

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

FIRST NATIONAL BANK OF
OMAHA,
APPELLANT,

V.

DOUGLAS COUNTY BOARD
OF EQUALIZATION,
APPELLEE.

CASE NOS: 17C 0476 &
17C 0477

DECISION AND ORDER
REVERSING THE DECISION
OF THE DOUGLAS COUNTY
BOARD OF EQUALIZATION

For the Appellant:

Howard Roston,
Daniel Deveny,
Fredrikson & Byron PA

For the Appellee:

Jennifer D. Chrystal-Clark,
Deputy Douglas County Attorney

These appeals were heard before Commissioners Robert W. Hotz and James D. Kuhn. Commissioner Hotz presided.

I. THE SUBJECT PROPERTY

The Subject Property is a 44-story office building located in downtown Omaha, Douglas County, Nebraska. The legal description and Property Record File (PRF) of the Subject Property is found at Exhibits 7 and 9. Because this property is subject to tax-increment financing (TIF), it has two associated Property Record Files and parcel identification numbers. One represents the 'base' value of the Subject Property, while the other represents the 'excess' value. As noted in the

County Board's narrative summary, the sum of the two values represents the actual value of the Subject Property.¹

II. PROCEDURAL HISTORY

The Douglas County Assessor (County Assessor) determined the base assessed value of the Subject Property was \$126,212,300 and the excess assessed value was \$4,127,700 for tax year 2017. First National Bank of Omaha (FNBO) protested this assessment to the Douglas County Board of Equalization (the County Board). The County Board determined the base taxable value of the Subject Property for tax year 2017 was \$126,212,300 and the excess taxable value for tax year 2017 was \$4,127,700.²

FNBO appealed the decisions of the County Board to the Tax Equalization and Review Commission (the Commission). The Commission held a hearing on June 14, 2022. Prior to the hearing, the parties exchanged exhibits and submitted a pre-hearing conference Report, as ordered by the Commission. Exhibits 1-49, 51-53, 55, and 57-93 were admitted into evidence. Exhibits 50, 54, and 56 were not admitted into evidence.

III. STANDARD OF REVIEW

The Commission's review of the County Board's determination is de novo.³ 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

¹ Exhibit 7:6, 9:6.

² Exhibit 1.

³ 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).

assessment and has acted upon sufficient competent evidence to justify its action.⁴

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.⁵

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.⁶ Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.⁷

The Taxpayer must introduce competent evidence of actual value of the Subject Property in order to successfully claim that the Subject Property is overvalued.⁸ 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.⁹

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

⁴ *Brenner v. Banner County Bd. of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (citations omitted).

⁵ *Id.*

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

⁷ *Omaha Country Club v. Douglas County Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

⁸ 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).

⁹ *Bottorf v. Clay County Bd. of Equal.*, 7 Neb. App. 162, 580 N.W.2d 561 (1998).

an appeal or cross appeal.¹⁰ The Commission may take notice of judicially cognizable facts, 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.¹¹ The Commission's Decision and Order shall include findings of fact and conclusions of law.¹²

IV. RELEVANT 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.¹³

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.¹⁴ Nebraska courts have held that actual value, market value, and fair market value mean exactly the same thing.¹⁵ 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.¹⁶ All real property in

¹⁰ Neb. Rev. Stat. § 77-5016(8) (Reissue 2018).

¹¹ Neb. Rev. Stat. § 77-5016(6) (Reissue 2018).

¹² Neb. Rev. Stat. § 77-5018(1) (Reissue 2018).

¹³ Neb. Rev. Stat. § 77-112 (Reissue 2018).

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

¹⁵ *Omaha Country Club v. Douglas County Bd. of Equal.*, 11 Neb. App. 171, 180, 645 N.W.2d 821, 829 (2002).

¹⁶ Neb. Rev. Stat. § 77-131 (Reissue 2018).

Nebraska subject to taxation shall be assessed as of January 1.¹⁷ All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.¹⁸

Taxes shall be levied by valuation uniformly and proportionately upon all real property and franchises as defined by the Legislature except as otherwise provided in or permitted by the Nebraska Constitution.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 The purpose of equalization of assessments is to bring the assessment of different parts of a taxing district to the same relative standard, so that no one of the parts may be compelled to pay a disproportionate part of the tax.²¹ Uniformity requires that whatever methods are used to determine actual or taxable value for various classifications of real property that the results be correlated to show uniformity.²² 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.²³ If taxable values are to be equalized it is necessary for a Taxpayer to establish by clear and convincing evidence that the valuation placed on the 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, and not mere errors of judgment.²⁴ There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity.²⁵

¹⁷ See Neb. Rev. Stat. § 77-1301(1) (Reissue 2018).

¹⁸ Neb. Rev. Stat. § 77-201(1) (Reissue 2018).

¹⁹ Neb. Const., art. VIII, § 1.

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

²¹ *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991); *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb. App. 582, 597 N.W.2d 623 (1999).

²² *Banner County v. State Bd. of Equal.*, 226 Neb. 236, 411 N.W.2d 35 (1987).

²³ *Equitable Life v. Lincoln County Bd. of Equal.*, 229 Neb. 60, 425 N.W.2d 320 (1988); *Fremont Plaza v. Dodge Cty. Bd. of Equal.*, 225 Neb. 303, 405 N.W.2d 555 (1987).

²⁴ *Newman v. County of Dawson*, 167 Neb. 666, 670, 94 N.W.2d 47, 49-50 (1959) (citations omitted).

²⁵ *Id.* at 673, 94 N.W.2d at 50.

V. FINDINGS OF FACT

A. Testimony of Bradley Braemer

The Taxpayer called Bradley Braemer to testify. Braemer was a certified appraiser for Real Estate Analysis Corporation and prepared Appraisal Reports appraising the actual value of the Subject Property with effective dates of January 1, 2017.²⁶ Braemer held the MAI designation from the Appraisal Institute, and was licensed in the states of Illinois, Iowa, and Michigan.²⁷ The Appraisal Reports were introduced by the Taxpayer with no objection. The Appraisal Reports were certified as being performed according to professionally approved methods of mass appraisal.²⁸

In appraising the Subject Property, Braemer utilized two approaches: the income capitalization approach and the sales comparison approach. Braemer's appraisal did not use the cost approach, which he asserted would have called for significant depreciation figures and substantial subjective judgment. Braemer asserted that in estimating the actual value of the Subject Property, the reliability of the cost approach was weak.²⁹ Braemer's valuation approaches are discussed further below.

1. Income Capitalization Approach

Braemer's first step in his income capitalization analysis was to determine a typical market rent rate to be applied to the rentable square footage of the Subject Property. To calculate the market rent, Braemer analyzed the historical rental and parking income derived from the Subject Property.³⁰ Braemer next selected three comparable properties to determine the typical rental rate, after adjustments were made to account for differences in size, location, age, and time differences.³¹ Braemer's analysis found a gross rental rate of \$24 per

²⁶ Exhibit 15:3.

²⁷ Exhibit 15:176.

²⁸ Exhibit 15:11.

²⁹ Exhibit 15:11.

³⁰ Exhibit 15:79.

³¹ Exhibit 15:85.

square foot for office space and \$15 per square foot for the first-floor commercial retail space.³²

Next, a typical market vacancy and collection loss rate was determined by comparing the historical vacancy rates for the Subject Property as well as the first quarter vacancy rates published by the Colliers, Cushman, and CoStar market reports for the downtown Omaha, Nebraska business market.³³ Braemer found a typical vacancy rate of 11% should be applied to the Subject Property.³⁴

Braemer next determined a typical expense rate for the Subject Property using three sources – an annual survey of income and expenses for office buildings across the country, as well as the historical expense reports for the Subject Property, and Braemer’s own experience.³⁵ Typical expenses considered included cleaning, repairs and maintenance, utilities, grounds and security, management, and insurance.³⁶ Braemer’s analysis found an expense rate of \$8.40 per square foot.³⁷

Lastly, a typical market capitalization rate was calculated. Braemer relied upon capitalization rates from three sales of similar buildings in Omaha, Nebraska and Milwaukee, Wisconsin.³⁸ Braemer also relied upon data from the Situs RERC Real Estate Report-4th quarter 2016 pertaining to the Omaha Office Market.³⁹ Braemer further considered data from Colliers and REIS reports concerning the Omaha market.⁴⁰ This analysis found a typical capitalization rate of 7% to be applied to the Subject Property.⁴¹ Braemer then applied the

³² Exhibit 15:100.

³³ Exhibit 15:102.

³⁴ Exhibit 15:103.

³⁵ Exhibit 15:106.

³⁶ Exhibit 15:107-114.

³⁷ Exhibit 15:115.

³⁸ Exhibit 15:120.

³⁹ Exhibit 15:116.

⁴⁰ Exhibit 15:124.

⁴¹ Exhibit 15:124.

effective tax rate of 2.24872% to the 7% rate to determine a loaded overall capitalization rate of 9.249%.⁴²

Using these figures, Braemer found the value of the Office Building portion of the Subject Property to be \$105,310,000. Braemer separately valued the Parking Garage portion of the Subject Property, using a rental rate of \$120 per parking space per month.⁴³ After utilizing an expense rate of \$550 per parking space annually, as well as the 9.249% capitalization rate, Braemer concluded a value of \$2,780,000 for the Parking Garage.⁴⁴ These figures result in an income approach valuation of \$108,090,000 for the Subject Property.⁴⁵

2. Sales Comparison Approach

In valuing the Subject Property using the sales comparison approach, Braemer selected five comparable properties: three of which were in Omaha, Nebraska; one in Milwaukee, Wisconsin; and one in St. Paul, Minnesota.⁴⁶

Once the sales were selected, Braemer adjusted the sales price of each comparable to account for differences such as expenditures immediately after sale, property rights conveyed, sales date, location, size, age, and parking space ratios.⁴⁷

After adjustments were made to control for those differences, Braemer's analysis using this approach found a value of \$109,185,000 for the Subject Property as of January 1, 2017.

3. Reconciliation of Value

To reconcile the two approaches into a final opinion of value, Braemer gave "substantial consideration" to the income approach result, asserting that this methodology required the least amount of subjective input and was more in line with the likely use of any

⁴² Exhibit 15:126.

⁴³ Exhibit 15:128.

⁴⁴ Exhibit 15:130.

⁴⁵ Exhibit 15:131.

⁴⁶ See Exhibit 15:140-156.

⁴⁷ Exhibit 15:157.

potential purchasers.⁴⁸ Braemer’s final opinion of value for the Subject Property as of January 1, 2017, was \$108,500,000.⁴⁹

VI. ANALYSIS

“The appraisal of real estate is not an exact science.”⁵⁰ “[A]ctual value is largely a matter of opinion and without a precise yardstick for determination with complete accuracy.”⁵¹

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.⁵² Here, the appraisal report and testimony of Braemer is competent evidence sufficient to rebut the presumption that the board of equalization has faithfully performed its official duties in making the assessments and has acted upon sufficient competent evidence to justify its action.

The remaining question, then, is whether there is clear and convincing evidence the determinations by the County Board were arbitrary or unreasonable. The Commission finds the appraisal report and testimony from Braemer demonstrate persuasive evidence of actual value. The opinions of value provided in Braemer’s appraisal reports are supported by facts and data contained within the report as well as explanations for how those facts and data were gathered and used to reach the value opinions.

To the contrary, the Property Record Files relied upon by the County Board did not provide the same level of detail and support for its conclusions. Further, very little evidence or testimony was adduced to demonstrate the methodology or underlying facts and data used to determine actual value by the County Board. Without more underlying data, the Commission is unable to determine the reasonableness of the

⁴⁸ Exhibit 15:169.

⁴⁹ Exhibit 15:170.

⁵⁰ *In re Estate of Bock*, 198 Neb. 121, 124, 251 N.W.2d 872, 874 (1977).

⁵¹ *Cain v. Custer Cty. Bd. of Equal.*, 298 Neb. 834, 851, 906 N.W.2d 285, 298 (2018).

⁵² *Id.*

County Board's determination of value. "It is well established that the value of the opinion of an expert witness is no stronger than the facts upon which it is based."⁵³

While a narrative summary is included with the PRF, the narrative summary is merely boilerplate language describing how reconciled values for TIF properties are allocated between a base value and an excess value using two parcel ID numbers.⁵⁴ No additional information or evidence was adduced to determine the County Board's methodology for determining the value of the Subject Property.

Based upon the record before the Commission, we find the Braemer appraisals provide clear and convincing evidence of value for the Subject Properties. Since the actual value of the property is below the base value, we determine there is no excess value.

VII. CONCLUSION

The Commission finds 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 there is clear and convincing evidence the County Board's decision was arbitrary or unreasonable.

For the reasons set forth above, the determinations of the County Board are vacated and reversed.

VIII. ORDER

IT IS ORDERED THAT:

1. The decisions of the Douglas County Board of Equalization determining the values of the Subject Properties for tax year

⁵³ *Bottorf v. Clay Cty. Bd. Of Equal.*, 7 Neb.App. 162, 167, 580 N.W.2d 561, 565 (1998). See *McArthur v. Papio-Missouri River NRD*, 250 Neb. 96, 547 N.W.2d 716 (1996); *Lindsay Mfg. Co. v. Universal Surety Co.*, 246 Neb. 495, 519 N.W.2d 530 (1994).

⁵⁴ Exhibit 7:6; 9:6.

2017 are vacated and reversed.⁵⁵

2. The taxable base value of the Subject Property in Case No. 17C 0476 for tax year 2017 is **\$108,500,000**. As the parcel numbers 1039982710 and 1039982712 (representing the base value and excess value under TIF) have been merged into parcel number 1039982715, this value shall apply to that parcel number.
3. The taxable excess value of the Subject Property in Case No. 17C 0477 for tax year 2017 is **\$0**.
4. 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).
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 year 2017.
8. This Decision and Order is effective for purposes of appeal on October 21, 2024.⁵⁶

Signed and Sealed: October 21, 2024

SEAL



Robert W. Hotz, Commissioner

James D. Kuhn, Commissioner

⁵⁵ 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.

⁵⁶ 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.