

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Fleming Family Investments,
Appellant,

v.

Douglas County Board of Equalization,
Appellee.

Case No: 09C 489, 10C 378, 11C 439

Order Affirming the
Determinations of the
Douglas County Board of Equalization

For the Appellant:

Mark J. LaPuzza,
Pansing Hogan Ernst & Bachman, LLP

For the Appellee:

Diane M. Carlson,
Douglas County Attorney

These appeals were heard before Commissioners Robert W. Hotz and Thomas D. Freimuth.

I. THE SUBJECT PROPERTY

The subject property is a commercial parcel in Douglas County located at 9502 Park Drive, Omaha, Nebraska. The parcel is improved with an apartment complex known as Applewood Pointe, consisting of 13 apartment buildings and a clubhouse, with a total of 238 apartment units. The legal description of the parcel is found at Exhibit 4, page 30. The property record card for the subject property is found at Exhibit 4.

II. PROCEDURAL HISTORY

The Douglas County Assessor determined that the assessed value of the subject property was \$10,367,200 for tax year 2009, and \$10,086,000 for both tax years 2010 and 2011. Fleming Family Investments (the Taxpayer) protested this assessment to the Douglas County Board of Equalization (the County Board). The Douglas County Board determined that the assessed value for tax years 2009, 2010, and 2011 was \$10,086,000.¹

The Taxpayer appealed the decisions of the County Board to the Tax Equalization and Review Commission (Commission). Prior to the hearing, the parties exchanged 17 exhibits and submitted a Pre-Hearing Conference Report, as ordered by the Commission. In the Pre-Hearing

¹ Exhibit 1:1, Exhibit 2:1, Exhibit 3:1.

Conference Report, the parties stipulated to the receipt of all exchanged exhibits and stipulated that the assessed value of the subject property be the same for each of the three years. The Commission held a consolidated hearing on May 29, 2012.

III. STANDARD OF REVIEW

The Commission's review of the determination by a County Board of Equalization is de novo.² 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."³ "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."⁴

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.⁵ Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.⁶

A Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued.⁷ The County Board need not put on any evidence to support its valuation of the property at issue unless the taxpayer establishes the Board's valuation was unreasonable or arbitrary.⁸

² 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). "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).

³ *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted).

⁴ *Id.*

⁵ Neb. Rev. Stat. §77-5016(8) (2010 Cum. Supp.)

⁶ *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

⁷ 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).

⁸ *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.”⁹ 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.”¹⁰

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.¹¹

"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."¹² “Actual value, market value, and fair market value mean exactly the same thing.”¹³ 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.¹⁴ All real property in Nebraska subject to taxation shall be assessed as of January 1.¹⁵ All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.¹⁶

⁹ Neb. Rev. Stat. §77-5016(8) (2011 Supp.)

¹⁰ Neb. Rev. Stat. §77-5016(6) (2011 Supp.)

¹¹ Neb. Rev. Stat. §77-112 (Reissue 2009)

¹² Neb. Rev. Stat. §77-112 (Reissue 2009)

¹³ *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002)

¹⁴ Neb. Rev. Stat. §77-131 (Reissue 2009)

¹⁵ See, Neb. Rev. Stat. §77-1301(1) (Reissue 2009)

¹⁶ Neb. Rev. Stat. §77-201(1) (Reissue 2009)

B. Summary of the Evidence

The Taxpayer offered the testimony of Rick Whitesides, a licensed real estate appraiser with appraisal experience in Douglas County since 1973. Whitesides holds both SRA and MAI professional designations from the Appraisal Institute.

Whitesides conducted a fee appraisal of the subject property for the Taxpayer in August, 2011.¹⁷ He inspected the subject property, including an interior inspection of several apartment units at Applewood Pointe on August 16, 2011. His appraisal report gave an opinion of value of \$9,500,000 as of August 16, 2011.¹⁸ The intended use of the fee appraisal was that it “be used for estate planning purposes for the subject property owner.”¹⁹

Based upon his inspection, Whitesides concluded the property was of average quality and average condition. He testified there were no significant upgrades since its original construction in 1985, and he noted no major deferred maintenance. In relation to general economic conditions during the relevant time period for the three tax years at issue, he opined that income-producing apartment complexes “maintained their value fairly well.”

In his appraisal, Whitesides considered both the sales comparison approach and the income approach to value. In the sales comparison approach, an opinion of value is developed by analyzing closed sales, listings, or pending sales of properties that are similar to the subject property.²⁰ Whitesides compared sales of eight apartment complexes to Applewood Pointe.²¹ Whitesides testified that these sales were the most comparable recent sales.

When forming an opinion of value based upon using the sales comparison approach, the following procedures are required:

1. Research the competitive market for information on sales transactions, listings, and offers to purchase or sell involving properties that are similar to the subject property in terms of characteristics such as property type, date of sale, size, physical condition, location, and land use restraints. ...
2. Verify the information by confirming that the data obtained is factually accurate and that the transactions reflect arm’s-length market considerations. ...
3. Select the most relevant units of comparison in the market (e.g., price per acre, price per square foot, price per front foot) and develop a comparative analysis for each unit. ...

¹⁷ Exhibit 15.

¹⁸ Exhibit 15:1-2.

¹⁹ Exhibit 15:4.

²⁰ *The Appraisal of Real Estate*, 13th Edition, Appraisal Institute, 2008 at 297.

²¹ Exhibit 15:55-69.

4. Look for differences between the comparable sale properties and the subject property using all appropriate elements of comparison. Then adjust the price of each sale property reflecting how it differs, to equate it to the subject property or eliminate that property as a comparable. This step typically involves using the most similar sale properties and then adjusting for any remaining differences. ...
5. Reconcile the various value indications produced from the analysis of comparables to a value bracket and then to a single value indication.²²

Whitesides explained that he gathered information about the physical characteristics of the apartment complexes being compared to Applewood Pointe from phone calls to real estate brokers, and from a review of each property record card.²³ In his analysis of the comparable apartment complexes, Whitesides analyzed the number of apartment units (not the square footage of living area), the gross building size, the average apartment unit size, the location of the apartment complex, the quality of construction, the age or condition of the improvements, garages, and other amenities.²⁴ With each physical characteristic, Whitesides considered a positive or negative adjustment to the price of each sale to reflect how that physical characteristic differed from Applewood Pointe.²⁵

Whitesides testified, however, that the “Number of Units” adjustments for all eight comparable sales were adjusted incorrectly, and those corrected adjustments were not shown in his analysis at pages 70-71. In his testimony Whitesides made the following corrections to pages 70-71 of Exhibit 15:

The “Number of Units” adjustment for Sale #1 was shown as 6%. Whitesides testified it should have been -6%, because Sale #1 had fewer apartment units than Applewood Pointe.

The “Number of Units” adjustment for Sale #2 was shown as 4%. Whitesides testified it should have been -4%, because Sale #2 had fewer apartment units than Applewood Pointe.

The “Number of Units” adjustment for Sale #3 was shown as 4%. Whitesides testified it should have been -4%, because Sale #3 had fewer apartment units than Applewood Pointe.

The “Number of Units” adjustment for Sale #4 was shown as -1%. Whitesides testified it should have been 1%, because Sale #4 had more apartment units than Applewood Pointe.

The “Number of Units” adjustment for Sale #5 was shown as 4%. Whitesides testified it

²² *The Appraisal of Real Estate*, 13th Edition, Appraisal Institute, 2008 at 301-302.

²³ The property record cards of the comparable apartment complexes were not provided by the Taxpayer and thus were not in evidence for the Commission to review.

²⁴ Exhibit 15:70-71.

²⁵ For example, Sale #1 had a -26% adjustment for good condition because its good condition is superior to the average condition of Applewood Pointe.

should have been -4%, because Sale #5 had fewer apartment units than Applewood Pointe.

The “Number of Units” adjustment for Sale #6 was shown as -3%. Whitesides testified it should have been 3%, because Sale #6 had more apartment units than Applewood Pointe.

The “Number of Units” adjustment for Sale #7 was shown as 8%. Whitesides testified it should have been -8%, because Sale #7 had fewer apartment units than Applewood Pointe.

The “Number of Units” adjustment for Sale #8 was shown as 6%. Whitesides testified it should have been -6%, because Sale #8 had fewer apartment units than Applewood Pointe.²⁶

Whitesides testified that economies of scale were also considered in each of these “Number of Units” adjustments. As a result of the corrections to “Number of Units” adjustments, Whitesides testified that corrections also needed to be made to the “Net Percentage Lump Sum Adjustments” for each of the eight comparable properties. When questioned, Whitesides agreed that the “Net Percentage Lump Sum Adjustments” for Sale #1 should be -16% rather than -4%, and that similar corrections should be made to Sales 2 through 8.²⁷ The Commission finds that the corrected “Net Percentage Lump Sum Adjustments” should therefore be as follows:

Sale #1	-16% rather than -4%
Sale #2	-15% rather than -7%
Sale #3	35% rather than 43%
Sale #4	-4% rather than -6%
Sale #5	-13% rather than -5%
Sale #6	-11% rather than -17%
Sale #7	11% rather than 27%
Sale #8	22% rather than 34% ²⁸

Based upon the corrections noted above, Whitesides testified to a different opinion of value using the sales comparison approach than what was shown in the appraisal report. In the report, and prior to making corrections to adjustments, Whitesides estimated the per apartment unit value to be \$55,000. This resulted in an estimation of value of the subject property of \$13,090,000, as indicated in the report (238 x \$55,000).²⁹ However, after making corrections to adjustments, Whitesides testified that he estimated the per apartment unit value to be \$50,000, resulting in an estimation of value of \$11,900,000 (238 x \$50,000).³⁰

²⁶ Exhibit 15:70-71.

²⁷ Exhibit 15:70-71.

²⁸ Exhibit 15:70-71.

²⁹ Exhibit 15:74.

³⁰ *Id.*

Whitesides also considered the income approach to estimate the value of Applewood Pointe.³¹ He testified that in forming his opinion of value, more weight was given to the income approach than to the sales comparison 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.”³² The direct capitalization method produces an indication of value based on a single year’s estimated income.³³ 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.³⁴

It appears that Whitesides utilized the direct capitalization method in his income approach. He included within his appraisal report a pro-forma operating statement, estimating potential income and expenses, and analyzed income and expense data from eight comparable income-producing properties.³⁵ Whitesides estimated potential rental income, based upon the number of bedrooms and monthly rental rates, and converted it to an annual rental income of \$1,753,800. He also determined vacancy and collection losses to be 7%, and determined potential income from garages and other income to be \$150,000. Based upon this potential income and expense data, he estimated the effective gross income for Applewood Pointe to be \$1,781,034. E15:96.

The operating statement estimated operating expenses to be \$1,031,540. Therefore, Whitesides estimated net operating income to be \$749,494 (\$1,781,034 - \$1,031,540).³⁶ Whitesides estimated the unloaded capitalization rate to be 8%.³⁷ Therefore, his income capitalization approach estimated value at \$9,368,675 ($\$749,494 / .08$), which he rounded to \$9,370,000.³⁸

³¹ Exhibit 15:75-98.

³² *The Dictionary of Real Estate Appraisal*, Fourth Edition, Appraisal Institute, p.143, (2002).

³³ See, *The Appraisal of Real Estate*, 13th Edition, The Appraisal Institute, 2001, at 465.

³⁴ See, *The Appraisal of Real Estate*, 13th Edition, The Appraisal Institute, 2008, 466.

³⁵ Exhibit 15:96. Also received in evidence were cash flow statements indicating actual income and expenses for calendar years 2008 and 2009. Exhibit 13:4, Exhibit 14:23. Whitesides’ income approach did not directly utilize actual income and expenses for Applewood Pointe, but rather estimated potential income and expenses based upon market data as explained below.

³⁶ Exhibit 15:96.

³⁷ Exhibit 15:97-98. Since real estate taxes were included in the operating expenses, the capitalization rate is unloaded. An unloaded capitalization rate includes the real estate taxes in the net operating income.

³⁸ Exhibit 15:98.

Whitesides testified that because of the testimonial corrections he made to the appraisal report his opinion of value of Applewood Pointe was \$9,750,000, rather than \$9,500,000 as in the report.³⁹ The Commission notes that his opinion of value *increased* from \$9,500,000 to \$9,750,000 despite the fact that his sales comparison approach estimation had *decreased* from \$13,090,000 to \$11,900,000. When asked to explain this apparent inconsistency, Whitesides did not provide a persuasive explanation.

Whitesides also testified that he relied upon the sales comparison approach to some extent to arrive at his value opinion for Applewood Pointe. However, the Taxpayer did not provide property record cards to support the use of the eight particular sales utilized by Whitesides. The appraisal report provided details regarding each of these properties, but without the property record cards, the evidence received did not allow for a verification of this data.⁴⁰

The Commission finds that the “Number of Units” adjustments utilized in the sales comparison approach, even when corrected by Whitesides’ testimony, were not persuasive. Whitesides testified that these adjustments were coupled with considerations of economies of scale, but the rationale for the amount of each percentage adjustment was not clearly presented in the record.

We further find that two elements of the scope of work of Whitesides’ appraisal opinion limited its usefulness for purposes of determining the actual value or market value of Applewood Pointe as of the applicable assessment dates.⁴¹ First, the intended use was for estate planning purposes, not necessarily for tax valuation purposes. The evidence is unclear whether his opinion of value would have been different had the intended use been for tax valuation purposes. Second, the effective date of the appraisal opinion was August 16, 2011, rather than January 1 of each applicable tax year. Whitesides testified that his opinion of value was for tax year 2011, and he did not assert that his opinion of value would extend back to tax years 2010 or 2009. Why the appraisal effective date was not stated as January 1, 2011, was also unclear. To what extent Whitesides’ opinion of value was applicable to tax years 2009 and 2010 was also not evident.

³⁹ Exhibit 15:99.

⁴⁰ The Commission’s Order for Hearing, paragraph 11, states that “for any parcel a party will assert is a comparable parcel” copies of the property record card shall be provided.

⁴¹ The applicable assessment dates for these three consolidated appeals are January 1, 2009, January 1, 2010, and January 1, 2011. See Neb. Rev. Stat. §77-1301(1) (Reissue 2009).

The County Board offered no testimonial evidence, and rested upon the receipt of documentary evidence. The County Board need not put on any evidence to support its valuation of the property at issue unless the taxpayer establishes the Board's valuation was unreasonable or arbitrary.⁴²

Therefore, the Commission finds that while Whitesides is an expert, qualified to give an opinion of the value of Applewood Pointe, his appraisal report and his revised opinion given in testimony do not rebut the presumption in favor of the County Board, nor are they clear and convincing evidence that the County Board's determination of value was arbitrary or unreasonable.

V. CONCLUSION

The Commission finds 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 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 determination of 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 years 2009, 2010, and 2011 is affirmed.
2. The taxable values of the subject property are \$10,086,000 for each of the three tax years, 2009, 2010, and 2011.
3. This Order, if no appeal is timely filed, shall be certified to the Douglas County Treasurer and the Douglas County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (2011 Supp.)
4. Any request for relief 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 Order shall only be applicable to tax years 2009, 2010, and 2011.

⁴² *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).

7. This Order is effective for purposes of appeal on October 19, 2012.

Signed and Sealed: October 19, 2012

Robert W. Hotz, Commissioner

SEAL

Commissioner Freimuth Concurring in the Result,

I concur only in the result that the value of the subject property is \$10,086,000 for tax years 2009, 2010, and 2011.

Thomas D. Freimuth, Commissioner

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