

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

JANEK AND TERESA
MIETUS,
APPELLANT,

V.

CHEYENNE COUNTY BOARD
OF EQUALIZATION,
APPELLEE.

CASE NO: 19C 0357

DECISION AND ORDER
REVERSING THE DECISION
OF THE CHEYENNE
COUNTY BOARD OF
EQUALIZATION

For the Appellant:

Thomas Helget,
Knudsen Law Firm

For the Appellee:

Paul Schaub,
Cheyenne County Attorney

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

I. THE SUBJECT PROPERTY

The Subject Property is a 30,100 square foot commercial parcel improved with a 16,206 square foot hotel located in Cheyenne County, Nebraska. The legal description and Property Record File (PRF) of the Subject Property are found at Exhibits 5 and 6.

II. PROCEDURAL HISTORY

The Cheyenne County Assessor determined the assessed value of the Subject Property was \$1,575,856 for tax year 2019. Janek and Teresa Mietus (the Taxpayer) protested this assessment to the Cheyenne County Board of Equalization (the County Board). The

County Board determined the taxable value of the Subject Property for tax year 2019 was \$1,575,856.¹

The Taxpayer appealed the decision of the County Board to the Tax Equalization and Review Commission (the Commission). The Commission held a hearing on September 21, 2021. Exhibits 1-24 and 26 were admitted into evidence. Exhibit 25 was not admitted into evidence.

III. STANDARD OF REVIEW

The Commission's review of the County Board's determination is de novo.² 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.³

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.⁴

The order, decision, determination, or action appealed from shall be affirmed unless evidence is adduced establishing that the order,

¹ Exhibits 4:10; 1:1.

² 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).

³ *Brenner v. Banner County Bd. of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (citations omitted).

⁴ *Id.*

decision, determination, or action was unreasonable or arbitrary.⁵ Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.⁶

The Taxpayer must introduce competent evidence of actual value of the Subject Property in order to successfully claim that the Subject Property is overvalued.⁷ 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.⁸

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.⁹ 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.¹⁰ The Commission's Decision and Order shall include findings of fact and conclusions of law.¹¹

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

⁵ Neb. Rev. Stat. § 77-5016(9) (Reissue 2018).

⁶ *Omaha Country Club v. Douglas County Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

⁷ 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).

⁸ *Bottorf v. Clay County Bd. of Equal.*, 7 Neb. App. 162, 580 N.W.2d 561 (1998).

⁹ Neb. Rev. Stat. § 77-5016(8) (Reissue 2018).

¹⁰ Neb. Rev. Stat. § 77-5016(6) (Reissue 2018).

¹¹ Neb. Rev. Stat. § 77-5018(1) (Reissue 2018).

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.¹²

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.¹³ Nebraska courts have held that actual value, market value, and fair market value mean exactly the same thing.¹⁴ 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.¹⁵ All real property in Nebraska subject to taxation shall be assessed as of January 1.¹⁶ All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.¹⁷

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.¹⁸ Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value.¹⁹ 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

¹² Neb. Rev. Stat. § 77-112 (Reissue 2018).

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

¹⁴ *Omaha Country Club v. Douglas County Bd. of Equal.*, 11 Neb. App. 171, 180, 645 N.W.2d 821, 829 (2002).

¹⁵ Neb. Rev. Stat. § 77-131 (Reissue 2018).

¹⁶ See Neb. Rev. Stat. § 77-1301(1) (Reissue 2018).

¹⁷ Neb. Rev. Stat. § 77-201(1) (Reissue 2018).

¹⁸ Neb. Const., art. VIII, § 1.

¹⁹ *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).

a disproportionate part of the tax.²⁰ 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.²¹ 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.²² 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.²³ There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity.²⁴

V. FINDINGS OF FACT

Testimony of Gary Brandt

Brandt had been a certified appraiser since 1975 and holds the MAI designation from the Appraisal Institute.²⁵ Brandt had appraised over 150 hotels in his career and performed an appraisal on the Subject Property conforming to the Uniform Standards of Professional Appraisal Practice (USPAP).²⁶ His appraisal utilized three approaches to value: cost, sales comparison, and income capitalization.²⁷

Brandt began his appraisal by inspecting the Subject Property. He determined the rental rooms were smaller than average. He also found the expenses for the Subject Property were high compared to typical

²⁰ *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).

²¹ *Banner County v. State Bd. of Equal.*, 226 Neb. 236, 411 N.W.2d 35 (1987).

²² *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).

²³ *Newman v. County of Dawson*, 167 Neb. 666, 670, 94 N.W.2d 47, 49-50 (1959) (citations omitted).

²⁴ *Id.* at 673, 94 N.W.2d at 50.

²⁵ Exhibit 24:78. Brandt's certification was as a Certified General Appraiser. Exhibit 24:71.

²⁶ Exhibit 24:71.

²⁷ Exhibit 24.

market expense ratios.²⁸ Brandt also reviewed three land sales in Sidney, Cheyenne County, Nebraska to determine a value for the land component of the Subject Property, finding a value of \$4.25 per square foot for a land value of \$128,000.²⁹

To complete his cost approach analysis, Brandt used the Marshall & Swift Cost Manual to determine a replacement cost new (RCN) for the improvements. Physical depreciation was calculated based upon the age of the building. Brandt also calculated an economic obsolescence factor to reflect changed market conditions. Brandt's cost approach resulted in a value of \$746,000.³⁰

Brandt's sales comparison approach examined four sales in western Nebraska, one sale in South Dakota, and one sale in Wyoming. All sales were of limited-service hotels like the Subject Property, with similar size and quality/condition ratings.³¹ Adjustments were made to account for differences in size for each comparable property. This analysis resulted in a value of \$790,000.³²

The income capitalization approach used by Brandt utilized market averages as well as the actual income and expenses of the Subject Property to determine the income and expense rates. Brandt noted the expense ratio of the Subject Property was higher than the market.³³ Brandt selected several comparable properties to determine a typical capitalization rate of 11.75%³⁴ These figures resulted in an income approach valuation of \$746,000.³⁵

Brandt then reconciled the three values, providing greater weight to the income approach due to the Subject Property's use as an income-producing hotel. Lesser weight was afforded to the sales comparison approach. After deducting for furniture, fixtures, and equipment, he

²⁸ Exhibit 24:3.

²⁹ Exhibit 24:43-49.

³⁰ Exhibit 24:50.

³¹ Exhibit 24:51-59.

³² Exhibit 24:61.

³³ Exhibit 24:64.

³⁴ Exhibit 24:68.

³⁵ Exhibit 24:68. This included furniture, fixtures, and equipment (FF&E).

ultimately opined that the overall value of the Subject Property was \$660,000 for the Subject Property.

Testimony of Janek Mietus

The Taxpayer, Janek Mietus, testified that since 2017, when a major employer, Cabela's, in Sidney, Cheyenne County, changed ownership and reduced their workforce, there had been a roughly 50% drop in occupancy for the Subject Property. Mietus related that several of his costs were static and did not decrease even though fewer rooms were occupied. He also stated the expenses for the Subject Property had increased because of an increased need to advertise and compete for travelers as hotels were overbuilt in Sidney because of the Cabela's transaction.

Testimony of Bryan Hill

Hill held an appraisal license as a Certified Residential Appraiser. He also held the State Assessor's Certificate. He had previously worked as the Chief Appraiser for the Keith County Assessor. Hill did not hold a license as a Certified General appraiser. Hill produced a "Summary Appraisal Report," including an opinion of value of the Subject Property, a commercial property, and asserting to be compliant with USPAP.³⁶

Hill's report utilized the cost, sales comparison, and income capitalization approaches. In determining the land value as though vacant, Hill examined five land sales along interstate interchanges in

³⁶ Exhibit 7:8. As a licensed Certified Residential Appraiser and not a Certified General Appraiser, it is questionable whether Hill's Summary Appraisal Report was a USPAP-compliant report. Hill's report listed the Cheyenne County Board of Commissioners as his client. Exhibit 7:2. As such, Hill does not appear to have been exempted from the requirements of the Real Property Appraiser Act by Neb. Rev. Stat. § 76-2221(9), because he was not "retained by a county to assist in the appraisal of real property as performed by the county assessor."

Cheyenne and Keith counties, finding a land value of \$167,800 per acre, resulting in a land value for the Subject Property of \$115,782.³⁷

Hill used the replacement-cost-new from the Subject Property's PRF. He then applied a physical and functional depreciation of 16.7%, with an additional 15% of functional obsolescence due to access and parking. A further 15% depreciation based on economic obsolescence was applied. These figures resulted in a valuation of \$1,282,480 for the Subject Property.

In performing a sales comparison analysis, Hill reviewed 16 sales of hotel properties along the I-80 corridor. Of those sales, Hill selected five which he felt were most comparable for further analysis.³⁸ This approach resulted in a valuation of \$1,226,700 for the Subject Property.

Hill's income capitalization approach examined sixteen hotel sales to determine what he believed to be typical market income, expense, vacancy, and capitalization rates. Using these figures, Hill calculated a value of \$1,282,670 for the Subject Property.³⁹ He then reconciled the three valuations and concluded that the actual value of the Subject Property as of January 1, 2019, was \$1,280,000.⁴⁰

VI. ANALYSIS

“[I]n tax valuation cases, actual value is largely a matter of opinion and without a precise yardstick for determination with complete accuracy.”⁴¹ This case presents three opinions of value for the Subject Property – the County Assessor's, Hill's, and Brandt's. 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.⁴² The Hill and Brandt appraisals each purported

³⁷ Exhibit 7:11.

³⁸ Exhibit 7:36.

³⁹ Exhibit 7:37-39.

⁴⁰ Exhibit 7:39-40.

⁴¹ *Cain v. Custer Cty. Bd. of Equal.*, 298 Neb. 834, 851, 906 N.W.2d 285, 298 (2018).

⁴² *Cain v. Custer Cty. Bd. of Equal.*, 298 Neb. 834, 850, 906 N.W.2d 285, 298 (2018).

to comply with USPAP. As such, the presumption that the County Board faithfully performed its duties and had sufficient competent evidence to make its determination is rebutted.

Hill and Brandt each offered expert testimony as to the actual value of the Subject Property. The weight to be given to expert testimony, and the credibility of witnesses, is a fact question to be decided by the fact finder at trial.⁴³ While both provided opinions of value based upon the cost, sales comparison, and income capitalization approaches, the Brandt opinion offered a more credible opinion of actual value based upon his experience and credentials.

As noted above, Brandt was a certified general appraiser, held the MAI designation from the Appraisal Institute, and had appraised between 150-200 hotel properties. Hill was only a certified residential appraiser. While Hill held the State Assessor's Certificate and had assisted in more complex appraisals such as truck stops and ethanol plants,⁴⁴ it is not clear from the record whether Hill had any experience in valuing hotels like the Subject Property.

Both appraisers placed greater weight upon their income capitalization analysis as the Subject Property is an income-producing property. "In general, for income-producing properties, the income approach is the preferred valuation approach when reliable income and expense data are available, along with well-supported income multipliers, overall rates, and required rates of return on investment."⁴⁵ Brandt used data compiled from sales reports in his sales comparison approach,⁴⁶ as well as the actual income and expenses from the Subject Property and comparable properties to calculate a typical market average.⁴⁷ The properties selected by Brandt for comparison were all limited service hotels with average or

⁴³ *Cabela's, Inc. v. Cheyenne Cty. Bd. of Equalization*, 8 Neb. App. 582, 596-97, 597 N.W.2d 623, 635 (Neb. App. 1999) (citing *Coffey v. Mann*, 7 Neb. App. 805, 585 N.W.2d 518 (1998)).

⁴⁴ Ex. 7:50.

⁴⁵ International Association of Assessing Officers, *Standard on Mass Appraisal of Real Property* § 4.4 (July 2017).

⁴⁶ Exhibit 24:52-57.

⁴⁷ Exhibit 24:64-65.

average/good quality and condition ratings, were of similar size, and had similar amenities. Brandt also provided adjustment to the price-per-room to improve comparability.⁴⁸ The properties selected by Hill generally had greater amenities, such as swimming pools, fitness centers, or conference rooms.⁴⁹ However, it is unclear from the record as to what, if any, adjustments were made to account for and improve comparability.⁵⁰ Additionally, one sale listed as Sale #14, was sold after the assessment date of January 1, 2019.⁵¹ Additionally, the PRF indicates that Sale #14 would be considered superior in terms of amenities and location.

“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.”⁵² Without evidence demonstrating what adjustments, if any, were made to quantify and account for these differences, the comparability of the properties is questionable at best.

The weight to be given to expert testimony, and the credibility of witnesses, is a fact question to be decided by the fact finder at trial.⁵³ Overall, the Commission finds the Brandt appraisal to be the better indicator of the actual value of the Subject Property for tax year 2019. The Commission also finds the Brandt appraisal to be clear and convincing evidence that the decision of the County Board was arbitrary and unreasonable.

VII. CONCLUSIONS OF LAW

The Commission finds there is competent evidence to rebut the presumption the County Board faithfully performed its duties and had

⁴⁸ Exhibit 24:60.

⁴⁹ Exhibit 7:36.

⁵⁰ Exhibit 7:36.

⁵¹ Exhibit 7:33.

⁵² Appraisal Institute, *Appraising Residential Properties*, at 334 (4th ed. 2007).

⁵³ *Cabela’s, Inc. v. Cheyenne Cty. Bd. of Equalization*, 8 Neb. App. 582, 596-97, 597 N.W.2d 623, 635 (Neb. App. 1999) (citing *Coffey v. Mann*, 7 Neb. App. 805, 585 N.W.2d 518 (1998)).

sufficient competent evidence to make its determination. The Commission also finds there is clear and convincing evidence the County Board's decision was arbitrary or unreasonable.

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

VIII. ORDER

IT IS ORDERED THAT:

1. The decision of the Cheyenne County Board of Equalization determining the value of the Subject Property for tax year 2019 is vacated and reversed.
2. The assessed value of the Subject Property for tax year 2019 is:

Total	\$ 660,000
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3. This Decision and Order, if no appeal is timely filed, shall be certified to the Cheyenne County Treasurer and the Cheyenne 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 2019.

7. This Decision and Order is effective for purposes of appeal on July 26, 2023.⁵⁴

Signed and Sealed: July 26, 2023

SEAL



Robert W. Hotz, Commissioner

James D. Kuhn, Commissioner

⁵⁴ 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.