

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Curtis L. Tate,
Appellant,

v.

Douglas County Board of Equalization,
Appellee.

Case No: 17R 0310

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

For the Appellant:

Curtis L. Tate,
Pro Se

For the Appellee:

Jennifer D. Chrystal-Clark
Deputy Douglas County Attorney

This appeal was heard before Commissioners Robert W. Hotz and Steven A. Keetle.

I. THE SUBJECT PROPERTY

The Subject Property is a residential parcel located in Douglas County. The parcel is improved with a 4,147 square foot home, constructed in 2003. The legal description and property record card for the Subject Property are found at Exhibit 2.

II. PROCEDURAL HISTORY

The Douglas County Assessor determined that the assessed value of the Subject Property was \$793,700 for tax year 2017.¹ Curtis L. Tate (the Taxpayer) protested this assessment to the Douglas County Board of Equalization (the County Board). The County Board determined that the taxable value of the Subject Property for tax year 2017 was \$761,600.²

The Taxpayer appealed the decision of the County Board to the Tax Equalization and Review Commission (the Commission). The Commission held a hearing on December 30, 2019, with Commissioner Hotz presiding. The parties stipulated to the receipt of exchanged Exhibits 1 through 4.

¹ Exhibit 1.

² Id.

III. STANDARD OF REVIEW

The Commission’s review of a decision by a county board of equalization 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 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 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.¹⁰ 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 also take notice of judicially cognizable facts, take

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).

⁴ *Brenner* at 283, 811.

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

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

¹¹ *Id.*

notice of general, technical, or scientific facts within its specialized knowledge, and 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 Revised 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

The central piece of evidence offered by the Taxpayer was an appraisal report with an effective date of April 21, 2014.²⁰ The appraiser who prepared the report, Charles R. Bundy, did not appear at the hearing to testify in support of his appraisal report, but as noted above, the

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).

²⁰ Exhibit 4, 4:2, 4:3.

parties stipulated to the admission of the report. The report indicates that Bundy was a Certified Residential Real Property Appraiser at the time the report was prepared, and Bundy also certified that the appraisal was performed according to the relevant professional standards.²¹

Bundy performed a sales comparison approach analysis.²² For the sales comparison approach, he selected six improved residential parcels in the same lakeside sub-development as the Subject Property, all between one and eleven years old at the time of appraisal (the “comparables”).²³ Four of the comparables were sold in 2013 or 2014, and the other two comparables were actively listed for sale at the time of the appraisal. For all of the comparables, Bundy rated the quality of construction at Q3,²⁴ which we understand to be the equivalent of the Very Good rating assigned by the County Assessor.²⁵ The comparables varied in condition from Average to Good, and Bundy rated the Subject Property at Fair/Average because it had received “less than average maintenance” and was affected by conditions including holes in the drywall, damage to the concrete in the drive and around the pool, and water damage to the basement ceiling. Bundy made adjustments to the sale price²⁶ of the comparables based on condition, gross living area, garage size, presence of a fence or dock, and other amenities. Bundy ultimately concluded that the value indicated by the sales comparison approach was \$650,000. The report indicates that a cost approach was performed, but the area calling for conclusions was left blank and refers to a calculation elsewhere in the report, which is not clearly identified.²⁷

The Taxpayer testified that the property was built with an improperly constructed sea wall and without taking adequate precautions to protect against the effect of underground springs below the parcel, which he believed caused extensive cracking to the concrete driveway and foundation.²⁸ As of the assessment date, the sea wall on the Subject Property had been repaired but the Taxpayer testified that he was still working with contractors to determine the impact of and cost to repair any damage to the Subject Property caused by underground springs. We agree with the Taxpayer’s contention that these conditions would likely affect the market value of the

²¹ Exhibit 4:31, 4:2, 4:24.

²² Bundy did not perform an income approach analysis because the Subject Property was not designed to generate income. Exhibit 4:7.

²³ Exhibit 4:6, 4:10, 4:30.

²⁴ Id.

²⁵ See Exhibit 2:4.

²⁶ Bundy presumably used the listing price for the active listings, but this is not clearly explained in the report.

²⁷ Exhibit 4:7, see also Exhibit 4:12.

²⁸ See Exhibit 3 for photographs of the damage to the driveway.

Subject Property, but the Taxpayer did not provide specific information to enable us to quantify the effect of these conditions on the value of the Subject Property. Rather, the Taxpayer repeatedly acknowledged that he did not know how much these conditions would impact the market value of the Subject Property because he was still in the process of determining the cost to cure them.

The County Board called Stan Mlotek to testify. Mlotek has been a licensed real estate appraiser for over thirty-five years; he also holds the State Assessor certificate. He has been employed by the Douglas County Assessor for the past seven years. He testified that a determination of market value would include consideration of conditions like those described by Bundy and the Taxpayer, but he stated that adjustments to value cannot be made on the basis of potential or hypothetical problems.

Mlotek opined that Bundy's appraisal report was "not a complete report" because no value was calculated for the land, and no cost approach was performed to calculate depreciation. Mlotek explained that a cost approach analysis is "not required, but it does either support or detract from your estimate of the market value." Mlotek opined that the adjustments made for condition were quite large, with little or no explanation for the adjustments. In general, Mlotek did not believe that Bundy's report contained adequate explanations for the results. Mlotek also noted that an appraisal report indicates value on a specific date. For the Bundy report, that date was April 21, 2014, but the relevant assessment date for tax year 2017 is January 1, 2017. Mlotek testified that the residential real estate market improved in the time between the report's effective date and the relevant assessment date. However, that market value increase was not quantified.

Mlotek explained that the County Assessor utilizes a cost approach to assess properties in the Subject Property's neighborhood. The cost approach operates by calculating the cost of constructing the building new, subtracts depreciation due to physical wear and other factors affecting the property being evaluated, and then adds the value of the land, which is determined based on a market analysis of sales of similar but undeveloped parcels.²⁹ The County Assessor used the Marshall & Swift cost guides to determine that the base cost of construction for the

²⁹ See Appraisal Institute, The Appraisal of Real Estate, 561-579 (14th ed. 2013).

Subject Property was \$127 per square foot, and the Assessor then added costs for construction of the deck, finished basement, attached garage, appliances, and other amenities. The Assessor determined that the replacement cost new of the improvement portion of the Subject Property was \$790,638, not including the swimming pool and sprinkler system.³⁰ Mlotek testified that physical depreciation of 5.74% was then applied, only to the \$790,638, not to the add-ons of the swimming pool (\$30,259 replacement cost) and the sprinkler system (\$3,500 replacement cost).³¹ The County Assessor's cost approach contained computational inconsistencies that Mlotek was unable to explain.³²

The Assessor also applied a neighborhood adjustment of 94%. Mlotek testified that, after using a cost approach analysis, the County Assessor compares its results with sales in the same market area to confirm the accuracy of its cost approach. If the outcome of the cost approach is inconsistent with the market data indicated by sales, an adjustment is applied to bring the cost approach outcome closer to conformity with the market data. In this case, the neighborhood adjustment reflects a market in which homes are selling at a lower value than otherwise indicated by the cost approach. Mlotek testified that, in his opinion, the comparable sales in the market area supported the County Assessor's value of \$793,700.³³

As noted above, following the Taxpayer's protest, the County Board lowered the assessed value of the Subject Property by \$32,100. Mlotek opined that this reduction was excessive; he testified that lowering the condition value of the Subject Property from Good to Average (i.e., to reflect the conditions described by the Taxpayer) would result in a reduction in value of approximately \$15,000. Mlotek believed that such a reduction would be warranted. He also noted that the Assessor performed a reappraisal of the properties in that neighborhood after tax year 2017, and changed the condition rating of the Subject Property from Good to Average based on an external inspection.

In Douglas County, the County Board uses referees to evaluate property valuation protests. The referee makes recommendations, which are reviewed by a referee coordinator and then

³⁰ Testimony of Mlotek, Exhibit 2:8.

³¹ Id.

³² For example, the cost approach analysis indicates that 5.74% depreciation was applied to the Subject Property, a total of \$45,359. However, \$45,359 is not 5.74% of either \$790,638 (the total replacement cost new without add-ons) or \$824,397 (the total replacement cost new with add-ons).

³³ The comparable sales referred to by Mlotek are listed at Exhibit 2:13-14.

transmitted to the County Board for its review.³⁴ Mlotek testified that he was unable to discern the basis for the County Board’s reduction based on the referee’s report.³⁵ The report indicates that the referee who initially examined the protest recommended that it be dismissed, but the referee coordinator recommended a reduction to \$761,800.³⁶ The only explanation listed for this proposed reduction is, “After review of info from owner and assessor I recommend valuation at \$761,800.”³⁷

C. Analysis

As noted above, we begin with a presumption 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. That presumption remains until competent evidence to the contrary is presented.³⁸ 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.³⁹ However, this case presents an unusual scenario in which the appraisal report presented is not for the tax year at issue, and the appraiser who prepared the report did not appear at the hearing to testify and relate the appraisal report to the tax year at issue.⁴⁰ Additionally, Mlotek, who is also a licensed appraiser, raised substantive challenges to the appraisal report for its lack of a cost approach and for its large, inadequately explained adjustments to comparable sales.

We are persuaded that Mlotek’s testimony constitutes competent evidence to rebut the presumption in favor of the County Board. Specifically, we rely on the testimony that the cost approach and market data supported the County Assessor’s value of \$793,700, that the County Board’s \$32,100 reduction was excessive, and that lowering the condition rating of the Subject Property from Good to Average would result in a \$15,000 reduction from \$793,700.

³⁴ Testimony of Mlotek, see also Neb. Rev. Stat. § 77-1502.01 (Reissue 2018).

³⁵ Exhibit 2:15-2:17.

³⁶ We believe this is a typographical error and the County Board’s determination reflects the coordinator’s intent to value the Subject Property at \$761,600. See Exhibit 1:1, Exhibit 2:17.

³⁷ Exhibit 2:17.

³⁸ *Brenner*, supra.

³⁹ *U.S. Ecology v. Boyd County Bd. of Equal.*, 256 Neb. 7, 588 N.W.2d 575 (1999).

⁴⁰ In the vast majority of reported cases, the appraisal is effective for the tax year in dispute. See, e.g., *JQH La Vista Conference Center Development LLC v. Sarpy County Board of Equalization*, 285 Neb. 120, 825 N.W.2d 447 (2013). We are aware of only one reported case in which an appraisal report from a prior year was deemed adequate by a Nebraska court to rebut the presumption, but in that case, the appraiser appeared at the hearing to explain his report and its conclusions. See *Cain v. Custer County Bd. of Equal.*, 298 Neb. 834, 906 N.W.2d 285 (2018).

Once the presumption in favor of the County Board has been rebutted, the reasonableness of the valuation fixed by the County Board becomes one of fact based upon all the evidence presented, with the burden of proof remaining upon the Taxpayer.⁴¹ We find that the Bundy appraisal does not constitute clear and convincing evidence for a valuation of \$650,000, because the appraisal was performed for a different tax year than the tax year at issue, because of the concerns raised by Mlotek, and because Bundy was not called as a witness to answer questions about the methodology behind his conclusions. We find that the County Board's reduction in assessed value, from \$793,700 to \$761,600, is not supported by evidence in the record and is not reasonable in light of the evidence presented at the hearing. We find that the actual value of the Subject Property for tax year 2017 should have included depreciation on the swimming pool and sprinkler system, as well as the \$15,000 reduction to account for the lowering of the condition rating from Good to Average, but not the County Board's unexplained \$32,100 reduction.

There is some difficulty in applying these findings because of the computational uncertainties in the County Assessor's cost approach detail mentioned above. The County Assessor's cost detail indicates that the physical depreciation should be 5.74% (the calculation actually applied 5.737% depreciation). We apply this same depreciation percentage to the total add-on value, resulting in a total depreciated add on value of \$31,822.⁴² The replacement cost new less depreciation, without add-ons, is \$745,279.⁴³ Therefore, the replacement cost new less depreciation is \$777,101.⁴⁴ We then apply the neighborhood adjustment of 94%, resulting in a value of \$730,475.

Mlotek testified that the Cost Approach calculation above was based upon a condition rating of good.⁴⁵ Since we are persuaded by Mlotek's testimony that a condition rating of average would be appropriate, and that the value of the Subject Property would be adjusted downward by \$15,000 if rated at average condition, we will subtract the \$15,000 to adjust the condition rating from Good to Average, resulting in a cost approach value of \$715,475.⁴⁶

⁴¹ *Brenner*.

⁴² $\$33,759 \text{ add-on value} - (0.05737 \times \$33,759) = \$31,822$.

⁴³ $\$790,638 \text{ total replacement cost new without add-ons} - \$45,359 \text{ depreciation} = \$745,279$.

⁴⁴ $\$745,279 + \$31,822$.

⁴⁵ The record does not include a calculation for replacement cost new using an average condition rating.

⁴⁶ $\$730,475 - \$15,000$.

And finally, we add the value of the land; the record supports the value of \$62,700, which was undisputed by any party. Therefore, the actual value of the Subject Property is \$778,175.⁴⁷

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 decision was arbitrary or unreasonable.

For all of the reasons set forth above, the decision of the County Board is vacated and reversed.

VI. ORDER

1. The decision of the Douglas County Board of Equalization determining the taxable value of the Subject Property for tax year 2017 is vacated and reversed.⁴⁸
2. The taxable value of the Subject Property for tax year 2017 is: \$778,175.
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 year 2017.

⁴⁷ \$62,700 land + \$715,475 improvements = \$778,175.

⁴⁸ 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.

7. This Decision and Order is effective for purposes of appeal on January 13, 2020.⁴⁹

Signed and Sealed: January 13, 2020

Robert W. Hotz, Commissioner

Steven A. Keetle, Commissioner

⁴⁹ 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.