

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Genesis Health Clubs of Midwest, LLC /
Realty Income Properties 25,
Appellant,

v.

Douglas County Board of Equalization,
Appellee.

Case Nos: 17C 0358, 17C 0361, 17C 0362,
18C 0336, 18C 0337, 18C 0338, 18C 0340,
19C 0141, 19C 0142 & 19C 0143

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

For the Appellant:

Jarrold P. Crouse,
Baylor Evnen Curtiss Gruit & Witt, LLP

For the Appellee:

Jennifer D. Chrystal-Clark,
Deputy Douglas County Attorney

This Decision and Order is amended to correct a typographical error. In the original order, Case No. 18C 0337 was listed as Case No. 18C 0377 at some points.

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

I. THE SUBJECT PROPERTIES

The Subject Property in Case Nos. 17C 0358, 18C 0337, and 19C 0142 is a commercial parcel located at 14651 Sprague Street, Omaha, Douglas County, Nebraska. The parcel is improved with a 48,580 square foot fitness center. The legal description of the parcel and Property Record File (PRF) for tax years 2017, 2018 and 2019 for the Subject Property are found at Exhibits 11, 12, and 13.

The Subject Property in Case Nos. 17C 0361 and 18C 0338 is a commercial parcel located at 4007 S 145 Plaza, Omaha, Douglas County, Nebraska. The parcel is improved with a 35,303 square foot fitness center. The legal description of the parcel and PRF for tax years 2017 and 2018 for the Subject Property are found at Exhibits 14 and 15.

The Subject Property in Case Nos. 17C 0362, 18C 0340, and 19C 0141 is a commercial parcel located at 7777 Cass St., Omaha, Douglas County, Nebraska. The parcel is improved with a 37,966 square foot fitness center. The legal description of the parcel and PRF for tax years 2017, 2018 and 2019 for the Subject Property are found at Exhibits 16, 17, and 18.

The Subject Property in Case Nos. 18C 0336 and 19C 0143 is a commercial parcel located at 1212 N 102 Street, Omaha, Douglas County, Nebraska. The parcel is improved with a 97,926 square foot fitness center. The legal description of the parcel and PRF for tax years 2018 and 2019 for the Subject Property are found at Exhibits 19 and 20.

II. PROCEDURAL HISTORY

In each of the appeals, the Douglas County Assessor (the County Assessor) determined the assessed value of a parcel of the Subject Property and Genesis Health Clubs (the Taxpayer) protested that determination to the Douglas County Board of Equalization (the 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 0358 | \$6,076,100 | \$4,629,400 | \$6,067,100 | E1, E11:16 |
| 18C 0337 | \$6,220,800 | \$4,629,400 | \$6,220,800 | E2, E12:14 |
| 19C 0142 | \$10,228,900 | \$5,555,300 | \$10,228,900 | E3, E13:17 |
| 17C 0361 | \$3,808,100 | \$2,859,500 | \$3,808,100 | E4, E14:10 |
| 18C 0338 | \$3,808,100 | \$2,859,900 | \$3,808,100 | E5, E15:10 |
| 17C 0362 | \$6,106,500 | \$3,617,900 | \$6,106,500 | E6, E16:13 |
| 18C 0340 | \$8,456,800 | \$3,617,900 | \$8,456,800 | E7, E17:15 |
| 19C 0141 | \$8,456,800 | \$3,671,900 | \$8,456,800 | E8, E18:13 |
| 18C 0336 | \$5,285,900 | \$3,966,000 | \$5,285,900 | E9, E19:12 |
| 19C 0143 | \$5,285,900 | \$3,966,000 | \$5,285,900 | E10, E20:14 |

The Taxpayer appealed the decisions of the County Board to the Tax Equalization and Review Commission (the Commission). The Commission held a hearing on February 20, 2020. Prior to the hearing, the parties exchanged exhibits; the parties stipulated to the receipt of exchanged exhibits 1-33, 35, and 36. Exhibits 34 and 37 were marked but not offered or received.

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 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

The Taxpayer must introduce competent evidence of the 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 questions necessary to determine taxable value of property as it hears an appeal or

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).

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

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 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

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.

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).

The Taxpayer offered the testimony of Thomas Scaletty, MAI,¹⁷ a Certified General Real Property Appraiser in the states of Nebraska, Iowa, Kansas, Missouri, and Texas. Mr. Scaletty inspected and appraised each of the four 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.¹⁸ Mr. Scaletty testified that all of his reports were prepared in conformity with the requirements of the Uniform Standards of Professional Appraisal Practice (USPAP).

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 placing little or no reliance on the cost approach. 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 sales or rental rate data from the Subject Properties because his verification of that data indicated that the sales were influenced by the inclusion of personal property and gym memberships, litigation, inclusion in a multiple state/multiple parcel transaction and assumption of leases from a prior owner.¹⁹

Based on his analysis, and relying primarily on the sales comparison approach, Mr. Scaletty appraised the Subject Properties as follows:

| Case No. | Address | Reconciled Value | Exhibit |
|-----------------|----------------|-------------------------|----------------|
| 17C 0358 | 14651 Sprague | \$3,430,000 | E28:89 |
| 18C 0337 | 14651 Sprague | \$3,550,000 | E28:89 |
| 19C 0142 | 14651 Sprague | \$3,550,000 | E28:89 |
| 17C 0361 | 4007 S 145 Pa | \$2,370,000 | E21:89 |
| 18C 0338 | 4007 S 145 Pa | \$2,440,000 | E21:89 |
| 17C 0362 | 7777 Cass | \$2,930,000 | E23:89 |
| 18C 0340 | 7777 Cass | \$3,000,000 | E23:89 |
| 19C 0141 | 7777 Cass | \$3,020,000 | E23:89 |
| 18C 0336 | 1212 N 102 | \$3,940,000 | E22:93 |
| 19C 0143 | 1212 N 102 | \$3,940,000 | E22:93 |

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

¹⁸ E21, E22, E23, E24.

¹⁹ See, e.g. E28:13.

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 including the Subject Property. She holds a State Assessor's certificate, but she is not a licensed appraiser. Ms. Rowe testified about the methodology used in the assessments. Ms. Rowe testified that due to the unique nature of the Subject Properties as fitness centers, the cost approach would be the only approach to value to use. Ms. Rowe testified that while she didn't conduct a sales comparison approach to value, the sales of the Subject Properties and the rental rates for the Subject Properties supported her determination of value.

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.

The Property Record Files (PRFs) presented by the County Board indicate that in Case No. 18C 0337 (14651 Sprague), 17C 0361 & 18C 0338 (4007 S 145 Plaza), and 17C 0362 (7777 Cass) the values are "reconciled" values based on a change in value by an administrative tribunal in prior years.²³ None of these PRFs contain any further explanation of how the assessed value of the property was determined or if any of the methodologies allowed by statute were used. The Nebraska Supreme Court has held that "[w]here a county assessor has not acted on his own information, and where it is arbitrarily determined without explanation of the methods used or

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).

²³ See E12:6, E14:6, E15:6, E16:7.

the elements considered, there is no presumption that the valuation is correct, and such a valuation is not supported by competent evidence and is legally erroneous.”²⁴

Ms. Rowe valued the Subject Property in Case No. 17C 0358 using the income 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 Commission finds the rent comparables analyzed by Mr. Scaletty to determine the appropriate rental rate more persuasive than the rental rates applied by Ms. Rowe.

With the exception of Case No. 17C 0358 where the income approach was used, Ms. Rowe valued the remaining Subject Properties using the cost approach to valuation. The main difference between the cost approach performed by Ms. Rowe and that performed by Mr. Scaletty is due to the amount of depreciation applied. In addition to differences in replacement cost new and physical depreciation,²⁵ Mr. Scaletty’s total depreciation also included depreciation up to 61% for economic obsolescence, determined based on the value estimates from the sales comparison approach and income approach, due to Mr. Scaletty’s opinion that development of a single-tenant property is not feasible on a purely speculative basis.²⁶ The Commission finds that Mr. Scaletty’s analysis of the depreciation factors to apply when determining the value of the Subject Properties using the cost approach persuasive, although we concur with Scaletty’s opinion that the sales comparison approach and income approach were better indicators of the Subject Properties’ actual values.

Finally the Commission finds that the Ms. Rowe’s utilization of the sales of the Subject Properties and the rental rates of the Subject Properties prior to the sales to verify her determinations of value using the income approach unreasonable. Ms. Rowe testified that the sales of the Subject Property were determined to be invalid sales and excluded from the sales file for Douglas County.²⁷ Additionally, Mr. Scaletty’s testimony regarding the rental rates of the Subject Properties calls into question their relationship to market rents.

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.

²⁴ *Leech, Inc. v. Bd. of Equal.*, 176 Neb. 841, 846, 127 N.W.2d 917, 921 (1964).

²⁵ Compare, for example, E23:59 with E19:6. Rowe applied 55% physical depreciation, whereas Scaletty applied over 75%.

²⁶ See, e.g., E23:58-59.

²⁷ See 350 Neb. Admin. Code, Ch. 12.

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 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.

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 determinations. The Commission also finds that there is clear and convincing evidence that the County Board's decisions were arbitrary or unreasonable.

For all of the reasons set forth above, the decisions of the County Board are 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.²⁸
2. The taxable values of the Subject Property are:

²⁸ 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 |
|-----------------|----------------------|
| 17C 0358 | \$3,430,000 |
| 18C 0337 | \$3,550,000 |
| 19C 0142 | \$3,550,000 |
| 17C 0361 | \$2,370,000 |
| 18C 0338 | \$2,440,000 |
| 17C 0362 | \$2,930,000 |
| 18C 0340 | \$3,000,000 |
| 19C 0141 | \$3,020,000 |
| 18C 0336 | \$3,940,000 |
| 19C 0143 | \$3,940,000 |

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.
5. Each party is to bear its own costs in this proceeding.
6. This Decision and Order shall only be applicable to tax years 2017, 2018, and 2019.
7. This Decision and Order is effective for purposes of appeal on August 4, 2021.²⁹

Signed and Sealed: August 13, 2021

Steven A. Keetle, Commissioner

SEAL

James D. Kuhn, Commissioner

²⁹ 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.