cost approach. Although the decisions of the County Board relied on additional analysis by Stanard and the referees, the value it determined for both tax years was identical to the value indicated by the County Assessor's cost approach.

Substantial differences exist between the cost approach performed by the County Assessor and the cost approach performed by Scaletty.⁴⁸ These differences point to a problem with the County Assessor's methodology: the cost approach is not well suited to determining the value the Subject Property. As Scaletty observed, the cost approach is best suited to determining the value of improvements that are either new or unique within the market. It follows that the cost approach is less reliable than the other approaches as an indicator of actual value due to the age

⁴⁶ Exhibit 8:8, 8:18.

⁴⁷ *JQH La Vista Conference Center Development LLC v. Sarpy County Board of Equalization*, 285 Neb. 120, 825 N.W.2d 447 (2013).

⁴⁸ For example, the County Assessor determined that the total RCN of the improvement component of the Subject Property was \$6,323,444, but Scaletty determined that it was \$9,024,435, a difference of more than 2.7 million dollars. Similarly, the County Assessor determined that the total depreciation (physical, functional, and economic) was \$1,863,928 for tax year 2017 and \$1,848,080 for tax year 2018, but Scaletty determined that the total depreciation (including obsolescence) was \$6,864,435, due primarily to Scaletty's conclusion that speculative development of a property like the Subject Property was not feasible.

of the Subject Property and the fact that grocery stores and similar buildings are not unique within the market.

As for the income and sales comparison approaches, the abbreviated versions of those approaches applied by Stanard or Stanard Appraisal were intended to confirm or reject the accuracy of the value already determined by the County Assessor utilizing the cost approach. The sales comparison approach applied by the referees, for example, did not make any adjustments to account for differences between the comparable sales and the Subject Property.⁴⁹ Similarly, the income approach applied by the referees relied upon the rental, expense, and capitalization rates suggested by Chatam, whereas the income approach applied by Scaletty included detailed analysis of each factor based on market-derived data. It is in details such as adjusting comparable sales and analyzing market data that the specificity available in a fee appraisal and the professional judgment of a qualified, experienced appraiser such as Scaletty are most useful in determining value. Accordingly, we conclude that Scaletty's appraisal report and supporting testimony constitute clear and convincing evidence that the determinations of value by the County Board were arbitrary or unreasonable, and we conclude that the value of the Subject Property is \$4,030,000, as indicated by Scaletty's appraisal, for each of the tax years at issue.

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 decisions were arbitrary or unreasonable.

For the reasons set forth above, the decisions of the County Board should be vacated and reversed.

⁴⁹ See Exhibit 9:1.

VI. ORDER

IT IS ORDERED THAT:

1. The decisions of the Hall County Board of Equalization determining the taxable value of the Subject Property for tax years 2017 and 2018 are vacated and reversed.⁵⁰
2. The taxable value of the Subject Property for tax year 2017 is \$4,030,000.
3. The taxable value of the Subject Property for tax year 2018 is \$4,030,000.
4. This Decision and Order, if no appeal is timely filed, shall be certified to the Hall County Treasurer and the Hall County Assessor, pursuant to Neb. Rev. Stat. § 77-5018 (Reissue 2018).
5. Any request for relief, by any party, which is not specifically provided for by this Decision and Order is denied.
6. Each party is to bear its own costs in this proceeding.
7. This Decision and Order shall only be applicable to tax years 2017 and 2018.
8. This Decision and Order is effective for purposes of appeal on August 19, 2020.⁵¹

Signed and Sealed: August 19, 2020

Robert W. Hotz, Commissioner

SEAL

Steven A. Keetle, Commissioner

⁵⁰ 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.

⁵¹ 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.