

**BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW
COMMISSION**

HY-VEE
APPELLANT,

V.

DODGE COUNTY BOARD OF
EQUALIZATION,
APPELLEE.

CASE NOS: 19C 0019
& 20C 0024

DECISION AND ORDER
REVERSING THE DECISIONS
OF THE DODGE COUNTY
BOARD OF EQUALIZATION

For the Appellant:
Max L. Rodenburg,
Rembolt Ludtke, LLP

For the Appellee:
Paul J. Vaughan,
Deputy Dodge County Attorney

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

I. THE SUBJECT PROPERTY

The Subject Property is a 5.41-acre commercial parcel, improved with a 60,448 square foot grocery store located in Dodge County, Nebraska. The legal description and Property Record File (PRF) of the Subject Property are found at Exhibit 4.

II. PROCEDURAL HISTORY

The Dodge County Assessor determined the assessed value of the Subject Property was \$4,767,668 for tax year 2019.¹ Hy-Vee (the Taxpayer) protested this assessment to the Dodge County Board of Equalization (the County Board) and requested a taxable value of \$3,992,800. The County Board determined the taxable value of the Subject Property for tax year 2019 was \$4,767,668. The County Board

¹ Exhibit 1.

determined the taxable value of the Subject Property for tax year 2020 was \$4,767,668.²

The Taxpayer appealed the decisions of the County Board to the Tax Equalization and Review Commission (the Commission). The Commission held a hearing on September 1, 2021. Prior to the hearing, the parties exchanged exhibits and submitted a pre-hearing conference Report, as ordered by the Commission. Exhibits 1 through 6 were admitted into evidence.

III. STANDARD OF REVIEW

The Commission's review of the County Board's determination 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,

² Exhibit 2.

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 v. Banner County Bd. of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (citations omitted).

⁵ *Id.*

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 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 that 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 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.¹¹ The Commission's Decision and Order shall include findings of fact and conclusions of law.¹²

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,

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 *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).

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 Nebraska courts have held that 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 taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.¹⁸

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.¹⁹ Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value.²⁰ The purpose of equalization of assessments is to bring the assessment of different parts of a taxing district to the same

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

¹⁴ Neb. Rev. Stat. § 77-112 (Reissue 2018).

¹⁵ *Omaha Country Club v. Douglas County Bd. of Equal.*, 11 Neb. App. 171, 180, 645 N.W.2d 821, 829 (2002).

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

¹⁷ See Neb. Rev. Stat. § 77-1301(1) (Reissue 2018).

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

¹⁹ Neb. Const., art. VIII, § 1.

²⁰ *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).

relative standard, so that no one of the parts may be compelled to pay a disproportionate part of the tax.²¹ 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.²² 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.²³ If taxable values are to be equalized it is necessary for a Taxpayer to establish by clear and convincing evidence that the valuation placed on the property when compared with valuations placed on other similar properties is grossly excessive and is the result of systematic exercise of intentional will or failure of plain legal duty, and not mere errors of judgment.²⁴ There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity.²⁵

V. FINDINGS OF FACT

A. Summary of the Evidence

The Taxpayer called its appraiser, Thomas Scaletty, to testify with respect to his appraisal of the Subject Property. Scaletty is a certified general real property appraiser with over 20 years' experience.²⁶ He is licensed in Nebraska and holds the MAI designation from the Appraisal Institute.

Scaletty conducted an appraisal of the Subject Property providing an opinion of value as of January 1, 2019, and January 1, 2020.²⁷ This appraisal was prepared in conformity with the Uniform Standards of Professional Appraisal Practice (USPAP). Scaletty performed an

²¹ *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991); *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb. App. 582, 597 N.W.2d 623 (1999).

²² *Banner County v. State Bd. of Equal.*, 226 Neb. 236, 411 N.W.2d 35 (1987).

²³ *Equitable Life v. Lincoln County Bd. of Equal.*, 229 Neb. 60, 425 N.W.2d 320 (1988); *Fremont Plaza v. Dodge Cty. Bd. of Equal.*, 225 Neb. 303, 405 N.W.2d 555 (1987).

²⁴ *Newman v. County of Dawson*, 167 Neb. 666, 670, 94 N.W.2d 47, 49-50 (1959) (citations omitted).

²⁵ *Id.* at 673, 94 N.W.2d at 50.

²⁶ Exhibit 3:76.

²⁷ Exhibit 3:3.

economic analysis of the market area containing the Subject Property.²⁸ His inspection of the Subject Property found the improvements were in average condition, with an average to good build quality, and a remaining useful life of 30 years.²⁹

Scaletty's appraisal considered three approaches to value: the cost approach, the sales comparison approach, and the income capitalization approach. Each of the three approaches will be discussed in turn below.

a. The Cost Approach

In developing his cost approach analysis, Scaletty first determined a value of the land, and then determined a replacement value for the improvements, less depreciation. To determine a land valuation, Scaletty utilized two comparable land sales in Fremont, Nebraska and one comparable land sale in Grand Island, Nebraska. Scaletty then adjusted for the size of the plots, as the Fremont sales were significantly smaller, and the Grand Island sale significantly larger than the Subject Property. After adjustments to account for the size of the Subject Property, as well as physical condition and location of the land, Scaletty determined the value of the land component of the Subject Property to be \$1,410,000 for both tax years.³⁰

Scaletty determined the replacement cost of the improvements on the Subject Property using the Marshall Valuation Service. Adjustments were made to account for building quality and physical depreciation.³¹ Additional adjustments were made to account for economic obsolescence based upon Scaletty's opinion "that currently development of a single-tenant retail property is not feasible on a

²⁸ Exhibit 3:14-19.

²⁹ Exhibit 3:30.

³⁰ Exhibit 3:40-41.

³¹ Exhibit 3:44-45.

purely speculative basis.”³² This approach resulted in a value estimate of \$3,040,000 for tax year 2019 and \$3,120,000 for tax year 2020.

b. The Sales Comparison Approach

In developing the sales comparison approach, Scaletty selected nine comparable sales of properties similar to the Subject Property.³³ Adjustments to these selected properties were made to account for the time and market conditions of the sale, the age and condition of the selected property, the location of the selected property, and the building sizes, in order to provide a proper basis for comparison to the Subject Property.³⁴ Scaletty’s sales comparison approach resulted in a value estimate of \$3,020,000 for both tax years.³⁵

c. The Income Capitalization Approach

In the income capitalization approach, Scaletty analyzed eight comparable properties to determine an average market rent. Again, adjustments were made to the selected properties to account for differences in age, condition, and location, resulting in a typical market lease rate of \$5.50 per square foot.³⁶

Scaletty then examined typical expenses, to include real estate taxes, insurance, utilities, maintenance, and management and administration expenses. He estimated a typical expense rate at 26.86%.³⁷ Scaletty then performed a market risk analysis to determine a typical yield capitalization rate.³⁸ His analysis resulted in his use of

³² *Id.*

³³ Exhibit 3:49-50.

³⁴ Exhibit 3:49-55.

³⁵ Exhibit 3:53.

³⁶ Exhibit 3: 56-64.

³⁷ Exhibit 3:64-66.

³⁸ Exhibit 3:67-73.

an 8.5% capitalization rate, which, when adjusted to account for the tax load, resulted in a loaded capitalization rate of 8.7%.³⁹

Using these figures, Scaletty opined that the value of the Subject Property using the income capitalization approach was \$3,050,000 for tax year 2019 and \$3,210,000 as of January 1, 2020.⁴⁰

d. Reconciliation of Value

In reconciling the three approaches to value to reach a single opinion of value for the Subject Property, Scaletty gave “thorough” consideration to the values reached via the sales comparison and income approach methods and “moderate” consideration to the cost approach, with the sales approach “considered to provide the most reliable indication of market value.”⁴¹ Scaletty’s ultimate opinion of value for the Subject Property was \$3,030,000 for tax year 2019, and \$3,070,000 for tax year 2020.⁴²

The County Board offered the testimony of Debbie Churchill, the Dodge County Assessor. Churchill had been the County Assessor for thirteen years and held the State Assessor’s Certificate. Churchill explained that there were certain items that were not “picked up” by the most recent conversion of the County’s computer-assisted mass appraisal (CAMA) system and were not previously valued. Churchill stated that this most recent conversion occurred in 2018, and that processing and correcting any errors caused by CAMA conversion may typically take up to six years.

Churchill stated that no CAMA-correction adjustments were made to the Subject Property for the 2019 or 2020 tax years. Churchill stated that the valuation used by the Assessor was based on a cost approach, using a depreciation schedule set by the CAMA system. Churchill

³⁹ Exhibit 3:72-73.

⁴⁰ Exhibit 3:73.

⁴¹ Exhibit 3:74.

⁴² Exhibit 3:75.

stated she did not know the exact depreciation percentage that was applied to the Subject Property for the applicable tax years.

Churchill disagreed with the comparable properties selected by Scaletty, asserting that the current uses of those properties rendered them inadequate for use as comparable properties. Instead, Churchill stated that the Assessor only uses the cost and sales approach to valuing properties, citing a lack of time and personnel needed to capture the relevant information to use an income approach.

Churchill stated in conducting a sales analysis, one comparable sale of another grocery store in Fremont, Nebraska was considered, as well as three other sales in Iowa. However, Churchill concedes that lease and vacancy rates were not considered in comparing the Iowa sales to the Subject Property.

B. Analysis

When an independent appraiser using professionally accepted methods of mass appraisal certifies that an appraisal was performed according to professional standards, the appraisal is considered competent evidence under Nebraska law.⁴³ Here, as the Taxpayer presented the USPAP-compliant appraisals and supporting testimony of Thomas Scaletty, the Commission finds that the Taxpayer has provided competent evidence sufficient to rebut the presumption that the County Board faithfully performed its duties and had sufficient evidence to make its determination.

As noted above, the question of the reasonableness of the County Board's valuation of the Subject Property becomes one of fact.⁴⁴ In this case, the County Board's property record card demonstrates a total valuation which, based upon Churchill's testimony, relies primarily upon the cost approach.⁴⁵ However, there is no breakdown present in the record to determine the amount of depreciation applied to the Subject Property or the replacement cost new (RCN). Churchill stated

⁴³ *Cain v. Custer Cty. Bd. of Equal.*, 298 Neb. 834, 850, 906 N.W.2d 285, 298 (2018).

⁴⁴ See *Brenner v. Banner County Bd. of Equal.*, *supra* note 4

⁴⁵ Exhibit 4:3.

this information is generally not included in the property record card in order to prevent taxpayer confusion.

While the property record card includes several properties as “comparables that have sold” as well as “comparables for sale,”⁴⁶ there is no indication that Churchill or the County Board considered the guidelines enumerated in Neb. Rev. Stat. § 77-1371, such as “(1) Whether the sale was financed by the seller and included any special financing considerations or the value of improvements; or (2) Whether zoning affected the sale price of the property...”⁴⁷ To the contrary, Churchill testified these factors were not considered during the sales analysis. Without consideration of these factors, and any necessary adjustments, the reliability of the Assessor’s comparables are called into question. The absence of this information in the property record card prevents the Commission from being able to ascertain certain aspects of the determination of value made by the Assessor and the County Board. The Commission is also unable to make a proper comparison with the Scaletty appraisal. For the reasons stated above, the Commission finds the Scaletty appraisal to be an accurate indicator of value and clear and convincing evidence that the determinations of the County Board were arbitrary or unreasonable.

VI. 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 determinations. The Commission also finds that there is clear and convincing evidence that the County Board’s decisions were arbitrary or unreasonable.

For the reasons set forth above, the determinations of the County Board are vacated and reversed.

⁴⁶ Exhibit 4:17-20.

⁴⁷ Neb. Rev. Stat. § 77-1371 (Reissue 2018).

VII. ORDER

IT IS ORDERED THAT:

1. The decisions of the Dodge County Board of Equalization determining the value of the Subject Property for tax years 2019 and 2020 are vacated and reversed.
2. The assessed value of the Subject Property for tax year 2019 is:
\$ 3,030,000
3. The assessed value of the Subject Property for tax year 2020 is:
\$ 3,070,000
4. This Decision and Order, if no appeal is timely filed, shall be certified to the Dodge County Treasurer and the Dodge County Assessor, pursuant to Neb. Rev. Stat. § 77-5018 (Reissue 2018)
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 2019 and 2020.
8. This Decision and Order is effective for purposes of appeal on May 9, 2023.⁴⁸

Signed and Sealed: May 9, 2023

SEAL



Robert W. Hotz, Commissioner

James D. Kuhn, Commissioner

⁴⁸ 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.