BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

THE FRANK BENTON LAND AND LIVESTOCK COMPANY, A Colorado Company,	)	CASE NO. 04C-43
Appellant,	)	
vs.	)	FINDINGS AND FINAL ORDER AFFIRMING THE DECISION OF THE COUNTY BOARD OF EQUALIZATION
SCOTTS BLUFF COUNTY BOARD OF EQUALIZATION,	)	
Appellee.	)	

SUMMARY OF DECISION

The Frank Benton Land and Livestock Company ("the Company") owns a commercial building with space for an "anchor store" and four bays in the City of Scottsbluff, Scotts Bluff County, Nebraska. The Company protested the Scotts Bluff County Assessor's Office ("the Assessor's") proposed 2004 value to the Scotts Bluff County Board of Equalization. The Board denied the Company's protest, and the Company appeals.

I.
ISSUES

The issues before the Commission are (1) whether the Board's decision to deny the Company's valuation protest was incorrect and either unreasonable or arbitrary; and (2) if so, whether the Board's determination of value was unreasonable.

II.
STATEMENT OF THE CASE

The Company owns a 5.91 acre tract of land legally described as Lot 1, Block 6, East Portal Addition, also described as the North 548 feet of Block 6, East Portal Addition to the City of Scottsbluff, Scotts Bluff County, Nebraska. (E1:1). The tract of land is improved with a neighborhood shopping center with approximately 70,641 square feet of gross building area built in 1967; a parking lot; and certain other amenities. (E3:11; E3:12). The building consists of two general areas. The first area, approximately 47,925 square feet in size, is the "anchor store," occupied in 2003 by a Nash Finch grocery store operating under the trade name SunMart. (E3:12). The second area, approximately 22,716 square feet in size, has four bays each of which was rented for commercial purposes. (E3:12). The building is served by two loading docks and approximately 160,000 square feet of paving. (E3:13; E2:29). The Parties agree that the subject property is of "Average" Quality of Construction and "Average" Condition. (E3:12; E2:11).

The Company purchased the property in March, 2003 for $2,900,000, with $250,000 of the amount paid by the Company placed in escrow to protect against the departure of the property's anchor store tenant. The Assessor determined that the subject property's actual or fair market value was $2,628,659 as of the January 1, 2004, assessment date. (E1:1). The Company timely protested that determination and alleged that the subject property's actual or fair market value was $1,445,685. (E1:1). The Board denied the protest. (E1:1).

The Company appealed the Board's decision on August 17, 2004. The Commission served a Notice in Lieu of Summons on the Board which the Board answered. The Commission thereafter issued an Order for Hearing and Notice of Hearing and served a copy of each document on each of the Parties. The Commission, pursuant to the Notice of Hearing, called the case for a hearing on the merits of the appeal in the City of Scottsbluff, Scotts Bluff County, Nebraska, on September 29, 2005. The Company appeared at the hearing through Mr. Tom Benton, the Company's President. The Board appeared through Douglas Warner, Esq., Acting Scotts Bluff County Attorney. Commissioners Hans, Lore, and Reynolds heard the appeal. Commissioner Reynolds served as the presiding officer. Commissioner Wickersham was excused from the proceedings.

The Commission afforded each of the Parties the opportunity to present evidence and argument as required by law. The Commission also afforded each of the Parties the opportunity to cross-examine witnesses who testified on behalf of an opposing party. The Commission, at the end of the proceedings, took the matter under advisement, which now comes on for decision.

III.
APPLICABLE LAW

The Company is required to demonstrate by clear and convincing evidence (1) that the Board's decision was incorrect and (2) that the Board's decision was either unreasonable or arbitrary. (Neb. Rev. Stat. §77-5016(7)(Cum. Supp. 2004, as amended by 2005 Neb. Laws, L.B. 15, §9). The "unreasonable or arbitrary" element requires clear and convincing evidence that the Board either (1) failed to faithfully perform its official duties; or (2) failed to act upon sufficient competent evidence in making its decision. The Company, once this initial burden has been satisfied, must then demonstrate by clear and convincing evidence that the Board's value was unreasonable. *Garvey Elevators v. Adams County Bd.*, 261 Neb. 130, 136, 621 N.W.2d 518, 523-524 (2001).

IV.
FINDINGS OF FACT

The Commission finds and determines that the subject property's actual or fair market value was $2,628,659 as of the January 1, 2004, assessment date.

V.
ANALYSIS

A.
PRESUMPTION IN FAVOR OF THE BOARD

The Board is presumed to have acted upon sufficient competent evidence to justify its decision. *Garvey Elevators, supra*. The Company called as its witness the Assessor's appraiser. The Assessor's appraiser testified that he relied upon the Cost Approach in determining the subject property's actual or fair market value. The Assessor's appraiser further testified that in determining the Replacement Cost New, he used per square foot costs for "restaurants" for two of the four bays, rather than neighborhood center "food service" per square foot costs. (E3:12). Replacement Cost New for a restaurant contemplates a stand alone building with four exterior walls and a roof. *See, e.g., Marshall Valuation Service*, Marshall & Swift, L.P., 5/2004, Section 13, p. 1. The subject property, however, is a "neighborhood center," which is defined as a row "of open stores comprising single lines of glazed storefronts with individual service entrances to the rear. These are normally small one-story projects with or without a major anchor." *Marshall Valuation Service*, Marshall & Swift, L.P., 5/2004, Section 13, p. 31.

The Board, in denying the Company's protest, relied on the Assessor's determination of value. This determination, in turn, relied on a Replacement Cost New where per square foot costs for "restaurants" were $97.88 per square foot and $99.44 per square foot, depending on size. (E3:12). The unadjusted Replacement Cost New cost factors for average quality "food service" establishments in "neighborhood centers" range from $35 to $80 per square foot. *Marshall Valuation Service,* Marshall & Swift, L.P., 5/2004, Section 13, p. 32. The Replacement Cost New per square foot costs used by the Board were incorrect for the two bays occupied by the "food service." These bays comprise approximately 7,864 square feet of the "neighborhood center."

The admission that incorrect cost factors were used for these two bays constitutes clear and convincing evidence that the Board's decision was not based on sufficient competent evidence. The Board's decision is therefore incorrect, and both unreasonable and arbitrary. The only issue remaining is whether the Board's determination of value, $2,628,659, was unreasonable.

B.
THE COMPANY'S EVIDENCE OF VALUE

The Board contends that the purchase price paid for the property nine months prior to the assessment date supports the Board's determination of value. The Company contends that purchase price does not equal value.

The purchase price paid, under applicable law, may be considered in determining actual value. Purchase price alone, however, is not conclusive of the actual value of property for assessment purposes. *Forney v. Box Butte County Bd. of Equalization*, 7 Neb.App. 417, 424, 582 N.W.2D 631, 637, (1998). Although the purchase price is only one factor which may be considered in determining value, where the evidence discloses the circumstances surrounding the sale and shows that the sale was an arm's length transaction between a seller who was not under compulsion to sell and a buyer who was not compelled to buy, the price paid should receive strong consideration as evidence of actual or fair market value. *Potts v. Board of Equalization of Hamilton County,* 213 Neb. 37, 48, 328 N.W.2d 175, 328 (1982).

The Company paid $2,900,000 for the subject property on March 28, 2003. The Company's President testified that he has 23-years experience in the field of commercial investments, and that he negotiated the purchase of the property as part of a federal Internal Revenue Service Code Section 1031 Exchange. An "arm's length" transaction is defined as a transaction between unrelated parties under no duress. *The Dictionary of Real Estate Appraisal,* 12th Ed., Appraisal Institute, 2002, p. 150. The evidence establishes that the Company's 2003 purchase of the subject property was an "arm's-length" transaction.

"Actual value" is defined as the market value of real property in the ordinary course of trade, or 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 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. Neb. Rev. Stat. §77-112 (Reissue 2003). The transaction described in the Company's President's testimony establishes that the price paid by the Company for the subject property, $2,900,000, represented actual or fair market value as of the date of transfer, March 28, 2003.

The Company, however, alleges that the subject property's actual or fair market value dropped from $2,900,000 to $1,900,000 between the date of purchase and the assessment date. The Company attributes this drop in value to a renegotiated lease with the anchor store tenant which provided for a lower per square foot rent; the subsequent departure of that anchor store tenant; and the impact of the relocation and subsequent expansion of a Wal-mart store on the local economy. (E1:1).

The Company failed to adduce either the rent rolls or any of the leases which were in effect for the subject property as of the assessment date. The Company adduced uncontroverted testimony, which the Commission received without objection, that it had entered into a new lease with the occupant of the anchor store space (Nash Finch/SunMart) after purchasing the subject property. This new lease, according to the testimony, was effective January 1, 2004, and reduced the annual rent from $6.24 per square foot to $5.00 per square foot. (E2:50). The Company's evidence indicates that the net rentable area leased to Nash Finch/SunMart was 45,939 square feet. (E1:2; E2:50).

The Income Approach is one of the professionally accepted mass appraisal methodologies which may be used to determine value. Neb. Rev. Stat. §77-112 (Reissue 2003). This approach has seven steps which may be summarized as requiring a determination of Net Operating Income to which a capitalization rate is applied in order to yield an indicated value. *Property Assessment Valuation*, 2nd Ed., International Association of Assessing Officers, 1996, p. 46. Net operating income is a property's gross income reduced by appropriate operating expenses. *Supra*. Net operating income for a particular property must be capitalized using an appropriate capitalization rate in order to reach an indication of value. Neither the Company's appraiser nor the Board's appraiser provided clear and convincing evidence of the appropriate capitalization rate for the subject property as of the assessment date. Neither Party adduced evidence of value based on this capitalization of income approach. The impact of this reduced rent on the subject property's actual or fair market value cannot be determined without clear and convincing evidence of the appropriate capitalization rate.

The Company also contends that the subject property's actual or fair market value was also adversely impacted when Nash Finch/SunMart unexpectedly vacated the anchor store portion of the property in April, 2004. The impact of this departure depends on the net rentable area leased to Nash Finch/SunMart. The Appraisal Report lists the Total Floor Area for the building as 70,641 square feet. (E2:11). The Summary of Leases section of the Appraisal Report indicates a net rentable area of 66,400 square feet. (E2:50). The difference between the two areas is 4,241 square feet. Gross building area is defined as the total floor area of a building, including below grade space but excluding unenclosed areas, measured from the exterior of the walls. *The Dictionary of Real Estate Appraisal*, 4th Ed., The Appraisal Institute, 2002, p. 131. Net rental area is defined as "The occupied area of a building not including hallways, elevator shafts, stairways, toilets, and wall thickness. The net floor area is used for determining rental space and fire-code requirements." *Supra* at 194.

Some of the difference in area between the gross building area and the net rental area is explained by the thickness of the exterior and the interior walls which separate the bays from each other and from the anchor store. Another factor may be the "common area" for which expense information is listed in Exhibit 2 at page 52. However, nothing in the record explains the size of the exterior or interior walls; the size of the common area (which may be limited to the parking lot and sidewalks, but which may also include utility rooms if one water heater and other service items like electrical boxes service the entire building); or the impact of these features on actual or fair market value.

The impact of this departure is subject to another consideration. Nash Finch/SunMart, the anchor store tenant, vacated the premises in April, 2004. While the tenant's departure may impact the subject property's actual or fair market value in subsequent years, this departure occurred after the January 1, 2004, assessment date. This departure is not, therefore, relevant to the determination of the subject property's actual or fair market value as of the 2004 assessment date. If relevant, however, then the fact that the Company required the seller to place $250,000 of the purchase price paid into escrow must also be considered. These funds were to be returned to the Company if Nash Finch/SunMart vacated the anchor store premises. The evidence establishes that when Nash Finch/SunMart vacated the property in 2004, the Company received the $250,000 paid into the escrow account. The purchase price paid in light of the departure of Nash Finch/SunMart was, therefore, $2,900,000 less $250,000, or $2,650,000. The Board determined that the subject property's actual or fair market value was $2,628,659 as of the assessment date. (E1:1; E3:11).

The difference between these two value indicators is $21,341, or less than one percent. If the events which transpired after the assessment date are relevant, then the adjusted price paid by the Company supports the Board's determination of value, and that valuation determination was reasonable.

C.
OTHER EVIDENCE OF VALUE

The Company failed to adduce any of the leases for either the "anchor store" portion of the property or for the four bays. The Company failed to adduce copies of the Income and Expense Statements for the three years prior to the assessment date. The stabilized income and expense information for the subject property cannot be derived from the record.

The Company did adduce two documents in support of its opinion of value. The first document is a one-page summary titled "East Village S/C Valuation" offered by the Company's agent at the hearing before the Board. (E1:2). This summary, lists an estimated or "Budget NOI" for calendar year 2004, an estimate of expenses for calendar year 2004, and a capitalization rate of 12%. The document, based on these projections, suggests a value of $1,445,685. (E1:2).

This summary is incomplete. The accompanying notes state "Owner negotiated reduction (reduced figures below)" but the "reduced figures" are not listed. The "Budget NOI" was speculative and basis was laid for the estimate. The expenses were also speculative and were not itemized. Nothing in the document explains the basis for the 12% capitalization rate. The Company, at the hearing before the Commission, explained that this was the best information available at the time of the hearing before the Board. The evidence adduced by the Company's agent at the hearing before the Board is not clear and convincing evidence of value of the subject property as of the assessment date.

The Company also adduced an Appraisal Report for the subject property in a Summary Report form. (E2). The Appraisal Report includes all three approaches to value and begins with a Cost Approach. (E2:19 - 29). The Report indicates that the land component had an actual or fair market value of $334,700. (E2:27). The Board determined that the land component had an actual or fair market value of $278,835. (E1:1; E3:11). There is no evidence that the Board's determination of value for the land component was unreasonable.

The Company's Cost Approach concludes that the subject property's actual or fair market value was $1,927,000. (E2:29). This opinion of value is based on a Replacement Cost New of $3,219,121. The accuracy of this indicated value relies on accurate estimation of Replacement Cost New and an accurate estimate of accrued depreciation. The Report uses the economic age-life method to determine depreciation. "The economic age-life method is also known as the straight-line depreciation method and is a mechanical method of handling depreciation borrowed from an accountant. This method allocates a uniform percentage of value loss each year over the useful life of the improvement. The accountant is interested primarily in book depreciation or in allocating a penalty against original cost over a number of time periods. The assessor is concerned with the actual loss in value as of the date of appraisal." *Property Assessment Valuation, supra*, at 160.

The Company's Cost Approach lists the improvement's economic life as 50 years. (E2:29). The economic life for a neighborhood center of average quality of construction, however, is 40 years. *Marshall Valuation Service*, Marshall & Swift, L.P., March, 2005, Section 7, p. 6. The Report also indicates that the effective age of the improvements is 27.5 years, when the chronological age is 37 years. The Assessor's appraiser testified without objection that there were substantial improvements to the property in the past, which would reduce the effective age. However nothing in the Report explains the 27.5 effective age upon which the physical depreciation was based. The Appraisal Report also indicates a small expense item for an elevator, but nothing in the record establishes whether or not an elevator exists or where on the property it might be located. (E2:52).

The true measure of depreciation is the effect on marketability and sales prices. *Id.* at 153. The Company's Cost Approach does not reconcile either the depreciation estimated under the economic age life method or the final value to the market. The Company's Cost Approach is not, therefore, clear and convincing evidence of value for the subject property as of the assessment date.

The Company also alleges that the relocation and expansion of the Wal-Mart Super Store adversely impacted the market for commercial real property in Scottsbluff. (E1:1; 2:5). Although the date of the relocation and expansion of the Wal-Mart into a Wal-Mart Super Center does not appear in the record, the Company further alleges that as a result of this relocation and expansion the subject property as of the assessment date was located in a "secondary location. . . [with] secondary location types of tenants paying lower rent, and increased vacancies in the smaller retail bays." (E2:5). A Sales Comparison Approach might support these contentions.

The Appraisal Report includes a Sales Comparison Approach. (E2:30 - 41). The indicated value under this approach is derived from six sales of "comparable" properties summarized on page 39. "Comparable properties" share similar quality, architectural attractiveness (style), age, size, amenities, functional utility, and physical condition. *Property Assessment Valuation*, 2nd Ed., International Association of Assessing Officers, 1996, p. 98. When using "comparables" to determine value, similarities and differences between the subject property and the comparables must be recognized. *Id.* at 103. "Financing terms, market conditions, location, and physical characteristics are items that must be considered when making adjustments . . . ." *Id.* at 98. Two specific adjustments are critical here: financing terms and location. The Appraisal Report's Sales Comparison Approach does not discuss any adjustment for the $250,000 placed in escrow. The locational adjustments are also problematic. Adjustments may be quantitative or qualitative. Usually adjustments are quantitative, that is, a specific dollar adjustment is listed for each factor. Here however, the adjustments are all qualitative (i.e., "Minus" or "Plus") but result in a specific dollar adjustment for each of the sold properties.

The location adjustments are an important factor in this appeal since the Company alleges that the relocation and expansion of the Wal-Mart Super Center turned the subject property into a "secondary location" with "secondary location types of tenants. The record does not include clear and convincing evidence of the source or magnitude of any of the adjustments. Furthermore, three of the sales were from Cheyenne, Wyoming; two from Grand Island; and only one sale was from Scottsbluff. (E2:39). The use of prices paid for commercial properties from other states and the use of prices paid for commercial properties in other counties within Nebraska but at a distance from the subject property is permitted. The Commission here, however, cannot conclude that these properties are truly comparable to the subject property without evidence of the similarities and differences between the commercial real estate markets in Cheyenne, Wyoming, and Grand Island, Nebraska. Finally, the Company failed to adduce clear and convincing evidence correlating the price paid for one property in Scottsbluff in 2001 to the impact on the local economy of the Wal-Mart Store, or the relation and enlargement of that store to Super Wal-Mart. The Company's Sales Comparison Approach does not support the contention that the subject property's actual or fair market value was adversely affected by the Wal-Mart relocation. This approach also fails to provide clear and convincing evidence of the subject property's actual or fair market value as of the assessment date.

The Company's Appraiser testified that he placed the greatest weight on the Income Approach. The Appraiser's Income Approach is based on a Discounted Cash Flow Analysis. (E2:54 - 57). Three pages of the 107 page report are devoted to this approach. The summary for the Discounted Cash Flow Analysis utilizes a 36% expense ratio for years 1 and 2, a 37% expense ratio for year 3, a 50% expense ratio for year 4, and 51% expense ratios for year 5. (E2:57). There is no change in the expense ratios between years 1 and 2, there is a 1% change between years 2 and 3, a 13% change between years 3 and 4, and a 1% change between years 4 and 5. (E2:57). The basis for the analysis, however, alleges that expenses would be increased at 1% per year. (E2:54). The analysis fails to follow the stated basis for estimating expense ratios and these ratios impact the final indicated value. The Company's Discounted Cash Flow Analysis is not, therefore, clear and convincing evidence of actual or fair market value for the subject property as of the assessment date.

Finally, the Appraisal Report is used to derive a retrospective opinion of value. The Report states it was prepared "in conformance with the Uniform Standards of Professional Appraisal Practice" ("USPAP"). (E2:2). Statement on Appraisal Standards 3 of *USPAP* provides:

> "In the absence of evidence in the market that data subsequent to the effective date were consistent with and confirmed market expectations as of the effective date, the effective date should be used as the cut-off date for data considered by the appraiser."

USPAP, 2004 Ed., The Appraisal Foundation, p. 89. The Appraisal Report states in the Discounted Cash Flow Analysis that "The subject's actual income and expenses will be utilized to establish expenses." (E2:53). The Appraisal Report does not explain how data obtained subsequent to the assessment date supports trends established in the commercial real estate market in Scottsbluff prior to the assessment date. The Appraisal Report to the contrary suggests that commercial real estate market values were falling after the assessment. The Report, however, used the 2004 calendar year Income and Expense data, which was not available as of the effective date of the appraisal.

D.
CONCLUSION

Although the Company adduced clear and convincing evidence that the Board's decision was incorrect and both unreasonable and arbitrary, the Company failed to adduce clear and convincing evidence that the Board's determination of value was unreasonable. The Board's valuation decision must accordingly be affirmed.

VI.
CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the Parties and over the subject matter of this appeal.
2. The Commission is required to affirm the decision of the Board unless evidence is adduced establishing that the Board's action was incorrect and either unreasonable or

arbitrary. Neb. Rev. Stat. §77-5016(7) (Cum. Supp. 2004, as amended by 2005 Neb. Laws, L.B. 15, §9).

3. The Board is presumed to have faithfully performed its official duties. The Board is also presumed to have acted upon sufficient competent evidence to justify its decisions. These presumptions remain until the Company presents competent evidence to the contrary. If the presumption is extinguished the reasonableness of the Board's value becomes one of fact based upon all the evidence presented. The burden of showing such valuation to be unreasonable rests on the Company. *Garvey Elevators, Inc. v. Adams County Board of Equalization*, 261 Neb. 130, 136, 621 N.W.2d 518, 523 (2001).

4. "Actual value" is defined as the market value of real property in the ordinary course of trade, or 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 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. Neb. Rev. Stat. §77-112 (Reissue 2003).

5. The Company failed to adduce clear and convincing evidence that the subject property's actual or fair market value was

adversely affected by the relocation and expansion of the Wal-Mart Super Store.

6. The Company failed to adduce clear and convincing evidence that as of the assessment date the subject property was located in a "secondary location" or that the "secondary location would command secondary location types of tenants paying lower rent, and increased vacancies in the smaller retail bays." (E2:5).

VII.
ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

1. The Scotts Bluff County Board of Equalization's Order setting the subject property's 2004 assessed value is affirmed.

2. The Company's real property legally described as Lot 1, Block 6, East Portal Addition, also described as the North 548 feet of Block 6, East Portal Addition to the City of Scottsbluff, Scotts Bluff County, Nebraska, shall be valued as follows for tax year 2004 as determined by the Board:

Land	$ 278,835
Improvements	$2,349,824
Total	$2,628,659

3. Any request for relief by any Party not specifically granted by this Order is denied.

4. This decision, if no appeal is filed, shall be certified to the Scotts Bluff County Treasurer, and the Scotts Bluff County Assessor, pursuant to Neb. Rev. Stat. §77-5016(9)(Cum. Supp. 2004, as amended by 2005 Neb. Laws, L.B. 15, §9).
5. This decision shall only be applicable to tax year 2004.
6. Each Party is to bear its own costs in this matter.

IT IS SO ORDERED.

Dated this 11th day of October, 2005.

Robert L. Hans, Commissioner

Susan S. Lore, Commissioner

Mark P. Reynolds, Vice-Chair

SEAL

ANY PARTY SEEKING REVIEW OF THIS ORDER MAY DO SO BY FILING A PETITION WITH THE APPROPRIATE DOCKET FEES IN THE NEBRASKA COURT OF APPEALS. THE APPEAL MUST BE FILED WITHIN THIRTY DAYS AFTER THE DATE OF THIS ORDER AND MUST SATISFY THE REQUIREMENTS OF STATE LAW IN NEBRASKA REVISED STATUTE §77-5019 (REISSUE 2003, AS AMENDED BY 2005 NEB. LAWS, L.B. 15, §11). IF A PETITION IS NOT TIMELY FILED, THIS ORDER BECOMES FINAL AND CANNOT BE CHANGED.