BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

BR Capital, LLC, Appellant, v. Douglas County Board of Equalization, Appellee.	Case No: 10C-413 Order Affirming the Determination by the Douglas County Board of Equalization

For the Appellant:
Molly Adair-Pearson,
Adair-Pearson Law

For the Appellee:
Sandra Connolly,
Deputy Douglas County Attorney

Heard before Commissioners Hotz and Salmon.

I. THE SUBJECT PROPERTY

The Subject Property is a commercial parcel located in Douglas County, Nebraska. The parcel is improved with a 23,484 square foot, three-story commercial office building. (E2:2). The legal description of the parcel is found at Exhibit 2:5. The property record card for the subject property is found at Exhibit 2, pages 5-6.

II. PROCEDURAL HISTORY

The Douglas County Assessor determined that the assessed value of the subject property was $2,028,000 for tax year 2010. BR Capital, LLC (Taxpayer) protested this assessment to the Douglas County Board of Equalization (County Board) and requested a taxable value of $1,175,032. (E4:1). The County Board determined that the assessed value for tax year 2010 was $2,028,000. (E1)

The Taxpayer appealed the determination of the Douglas County Board to the Tax Equalization and Review Commission (Commission). The Commission held a hearing on April 2, 2012. Prior to the hearing, the parties exchanged exhibits.

III. STANDARD OF REVIEW

The Commission's review of the determination by a County Board of Equalization is de novo. See, Neb. Rev. Stat. §77-5016(8) (2010 Cum. Supp.), *Brenner v. Banner Cty. Bd. Of Equal*., 276 Neb. 275, 286, 753 N.W.2d 802, 813 (2008).[1] 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." *Brenner v. Banner Cty. Bd. Of Equal*., 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted).

> 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.

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. Neb. Rev. Stat. §77-5016(8) (2010 Cum. Supp.). Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence. *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

A Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued. Cf. *Josten-Wilbert Vault Co. v. Board of Equalization 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 Equalization of York County,* 209 Neb. 465, 308 N.W.2d 515 (1981) (determination of equalized taxable value) . The County Board need not put on any evidence to support its valuation of the property at issue

[1] "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 Cty. Freeholder Bd.*, 276 Neb. 1009, 1019 (2009).

unless the taxpayer establishes the Board's valuation was unreasonable or arbitrary. *Bottorf v. Clay County Bd. of Equalization*, 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." Neb. Rev. Stat. §77-5016(8) (2011 Supp.). 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. Neb. Rev. Stat. §77-5016(6) (2011 Supp.).

> The Commission may consider and find a taxable value in excess of the highest taxable value for which notice was given by the County Assessor, the County Board of Equalization, or the Property Tax Administrator if notice of a higher taxable value and the intent to offer proof in its support is given by a party. Notice of a higher taxable value and the intent to prove that taxable value must be served on all other parties and the Commission no later than the date for an initial exchange of evidence as set forth in a Commission Order for Hearing and Notice of Hearing on the merits. Notice of a higher taxable value and intent to offer proof in its support is a pleading and shall be served as a motion or objection to a motion as provided in section 15 of this chapter.

442 Neb. Rev. Code, ch. 5, § 016.02A (6/11).

IV. VALUATION

A. Law

Under Nebraska law,

> [a]ctual 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.

Neb. Rev. Stat. §77-112 (Reissue 2009). "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 section 77-1371, (2) income approach, and (3) cost approach." Neb. Rev. Stat. §77-112 (Reissue 2009). "Actual value, market value, and fair market value mean exactly the same thing." *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002). Taxable value is the percentage of actual value subject to taxation as directed by section 77-201 of Nebraska Statutes and has the same meaning as assessed value. Neb. Rev. Stat. §77-131 (Reissue 2009). All real property in Nebraska subject to taxation shall be assessed as of January 1. See, Neb. Rev. Stat. §77-1301(1) (Reissue 2009). All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation. Neb. Rev. Stat. §77-201(1) (Reissue 2009).

B. Summary of the Evidence

Alexander Karimi-Asl testified on behalf of the Taxpayer. Karimi-Asl was a full-time employee of the Landmark Group, and was the Property Manager for the subject property, a rent-producing commercial property. Karimi-Asl testified regarding his personal knowledge of actual income and expense information for the subject property for 2011. He said the actual rental rate was $15 per square foot, and that rental income for 2011 was $286,268. Karimi-Asl testified that the vacancy rate was 8%, and that expenses were $131,199.

The testimony of Karimi-Asl was limited to the actual rental rate, vacancy percentage, expenses, collection losses and gross income of the subject property for the year 2011. The Taxpayer asserted that these actual rates for the subject property in the year 2011 should be used to calculate the income approach value of the subject property for 2010.

The testimony of Greg Weisheipl was offered on behalf of the County Board. Weisheipl has been a licensed appraiser for more than 20 years, holds a certified general appraiser license, and has been the senior commercial property appraiser for the Douglas County Assessor (Assessor) for two years. He testified the subject property was assessed using mass appraisal techniques. He said he relied most heavily on the income approach to value, utilizing income and expenses that would be typical for the neighborhood. Weisheipl said the cost approach was used to substantiate the value reached using the income approach.

The income approach can be defined as "a set of procedures through which an appraiser derives a value indication for an income-producing property by converting its anticipated benefits (cash flows and reversion) into property value." *The Dictionary of Real Estate Appraisal*, Fourth Edition, Appraisal Institute, p.143, (2002). The income approach supports two basic methodologies: direct capitalization[2] and yield capitalization.[3] Both of these methods "require a comprehensive study of historical income and expenses for the subject property. This study is combined with an analysis of typical income and expense levels for comparable properties. A reconstructed operating statement is [then] developed for the subject property." *The Appraisal of Real Estate,* 13th Edition, The Appraisal Institute, 2001, p. 465. "Only the reasonable and typical expenses necessary to support and maintain the income-producing capacity of the property should be allowed." *Property Assessment Valuation*, 2nd Ed., International Association of Assessing Officers, 1996, p. 318.

The steps required for use of the income approach with direct capitalization may be summarized as (1) estimate potential gross income; (2) deduct estimated vacancy and collection loss to determine effective gross income; (3) deduct estimated expenses to determine net operating income; (4) divide net operating income by an estimated capitalization rate to yield indicated value. See, *The Appraisal of Real Estate,* 13th Edition, The Appraisal Institute, 2008, 466. The Assessor's income approach worksheet appears to be a direct capitalization analysis, indicating an estimated value of $2,236,800. E2:17.

According to Weisheipl, the rental rate used in the income approach to determine the value for office space in the subject property was set at $17 per square foot. He testified that this rental rate was a full service rental rate that includes all services and common area maintenance costs as a flat rate per square foot. Weisheipl testified that the market rent was established using rental rates obtained from LoopNet (an online commercial real estate listings and research service), actual rental rates supplied by Taxpayers in Board of Equalization protest packets, and from rent surveys. He testified that he did not know whether the Taxpayer had been charging triple net or full service rental rates on the date of assessment, but that the difference between full service and triple net rental rates would have generally been $5 to $6 per square foot. Weisheipl said he would have expected the triple net rate of the subject property to be around $12 per square foot.

Weisheipl testified that the expected full-service rental rate of $17 was multiplied by the total square feet available for rent at the subject property to arrive at a gross income of $392,819 ($17

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[2] The direct capitalization method produces an indication of value based on a single year's estimated income. See, *The Appraisal of Real Estate*, 13th Edition, The Appraisal Institute, 2001, at 465.

[3] A yield capitalization method requires an analysis of income and expected returns over multiple years. See, *Id.*

per square foot x 23,107 square feet). E2:17. The Assessor then deducted 12% for estimated vacancy and collection losses to arrive at an effective gross income of $345,681 ($392,819 - ($392,819 x .12)). E2:17. The Assessor next estimated reasonable and typical expenses to be 45% of gross income to arrive at a net operating income of $190,125 ($345,681 – ($345,681 x .45)). E2:17. Last, the Assessor estimated the capitalization rate of 8.5% after analyzing sales of similar properties in Nebraska and neighboring states. The application of an 8.5% capitalization rate resulted in an indicated income approach value rounded to $2,236,800 ($190,125 / .085 = 2,236,752). E2:17.

Regarding comparable sales, Weisheipl testified about five sales of other properties, concluding that three of the sales were not comparable to the subject property. E2:12-13. He also concluded that two other properties were comparable to the subject property due to similarities in the condition of the subject property and the comparable properties. E2:14-15. However, neither Weisheipl nor the Taxpayer quantified any adjustments that would need to be made to compare these properties to the subject property.

Finally, Weisheipl testified that the cost approach was utilized to substantiate the income approach value of the subject property even though the Assessor typically does not utilize the cost approach to determine the assessed value for income-producing property. He testified that the Assessor's use of the cost approach is to substantiate the value estimations of the other approaches. The cost approach includes six steps:

> (1) Estimate the land (site) value as if vacant and available for development to its highest and best use; (2) Estimate the total cost new of the improvements as of the appraisal date, including direct costs, indirect costs, and entrepreneurial profit from market analysis; (3) Estimate the total amount of accrued depreciation attributable to physical deterioration, functional obsolescence, and external (economic) obsolescence; (5) Subtract the total amount of accrued depreciation from the total cost new of the primary improvements to arrive at the depreciated cost of improvements; (5) Estimate the total cost new of any accessory improvements and site improvements, then estimate and deduct all accrued depreciation from the total cost new of these improvements; (6) Add site value to the depreciated cost of the primary improvements, accessory improvements, and site improvements, to arrive at a value indication by the cost approach.

Property Assessment Valuation, 3rd Ed., International Association of Assessing Officers (2010), p. 230. The Assessor determined an estimated land value of $162,000. E2:10. The total cost new of the improvement was determined to be $3,154,449. This was based upon a square footage of 23,484 times $120.54 per square foot, $299,188 for basement value, and $24,500 for asphalt paving. E2:9. The estimated physical depreciation was 30% or $946,335 ($3,154,449 x .30). E2:9. The Assessor determined the replacement cost new less depreciation was $2,208,114 ($3,154,449 - $946,335). E2:9. The Assessor rounded the cost approach value to $2,370,100 ($2,208,114 + $162,000). E2:8. Weisheipl did not explain why the Assessor determined the reconciled value of the subject property to be lower than both the values derived from the cost approach and the income approach. E2:2, E2:19.

Weisheipl expressed an opinion of value of the subject property of $2,236,800, which was indicated by the income approach. E2:17. Great weight is given to Weisheipl's opinion of value. However, his opinion of value is higher than both the noticed value by the Assessor and the determination of value by the County Board. Moreover, the Commission finds that under 442 Neb. Rev. Code, ch. 5, § 016.02A (6/11) the Commission cannot consider this evidence of a higher taxable value because the required notice was not given.

V. CONCLUSION

The Commission finds that the Taxpayer has not provided 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 the Taxpayer has not provided clear and convincing evidence that the County Board's determination was arbitrary or unreasonable.

For all of the reasons set forth above, the determination by the County Board is affirmed.

VI. ORDER

IT IS ORDERED THAT:

1. The decision of the Douglas County Board of Equalization determining the value of the subject property for tax year 2010 is affirmed.
2. The assessed value of the subject property for tax year 2010 is:

Land	$162,000.00
Improvements	$1,866,000.00
Total	$2,028,000.00

3. This decision and order, if no appeal is timely filed, shall be certified to the Douglas County Treasurer and the Any County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (2011 Supp.)
4. Any request for relief, by any party, which is not specifically provided for by this order is denied.
5. Each party is to bear its own costs in this proceeding.
6. This decision shall only be applicable to tax year 2010.
7. This order is effective for purposes of appeal on May 15, 2012

Signed and Sealed: May 15, 2012

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Robert W. Hotz, Commissioner

SEAL

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Nancy J. Salmon, Commissioner

Appeals from any decision of the Commission must satisfy the requirements of Neb. Rev. Stat. §77-5019 (2011Supp.), other provisions of Nebraska Statute and Court Rules.