

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

A.M. Davis Mercantile Co.,
Appellant,

Case No: 20C 0041

v.

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

Lancaster County Board of
Equalization,
Appellee.

For the Appellant:

Theodore Wright,
Executive Vice President,
A.M. Davis Mercantile Co.

For the Appellee:

Daniel J. Zieg,
Deputy Lancaster 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 commercial parcel located at 5601 S. 56th Street in Lincoln, Lancaster County, Nebraska. The parcel is improved with a 33,715 square foot commercial strip center and a 12,062 square foot retail building. The legal description and property record file (PRF) for the Subject Property are found at Exhibits 2 and 3.

II. PROCEDURAL HISTORY

The Lancaster County Assessor determined the assessed value of the Subject Property was \$5,073,300 for tax year 2020.¹ A.M. Davis Mercantile Co. (the Taxpayer) protested this assessment to the

¹ Exhibit 1.

Lancaster County Board of Equalization (the County Board) and requested an assessed valuation of \$4,044,400.² The County Board determined the taxable value of the Subject Property for tax year 2020 was \$5,073,300.³

The Taxpayer appealed the decision of the County Board to the Tax Equalization and Review Commission (the Commission). The Commission held a hearing on July 20, 2022. At the hearing, the parties stipulated to the receipt of exchanged exhibits 1 through 30.

III. STANDARD OF REVIEW

The Commission's review of the determination by a county board of equalization is de novo.⁴ 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.⁵

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.⁶

² Exhibit 2:2, Exhibit 2:33.

³ Exhibit 1.

⁴ 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).

⁵ *Brenner* at 283, 811 (Citations omitted).

⁶ *Id.*

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.⁷ Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.⁸

The Taxpayer must introduce competent evidence of actual value of the Subject Property in order to successfully claim that the Subject Property is overvalued.⁹ 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.¹⁰

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.¹¹ 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.¹² The Commission's Decision and Order shall include findings of fact and conclusions of law.¹³

⁷ Neb. Rev. Stat. § 77-5016(9) (Reissue 2018).

⁸ *Omaha Country Club v. Douglas County Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

⁹ 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).

¹⁰ *Bottorf v. Clay County Bd. of Equal.*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).

¹¹ Neb. Rev. Stat. § 77-5016(8) (Reissue 2018).

¹² Neb. Rev. Stat. § 77-5016(6) (Reissue 2018).

¹³ Neb. Rev. Stat. § 77-5018(1) (Reissue 2018).

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.¹⁴

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.¹⁵ Actual value, market value, and fair market value mean exactly the same thing.¹⁶ 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.¹⁷ All real property in Nebraska subject to taxation shall be assessed as of January 1.¹⁸ All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.¹⁹

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

¹⁵ *Id.*

¹⁶ *Omaha Country Club* at 180, 829 (2002).

¹⁷ Neb. Rev. Stat. § 77-131 (Reissue 2018).

¹⁸ Neb. Rev. Stat. § 77-1301(1) (Reissue 2018).

¹⁹ Neb. Rev. Stat. § 77-201(1) (Reissue 2018).

B. Factual Findings

Derrick Niederklein, Chief Field Deputy for the County Assessor, testified regarding the assessment of the Subject Property. The property was inspected May 19, 2022, in preparation for the hearing on this appeal. Niederklein explained the use of an income approach to determine value. The income approach used rates for rent, vacancy and collection loss, expenses, and income capitalization that were typical in the market, as shown below²⁰:

	Rental Rate	Vacancy & Collection Loss	Expenses	Capitalization Rate
Main Building 42,592 sq. ft.	\$11	6%	10%	8.5%
Main Building Basement 7,964 sq. ft.	\$3	10%	8%	8.5%
Freestanding Building 2,744 sq. ft.	\$6.50	6%	10%	8.5%

According to the Property Information sheet in the PRF,²¹ the main building was rated and assessed as Fair CDU (condition, desirability, utility), the basement was rated as Typical CDU, and the Freestanding Building was rated as Poor CDU. The Appellant did not produce any

²⁰ Exhibit 2:40-41.

²¹ Id.

competent evidence to demonstrate that the assigned CDU ratings were arbitrary or unreasonable.

Theodore Wright testified that the actual vacancy rate for the Subject Property was greater than the rates applied by the County Assessor. Wright stated that the actual vacancy rate for the Subject Property was approximately 30%. Wright also asserted that the Subject Property's value should be reduced due to various factors such as the age of the property, its location on a flood plain, as well as poor visibility from Highway 2.

On cross-examination, Wright testified the 30% vacancy of the Subject Property has been a long-term issue that has been worsening. Wright stated that he has been attempting to improve the vacancy issue, but has not been successful, stating that his vacancy rate has worsened since the assessment date, rising to an estimated 50% vacancy rate. Wright states that the rental rates charged to the tenants of the Subject Property are between \$6 per square foot to \$15 per square foot.²² Wright believes that the rental rates as of the assessment date were market rates. Wright provided an ultimate opinion that the Subject Property had a taxable value of \$4,500,000.

The Taxpayer provided an income statement for tax years 2019 and 2020.²³ The statement showed total revenue but did not show rental rates or vacancy and collection loss rates. The statement also showed expenses but did not indicate a capitalization rate.

Wright offered an appraisal report prepared by Kevin Hermsen, MAI. The County Board objected to the receipt of the appraisal report, citing that the Appellant failed to timely exchange the appraisal report as required in the Commission's Order for Hearing.²⁴ Wright

²² Exhibit 6:2-5.

²³ Exhibit 2:5.

²⁴ Paragraph 7 of the Commission's May 13, 2022, Order for Hearing and Notice of Hearing requires the parties "[a]t least 30 days before the date of the hearing, each party shall: a. Deliver one complete, legible copy of all documentary or photographic evidence to each other party and make any other physical evidence available for inspection; b. Deliver the original

acknowledged that the appraisal report was not timely exchanged to the County Board as required, and the County Board's objection was sustained.

Wright also called Kevin Hermsen to testify as to the contents of his appraisal report. The County Board objected to Hermsen's testimony, citing a failure for the Appellant to timely disclose Hermsen as an expert witness who might testify, as required in the Commission's Order for Hearing. Wright acknowledged that Hermsen was not timely disclosed to the County Board as required, and the County Board's objection was sustained.

C. Analysis

Because it is difficult for an assessor to evaluate management quality, typical income and expense figures are deemed to reflect typical management. Income flows are averaged across comparable businesses to reflect *typical* management and smoothed or *stabilized* across years to eliminate random fluctuations. In mass appraisal, expenses frequently are expressed as percentages instead of fixed amounts. They may also be analyzed and expressed on a per-unit basis.²⁵

Testimony from an employee of the owner of the property can "constitute[] competent evidence" which cause[s] the presumption of validity of the county board of equalization's valuation to disappear."²⁶ Here, Wright's testimony as to his familiarity with the Subject Property as well as his ultimate opinion of its value, is competent evidence sufficient to rebut the presumption in favor of the County Board's decision.

and two complete, legible copies of all documentary or photographic evidence to the Commission..."

²⁵ International Association of Assessing Officers, *Fundamentals of Mass Appraisal* 175 (2011).

²⁶ *Schmidt v. Thayer County Bd. of Equalization*, 10 Neb. App. 10, 624 N.W.2d 63, 70 (2001).

However, as noted above, once the County Board's presumption is rebutted, the burden of showing a valuation to be arbitrary or unreasonable rests upon the taxpayer on appeal from the action of the board of equalization. The burden of persuasion imposed on a complaining taxpayer is not met by showing a mere difference of opinion unless it is established by clear and convincing evidence that the valuation placed upon the property when compared with valuations placed on other similar property is grossly excessive and is a result of a systematic exercise of intentional will or failure of plain duty, and not mere errors of judgment.²⁷

Wright relied on the actual income, vacancy, and expense data of the Subject Property, rather than data that showed what was typical in the market, as appraisal standards require. His actuals did not quantify what is typical in the market.

We find Wright's testimony was insufficient to demonstrate that the County Board's valuation of the Subject Property was arbitrary or unreasonable. Because the Taxpayer did not meet its burden to demonstrate by clear and convincing evidence that the County Board's decision was arbitrary or unreasonable, the Commission should affirm the County Board's 2020 valuation for the Subject Property.

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. However, the Commission also finds that there is not clear and convincing evidence that the County Board's decision was arbitrary or unreasonable.

²⁷ *Wheatland Indus. v. Perkins Cty. Bd. of Equal.*, 304 Neb. 638, 644-45, 935 N.W.2d 764, 769-70 (2019) (citing *Betty L. Green Living Trust v. Morrill Cty. Bd. of Equal.*, 299 Neb. 933, 941-42, 911 N.W.2d 551, 558 (2018)).

For all of the reasons set forth above, the appeal of the Taxpayer should be denied.

VI. ORDER

IT IS ORDERED THAT:

1. The decision of the Lancaster County Board of Equalization determining the taxable value of the Subject Property for tax year 2020 is affirmed.²⁸
2. The taxable value of the Subject Property for tax year 2020 is:

Land:	\$2,230,460
<u>Buildings:</u>	<u>\$2,842,840</u>
Total:	\$5,073,300

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

²⁸ 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.

6. This Decision and Order shall only be applicable to tax year 2020.
7. This Decision and Order is effective for purposes of appeal on April 11, 2023.²⁹

Signed and Sealed: April 11, 2023

Robert W. Hotz, Commissioner

SEAL

James D. Kuhn, Commissioner

²⁹ 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.