

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Steven J. and Katherine L. Mercure,
Appellant,

v.

Johnson County Board of Equalization,
Appellee.

Case No: 18R 0069

Decision and Order Reversing the
Determination of the Johnson
County Board of Equalization

For the Appellant:

Timothy L. Moll,
Rembolt Ludtke, LLP

For the Appellee:

Benjamin Beethe,
Deputy Johnson County Attorney

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

I. THE SUBJECT PROPERTY

The Subject Property is a residential parcel located in Johnson County. The parcel is improved with a 3,862 square foot home. The legal description and property record card for the Subject Property are found at Exhibit 6.

II. PROCEDURAL HISTORY

The Johnson County Assessor determined that the assessed value of the Subject Property was \$362,517 for tax year 2018. Steven J. and Katherine L. Mercure (the Taxpayer) protested this assessment to the Johnson County Board of Equalization (the County Board) and requested an assessed valuation of \$256,000. The County Board determined that the taxable value of the Subject Property for tax year 2018 was \$357,568.¹

The Taxpayer appealed the decision of the County Board to the Tax Equalization and Review Commission (Commission). On May 24, 2019, Commissioner Kuhn conducted a single commissioner hearing pursuant to Neb. Rev. Stat. § 77-5015.02, and on June 7, 2019, the commission issued an order reversing the decision of the County Board and setting the value of the Subject Property at \$315,000 for tax year 2018. On June 28, 2020, the County Board filed an

¹ E1.

application for rehearing by a panel of the Commission.² The Commission held a hearing on October 4, 2020, with Commissioner Keetle presiding. Prior to the hearing, the parties exchanged exhibits and submitted a Pre-Hearing Conference Report, as ordered by the Commission. In the Pre-Hearing Conference Report, the parties stipulated to the receipt of exchanged exhibits 1-10.

III. STANDARD OF REVIEW

The Commission's review of the determination 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 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

² See Neb. Rev. Stat. § 77-5005(4) (Reissue 2018).

³ 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 (Citations omitted).

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).

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. The Commission may consider all questions necessary to determine taxable value of property as it hears an appeal or cross appeal.¹⁰ 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.¹¹ The Commission's Decision and Order shall include findings of fact and conclusions of law.¹²

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.¹³

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.¹⁴ Actual value, market value, and fair market value mean exactly the same thing.¹⁵ 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.¹⁶ All real property in Nebraska subject to taxation shall be assessed as of January 1.¹⁷ All

⁹ *Bottorf 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 Neb. Rev. Stat. § 77-5016(6) (Reissue 2018).

¹² Neb. Rev. Stat. § 77-5018(1) (Reissue 2018).

¹³ Neb. Rev. Stat. § 77-112 (Reissue 2018).

¹⁴ *Id.*

¹⁵ *Omaha Country Club* at 180, 829 (2002).

¹⁶ Neb. Rev. Stat. § 77-131 (Reissue 2018).

¹⁷ 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.¹⁸

B. Facts & Analysis

The Taxpayer presented the testimony of Tammy Lempka, a Licensed Real Property Appraiser and real estate broker primarily working in southeast Nebraska. Ms. Lempka performed a fee appraisal for the Subject Property and certified that that appraisal was performed according to professional standards.¹⁹ Ms. Lempka testified regarding the preparation of the appraisal report and the reasons set forth in the appraisal report for eliminating the use of the income and cost approaches to determining value based on the characteristics of the Subject Property and data available to conduct these valuation methods. Ms. Lempka further testified regarding the market for acreage properties in Southeastern Nebraska. The appraisal report utilized the sales comparison approach to value because it provided a more accurate value for a property with the characteristics of the Subject Property. Because the Subject Property is unique in both the city of Tecumseh and Johnson County, Ms. Lempka had to look for sales of properties outside of Tecumseh and Johnson County. Ms. Lempka testified regarding the locations and characteristics of the four properties utilized as comparable sales and the basis of each of the adjustments that were applied to these sales to make them comparable to the Subject Property.²⁰ Ms. Lempka acknowledged that it was more desirable to have comparable sales which required fewer adjustments to be made; however, when each of the adjustments are supported as they are in the appraisal report, the sales can be relied on. Utilizing the sales comparison approach to value, Ms. Lempka reached a determination of value of \$315,000 for the Subject Property as of the assessment date.²¹

Steven J. Mercure testified that he was familiar with the real estate market in Tecumseh and testified that no residential property in Tecumseh has sold for more than \$300,000. The Taxpayer further testified that he was familiar with the property located at 684 N 5th Street and that it had been for sale for approximately five years before it sold in November of 2017 for \$219,000.²²

¹⁸ Neb. Rev. Stat. § 77-201(1) (Reissue 2018).

¹⁹ E7

²⁰ “A sales comparison adjustment is made to account (in dollars or a percentage) for a specific difference between the subject property and a comparable property. As the comparable is made more like the subject, its price is brought closer to the subject’s unknown value.” Appraisal Institute, *Appraising Residential Properties*, at 334 (4th ed. 2007).

²¹ E7:3.

²² The property at 684 N 5th Street was presented by the County Board as a comparable sale and was utilized in the appraisal report presented by the Taxpayer as a comparable sale.

Terry Keebler, Johnson County Assessor, testified that it is hard to find comparable sales for higher valued properties in Johnson County, and that there are no comparable properties to the Subject Property in Tecumseh. Due to this lack of comparables, the County Assessor utilized the cost approach to value the Subject Property and utilized the sales that did occur in Johnson County to determine the applicable depreciation to apply to the Subject Property. The County Board adjusted the value of the land component to account for the gravel driveway at the protest hearing. The County Board presented the Property Record File (PRF) for the Subject Property before and after the adjustment made by the County Board.²³ The PRFs do not contain information regarding the determination of the type and amount of depreciation applied to the replacement cost determined in the Vanguard Computer Assisted Mass Appraisal system utilized by the Assessor. The Assessor testified that the value of the Subject Property was equalized with residential properties in Johnson County.

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 to overcome the presumption in favor of the determination of the County Board.²⁴ The Commission finds that the opinion of value of Ms. Lempka, together with the appraisal report, constitute competent evidence to rebut the presumption in favor of the County Board's determination. When the appraisal report and other evidence presented to the Commission are taken together, this constitutes clear and convincing evidence that the County Board's determination was unreasonable.

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.

²³ E5 & E6.

²⁴ See, *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).

VI. ORDER

IT IS ORDERED THAT:

1. The decision of the Johnson County Board of Equalization determining the taxable value of the Subject Property for tax year 2018 is vacated and reversed.²⁵
2. The taxable value of the Subject Property for tax year 2018 is:

Land:	\$ 6,829
<u>Improvements:</u>	<u>\$308,171</u>
Total:	\$315,000

3. This Decision and Order, if no appeal is timely filed, shall be certified to the Johnson County Treasurer and the Johnson 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 October 7, 2020.²⁶

Signed and Sealed: October 7, 2020

Steven A. Keetle, Commissioner

SEAL

James D. Kuhn, Commissioner

²⁵ 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.

²⁶ 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.