

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Wheatland Industries, LLC,
Mid America Agri Products,
Appellant,

v.

Perkins County Board of Equalization,
Appellee.

Case No: 17C 0014

Decision and Order Denying Motion in
Limine and Reversing the Determination of
the Perkins County Board of Equalization

For the Appellant:

Frederick D. Stehlik,
Gross & Welch, PC, LLO

For the Appellee:

Richard H. Roberts,
Deputy Perkins County Attorney

This appeal was heard before Commissioners Steven Keetle and James Kuhn.

I. THE SUBJECT PROPERTY

The Subject Property is a 36.93 acre commercial parcel located in Perkins County. The parcel is improved with an ethanol plant. The legal description of the parcel is found at Exhibit 1. The property record card for the Subject Property is found at Exhibit 2 page 35.

II. PROCEDURAL HISTORY

The Perkins County Assessor (the Assessor) determined that the assessed value of the Subject Property was \$16,364,768 for tax year 2017. Wheatland Industries, LLC / Mid America Agri Products (the Taxpayer) protested this assessment to the Perkins County Board of Equalization (the County Board) and requested an assessed valuation of \$8,204,761. The Perkins County Board determined that the taxable value of the Subject Property for tax year 2017 was \$16,364,768.¹

The Taxpayer appealed the decision of the County Board to the Tax Equalization and Review Commission (the Commission). The Commission held a hearing on June 12, 2018. Prior to the hearing, the parties exchanged exhibits and submitted a Pre-Hearing Conference Report, as

¹ Ex 1.

ordered by the Commission. In the Pre-Hearing Conference Report, the parties stipulated to the receipt of exchanged exhibits 1 through 5. The Commission received exhibit 6 as well as testimony from witnesses in the course of the hearing. The Taxpayer made a Motion in Limine to bar testimony from the Appellee's listed expert witness beyond the process of mass appraisal per state statutes.

III. MOTION IN LIMINE

At the hearing before the Commission, the Taxpayer made a Motion in Limine to bar testimony from the Appellee's listed expert witness, Darrel Stanard, beyond the process of mass appraisal per state statutes. The Commission took the Motion under advisement and conducted the hearing on the merits of the appeal. The Commission finds and determines that the testimony of Darrel Stanard did not go beyond the process of mass appraisal per state statutes. The Commission therefore denies the Taxpayer's Motion in Limine.

IV. STANDARD OF REVIEW

The Commission's review of the determination by a County Board of Equalization is de novo.² 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."³

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.⁴

² See Neb. Rev. Stat. §77-5016(8) (Reissue 2018), *Brenner v. Banner Cty. 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 Cty. Freeholder Bd.*, 276 Neb. 1009, 1019 (2009).

³ *Brenner* at 283, 811.

⁴ *Id.*

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.⁵ Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.⁶

A Taxpayer must introduce competent evidence of actual value of the Subject Property in order to successfully claim that the Subject Property is overvalued.⁷ 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.⁸

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.”⁹ 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.”¹⁰ The Commission’s Decision and Order shall include findings of fact and conclusions of law.¹¹

V. 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.¹²

⁵ Neb. Rev. Stat. §77-5016(9) (Reissue 2018).

⁶ *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

⁷ Cf. *Josten-Wilbert Vault Co. v. Bd. of Equal. for Buffalo Cty.*, 179 Neb. 415, 138 N.W.2d 641 (1965) (determination of actual value); *Lincoln Tel. and Tel. Co. v. Cty. Bd. of Equal. of York Cty.*, 209 Neb. 465, 308 N.W.2d 515 (1981) (determination of equalized taxable value).

⁸ *Bottorf v. Clay Cty. Bd. of Equal.*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).

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

¹⁰ Neb. Rev. Stat. §77-5016(6) (Reissue 2018).

¹¹ Neb. Rev. Stat. §77-5018(1) (Reissue 2018).

¹² 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.”¹³ “Actual value, market value, and fair market value mean exactly the same thing.”¹⁴ 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.¹⁵ All real property in Nebraska subject to taxation shall be assessed as of January 1.¹⁶ All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.¹⁷

B. Summary of the Evidence

The Taxpayer presented the testimony of, and an Appraisal Report prepared by, Joseph Calvanico (the Taxpayer’s Appraiser) for the Subject Property which was certified as being performed according to professional appraisal standards.¹⁸ 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.¹⁹ The Commission finds and determines that the Appraisal Report constitutes competent evidence concerning the value of the Subject Property and that the presumption in favor of the County Board’s determination is rebutted.²⁰

The Assessor testified that the value for the Subject Property was determined by the prior assessor using mass appraisal techniques; because it was recently determined, she did not change the assessed valuation for the 2017 assessment year. She testified that, when performing mass appraisal, she did not apply depreciation to any property, and that she did not believe that depreciation had been applied when the value of the Subject Property was determined by the prior assessor. However, the Assessor testified that she believed depreciation for physical deterioration would be appropriate for the Subject Property. She also utilized a spreadsheet of information regarding other ethanol plants in Nebraska when determining the value of the

¹³ *Id.*

¹⁴ *Omaha Country Club* at 180, 829.

¹⁵ Neb. Rev. Stat. §77-131 (Reissue 2018).

¹⁶ See Neb. Rev. Stat. §77-1301(1) (Reissue 2018).

¹⁷ Neb. Rev. Stat. §77-201(1) (Reissue 2018).

¹⁸ See, E3:54

¹⁹ *JQH La Vista Conference Center Development LLC v. Sarpy County Board of Equalization*, 285 Neb. 120, 825 N.W.2d 447 (2013).

²⁰ *Id.*

Subject Property.²¹ The Assessor gathered the information regarding the assessed values of other ethanol plants by obtaining the Property Record Files and compiling the total assessed values for the building and improvements onto a spreadsheet.²² She further testified that because the nameplate capacity or production capacity of the Cambridge plant in Furnas County was incorrect as listed on her spreadsheet, her opinion of value for the Subject Property would be different; however, she did not indicate what that new opinion of value would be. The Assessor testified that she hired Darrel Stanard (the County's Appraiser) to perform "Mass Appraisal" work to value the Subject Property for the Assessor's office.²³ The Assessor understood that the same or similar "Mass Appraisal" work was done to value ethanol plants throughout Nebraska.

The County's Appraiser indicated that he had personally inspected the interior and exterior of the Subject Property in 2015 or 2016. He testified that he utilized the County Assessor's CAMA (Computer Assisted Mass Appraisal) system which was "tied in to Marshall and Swift" to value the Subject Property. He indicated that he thought physical depreciation was built into the CAMA system utilized by the County Assessor, but he didn't know the amount of depreciation or how it was applied. He further indicated that he thought there was no functional or economic depreciation applied to the assessed value of the Subject Property by the CAMA system. He testified that, in his opinion, there should be physical depreciation applied to the Subject Property, there should not be any functional depreciation applied to the Subject Property, and there might need to be some economic depreciation applied to the Subject Property but that the amount of economic depreciation would be low.

The County's Appraiser testified that the nameplate capacity of an ethanol plant is the critical factor when determining the value of an ethanol plant. He testified that because the value per gallon of production of the Subject Property was the same as the median value per gallon of production of the ethanol plants on the Assessor's spreadsheet, this indicated that the value of the Subject Property was equalized with that of other ethanol plants in Nebraska. He was not aware if depreciation was applied for physical or functional obsolescence to arrive at the value of any of the other ethanol plants listed in the spreadsheet found at page 84 of exhibit 2. The County's

²¹ E2:84.

²² See, E2:85-258.

²³ See, Neb. Rev. Stat. §76-2221(9) (Reissue 2018). Under this provision of law, Mr. Stanard was retained by the county to assist in the appraisal of real property as performed by the county assessor of such county and under the direction and responsibility of the county assessor, rather than acting as a Real Property Appraiser subject to the Real Property Appraiser Act.

Appraiser further testified that he knew that the nameplate capacity of the Cambridge plant was actually 44,000,000 gallons rather than the 22,000,000 listed on the Assessor's spreadsheet.

The Commission agrees with the Assessor and the County's Appraiser, as well as the Taxpayer's Appraiser, that depreciation for physical deterioration should be applied when valuing the Subject Property. The testimony of the Assessor and the County's Appraiser is inconsistent as to whether physical depreciation was applied to the valuation of the Subject Property, and if so, there is no evidence as to what that physical depreciation was. Additionally the spreadsheet of data related to other ethanol plants in Nebraska, relied on by the Assessor when arriving at her determination of assessed value for the Subject Property, contained incorrect information that the Assessor testified would affect her opinion of value. A quantification of the Assessor's revised opinion of value in light of the corrected information on the Assessor's spreadsheet was not provided. The Commission finds and determines that it was unreasonable and arbitrary for the County Board to rely upon the Assessor's determination of value.²⁴

The Taxpayer presented the testimony of the CEO and the Controller for Mid America Agri Products, which operates the Subject Property under the name Wheatland Industries, LLC, regarding the Subject Property, its operation, and the ethanol industry in general. Both the CEO and the Controller testified that the ethanol production on the Subject Property generated the majority of the revenue for the operation and that ethanol was produced by the equipment rather than the real property on the Subject Property.

The Taxpayer offered the testimony of the Taxpayer's Appraiser regarding his opinion of value for the Subject Property as set forth in the Appraisal Report. The Taxpayer's Appraiser inspected the Subject Property on September 18, 2017, for purposes of appraising the Subject Property including the land, two administrative buildings, and 13 industrial buildings. The Appraisal Report relies primarily on the Cost Approach to valuation and utilized a Sales Comparison Approach as a supportive method.²⁵ The Appraisal Report first determines the value of the land component using recent sales of agricultural land in the area. The Appraisal Report then determines the Replacement Cost New of the improvements located on the Subject Property using the Marshal Valuation Service.²⁶

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

²⁵ E3:36

²⁶ E3:40-41.

After determining the cost to replace the improvements located on the Subject Property the Taxpayer's Appraiser depreciated the improvements for three different reasons. He first applied depreciation for the age and physical condition of the property. The majority of the improvements are 11 years old with three newer buildings that are 2 years old. All of these buildings have "suffered some accelerated deterioration resulting from the high volume of corn dust," and, due to its abrasive effects, require higher maintenance costs. Due to this the Taxpayer's Appraiser estimated the effective age of the older buildings at 10 years and the newer buildings as 2-3 years resulting in an estimate of physical depreciation of 20-22% for the older buildings and 4-6% for the newer buildings.²⁷

Next the Taxpayer's Appraiser looked at the functional obsolescence of the Subject Property. He determined that the portions of the Subject Property related to the Delta-T design rather than the "newer, more technologically superior ICM design" should receive 20% depreciation. This determination is at odds with the testimony presented. The portions of Subject Property to which the Taxpayer's Appraiser attributes depreciation due to functional obsolescence were built as part of an ethanol plant utilizing the Delta-T technology and they are still currently serving that function today. Functional obsolescence is defined as "[a]n element of depreciation resulting from deficiencies or superadequacies in the structure."²⁸

Functional utility is the overall usefulness and desirability of a property. The ultimate criterion is whether the improvement efficiently satisfies the wants and needs of the market. Functional obsolescence is the loss of value in a property improvement due to changes in style, taste, technology, needs, and demands and can be curable or incurable. Functional obsolescence exists when a property suffers from poor or inappropriate architecture, lack of modern equipment, wasteful floor plans, inappropriate room sizes, inadequate heating or cooling capacity, and so on. *It is the inability of a structure to perform adequately the function for which it is currently used.*²⁹

²⁷ E3:44-45

²⁸ The Dictionary of Real Estate Appraisal, 4th Ed., Appraisal Institute, (2002) at p. 122.

²⁹ *Property Assessment Valuation, 3rd Ed., International Association of Assessing Officers* (2010), at pp. 260-61. Emphasis Added.

The Taxpayer's Appraiser's determination seems to be saying that since the Subject Property had been constructed according to a Delta-T design rather than the "newer, more technologically superior ICM design" it suffered from a "lack of modern equipment" and had the inability to perform adequately the function for which it was used on the effective date. We find that since the Subject Property was built as an ethanol plant using Delta-T technology and was still operating as an ethanol plant using Delta-T technology as of the assessment, the Subject Property did not suffer from the inability to perform adequately the function for which it was used on the effective date. We therefore reject the assertion that the Subject Property suffered from functional obsolescence on the effective date.

Finally, the Taxpayer's Appraiser applied depreciation to the assessed value of the Subject Property due to economic obsolescence. The Taxpayer's Appraiser determined that due to the state of the ethanol industry, including a reduction in the price per gallon paid for ethanol, a reduction if not contraction of the rate of ethanol plant construction and other factors the depreciation to be applied to the Subject Property for economic obsolescence should be 40%.

The Commission finds the Taxpayer's Appraisal's determination of value persuasive with the exception of the application of functional depreciation to three of the buildings located on the Subject Property. The Commission therefore determines that the assessed value of the Subject Property for tax year 2017 is \$7,336,042.³⁰

VI. 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

³⁰ The Appraisal Report contains a summary of the cost approach used to determine the value of the Subject Property found at Exhibit 3 page 45. The Commission utilized those determinations of value with the exception of the determination of value for the Processing Building, Fermentation Building and DD&E Building to which the Appraisal Report applied Functional Depreciation. The value for those buildings without applying functional depreciation is as follows: Processing Replacement Cost New (RCN) \$2,929,080, less 20% physical depreciation = \$2,343,264, less 40% economic depreciation = \$1,405,958 Replacement Cost New Less Depreciation (RCNLD) for Processing Building. Fermentation RCN \$2,043,829, less 20% physical depreciation = \$1,635,063, less 40% economic depreciation = \$981,038 RCNLD for Fermentation Building. DD&E RCN \$1,124,801, Less 20% physical depreciation = \$899,841, less 40% economic depreciation = \$539,904. Using these numbers (shown in bold) with the other values from the Appraisal Report the Building RCNLD would be: \$73,106 (Office) + \$333,194 (Office/MCC) + \$14,764 (Fire Suppr) + **\$1,405,958** (Processing) + **\$981,038** (Fermentation) + \$65,247 (Main Shop) + \$32,623 (Elec. Shop) + **\$539,904** (DD&E) + \$325,188 (Boiler) + \$336,974 (Grain Rec) + \$13,276 (Material Storage Shed) + \$13,276 (Material Storage Shed) + \$365,703 (Bio-Diesel) + \$18,093 (Equipment) + \$2,171 (Electrical Equip) = \$4,520,515 Building RCNLD. The RCNLD of the Improvements on the Subject Property would then be \$4,520,515 (Buildings) + \$2,538,527 = \$7,059,042. Adding in the land value the value for the Subject Property would be \$7,059,042 (Improvements) + \$277,000 (Land) = \$7,336,042

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 decision of the County Board is vacated and reversed.

VII. ORDER

IT IS ORDERED THAT:

1. The decision of the Perkins County Board of Equalization determining the taxable value of the Subject Property for tax year 2017 is vacated and reversed.³¹
2. The taxable value of the Subject Property for tax year 2017 is:

Land:	\$ 277,000
<u>Improvements:</u>	<u>\$7,059,042</u>
Total:	\$7,336,042
3. This Decision and Order, if no appeal is timely filed, shall be certified to the Perkins County Treasurer and the Perkins 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 year 2017.
7. This Decision and Order is effective for purposes of appeal on February 27, 2019.³²

Signed and Sealed: February 27, 2019

Steven A. Keetle, Commissioner

SEAL

James D. Kuhn, Commissioner

³¹ 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.

³² 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.

