

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

Daniel J. Costello,  
Appellant,

v.

Johnson County Board of Equalization,  
Appellee.

Case Nos: 20C 0141 & 21C 0223

Decision and Order Affirming the Decisions  
of the Johnson County Board of  
Equalization

**For the Appellant:**

Travis Kaffar,  
Director of Finance, Costello Property Management

**For the Appellee:**

Ben Beethe  
Deputy Johnson County Attorney

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

**I. THE SUBJECT PROPERTY**

The Subject Property is an income-restricted multi-family housing project located in Tecumseh, Johnson County, Nebraska. The parcel is improved with three multi-family homes, as well as a storage shed and parking lot. The legal description and property record card for the Subject Property are found at Exhibit 5.

**II. PROCEDURAL HISTORY**

The Johnson County Assessor determined that the assessed value of the Subject Property was \$1,011,959 for tax years 2020 and 2021. Daniel J. Costello (the Taxpayer) protested these assessments to the Johnson County Board of Equalization (the County Board) and requested an assessed valuation of \$749,581 for tax year 2020 and \$914,435 for tax year 2021. The County Board determined that the taxable value of the Subject Property for tax years 2020<sup>1</sup> and 2021<sup>2</sup> was \$1,011,959.

The Taxpayer appealed the decisions of the County Board to the Tax Equalization and Review Commission (Commission). The Commission held a hearing on August 24, 2022, with

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<sup>1</sup> Ex 1.

<sup>2</sup> Ex 2.

Commissioner Robert W. 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 exchanged exhibits 1 through 6.

### III. STANDARD OF REVIEW

The Commission's review of the determination by a county board of equalization is de novo.<sup>3</sup> 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.<sup>4</sup>

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.<sup>5</sup>

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.<sup>6</sup> Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.<sup>7</sup>

The Taxpayer must introduce competent evidence of actual value of the Subject Property in order to successfully claim that the Subject Property is overvalued.<sup>8</sup> 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.<sup>9</sup>

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<sup>3</sup> 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).

<sup>4</sup> *Brenner* at 283, 811 (Citations omitted).

<sup>5</sup> *Id.*

<sup>6</sup> Neb. Rev. Stat. § 77-5016(9) (Reissue 2018).

<sup>7</sup> *Omaha Country Club v. Douglas County Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

<sup>8</sup> 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).

<sup>9</sup> *Bottorf v. Clay County Bd. of Equal.*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).

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.<sup>10</sup> 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.<sup>11</sup> The Commission's Decision and Order shall include findings of fact and conclusions of law.<sup>12</sup>

#### 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.<sup>13</sup>

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.<sup>14</sup> Actual value, market value, and fair market value mean exactly the same thing.<sup>15</sup> 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.<sup>16</sup> All real property in Nebraska subject to taxation shall be assessed as of January 1.<sup>17</sup> All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.<sup>18</sup>

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<sup>10</sup> Neb. Rev. Stat. § 77-5016(8) (Reissue 2018).

<sup>11</sup> Neb. Rev. Stat. § 77-5016(6) (Reissue 2018).

<sup>12</sup> Neb. Rev. Stat. § 77-5018(1) (Reissue 2018).

<sup>13</sup> Neb. Rev. Stat. § 77-112 (Reissue 2018).

<sup>14</sup> *Id.*

<sup>15</sup> *Omaha Country Club* at 180, 829 (2002).

<sup>16</sup> Neb. Rev. Stat. § 77-131 (Reissue 2018).

<sup>17</sup> Neb. Rev. Stat. § 77-1301(1) (Reissue 2018).

<sup>18</sup> Neb. Rev. Stat. § 77-201(1) (Reissue 2018).

Nebraska Revised Statutes § 77-1333(3) provides that a “county assessor shall utilize an income-approach calculation to determine the actual value of a rent-restricted housing project when determining the assessed valuation to place on the property for each assessment year.” Section 77-1333(1) defines a ‘rent-restricted housing project’ as “a project consisting of five or more houses or residential units that has received an allocation of federal low-income housing tax credits under Section 42 of the Internal Revenue Code from the Nebraska Investment Finance Authority or its successor agency and, for the year of assessment, is a project as defined in section 58-219 involving rental housing as defined in section 58-220.<sup>19</sup>”

## **B. Facts**

The Appellant provided evidence through the testimony of Travis Kaffar, Director of Finance for Costello Property Management, the holding company for Tecumseh Place Apartments LLC. Mr. Daniel J. Costello, Appellant, is a member of that LLC.

Kaffar testified that the Subject Property is enrolled in the USDA Rural Development Section 515 rent-restriction program and was subject to a Land Use Restriction Agreement. Kaffar did not know whether the Subject Property had ever been enrolled in the Section 42 Low Income Housing Tax Credit Program. Kaffar asserted that the income approach would be the most appropriate approach for valuing the Subject Property as the rent restrictions placed upon the Subject Property due to the USDA Section 515 program are similar to the rent restrictions placed upon properties subject to Section 42.

Kaffar further stated that, should the Subject Property be subject to an income approach valuation, based upon the actual income derived from the Subject Property for tax year 2020, the assessed value should be \$914,435.<sup>20</sup> However, Kaffar conceded that the market capitalization rate used in that determination may or may not be consistent with the market capitalization rate prescribed by the Rent-Restricted Housing Project Valuation Committee pursuant to Neb. Rev. Stat. § 77-1333(6).

The Appellee called Terry Keebler, Johnson County Assessor. Keebler has been the Johnson County Assessor since January 2019. Keebler testified that a third-party contractor was used to

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<sup>19</sup> Neb. Rev. Stat. § 58-220 defines ‘Rental Housing’ as “a specific work or improvement within this state undertaken primarily to provide rental dwelling accommodations for low-income or moderate-income persons, which work or improvement shall include the acquisition, construction, reconstruction, or rehabilitation of land, buildings, and improvements hereto...”

<sup>20</sup> See Ex. 4:5.

appraise the Subject Property and determine the assessed value. The valuation approach used by the County Assessor, via its third-party contractor, was the cost approach.

Keebler testified that his office uses the income approach for Section 42 properties, and did, in fact, use that approach for the only Section 42 property located in Johnson County as required by Neb. Rev. Stat. § 77-1333. Keebler testified that the Subject Property, to his knowledge, was not a Section 42 property, and therefore was assessed using the cost approach, which was used for all non-Section 42 commercial properties in Johnson County.

### **C. Analysis**

The question of law presented to the Commission is whether the Subject Property meets the criteria set forth in Neb. Rev. Stat. § 77-1333, which would require that the Johnson County Assessor calculate the assessed value using the income approach and actual income/expenses from the Subject Property.

As stated above, Section 77-1333 is applicable when a Subject Property meets two criteria. First, the Subject Property must be a project containing five or more houses or rental units that has received federal low-income housing tax credits under Section 42 of the Internal Revenue Code. Second, the project must meet certain other statutory definitions. When interpreting a statute, “[The Commission] gives statutory language its plain and ordinary meaning and will not look beyond the statute to determine the legislative intent when the words are plain, direct, and unambiguous.”<sup>21</sup>

As indicated by both Kaffar and Keebler, nothing in the record indicates that the Subject Property has ever received an allocation of federal low-income housing tax credits under Section 42 of the Internal Revenue Code. Further, no documentary evidence was presented showing that the Subject Property has ever been a Section 42 property.

Despite any similarity of land use restrictions between Section 42 and the USDA Section 515 Program, the Legislature has clearly indicated that only those properties receiving Section 42 federal low-income housing tax credits are required to be assessed using the income approach valuation method provided in Neb. Rev. Stat. § 77-1333. As the statutory language is plain and unambiguous, the Commission cannot read any additional meaning into the statute, and consequently Appellant’s argument cannot prevail.

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<sup>21</sup> *County of Webster v. Nebraska Tax Equal. & Rev. Comm.*, 296 Neb. 751, 766, 896 N.W.2d 887, 898 (2017).

Because no evidence was adduced that the Subject Property met the requirements of Neb. Rev. Stat. § 77-1333, the Johnson County Assessor was not required to use the income approach to value the Subject Property. Therefore, it was appropriate for the Johnson County Assessor to use any of the approaches provided for in Neb. Rev. Stat. § 77-112, including the cost approach method.

The burden is on the Appellant to adduce competent evidence to rebut the presumption that the Johnson County Board faithfully performed its statutory duties. The Appellant bears a further burden to demonstrate by clear and convincing evidence that the County Board's actions were arbitrary or unreasonable. As the Appellant has not produced sufficient competent evidence to rebut the presumption in favor of the County Board and has not adduced clear and convincing evidence that the determination of the County Board was arbitrary or unreasonable, the Commission must deny the appeal and affirm the valuation of the County Board.<sup>22</sup>

## **V. CONCLUSION**

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 appeal of the Taxpayer is denied, and the decision of the County Board is affirmed.

## **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 years 2020 and 2021 are affirmed.<sup>23</sup>

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<sup>22</sup> Neb. Rev. Stat. § 77-5016(9).

<sup>23</sup> 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.

2. The taxable value of the Subject Property for tax years 2020 and 2021 is:

Land:	\$ 35,262
<u>Improvements:</u>	<u>\$ 976,697</u>
Total:	\$ 1,011,959

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 years 2020 and 2021.
7. This Decision and Order is effective for purposes of appeal on September 22, 2022.<sup>24</sup>

Signed and Sealed: September 22, 2022

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Robert W. Hotz, Commissioner

SEAL

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James D. Kuhn, Commissioner

<sup>24</sup> 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.