

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Betty F. Quinn et al.,
Appellant,

v.

Douglas County Board of Equalization,
Appellee.

Case No: 17R 0478

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

For the Appellant:

Sean T. Mullen,
Sean T. Mullen P.C., L.L.O.

For the Appellee:

Jennifer D. Chrystal-Clark
Deputy Douglas County Attorney

This appeal was heard before Commissioners Robert W. Hotz and James D. Kuhn.

I. PROCEDURAL HISTORY

The Subject Property is an improved parcel of real property in Douglas County, Nebraska.¹ The Douglas County Assessor (the County Assessor) determined that the assessed value of the Subject Property was \$2,593,900 for tax year 2017.² Betty F. Quinn et al. (the Taxpayer) protested this assessment to the Douglas County Board of Equalization (the County Board) and requested an assessed valuation of \$1,498,204.³ The County Board determined that the taxable value of the Subject Property for tax year 2017 was \$2,593,900.⁴

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 12, 2019, with Commissioner Hotz presiding; the hearing was recessed until January 21, 2020, when it was concluded. Prior to the hearing, the parties stipulated to the admission of Exhibits 1 through 4. James Quinn, Stan Mlotek, and Nick Dizona testified at the hearing.

On December 11, 2019, and again on January 2, 2020, Appellant filed an “Objection and Motion to Strike Appellee Primary Expert Witness List (Amended).” This pleading effectively urged the Commission to exclude the testimony of Stan Mlotek, an appraiser from the Douglas

¹ The legal description and property record card for the Subject Property are found at Exhibit 2, pages 2 through 15.

² Exhibit 1.

³ Exhibit 2:16.

⁴ Exhibit 1.

County Assessor's office, on the ground that Mlotek was substituted for a different appraiser, Larry Thomsen, after the deadline for exchange of expert witness information provided in the order for hearing. Counsel for the County Board advised the Commission that Mlotek was substituted for Thomsen due to a medical condition that prevented Thomsen from appearing. Neither Thomsen nor Mlotek was subpoenaed to appear and testify at the hearing.

The rules that govern hearings before the Commission provide that testimony of an expert witness whose identity, reference documents, and substance of expected testimony have not been disclosed within the time prescribed in an Order for Hearing will not be received at the hearing in the absence of good cause shown or agreement of the parties.⁵ No evidence was formally admitted to show that the substitution of Mlotek for Thomsen was required due to Thomsen's medical condition. Under the circumstances, however, we are satisfied that attorney's representation to the Commission is adequate to demonstrate good cause. Appellant's motion filed on December 11 was denied on the record; the similar motion filed on January 2 is denied now.

II. STANDARD OF REVIEW

The Commission's review of the determination by a County Board of Equalization is de novo.⁶ 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."⁷

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.⁸

⁵ 442 Neb. Admin. Code, Ch. 5 § 020.10D (2011).

⁶ 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).

⁷ *Brenner* at 283, 811.

⁸ *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.⁹ Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.¹⁰

A taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued.¹¹ 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.¹²

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.¹³ 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.¹⁴ The Commission's Decision and Order shall include findings of fact and conclusions of law.¹⁵

III. FINDINGS OF FACT

1. The Subject Property is a 162,260 square foot (3.725 acre) residential parcel improved with a 9,619 square foot residence and a 1,652 square foot carriage house.¹⁶ Both improvements were built in 1907.¹⁷ The Subject Property is located in a neighborhood of Omaha, Nebraska, where land and improvement values are higher than average for the market area. The Subject Property is in an historic neighborhood, and it cannot legally be used for any purpose other than single family residential use.

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

¹⁰ *Omaha Country Club v. Douglas County Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

¹¹ 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).

¹² *Bottorf v. Clay County Bd. of Equal.*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).

¹³ Neb. Rev. Stat. § 77-5016(8) (Reissue 2018).

¹⁴ Neb. Rev. Stat. § 77-5016(6) (Reissue 2018).

¹⁵ Neb. Rev. Stat. § 77-5018(1) (Reissue 2018).

¹⁶ Exhibit 2:4, 2:6.

¹⁷ Id.

2. James Quinn and his wife own the Subject Property. They purchased the Subject Property in 1971 from the Roman Catholic Church, which had used it as a bishop's residence. After the assessment date of January 1, 2017, the owners had to replace a chimney and exterior brickwork at a cost of \$100,000, because one corner of the house was "falling off." Other than this renovation, no significant remodeling was done on the Subject Property after 1984, when portions of the residence were updated with paint, plaster, and cabinetry for use as a show house.

3. Stan Mlotek is employed by the County Assessor as a Real Estate Specialist and Special Valuation Appraiser. He has worked in those capacities since 2015. He has been a licensed appraiser since 1984 and has worked in the field consistently since obtaining his license.

4. Mlotek did not appraise the Subject Property for the County Assessor, and he did not inspect it any time prior to the hearing. His knowledge of the Subject Property was limited to his general knowledge of the area and his review of the County Assessor's Property Record File.

5. The County Assessor assessed the Subject Property using the cost approach.

In the cost approach, appraisers compare the cost of the subject improvements to the cost to develop similar improvements as evidenced by the cost of construction of substitute properties with the same utility as the subject property. The estimate of development cost is adjusted for market-extracted losses in value caused by the age, condition, and utility of the subject improvements or for locational problems. The land value is then added, usually based on comparison with sales of comparable sites.¹⁸

6. The County Assessor determined that the quality of construction of the residence was excellent, and the condition of the residence was fair. The County Assessor determined that the quality of construction of the carriage house was good, and the condition of the carriage house was fair.

7. The County Assessor utilized the Marshall & Swift costing tables, a recognized source for costing data, to estimate the cost of reproducing the improvements on the Subject Property. The County Assessor determined that the total replacement cost new of the residence was \$1,650,183,¹⁹ and the total replacement cost new of the carriage house was \$259,337.²⁰ The

¹⁸ The Appraisal Institute, The Appraisal of Real Estate, 561 (14th ed. 2014).

¹⁹ Exhibit 2:12. This sum includes the replacement cost new of a greenhouse at \$15,340.

²⁰ Exhibit 2:13.

County Assessor determined that the land value for the Subject Property was \$7 per square foot for 162,260 square feet, or \$1,116,300.

8. To determine the appropriate amount of depreciation to apply, the County Assessor utilized a study conducted by the University of Nebraska at Omaha (UNO). This study was described by Stan Mlotek as a multiple regression analysis including a large amount of data, and the County Assessor's office has incorporated the study into its Computer Assisted Mass Appraisal (CAMA) system. Neither the study itself nor the supporting data were entered into the record before the Commission, and Mlotek testified that he had not read the study.

9. The County Assessor determined that the total depreciation for the residence was 19.55%,²¹ and the total depreciation for the carriage house was 54.05%.²² Although Mlotek was unable to explain how the UNO study and the CAMA system generated these percentages, he testified that the difference in depreciation rates was likely due to the difference in the quality of construction: the excellent quality residence depreciated more slowly than the good quality carriage house. Mlotek also asserted that standard Marshall & Swift depreciation tables supported depreciation of approximately 20% for the Subject Property.²³

10. Nick Dizona is a Certified General Appraiser in Nebraska; he has held this credential for approximately 20 years, with a brief period of suspension prior to his involvement with the subject matter of this appeal. With the exception of that brief suspension, Dizona has worked in the field of real estate appraisal for the past 20 years and has published articles and taught courses in the field.

11. Dizona performed a USPAP-compliant fee appraisal of the Subject Property.²⁴ As part of this appraisal, he personally inspected the Subject Property, including both buildings, exterior and interior. The Subject Property had worn and dated wall finishes and flooring in several areas. The Subject Property had deferred maintenance and was in need of brickwork and ductwork maintenance and repair. The Subject Property contained a chapel and the kitchen of the Subject Property was unusually small for a house of its size; in Dizona's opinion, these features would

²¹ Exhibit 2:12.

²² Exhibit 2:13.

²³ Mlotek referred to a table in the Residential Cost Handbook that we have been unable to locate. Under the

²⁴ The appraisal report is found at Exhibit 3:34-3:63.

not be desirable for most buyers in the market. The Subject Property included an elevator; in Dizona's opinion, this would be a desirable trait for buyers.

12. Based on his inspection, Dizona determined that the quality of the residence was Q3 and the condition was C4. These ratings are approximately equivalent to good quality and fair-to-average condition using the scale employed by the County Assessor.²⁵

13. Dizona appraised the Subject Property using the sales comparison approach. For his sales comparison approach, he identified seven sales of similar properties in the Omaha market (the comparable properties).²⁶ The comparable properties were located from 0.32 to 2.74 miles from the Subject Property; all were located in "elite" areas, similar to the location of the Subject Property. They ranged in size from 4,215 square feet to 9,488 square feet and were situated on lots ranging from 27,703 square feet (0.636 acres) to 1.41 acres. The sales prices ranged from \$81.24 per square foot to \$450.77 per square foot.

14. Dizona determined the value of the carriage house on the basis of the income it might generate if rented as a residence.²⁷ He estimated its market rent at \$1,400 per month and the gross rent multiplier (GRM) to be 130.²⁸ On this basis, he calculated the market value of the carriage house to be \$182,000, and made adjustments on that basis to the comparable properties that had no guest houses or smaller guest houses.²⁹ Dizona's appraisal did not include data to support his determination of market rent or GRM.

15. Dizona also made adjustments to the sales prices of the comparable properties on the basis of lot size, view, quality, age, condition, room count, and other factors and amenities. His net adjustments ranged from -\$161,785 to \$442,630.³⁰ Dizona determined that the adjusted sales prices of the comparable properties ranged from \$1,056,080 to \$2,303,880.³¹

16. Dizona concluded that the value indicated by the sales comparison approach for the Subject Property was \$1,750,000, effective January 1, 2018.³² He did not perform an appraisal with an effective date of January 1, 2017, and he declined to testify as to his opinion of the value

²⁵ Dizona used a different rating scale than the County Assessor; his definitions are set forth at Exhibit 3:57-3:58.

²⁶ The comparable properties with Dizona's notes and adjustments are listed at Exhibit 3:39-3:42.

²⁷ Exhibit 3:40.

²⁸ Id.

²⁹ Exhibit 3:39-3:42.

³⁰ Id.

³¹ Id.

³² Exhibit 3:36-3:37, testimony of Dizona.

of the Subject Property on that date without completing a full appraisal. Dizona testified that the Omaha residential market in general trended upward approximately 3.5% between 2017 and 2018, but because the universe of sales comparable to the Subject Property was so limited, he was unable to determine whether that trend applied to the Subject Property.

17. Dizona did not perform a cost approach analysis for the Subject Property. However, he believed that the 19.55% depreciation used by the County Assessor in its cost approach reflected an effective age of approximately 12 years. Based on Dizona's inspection of the Subject Property, he believed the Subject Property had a total economic life of 60 to 70 years, with an effective age of 30 to 40 years.

18. After reading Dizona's appraisal report, Mlotek determined that the report contained inconsistencies and other concerns. Mlotek specifically found concern with the following:

- a. Dizona applied different adjustments for condition to comparable sales with the same condition rating;
- b. Dizona characterized all of the comparable properties as being in elite neighborhoods, when Mlotek disagreed;
- c. Dizona determined that the quality of the Subject Property was Q3 rather than excellent quality;³³ and
- d. Dizona failed to supply the details to support his income analysis of the carriage house.³⁴

19. For tax year 2018, the County Assessor assessed the Subject Property at \$2,593,900.³⁵ After a protest by the Taxpayer, the County Board reduced the assessed value of the Subject Property to \$1,750,000, which was the value indicated by Dizona's appraisal.³⁶

IV. OPINION

A. Applicable 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

³³ I.e., the equivalent of Q1 on Dizona's scale.

³⁴ See Exhibit 3:40.

³⁵ Exhibit 3:33.

³⁶ Exhibit 3:33, Exhibit 2:21, Exhibit 3:37.

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.³⁷

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.³⁸ Actual value, market value, and fair market value mean exactly the same thing.³⁹ 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.⁴⁰ All real property in Nebraska subject to taxation shall be assessed as of January 1.⁴¹ All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.⁴²

B. Analysis

We begin with the presumption that the County Board faithfully performed its official duties in making its assessment of the Subject Property and acted upon sufficient competent evidence to justify its action. That presumption remains until competent evidence to the contrary is presented. 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.⁴³ In this case, the appraisal offered by the Taxpayer was not effective on January 1, 2017, but rather, on January 1, 2018.⁴⁴ The appraiser testified that he could not provide an opinion on the value of the Subject Property on January 1, 2017.

In the majority of reported cases involving the use of an appraisal to rebut the presumption in favor of the county board, the appraisal is effective for the tax year in dispute.⁴⁵ In *Cain v. Custer County Board of Equalization*, the Nebraska Supreme Court relied on a 2010 appraisal to rebut

³⁷ Neb. Rev. Stat. § 77-112 (Reissue 2018).

³⁸ *Id.*

³⁹ *Omaha Country Club* at 180, 829.

⁴⁰ Neb. Rev. Stat. § 77-131 (Reissue 2018).

⁴¹ See Neb. Rev. Stat. § 77-1301(1) (Reissue 2018).

⁴² Neb. Rev. Stat. § 77-201(1) (Reissue 2018).

⁴³ *U.S. Ecology v. Boyd County Bd. of Equal.*, 256 Neb. 7, 588 N.W.2d 575 (1999).

⁴⁴ The County Board appears to have relied upon Dizona's appraisal for tax year 2018, since it took action to reduce the assessed value of the property from the \$2,593,900 determined by the County Assessor to \$1,750,000 for tax year 2018.

⁴⁵ See, e.g., *U.S. Ecology v. Boyd County Bd. of Equal.*, 256 Neb. 7, 588 N.W.2d 575 (1999), *JQH La Vista Conference Center Development LLC v. Sarpy County Bd. of Equal.*, 285 Neb. 120, 825 N.W.2d 447 (2013).

the presumption in favor of a county assessor for tax year 2012.⁴⁶ The court also relied upon the appraisal to establish the value of the property for the tax year on appeal, although the taxpayer's burden of proof in that case was a preponderance of the evidence rather than clear and convincing evidence.⁴⁷ We infer that an appraisal from a tax year other than the tax year on appeal can constitute competent evidence to rebut the presumption of reasonableness of a county board, depending upon the totality of the evidence in the record. We conclude that such an appraisal should be weighed alongside all of the evidence presented, with consideration given to the closeness in time to the tax year on appeal and other to evidence in the record tending to support or contradict the appraiser's methods and conclusions.

We find that Dizona's appraisal constitutes competent evidence to rebut the presumption in favor of the County Board's decision for tax year 2017. We further find that the Taxpayer has adduced clear and convincing evidence that County Board's valuation was arbitrary or unreasonable. Although we acknowledge Mlotek's concerns about the appraisal, we give significant weight to the fact that Dizona personally inspected the Subject Property and selected the best comparable sales available in a limited market in the course of completing his appraisal report. The County Board's witness never inspected the Subject Property; indeed, it is not clear from the record when any employee of the County Assessor last inspected the Subject Property. Similarly, the County Board presented no substantive evidence to explain the County Assessor's application of 19.55% depreciation to the residence on the Subject Property. The study from which this depreciation amount was derived was not offered into evidence, and Mlotek's testimony did not clarify its sources of data or methodology.

In sum, all of the County Board's evidence on the value of the Subject Property consisted of either records compiled by individuals who did not testify at the hearing, or testimony based on a review of those same records. This evidence is outweighed by the first-hand knowledge and opinions of the appraiser, Dizona, and the property owner, Quinn.⁴⁸ The use of 19.55% depreciation for the residence is not reasonable in light of Dizona and Quinn's first-hand description of a 110-year-old property with crumbling brickwork, no renovation within the 30

⁴⁶ See *Cain v. Custer County Bd. of Equal.*, 298 Neb. 834, 848, 906 N.W.2d 285, 296-297 (2018).

⁴⁷ *Id.*, see also *Cain v. Custer County Bd. of Equal.*, 291 Neb. 730, 868 N.W.2d 334 (2015).

⁴⁸ A resident owner who is familiar with his or her property and knows its worth is permitted to testify as to its value without further foundation; this principle rests upon the owner's familiarity with the property's characteristics, its actual and potential uses, and the owner's experience in dealing with it. *Darnall Ranch v. Banner County Bd. of Equal.*, 276 Neb. 296, 753 N.W.2d 819 (2008).

years prior to the assessment date, multiple undesirable features, and dated interior finishes. Dizona's appraisal is the most persuasive evidence for the value of the Subject Property on January 1, 2017. The taxable value of the Subject Property should be \$1,750,000 for tax year 2017.

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

IT IS ORDERED THAT:

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.⁴⁹
2. The taxable value of the Subject Property for tax year 2017 is \$1,750,000.
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 year 2017.

⁴⁹ 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 February 5, 2020.⁵⁰

Signed and Sealed: February 5, 2020

Robert W. Hotz, Commissioner

SEAL

James D. Kuhn, Commissioner

⁵⁰ 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.