

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

MMY Hospitality LLC,
Appellant,

v.

Hall County Board of Equalization,
Appellee.

Case No: 18C 0184

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

For the Appellant:
MMY Hospitality LLC,
Pro Se

For the Appellee:
Sarah Carstensen,
Deputy Hall County Attorney

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

I. THE SUBJECT PROPERTY

The Subject Property is a commercial parcel located in Grand Island, Hall County, Nebraska. The parcel is improved with a 44 room motel located at 2311 South Locust Street. The motel was built in 1970. The legal description and property record card for the Subject Property are found at Exhibit 3.

II. PROCEDURAL HISTORY

The Hall County Assessor determined that the assessed value of the Subject Property was \$917,564¹ for tax year 2018. MMY Hospitality LLC (the Taxpayer) protested this assessment to the Hall County Board of Equalization (the County Board) and requested an assessed valuation of \$600,000.² A referee hired by the County Board recommended the taxable value of \$917,564.³ The referee gave a revised recommendation of \$850,000.⁴ The County Board determined that the taxable value of the Subject Property for tax year 2018 was \$851,455.⁵

¹ Exhibit 1.

² Id.

³ Exhibit 4:1. The recommendation was dated July 5, 2018.

⁴ Exhibit 4:3. This recommendation was dated July 12, 2018. An unexplained deduction of \$67,564 resulted in the lowered recommendation.

⁵ Exhibit 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 18, 2019 with Commissioner Hotz presiding. Prior to the hearing, the parties exchanged exhibits and submitted a Pre-Hearing Conference Report, as ordered by the Commission. Exhibits 1 to 26 were exchanged by the parties and offered and received in evidence. Mike Bhatt, Kristi Wold, and Darrel Stanard testified at the hearing.

III. 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 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

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

The 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

⁶ 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 (Citations omitted).

⁸ *Id.*

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).

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

IV. APPLICABLE LAW

A. Valuation

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.¹⁶

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.¹⁷ Actual value, market value, and fair market value mean exactly the same thing.¹⁸ 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.¹⁹ All real property in Nebraska subject to taxation shall be assessed as of January 1.²⁰ All

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

¹⁷ *Id.*

¹⁸ *Omaha Country Club* at 180, 829 (2002).

¹⁹ Neb. Rev. Stat. § 77-131 (Reissue 2018).

²⁰ Neb. Rev. Stat. § 77-1301(1) (Reissue 2018).

taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.²¹

B. Equalization

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.²² Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value.²³ 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.²⁴ In order to determine a proportionate valuation, a comparison of the ratio of assessed value to market value for both the Subject Property and comparable property is required.²⁵ 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.²⁶ 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.²⁷ The constitutional requirement of uniformity in taxation extends to both rate and valuation.²⁸ If taxable values are to be equalized it is necessary for a taxpayer to establish by clear and convincing evidence that valuation placed on his or her property when compared with valuations placed on similar property is grossly excessive and is the result of systematic will or failure of a plain legal duty, and not mere error of judgment.²⁹ There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity.³⁰

²¹ Neb. Rev. Stat. § 77-201(1) (Reissue 2018).

²² *Neb. Const.*, Art. VIII, § 1.

²³ *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).

²⁴ *Id.*; *Cabela's Inc. v. Cheyenne County Bd. of Equal.*, 8 Neb.App. 582, 597 N.W.2d 623, (1999).

²⁵ *Cabela's Inc.* at 582, 623.

²⁶ *Banner County v. State Bd. of Equal.*, 226 Neb. 236, 411 N.W.2d 35 (1987).

²⁷ *Equitable Life v. Lincoln County Bd. of Equal.*, 229 Neb. 60, 425 N.W.2d 320 (1988); *Fremont Plaza v. Dodge County Bd. of Equal.*, 225 Neb. 303, 405 N.W.2d 555 (1987).

²⁸ *First Nat. Bank & Trust Co. v. County of Lancaster*, 177 Neb. 390, 128 N.W.2d 820 (1964).

²⁹ *Newman v. County of Dawson*, 167 Neb. 666, 670, 94 N.W.2d 47, 49-50 (1959) (Citations omitted).

³⁰ *Id.* at 673, 94 N.W.2d at 50.

V. FINDINGS OF FACT

Kristi Wold, the County Assessor, testified on behalf of the County Board. She has been the Hall County Assessor since December, 2017. Wold testified that she inspected the Subject Property on April 30, 2019.

Darrel Stanard also testified on behalf of the County Board. Stanard is a licensed appraiser. Stanard recited the involvement of his appraisal firm, Stanard Appraisal Services, Inc. (Stanard Appraisal), in the assessment of the Subject Property for tax year 2018 to include being hired by the County Assessor to perform the initial assessment, being hired by the County Board to function as a Referee in relation to the Protest proceeding, and being hired by the County Board for purposes of preparation for and testimony at the present appeal hearing. Stanard testified that he conducted inspections of the Subject Property on July 5, 2018 and April 30, 2019. Stanard opined at the hearing that the taxable value of the Subject Property was \$917,564.

The property record file for the Subject Property indicates that the County Assessor considered both the Cost Approach and the Income Approach in determining the actual value of the property.³¹ According to the Cost Approach calculation, the value of the property was \$851,455.³² According to the Income Approach calculation, the value of the property was \$843,258.³³ A “Final Value Reconciliation,” is shown at \$851,455.³⁴ The referee’s report, dated July 5, 2018, includes an opinion of value of \$917,564.³⁵ The report was done by Stanard Appraisal for the County Board.³⁶ A “Board of Equalization Review Form,” dated July 12, 2018, and also completed by Stanard Appraisal, indicates a revised recommendation by a reduction of \$67,564, with no corresponding explanation for the reduction, resulting in a recommended value of \$850,000.³⁷ The County Board did not follow this revised recommendation, but rather determined that the value was \$851,455, the same amount as determined by the Cost Approach discussed above.

³¹ Exhibit 3:2.

³² Id. Replacement cost new less depreciation of \$752,480 and land value of \$98,975.

³³ Exhibit 3:2. The rental rate is unexplained.

³⁴ Exhibit 3:2.

³⁵ Exhibit 4:1.

³⁶ A referee may be hired by the County Board pursuant to Neb. Rev. Stat. § 77-1502.01.

³⁷ Exhibit 4:3.

Mike Bhatt testified on behalf of the Taxpayer. Bhatt was a Member of MMY Hospitality, LLC, the owner of the Subject Property. Bhatt testified that the Subject Property was not a franchise or “flagged” motel. He explained that franchise motel properties enjoy guaranteed occupancies, a member base, infrastructure, and loyalty programs. However, on the downside, he explained that franchise properties also involve an up-front fee, ongoing royalty payments, certain maintenance and upgrade requirements, and a process improvement plan. None of these criteria were quantified in terms of the actual value of the Subject Property.

Bhatt also explained that as an unflagged motel, the Subject Property had an inferior location, lower room rates, and lower occupancy rates (20% to 40%). He stated that walk-ins and extended stay customers were thus more common, each commanding lower rates than flagged motels.

Bhatt testified that the Taxpayer purchased the Subject Property on April 15, 2014 for \$970,000.³⁸ He asserted that the sale included \$120,000 worth of personal property.³⁹ Bhatt explained that the property had been significantly damaged by a hail storm on August 4, 2017, but that the Taxpayer had made no insurance claim due to concerns about increased premiums. He asserted that repair estimates exceeded \$100,000.⁴⁰ As a result of the storm and no repairs being effected, Bhatt explained that the roof had various leaks putting 8 of the 44 rooms out of service. He stated that the decision to not repair the roof was a management decision relating to occupancy rates.

Profit and loss statements and average daily rate documents were received in evidence.⁴¹ Estimates regarding furniture, fixtures, and equipment were also received in evidence.⁴²

VI. ANALYSIS

Throughout the assessment process leading up to and including the hearing on this appeal, the County Assessor, County Board, and Stanard Appraisal, the same appraisal firm hired by each of them at different times, have given no fewer than three different determinations of the

³⁸ The Real Estate Transfer Statement, Form 521, is found at Exhibit 5:1.

³⁹ *Id.*

⁴⁰ See Exhibits 7:9-15.

⁴¹ Exhibits 10:1-4.

⁴² Exhibits 11:1-2.

value of the Subject Property for tax year 2018. Stanard Appraisal was hired by the County Assessor to complete the initial assessment. That assessment was \$917,564.⁴³ It is unclear and unexplained in the record why that was the assessment amount when the property record card shows that two approaches to value were considered in the assessment, resulting in a “Final Value Reconciliation” of \$851,455,⁴⁴ including a cost approach determination of \$851,455 and an income approach determination of \$843,258. After receiving an assessment notice of \$917,564, the Taxpayer filed a protest.

Once the protest was filed, the County Board hired Stanard Appraisal, the same appraisal firm that had completed the assessment, to serve as a referee in the protest proceeding.⁴⁵ The essence of a protest proceeding is to give a Taxpayer an opportunity to protest the assessment made by a county assessor to a county board of equalization. A referee is defined as an “impartial credentialed appraiser ... who conducts protest hearings as the representative of, and under the direction of, the county board of equalization.”⁴⁶ A referee may be hired by a county board to conduct the protest hearing and must make a written recommendation to the county board.⁴⁷ However, the county board is not required to follow the recommendation made by the referee.⁴⁸

An employee of Stanard Appraisal⁴⁹ conducted the protest proceeding and made a referee recommendation of \$917,564, dated July 5, 2018.⁵⁰ On the same day, another employee of Stanard Appraisal, signing as a referee coordinator,⁵¹ agreed with the recommendation and recorded the following notes: “No hearing. [o]wner supplied 2017 Profit/loss Statement but I also need nightly rent rates, occupancy and I have some questions about expenses.” In sum, Stanard Appraisal completed the initial assessment for the County Assessor and then, when acting as the appointed referee in the protest proceeding, Stanard Appraisal reviewed and then agreed with the assessment determination that Stanard Appraisal had previously made, recommending a taxable value of \$917,564.⁵²

⁴³ Exhibit 1.

⁴⁴ Exhibit 3:2.

⁴⁵ The record does not indicate whether the County Board was aware that Stanard Appraisal had conducted the initial assessment.

⁴⁶ See Title 350, Chapter 50, § 001.24 (2017) of equalization.

⁴⁷ Neb. Rev. Stat. § 77-1502.01.

⁴⁸ *Id.*

⁴⁹ The referee report was signed by Josh Garris, an employee of Stanard Appraisal.

⁵⁰ Exhibit 4:1.

⁵¹ The referee coordinator was Mark Stanard.

⁵² Exhibit 4:1.

After a hearing on July 11, 2018, the same referee coordinator signed a “Board of Equalization Review Form,” revising his recommendation by reducing the value estimate by \$67,564.⁵³ The form was signed on July 12, 2018. The coordinator’s notes stated: “sale of subject supports value – Rep could not provide actual room rent rates or occupancy[.] sold 4-14 for \$970,000 – for real estate.” Based upon these notes, it appears that the coordinator was of the opinion that the April 15, 2014 sale of the Subject Property for \$970,000 (minus the personal property value of \$120,000)⁵⁴ supported the lowered recommendation of \$850,000.

The referee coordinator’s reliance upon a single sale from well over three years prior to the effective date is problematic for at least two reasons. First, a single sale is just one indicator of value within a given market. Although “prior sales of the subject property must be considered in market value appraisals,” this consideration appears in the context of comparison and analysis of multiple sales of properties that are similar to the subject property.⁵⁵ The purchase price of the subject property may be taken into consideration in determining the actual value of the subject property for assessment purposes, but standing alone, it is not conclusive of its actual value for assessment purposes.⁵⁶ Sale price is not synonymous with actual value or fair market value.⁵⁷ Further, setting the assessed value of a property at the sale price of the same property is generally known as “sales chasing,” a practice that is discouraged by professional appraisal standards.⁵⁸ Also of concern is the referee coordinator’s reliance upon any sale that is well over three years prior to the effective date of January 1, 2018. Regarding commercial properties in Nebraska, county assessors are generally encouraged to use comparable property sales that are within three years of the effective date of the assessment of a subject property.⁵⁹

Upon receiving the revised recommendation from the referee, the county board set the taxable value at \$851,455. As noted above, the county board is not required to set the taxable value at the same amount as recommended by the referee. In reporting its decision, the county board gave as its basis for action taken: “ADDITIONAL INFORMATION PROVIDED

⁵³ Mark Stanard signed the form. Exhibit 4:3. It is unclear from the record what prompted this additional review.

⁵⁴ The record does not indicate whether Mark Stanard had seen the Real Estate Transfer Statement, Form 521, at the time he made this recommendation. The Form 521 indicates that \$120,000 of the sale price of \$970,000 was allocated for personal property, presumably furniture, fixtures, and equipment rather than real property. See, Exhibit 5:1.

⁵⁵ The Appraisal Institute, *The Appraisal of Real Estate* 384, 377-395 (14th ed. 2013).

⁵⁶ *Forney v. Box Butte County Bd. of Equal.*, 7 Neb.App. 417, 582 N.W.2d 631 (1998).

⁵⁷ *Id.*

⁵⁸ Sales chasing is the practice of using the sale of a property to trigger a reappraisal of that property at or near the selling price. IAAO Glossary for Property Appraisal and Assessment at 149 (2nd ed. 2013). See generally, International Association of Assessing Officers, *Standard on Ratio Studies* (2013).

⁵⁹ Title 350 NAC Chapter 17, § 003.05B.

ACCEPTED REFEREE’S RECOMMENDATION.” It is unexplained how setting the value at \$851,455 when the referee recommendation was \$850,000 constitutes accepting the referee’s recommendation, particularly when the exact amount of \$851,455 was the Total Cost Value in the Property Record File, as discussed above. What is clear from the record is that the county board’s decision is exactly the same as the cost approach determination in the property record file.⁶⁰ As such, we find that the county board, when presented with multiple possibilities, chose the cost approach calculation to value the Subject Property.

At the time of the effective date, the Subject Property was approximately 48 years old. Nothing in the record suggests that the motel is unique in any way. Typically, when properties are newer or unique, the cost approach is most appropriate.⁶¹ As properties age, depreciation becomes more difficult to determine with accuracy. When using the cost approach, depreciation can be determined by analyzing the sales of comparable properties within the same market, or by using cost information from Marshall and Swift Valuation Service (Marshall).

In this case, the record does not reveal whether the sales of comparable properties were used to determine the depreciation rate applied to the Subject Property when using the cost approach. Instead, the record indicates that the County Assessor utilized TerraScan, a Computer Assisted Mass Appraisal system that incorporates cost data from Marshall. The property record file indicates that the following data was input into the cost approach that was performed: year built 1970 (age 48), Class D property, Quality 200 (Fair), Condition 30 (Average), and Physical Depreciation 32%.⁶² Based upon these determinations and ratings, the replacement cost new was indicated at \$1,102,539. Depreciation of 32% amounted to \$350,059, resulting in a replacement cost new less depreciation of \$752,480.⁶³ The land value was determined to be \$98,975, resulting in a total cost value of \$851,455.⁶⁴

Each of the characteristics of the Subject Property utilized to determine the cost approach value either was not disputed, or the record contained no clear and convincing evidence that was contrary to those determinations. The Taxpayer’s evidence supported the determination that the property should be rated at fair quality and average condition. The Taxpayer’s evidence did not

⁶⁰ Exhibit 3:2.

⁶¹ The Appraisal Institute, *The Appraisal of Real Estate* 566 (14th ed. 2013).

⁶² Exhibit 3:2. Depreciation on the parking lot paving was shown as 35%, and depreciation on each of two canopies was shown as 25%.

⁶³ Exhibit 3:2.

⁶⁴ *Id.*

support a conclusion that there was clear and convincing evidence that the quality was not fair or that the condition was not average. Likewise regarding the age of the property and the Class D determination of the property.

However, this is not the case regarding the 32% depreciation that was utilized. The Commission has reviewed Marshall regarding Class D motels with fair quality and average condition. The depreciation that should be applied to this 48 year old motel is 49%, not 32%, utilizing the appropriate Life Expectancy Guidelines and Depreciation from the Commercial tables in Marshall.⁶⁵ As a result, we find that the combined depreciation on the buildings and listed improvements should be \$566,738 rather than \$350,059.⁶⁶ The resulting replacement cost new less depreciation should be \$535,801 rather than \$752,480.⁶⁷ There is no evidence to dispute the land value of \$98,975. We therefore find that the taxable value of the Subject Property for tax year 2018 should be \$634,776.⁶⁸ As discussed above, the assessment of the Subject Property had a multitude of unexplained value determinations, and several decisions where the explanation was inconsistent with the resulting value determination.

VII. CONCLUSIONS OF LAW

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.

⁶⁵ In addition, the Commission has examined the Life Expectancy Guidelines and Depreciation for the "Refinements" shown on the property record file with an age of 48 years, consisting of concrete paving and two canopies, and we have determined that the depreciation for those items should be 80%.

⁶⁶ $\$485,683 \times 0.49 + \$531,395 \times 0.49 + \$83,142 \times 0.8 + \$955 \times 0.8 + \$1,364 \times 0.8 = \$566,738$.

⁶⁷ $\$1,102,539 - \$566,738 = \$535,801$.

⁶⁸ $\$535,801 + \$98,975 = \$634,776$.

VIII. ORDER

IT IS ORDERED THAT:

1. The decision of the Hall County Board of Equalization determining the taxable value of the Subject Property for tax year 2018 is vacated and reversed.⁶⁹
2. The taxable value of the Subject Property for tax year 2018 is \$634,776.
3. This Decision and Order, if no appeal is timely filed, shall be certified to the Hall County Treasurer and the Hall 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 2018.
7. This Decision and Order is effective for purposes of appeal on September 16, 2020.⁷⁰

Signed and Sealed: September 16, 2020

Robert W. Hotz, Commissioner

SEAL

James D. Kuhn, Commissioner

⁶⁹ 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.

⁷⁰ 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.