

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

American National Bank,
Appellant,

v.

Douglas County Board of Equalization,
Appellee.

Case Nos: 17C 0549, 18C 0380,
& 19C 0386

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

For the Appellant:

Christopher A. Stafford,
Fredrikson & Byron, P.A.

For the Appellee:

Jennifer D. Chrystal-Clark,
Deputy Douglas County Attorney

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

I. THE SUBJECT PROPERTY

The Subject Property is a commercial parcel located at 8990 West Dodge Road, in the city of Omaha, Douglas County, Nebraska. The parcel is improved with a 67,688 square foot, three-story office building owned and occupied by American National Bank (the Taxpayer). The legal description of the parcel is found at Exhibit 8:3. The property record files for the Subject Property are found at Exhibits 8 through 10.

II. PROCEDURAL HISTORY

For each of the three tax years at issue, the Douglas County Assessor (the County Assessor) determined the assessed value of the Subject Property, the Taxpayer protested the assessment to the Douglas County Board of Equalization (the County Board) and requested a lower assessed value, and the County Board determined the taxable value of the Subject Property, as shown in the table below:

| | County Assessor ¹ | Taxpayer | County Board ² |
|---------------|------------------------------|--------------------------|---------------------------|
| Tax Year 2017 | \$6,627,300 | | \$6,627,300 |
| Tax Year 2018 | \$6,627,300 | \$4,800,000 ³ | \$6,627,300 |
| Tax Year 2019 | \$6,615,700 | \$5,300,000 ⁴ | \$6,615,700 |

The Taxpayer appealed the decisions of the County Board to the Tax Equalization and Review Commission (the Commission). The Commission held a hearing on March 10, 2020. 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 24. Peter Helland and Micaela Larsen testified at the hearing.

III. STANDARD OF REVIEW

The Commission’s review of the determination by a County Board of Equalization is de novo.⁵ 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.”⁶

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.⁷

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

¹ Exhibits 1-3.

² Id.

³ Exhibit 9:14.

⁴ Exhibit 10:13.

⁵ 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, 759 N.W.2d 464, 473 (2009).

⁶ *Brenner* at 283, 811.

⁷ Id.

arbitrary.⁸ Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.⁹

The Taxpayer must introduce competent evidence of actual value of the Subject Property in order to successfully claim that the Subject Property is overvalued.¹⁰ The County Board need not put on any evidence to support its valuation of the property at issue unless the Taxpayer establishes the County Board's valuation was unreasonable or arbitrary.¹¹

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.¹² The Commission may also take notice of judicially cognizable facts or 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.¹³ The Commission's Decision and Order shall include findings of fact and conclusions of law.¹⁴

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.¹⁵

⁸ Neb. Rev. Stat. §77-5016(9) (Reissue 2018).

⁹ *Omaha Country Club v. Douglas County Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

¹⁰ 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).

¹¹ *Bottorf v. Clay County Bd. of Equal.*, 7 Neb. App. 162, 580 N.W.2d 561 (1998).

¹² Neb. Rev. Stat. §77-5016(8) (Reissue 2018).

¹³ Neb. Rev. Stat. §77-5016(6) (Reissue 2018).

¹⁴ Neb. Rev. Stat. §77-5018(1) (Reissue 2018).

¹⁵ Neb. Rev. Stat. §77-112 (Reissue 2018).

“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.”¹⁶ “Actual value, market value, and fair market value mean exactly the same thing.”¹⁷ Taxable value is the percentage of actual value subject to taxation as directed by section 77-201 of the Nebraska Revised Statutes and has the same meaning as assessed value.¹⁸ All real property in Nebraska subject to taxation shall be assessed as of January 1.¹⁹ All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.²⁰

B. Summary of the Evidence

Micaela Larsen testified at the hearing. Larsen has been employed by the Douglas County Assessor for eight years, beginning as a real estate lister, before being promoted to appraiser tech.; she is now a real estate specialist. She has been a licensed appraiser since 2007.

Larsen testified that the Subject Property was assessed for each of the three tax years at issue using the income approach.²¹ The income approach operates by calculating the potential gross income (PGI) for a property based on square footage and market rental rates.²² Vacancy and collection losses based on market rates are subtracted, and additional income is added, to arrive at an effective gross income (EGI).²³ Typical market expenses are subtracted to arrive at net operating income (NOI), which is then divided by a market derived capitalization rate to arrive at the indicated value.²⁴ Indicated values increase as rental rates and square footage increase, and decrease as expenses, vacancy and collection losses, and capitalization rates increase. Because each parcel is valued as a single economic unit including both land and improvements, value is allocated to the land component only after the total value has been determined.

¹⁶ *Id.*

¹⁷ *Omaha Country Club* at 180, 829.

¹⁸ Neb. Rev. Stat. §77-131 (Reissue 2018).

¹⁹ See Neb. Rev. Stat. §77-1301(1) (Supp. 2020).

²⁰ Neb. Rev. Stat. §77-201(1) (Reissue 2018).

²¹ The commercial income worksheets are found at Exhibits 8:7, 9:7, and 10:7.

²² See The Appraisal Institute, *The Appraisal of Real Property* 491-508 (14th ed. 2013). This description is for the direct capitalization method, which is the most common version of the income approach and is the version used by both parties in these appeals.

²³ *Id.*

²⁴ *Id.*

The income approach models for tax years 2017 and 2018 were developed by a third party for the County Assessor; Larsen developed the 2019 model. The variables used in each year were as follows:²⁵

| | Rental Rate (per square foot) | V & C Loss Rate | Expense Rate | Cap Rate |
|------|-------------------------------|-----------------|--------------|----------|
| 2017 | \$19.50 | 4.5% | 35% | 11% |
| 2018 | \$19.50 | 4.5% | 35% | 11% |
| 2019 | \$19.50 | 9% | 35% | 10.5% |

Larsen did not have any specific knowledge of the third-party contractor’s qualifications or what data sources it used to construct the 2017 and 2018 models. For 2019, she testified the rental rate was based on several years of research of market rental rates, review of available publications for the Omaha market, and analysis of information provided by property owners and managers. The vacancy rate was based on a review of available publications for the Omaha market specific to office buildings in the Central West Dodge Street market. The expense rate was based on an analysis of information Larsen collected from properties throughout her employment with the County Assessor’s office. The expense rate might have varied based on the condition of the building; expenses would be lower for buildings of a higher condition regardless of age. The capitalization rate was also based on market research and varied based on the condition. According to a narrative summary included in the County Board’s exhibits, “The data in the model is derived from data gathered from the local market for properties of similar type.”²⁶

Peter Helland also testified at the hearing. Helland is a certified general property appraiser licensed in Nebraska. Helland prepared an appraisal report for the Subject Property;²⁷ the appraisal is certified as having been prepared in conformity with the Uniform Standards of Professional Appraisal Practice and the requirements of the State of Nebraska.²⁸ Helland’s appraisal used the cost, sales comparison, and income capitalization approaches to value.

²⁵ These variables are reflected in the commercial income worksheets at Exhibits 8:7, 9:7, and 10:7.

²⁶ Exhibit 10:8.

²⁷ See Exhibit 15.

²⁸ Exhibit 15:4, ¶ 8.

Helland's sales comparison approach²⁹ utilized six comparable sales selected based on building size, location, and age, to the extent possible; the Subject Property is the oldest building of its type in the West Dodge corridor.³⁰ Comparable 1 is located in close proximity to the Subject Property and is similar to the Subject Property in land size, rentable area, and construction style. Comparable 2 is adjacent to Comparable 1, with a larger building area and a larger land area than the Subject Property. Comparable 3 is in the adjacent Miracle Hills submarket; it is also similar to the Subject Property in rentable area and construction style. Comparable 4 is similar in construction style to the Subject Property and was sold in a fee simple, owner-user transaction. Comparable 5 is in the Central West Dodge submarket but not on Dodge Road. Comparable 6 is similar to the Subject Property in size; it was built in 1980 but has not received a modern renovation, making it somewhat similar to the Subject Property in age and condition. Helland believed these six sales were the best available comparable properties to the Subject Property in terms of location, size, and age, although he acknowledged that the Subject Property was older than any of the comparables. Some of the sales were leased fee interests, and others were fee simple interests.³¹

Helland made adjustments to the sale prices of the six comparables based on property rights conveyed, market conditions at the time of sale, location, size, age/condition, land to building ratio, and quality. The adjusted range of sales was \$57.36 to \$79.86 per square foot. Helland concluded that the per square foot indicated sale price was \$70.00, which resulted in an indicated value of \$4,624,270, rounded to \$4,600,000.

Helland's income approach³² was performed using the direct capitalization method. He determined that the rentable area of the Subject Property was 66,061 square feet, a total reached by removing garage space from the gross building area to leave only finished office space. To determine the rental rate, Helland examined the actual rental rates of the Subject Property, surveys and publications available in the market area, and leases of comparable properties; the

²⁹ See Exhibit 15:58-64.

³⁰ The details of the selected properties are found in the addenda to the appraisal report at Exhibit 15:120-125.

³¹ The sale of a leased fee interest, in brief, is the sale of property that is already leased to a party other than the buyer. Unlike a fee simple sale, the buyer does not obtain the right to immediately occupy the property. Leased fee interests are often more desirable to investors because of the income generated by the existing leases.

³² See Exhibit 15:65-88.

comparable leases were given the most weight.³³ All of the leases considered were in multi-tenant buildings with varying unit sizes, and eight of the ten comparable properties were located in the Central West Dodge submarket in close proximity to the Subject Property.³⁴ Helland made adjustments to the comparable rents for rent concessions, age, condition, quality, tenant improvement allowances, and other factors and concluded that the range of adjusted rents in the market was \$14.77 to \$21.73 per square foot. He used \$18 per square foot as the rental rate in his income approach calculation. In testimony, Helland conceded that the \$19.50 rental rate used by the County Assessor was within the range of rents charged in the market, but he believed the \$18 rate indicated by his analysis was more accurate due to his selection of comparables and adjustments for age, quality, and conditions specific to the Subject Property, such as asbestos and lack of a sprinkler system.

To calculate the expense rate used in the income approach, Helland reviewed the actual expenses of the Subject Property.³⁵ Helland also selected five comparable properties and examined their actual expenses.³⁶ He found that the actual expenses of the Subject Property were higher than the comparables because the Subject Property was between 15 and 29 years older than the comparable properties, which led to higher utility, repair, and maintenance costs.³⁷ He determined that the appropriate expense amount was \$510,889, which was 48.8% of EGI.³⁸

To determine the vacancy and collection loss rates for the income approach,³⁹ Helland reviewed quarterly reports of vacancies in the Omaha-Council Bluffs metropolitan statistical area and in the Central Dodge submarket where the Subject Property is located. He also reviewed occupancy rates for the eight lease comparables within the Central West Dodge area. He eliminated outlying low occupancy rates and determined that stabilized occupancy ranged from 81% to 92% among the comparables, with an average occupancy rate of 87.5%.⁴⁰ He utilized a

³³ See Exhibit 15:66-73 for Helland's market rent analysis.

³⁴ See Exhibit 15:67 for a map of the lease comparables.

³⁵ See Exhibit 15:75-76.

³⁶ See Exhibit 15:78-83.

³⁷ Exhibit 15:78.

³⁸ Exhibit 15:83.

³⁹ See Exhibit 15:29-34.

⁴⁰ Exhibit 15:33.

12% vacancy rate for the income approach, which is lower than the Subject Property's actual vacancy rate of 17.9%.⁴¹

Helland used multiple methods to determine his capitalization rate.⁴² He considered comparable sales for which capitalization rate data was available. He reviewed investor surveys. He utilized a band of investment analysis that reflects loan rates for similar properties in Omaha. He concluded that the appropriate capitalization rate for use in the income approach was 9% "unloaded," which means that the capitalization rate does not include property taxes.⁴³ His final, loaded capitalization rate, including local property tax rates, was 11.39%.⁴⁴

These rent, vacancy, expense, and capitalization rates resulted in a determination of \$1,189,098 PGI, \$1,046,406 EGI, \$535,517 NOI, and an indicated value of \$4,701,641, which Helland rounded to \$4,700,000.⁴⁵

In summary, as of January 1, 2019, Helland's cost approach indicated a value of \$4,400,000, his sales comparison approach indicated a value of \$4,600,000, and his income capitalization approach indicated a value of \$4,700,000.⁴⁶ In reconciling these values, Helland gave primary consideration to the sales comparison approach and the income approach.⁴⁷ He gave supporting consideration to the cost approach because the cost approach is best suited to properties with new or nearly new improvements,⁴⁸ and the improvements on the Subject Property were built in 1963 and renovated in 2013.⁴⁹ Helland's final opinion of market value for the Subject Property was \$4,600,000 as of January 1 for each tax year at issue in these appeals.⁵⁰

C. Analysis

The presumption in favor of the County Board's determination of value remains until rebutted by competent evidence.⁵¹ When an independent appraiser using professionally approved

⁴¹ Exhibit 15:34.

⁴² See Exhibit 15:84-88.

⁴³ Exhibit 15:86.

⁴⁴ Exhibit 15:87.

⁴⁵ Exhibit 15:88.

⁴⁶ Exhibit 15:89.

⁴⁷ Exhibit 15:89-90.

⁴⁸ Exhibit 15:89.

⁴⁹ Exhibit 15:11. We agree that the cost approach is less useful in this case, so we do not discuss it further.

⁵⁰ The appraisal also includes an opinion of value of \$4,700,000 as of January 1, 2020. Exhibit 15:90.

⁵¹ *JQH La Vista Conf. Ctr. Dev. LLC v. Sarpy County Bd. of Equal.*, 285 Neb. 120, 825 N.W.2d 447 (2013).

methods of mass appraisal certifies that an appraisal was performed according to professional standards, the appraisal is considered competent evidence under Nebraska law.⁵² Helland's appraisal constitutes competent evidence to rebut the presumption. Once the presumption is rebutted, the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon all the evidence presented.⁵³

The Taxpayer's evidence of the actual value of the Subject Property is much more persuasive than the County Board's evidence. Helland's appraisal report and testimony contain extensive detail and documentation of his selection of comparable properties and adjustments to sale prices and income approach variables. By contrast, Larsen's income approach is based on "market research" and other "data gathered from the local market for properties of similar type," without any supporting documentation, adjustments, or analysis. The County Board's evidence included a list of approximately 165 sales of commercial properties in Douglas County and the property record files of several of those properties. However, the assessment did not use the sales comparison approach, nor did the County Board put on a case-in-chief to explain what these documents were meant to prove.

We find that Helland's appraisal constitutes clear and convincing evidence that the County Board's determinations of value were arbitrary or unreasonable.

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.

⁵² *Id.*

⁵³ *Id.*

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.⁵⁴
2. The taxable value of the Subject Property is \$4,600,000 for each tax year 2017, 2018, and 2019.
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 June 21, 2021.⁵⁵

Signed and Sealed: June 21, 2021

Robert W. Hotz, Commissioner

SEAL

James D. Kuhn, Commissioner

⁵⁴ 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.

⁵⁵ Appeals from any decision of the Commission must satisfy the requirements of Neb. Rev. Stat. §77-5019 (Reissue 2018) and other provisions of the Nebraska Revised Statutes and Court Rules.