

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Herman H. Frese,
Appellant,

v.

Dakota County Board of Equalization,
Appellee.

Case No. 19R 0010

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

Case No. 20R 0015

Decision and Order Affirming the Decision
of the Dakota County Board of Equalization

For the Appellant:

Herman H. Frese,
Pro Se

For the Appellee:

Melinda B. Wicks,
Deputy Dakota County Attorney

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

I. THE SUBJECT PROPERTY

The Subject Property is a residential parcel located in South Sioux City, Dakota County, Nebraska. The parcel is improved with a 1,674 square foot home. The parcel is located on the banks of the Missouri River. The legal description and property record card for the Subject Property are found at Exhibit 4.

II. PROCEDURAL HISTORY

The Dakota County Assessor (the County Assessor) determined that the assessed value of the Subject Property was \$269,750 for tax year 2019. Herman H. Frese (the Taxpayer) protested this assessment to the Dakota County Board of Equalization (the County Board) and requested an assessed valuation of \$248,750. The County Board determined that the taxable value of the Subject Property for tax year 2019 was \$269,750.¹

The County Assessor determined that the assessed value of the Subject Property was \$268,575 for tax year 2020. The Taxpayer protested this assessment to the County Board and

¹ Exhibit 1.

requested an assessed valuation of \$249,295. The County Board determined that the taxable value of the Subject Property for tax year 2020 was \$268,575.²

The Taxpayer appealed the decisions of the County Board to the Tax Equalization and Review Commission (the Commission). The Commission held a hearing on March 12, 2021, with Commissioner Hotz 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 exhibits 1-11. Exhibits 12 and 13 were produced at the hearing. Exhibits 1-13 were received in evidence.

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

² Exhibit 2.

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).

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 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. 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.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

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).

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

¹⁴ *Id.*

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

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

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.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 relative standard, so that no one of the parts may be compelled to pay a disproportionate part of the tax.²¹ 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.²² 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.²³ 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.²⁴ The constitutional requirement of uniformity in taxation extends to both rate and valuation.²⁵ 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.²⁶ There must be something more, something

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

¹⁷ 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).

²¹ *Id.*; *Cabela's Inc. v. Cheyenne County Bd. of Equal.*, 8 Neb.App. 582, 597 N.W.2d 623, (1999).

²² *Cabela's Inc.* at 582, 623.

²³ *Banner County v. State Bd. of Equal.*, 226 Neb. 236, 411 N.W.2d 35 (1987).

²⁴ *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).

²⁵ *First Nat. Bank & Trust Co. v. County of Lancaster*, 177 Neb. 390, 128 N.W.2d 820 (1964).

²⁶ *Newman v. County of Dawson*, 167 Neb. 666, 670, 94 N.W.2d 47, 49-50 (1959) (Citations omitted).

which in effect amounts to an intentional violation of the essential principle of practical uniformity.²⁷

V. FINDINGS OF FACT

The size of the land component of the Subject Property was 49,233 square feet.²⁸ The Subject Property was located in a market area designated by the County Assessor as Neighborhood 104.

The primary assertion of the Taxpayer was that the land component of the Subject Property should have been assessed on a per square foot basis and equalized with the assessments of the land components of other properties in the same market area regardless the size of the properties. The Taxpayer also argued that the land component assessment should have stayed the same as it was in tax year 2018. It was further asserted that because the property was subjected to three separate flood events in 2019 and increased flood insurance premiums in 2020, there was sufficient reason to lower the assessment. The Taxpayer called three witnesses.

Christy Abts, the County Assessor, testified that she was the Deputy County Assessor at the time of the 2019 and 2020 assessments and that she did not work directly on either assessment. She stated that she became the County Assessor in October 2020, after the resignation of the previous county assessor. Ms. Abts testified that a land table was used to assess the land component of the Subject Property.²⁹ She also asserted that because neither of the flood events occurred on January 1 of either tax year, she did not believe the flooding should be an assessment consideration.

Samuel Ferraro was also called by the Taxpayer to testify. Ferraro was a licensed appraiser and was contracted by the County Board to prepare to testify at the hearing. Ferraro had also been contracted by the County Board to serve as a referee for the tax year 2019 protest proceeding involving the Subject Property.

Ferraro testified that the land table used by the County Assessor to assess the land component of the properties in Neighborhood 104 was consistent with appropriate assessment and appraisal

²⁷ *Id.* at 673, 94 N.W.2d at 50.

²⁸ Exhibit 4:2.

²⁹ Dakota County Assessor's Office Neighborhood Land Table, Exhibit 4:5-6.

principles including considering of economies of scale,³⁰ valuing the land as though vacant,³¹ and equalizing the valuation of the Subject Property with similar properties in the same market area. The land table utilized by the County Assessor to assess the values of the land in each parcel in Neighborhood 104 assessed the first 22,500 square feet at \$2.60 per square foot, the next 21,060 square feet (up to 43,560 square feet) at \$1.85 per square foot, and \$1.25 per square foot for any land in excess of 43,560 square feet. As a result of the application of the land table to the 49,233 square feet of the Subject Property, the assessment was \$104,550.³²

Ferraro testified that he had reviewed property record files for other properties in Neighborhood 104, and that the land component of every property he reviewed was assessed consistently with the land table. Therefore, it was Ferraro's opinion that the assessment of the Subject Property was equalized with the assessments of the land components of the other parcels in Neighborhood 104.

Herman Frese testified that he did not dispute that the area of the land was 49,233 square feet. He asserted that the use of the land table resulted in disequalization. Frese contended that the size of the parcel should not be considered and that the entirety of each parcel should be assessed on the same per square foot value. Frese focused on what was shown in the property record files as a "Unit Value." The unit value was based upon a calculation of the assessed value as determined by using the land table divided by the total number of square feet. In the case of the Subject Property, the unit value was shown as 2.12.³³ The unit value showed the effective per square foot assessment as a result of the use of the land table.

Frese focused primarily on the adjacent property to the east of the Subject Property.³⁴ The area of the land component of that property was 67,166 square feet and the land component was

³⁰ "Size differences can affect value and are considered in site analysis. Reducing sale prices to consistent units of comparison facilitates the analysis of comparable sites and can identify trends in market behavior. Generally, as size increases, unit prices decrease. Conversely, as size decreases, unit prices increase. The functional utility or desirability of a site often varies depending on the types of uses to be placed on the parcel. Different prospective uses have ideal size and depth characteristics that influence value and the highest and best use." Appraisal Institute, *The Appraisal of Real Estate*, at 198 (14th ed. 2013).

³¹ "Land must be valued as though vacant and available to develop to its highest and best use. Land valuation must be conducted in the manner described in the sales comparison approach. When insufficient market data is available, an income approach such as a land residual technique can be used." 350 Neb. Admin. Code, Ch. 50 § 002.05A (2017).

³² $(22,500 \times \$2.60) + (21,060 \times \$1.85) + (5,673 \times \$1.25) = \$104,552$.

³³ Exhibit 4:2. $\$104,550 / 49,233 = \2.12 .

³⁴ Exhibit 5:1-2.

assessed at \$126,970, based upon the application of the land table.³⁵ The unit value shown for the parcel was 1.89.³⁶ Frese highlighted similar comparisons up and down the river using Exhibit 10:17. In each case, Frese made per square foot calculations and comparisons to the Subject Property without regard to the relative sizes of the parcels.

Frese also asserted that the assessed value should have been decreased because the Subject Property was flooded three times in 2019³⁷ and flood insurance was rewritten with significantly increased premiums as of March 12, 2020.³⁸ And Frese also argued that the assessment for the land component should remain the same as was agreed upon in a Confession of Judgment between the County Board and the Taxpayer for tax year 2018.³⁹

Finally, the County Board offered Exhibit 3:1, wherein it asserts that the assessment for tax year 2019 should be reduced from \$269,750 to \$268,575 due to equalization concerns.

VI. ANALYSIS

The assessment methodology applied by the County Assessor in its use of the land table is consistent with the appraisal principles including economies of scale. Ferraro, a licensed appraiser, testified as to his understanding that the land table was developed based upon sales of properties from the market area and to his opinion that the assessment of the Subject Property was equalized with the other properties in the market area. There is no clear and convincing evidence in the record to the contrary.

Based upon the evidence received, we cannot conclude that the assessment of the land component of the Subject Property was not equalized with other properties in the same market area simply because of the different unit values shown on the property record files. It was appropriate and reasonable for the County Assessor to account for economies of scale in relation to the smaller and larger parcels within the market area as was done with the land table. Further, our review of the property record files in Exhibit 5 and Exhibit 9 of parcels in the same market area as the Subject Property indicates that the land table was applied in the same way to the

³⁵ $(22,500 \times \$2.60) + (21,060 \times \$1.85) + (23,606 \times \$1.25) = \$126,979$.

³⁶ Exhibit 5:2. $\$126,979 / 67,166 = \1.89 .

³⁷ Exhibit 7:5.

³⁸ Exhibit 7:5-7.

³⁹ In that Confession of Judgment, the parties agreed to a land component value of \$85,270, but we do not have in this record any evidence of the basis of that agreement. See, Exhibit 7:2.

Subject Property as it was to each of the other parcels. There is no evidence that any Neighborhood 104 properties were not assessed uniformly and proportionately.

Regarding the three different flood events of 2019 and the Taxpayer's insurance premium increases, the Taxpayer provided no persuasive evidence to quantify what effect the flooding issues had on the actual value of the Subject Property for tax years 2019 and 2020.⁴⁰ Sales that occurred in the market area subsequent to the 2019 flooding may indicate effects on market demand, but no such sales were highlighted in this record.

Concerning the applicability of the 2018 assessment of the Subject Property on the assessment of the land component for tax years 2019 and 2020, we are not persuaded that the assessment for 2018 should control. A decree fixing the value of property under a prior assessment is not admissible to prove value under a subsequent assessment, and a prior year's assessment is not relevant to a subsequent year's valuation.⁴¹ The 2018 assessment was based upon a settlement between the Taxpayer and the County Board in the form of a Confession of Judgment while an appeal to this Commission was pending. In that case, the parties agreed to a land component value of \$85,270, but no evidence of the basis for that agreed upon amount is in this record. Further, the assessed value for real property may be different from year to year, dependent upon the circumstances.⁴² An agreed upon amount in a Confession of Judgment for tax year 2018 is not clear and convincing evidence of the land component value for tax years 2019 and 2020.

Finally, the County Board offered Exhibit 3:1, wherein it asserts that the assessment for tax year 2019 should be reduced from \$269,750 to \$268,575 due to equalization concerns. Since no other evidence was offered to rebut this assertion, we will regard it as a stipulation.

VII. CONCLUSION

For tax year 2019, the Commission finds that there is evidence to rebut the presumption that the County Board faithfully performed its duties and had sufficient competent evidence to make

⁴⁰ However, we are not in agreement with the assertion by the County Assessor that unless the flooding occurs on January 1 the assessment is unaffected.

⁴¹ *DeVore v. Bd. of Equal.*, 144 Neb. 351, 13 N.W.2d 451 (1944), *Affiliated Foods*, 229 Neb. at 613, 428 N.W.2d at 206 (1988), *Kohl's Department Stores v. Douglas County Board of Equalization*, 10 Neb.App. 809, 814, 638 N.W.2d 877, 881-882 (2002).

⁴² *DeVore v. Bd. of Equal.*, 144 Neb. 351, 355, 13 N.W.2d 451, 453 (1944), *Affiliated Foods Coop. v. Madison Co. Bd. of Equal.*, 229 Neb. 605, 613, 428 N.W.2d 201, 206 (1988).

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

For tax year 2020, the Commission finds that there is not 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 not 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 should be vacated and reversed for tax year 2019 and affirmed for tax year 2020.

VIII. ORDER

IT IS ORDERED THAT:

1. The decision of the Dakota County Board of Equalization determining the taxable value of the Subject Property for tax year 2019 is vacated and reversed.
2. The taxable value of the Subject Property for tax year 2019 is \$268,575.
3. The decision of the Dakota County Board of Equalization determining the taxable value of the Subject Property for tax year 2020 is affirmed.
4. The taxable value of the Subject Property for tax year 2020 is \$268,575.
5. This Decision and Order, if no appeal is timely filed, shall be certified to the Dakota County Treasurer and the Dakota County Assessor, pursuant to Neb. Rev. Stat. § 77-5018 (Reissue 2018).
6. Any request for relief, by any party which is not specifically provided for by this Decision and Order is denied.
7. Each party is to bear its own costs in this proceeding.
8. This Decision and Order shall only be applicable to tax years 2019 and 2020.

9. This Decision and Order is effective for purposes of appeal on March 17, 2021.⁴³

Signed and Sealed: March 17, 2021

Robert W. Hotz, Commissioner

SEAL

James D. Kuhn, Commissioner

⁴³ 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.