

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Orpheum Tower LLC,
Appellant,

v.

Douglas County Board of Equalization,
Appellee.

Case Nos. 18C 0517 & 19C 0256

**DECISION AND ORDER
REVERSING THE DECISIONS 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

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

I. THE SUBJECT PROPERTY

The Subject Property is a commercial parcel located at 405 S. 16th Street, Omaha, Douglas County, Nebraska. The parcel is improved with a 147,584 square foot 16-story apartment building that was constructed in 1910 and remodeled in 2012. The property record files (PRFs) and legal description for the Subject Property are found at Exhibit 3 (2018) and Exhibit 4 (2019).¹

II. PROCEDURAL HISTORY

The Douglas County Assessor (the County Assessor) determined that the assessed value of the Subject Property was \$15,399,600 for tax years 2018² and 2019.³ Orpheum Tower LLC (the Taxpayer) protested these assessments to the Douglas County Board of Equalization (the County Board). The County Board determined that the taxable value of the Subject Property for both tax years 2018 and 2019 was \$15,399,600.⁴

¹ See legal descriptions at Ex. 3:20 and 4:22, respectively.

² Ex. 3:3-4.

³ Ex. 4:3-4.

⁴ Ex. 1, 2.

The Taxpayer appealed the decisions of the County Board to the Tax Equalization and Review Commission (the Commission). The Commission held a hearing on May 27, 2021, with Commissioner Hotz presiding. Exhibits 1 through 16 were admitted.⁵ Mark D. Jenkins and Nick Dizona 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

⁵ Absent in the record is any indication that the parties conducted a Pre-Hearing Conference or made any stipulations.

⁶ 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).

⁷ *Brenner* at 283, 811 (citations omitted).

⁸ *Id.*

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

¹⁰ *Omaha Country Club v. Douglas Cty. 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 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).

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. RELEVANT 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.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 Cty. 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

V. FINDINGS OF FACT

Two witnesses testified at the hearing. Mark D. Jenkins works as a Real Estate Specialist with the Douglas County Assessor/Register of Deeds office. He holds the State Assessor's certificate, but he is not a licensed appraiser. Jenkins inspected the Subject Property in December 2012, May 2014, and November 2019.²² Nicholas Dizona is a certified general appraiser, a credential he has held for more than 10 years. He has appraised hundreds of apartment buildings over the course of his career. He prepared an appraisal report on the Subject Property with an effective date of January 1, 2019. While appraising the Subject Property, Dizona personally inspected the property on February 2, 2019. Dizona asserted, and his appraisal report stated, the appraisal report was completed consistent with professional appraisal standards.²³

Square Footage

For both tax years at issue, the square footage used in the County Assessor's income approach for the office space was 6,163 square feet, and the square footage used for the apartments was 147,921.²⁴ The built-as square footage listed in the Property Profile Report of the PRF is 147,584 for both tax years.²⁵ Jenkins inspected the Subject Property in November 2019. He determined that the square footage of the gross built-as building square footage was 154,895 and the gross built-as apartment square footage was 141,750. Jenkins's square footage determinations were based on "gross built-as square footage," which Jenkins described as "the exterior dimensions of the building for all levels." Jenkins acknowledged that the measurements from his inspection did not correspond to the square footage figures used in the income approaches for 2018 or 2019.

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

²² The first two inspections are documented at Exhibit 4:5-6.

²³ Exhibit 8:2. 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. *JQH La Vista Conference Center Development LLC v. Sarpy County Board of Equalization*, 285 Neb. 120, 825 N.W.2d 447 (2013). See also: *U.S. Ecology v. Boyd County Bd. of Equal.*, 256 Neb. 7, 588 N.W.2d 575 (1999).

²⁴ Exhibits 3:8-9, 4:10-11.

²⁵ Exhibits 3:4, 4:4.

As a result of his inspection of the building, Dizona determined there was a net rentable area of 3,160 square feet for the first-floor office area and 96,819 square feet of net rentable apartment space. These measurements are substantially less than both the measurements used in the original assessment and the revised measurements from Jenkins's inspection. Dizona attributed the difference to common spaces such as hallways. In Dizona's opinion, the market rent rate should be applied only to the net rentable apartment space.

Assessment and Jenkins Testimony

For tax years 2018 and 2019, the County Assessor rated the Subject Property as Very Good quality and Very Good condition.²⁶ For both quality and condition, Very Good is the second highest rating available on a six-tiered rating system used by the County Assessor. The quality rating is based on exterior finish, fenestration, HVAC system, interior finishes, and appliances. The May 2014 inspection was the most recent inspection by the County Assessor before either the 2018 or 2019 assessment.

The County Assessor determined the value of the Subject Property using the income approach to value. The income approach involves multiplying rental rates by rentable square footage to calculate potential gross income (PGI).²⁷ Vacancy and collection losses are subtracted, and any additional income is added to PGI to determine effective gross income (EGI). Expenses are subtracted from EGI to determine net operating income (NOI). NOI is then divided by a capitalization rate, commonly called a "cap rate," to determine indicated market value of the property. The income approach values both land and buildings as a single economic unit. A portion of the value indicated by the income approach is attributed to the land; this portion is calculated based on sales of vacant land in the area, but the apportionment does not increase or decrease the assessed value of the property as a whole.

The first floor of the Subject Property is commercial office space; the second through sixteenth floors are apartments. For both tax years 2018 and 2019, the County Assessor used separate income approaches for the first floor and for the next fifteen floors. For both tax years,

²⁶ Exhibits 3:4, 4:4.

²⁷ See The Appraisal Institute, *The Appraisal of Real Estate*, 439-508 (14th ed. 2013). In mass appraisal, rental rates, vacancy and collection loss rates, expenses, and the capitalization rate are determined based on market research and represent typical values in the market, e.g., typical rent for similar properties rather than the specific rent charged by any specific landlord.

the income approach indicated a value of \$14,614,600 for the apartments and \$785,000 for the office space.²⁸

The County Assessor uses the condition of the property to calibrate its CAMA (Computer Assisted Mass Appraisal) system to capture the amount of income a property is expected to generate. The variable rates used in the income approach were the same for the Subject Property for tax years 2018 and 2019. A condition rating of Very Good corresponds to a rental rate of \$13 per square foot, which was used in the income approaches for the Subject Property's apartments.²⁹ Based on a \$13 per square foot rental rate and rentable square footage of 147,750, the County Assessor determined that the PGI of the Subject Property was \$1,922,973. The vacancy rate was set at 5% for the Subject Property and all similar properties in the neighborhood regardless of quality or condition, which resulted in an EGI of \$1,826,824.35 for the Subject Property. The condition rating of Very Good corresponded to an expense rate of 40%. Application of the 40% expense rate resulted in NOI of \$730,729.74 for the Subject Property. Jenkins testified that the Subject Property was "unique" within the market area, so there were few sales from which to derive a capitalization rate. Instead, the capitalization rate of 7.5 % was based on industry standards. This capitalization rate was "loaded," meaning that the effective tax rate was included in the capitalization rate rather than the expense rate. This methodology resulted in an indicated value of \$14,614,600 for the apartment portion of the Subject Property for both tax years.³⁰

The County Assessor performed a separate income approach for the office space; as with the apartments, this income approach was the same for tax years 2018 and 2019. For the office space, the condition rating of Very Good corresponded to a rental rate of \$21 per square foot.³¹ The vacancy rate was set at 5.8% for the Subject Property and all similar properties in the neighborhood regardless of quality or condition. The condition rating of Very Good corresponded to an expense rate of 34%. The loaded capitalization rate was 10.25%. This

²⁸ Exhibits 3:8-9, 4:10-11.

²⁹ All of the findings in this paragraph are derived from Exhibit 3:8, Exhibit 4:10, and the testimony of Jenkins.

³⁰ Exhibits 3:8, 4:10.

³¹ All of the findings in this paragraph are derived from Exhibit 3:9, Exhibit 4:11, and the testimony of Jenkins.

methodology resulted in an indicated value of \$785,000 for the apartment portion of the Subject Property for both tax years.³²

Based on the information received from Orpheum Tower in the course of the appeal, Jenkins testified that he would use the same valuation model and rates in the income approach, but he would change the square footage to reflect the results of his inspection, to determine the value of the Subject Property.

Dizona Appraisal and Testimony

The Subject Property was purchased in 2016 for \$15,000,000. This price included a leasehold interest in an adjacent garage; Dizona testified that without the garage, the Subject Property could not be operated as an apartment building. The garage is owned by a separate entity and is located on a separate parcel. Dizona's appraisal of the Subject Property did not include the leasehold interest in the garage, but the appraisal assumed that access to parking continued. Dizona testified that the Subject Property would be worth much less without tenant access to the garage because there would be no demand for a 137-unit apartment building without any parking. Without the garage, Dizona testified, the Subject Property would have a different highest and best use. The 2016 purchase price also included a "cash equivalency" necessary to obtain favorable financing for the transaction.

Based on his February 2, 2019 inspection, Dizona determined that the quality and condition of the Subject Property should both be rated as Average. The County Assessor, as noted above, had both quality and condition rated as Very Good. Dizona's quality and condition ratings were based on the discovery of "substantial deferred maintenance" with the building's boiler and observations of a "fairly worn" building with deferred maintenance throughout, including the common areas and elevators. Dizona noted that items such as the boiler and the cooling system were not newly renovated. The apartments in the Subject Property have communal laundry rooms on each floor with coin operated washers and dryers. In Dizona's opinion, the Subject Property was designed to be a low-cost alternative to luxury apartment complexes. Dizona also

³² Exhibits 3:9, 4:11.

testified that these ratings were consistent with classifications described in the Marshall & Swift costing guidelines.

Dizona used a sales comparison approach in his appraisal, identifying comparable properties that had recently sold in downtown Omaha and making adjustments to account for the superior or inferior qualities and features of those properties.³³ Dizona selected some properties that were generally superior to the Subject Property and some that were generally inferior, to bracket the value of the Subject Property. One of the comparables, the Greenhouse,³⁴ was significantly superior to the Subject Property, but Dizona selected it as a comparable because it relies on a lease of an adjacent garage for parking, like the Subject Property. The sale of the Greenhouse, for \$17,600,000 in November 2018, included the leasehold interest in the adjacent parking garage. Dizona's sales comparison approach indicated an actual value of \$11,880,000.

Dizona's appraisal also included an income approach analysis.³⁵ He used seventeen apartment buildings in Omaha for rent comparables. Dizona calculated market rental rates on a per-unit basis rather than on a per-square-foot basis, determining that the market rental rate for a studio apartment (the Subject Property has 16) was \$691 per month, the market rental rate of a one-bedroom apartment (the Subject Property has 49) was \$873 per month, and the market rental rate of a two-bedroom apartment (the Subject Property has 67) was \$1,023 per month. This resulted in an annual PGI of \$1,468,488. Dizona found that the Subject Property had an unusually low 85% occupancy rate for the area, but he used a market-derived vacancy rate of 6% in his analysis. He used an expense rate totaling 40%, resulting in an NOI of \$828,227. He used a capitalization rate of 7%, which resulted in a rounded indicated value of \$11,832,000.

In reconciling his income and sales comparison approaches, Dizona gave slightly greater weight to the income approach, but he noted that the two approaches produced similar results. Dizona's opinion of value of the Subject Property was \$11,840,000 as of January 1, 2019. Dizona gave no opinion of value for 2018, although he testified that the income and expense rates for the Subject Property were similar for that tax year.

³³ Dizona's adjustment grid for the sales comparison approach is found at Exhibit 8:81.

³⁴ See Exhibit 8:81.

³⁵ The information in this paragraph is derived from the testimony of Dizona and Exhibit 8:102.

VI. ANALYSIS

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. 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 to rebut the presumption in favor of the County Board under Nebraska law.³⁶

A. Tax Year 2019

Based upon the record above, the Commission finds that for tax year 2019, Dizona's appraisal constitutes both competent evidence to rebut the presumption in favor of the County Board, and clear and convincing evidence that the determination of the County Board was arbitrary or unreasonable for tax year 2019. The Commission finds that the taxable value of the Subject Property for tax year 2019 is \$11,840,000.

B. Tax Year 2018

Dizona's appraisal had a retrospective effective date of January 1, 2019, and Dizona did not give an opinion of value for January 1, 2018.³⁷ However, Dizona's appraisal is not the only evidence that can rebut the presumption in favor of the County Board. For both tax years at issue, the square footage used in the County Assessor's income approach for the office space was 6,163 square feet, and the square footage used for the apartments was 147,921. Jenkins' 2019 inspection revealed 2,600 square feet for office space and 141,750 square feet for apartment space. Dizona's 2019 inspection revealed a net rentable area of 3,160 square feet for the first-floor office area and 96,819 square feet of net rentable apartment space. The difference appears to be that Dizona excluded common spaces such as hallways, elevators, and lobbies, whereas Jenkins included those common spaces in his determination of square footage. Such areas are not rentable square footage and should not be multiplied by the market rental rate in the income approach. We find that this discrepancy is both competent evidence to rebut the presumption in

³⁶ *Cain v. Custer Cty. Bd. of Equal.*, 298 Neb. 834, 850, 906 N.W.2d 285, 298 (2018).

³⁷ Exhibit 8:2.

favor of the County Board, and clear and convincing evidence that the determination of the County Board was arbitrary or unreasonable.

As noted above, in its determination of value for tax year 2018, the County Board adopted the assessed value as determined by the County Assessor. That value, and every detail that it was based upon when applying its income approach, was subsequently relied upon by the County Assessor in its assessment for tax year 2019, including the rental rates, the vacancy rates, the expense rates, and the capitalization rates. Based upon the entirety of the record, we find there is sufficient evidence to conclude that the actual value of the Subject Property was unchanged from tax year 2018 to tax year 2019. Nothing in the record persuasively suggests otherwise.

VII. CONCLUSION

The Commission finds there is competent evidence to rebut the presumption that the County Board faithfully performed its duties and had sufficient competent evidence to make its determinations. The Commission also finds there is clear and convincing evidence that the County Board's decisions were arbitrary or unreasonable.

For the reasons set forth above, the decisions of the County Board should be vacated and reversed.

VIII. ORDER

IT IS ORDERED THAT:

1. The decisions of the Douglas County Board of Equalization determining the taxable value of the Subject Property for tax years 2018 and 2019 are reversed.³⁸
2. The taxable value of the Subject Property for tax year 2018 is **\$11,840,000**.
3. The taxable value of the Subject Property for tax year 2019 is **\$11,840,000**.
4. 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).

³⁸ 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.

5. Any request for relief, by any party, which is not specifically provided for by this Decision and Order is denied.
6. Each party is to bear its own costs in this proceeding.
7. This Decision and Order shall only be applicable to tax years 2018 and 2019.
8. This Decision and Order is effective for purposes of appeal on November 9, 2021.³⁹

Signed and Sealed: November 9, 2021

Robert W. Hotz, Commissioner

SEAL

James D. Kuhn, Commissioner

³⁹ 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.