

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Peter J. Fink,
Appellant,

v.

Douglas County Board of Equalization,
Appellee.

Case No: 11C-267

Decision and Order Affirming the
Determination by the Douglas County Board
of Equalization

For the Appellant:

Peter J. Fink,
Pro Se

For the Appellee:

Malina Dobson,
Deputy Douglas County Attorney

The appeal was heard before Commissioners Robert W. Hotz and Nancy J. Salmon.

I. THE SUBJECT PROPERTY

The Subject Property is a commercial parcel located at 2001 S. 55th Street, Omaha, Douglas County, Nebraska. The parcel is improved with two buildings used for light manufacturing, totaling 7,970 square feet in size.¹ The legal description of the parcel is found at Exhibit 2, page 6. The property record card for the Subject Property is found at Exhibit 2.

II. PROCEDURAL HISTORY

The Douglas County Assessor (the Assessor) determined that the assessed value of the Subject Property was \$381,800 for tax year 2011.² Peter J. Fink (the Taxpayer) protested this assessment to the Douglas County Board of Equalization (the County Board) and requested an assessed valuation of \$300,600.³ The County Board determined that the taxable value for tax year 2011 was \$381,800.⁴

¹ Building 1 = 3,470 sq. ft. Building 2 = 4,500 sq. ft.

² E1:1. The land component was valued at \$67,100 and the improvement component was valued at \$314,700.

³ E3:1. The Taxpayer requested a taxable value of the land component of \$67,000 and a taxable value for the improvement component of \$233,500.

⁴ E1:1. The County Board determined the land component to have a taxable value of \$67,100 and the improvement component to have a taxable value of \$314,700.

The Taxpayer appealed the decision of the County Board to the Tax Equalization and Review Commission (Commission). Prior to the hearing, the parties exchanged exhibits as ordered by the Commission. The Commission held a hearing on May 28, 2013.

III. STANDARD OF REVIEW

The Commission's review of the determination by a County Board of Equalization is de novo.⁵ 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."⁶

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.⁷

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.⁸ Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.⁹

A Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued.¹⁰ 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.¹¹

⁵ See, Neb. Rev. Stat. §77-5016(8) (2012 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).

⁶ *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted).

⁷ *Id.*

⁸ Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.).

⁹ *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

¹⁰ 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).

¹¹ *Botdorf 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.”¹² 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.”¹³

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.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 section 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 section 77-201 of Nebraska Statutes 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

¹² Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.).

¹³ Neb. Rev. Stat. §77-5016(6) (2012 Cum. Supp.).

¹⁴ Neb. Rev. Stat. §77-112 (Reissue 2009).

¹⁵ *Id.*

¹⁶ *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).

¹⁷ Neb. Rev. Stat. §77-131 (Reissue 2009).

¹⁸ See, Neb. Rev. Stat. §77-1301(1) (Reissue 2009).

¹⁹ Neb. Rev. Stat. §77-201(1) (Reissue 2009).

B. Summary of the Evidence

The County Board relied upon the value derived by the income approach used by the Assessor.²⁰ The Assessor rated both buildings as having fair quality and average condition.²¹ Using income worksheets, the Assessor assigned: (1) rental rates of \$5.50 per square foot; (2) vacancy and collection loss rates of 10%; (3) expense rates of 25%; and (4) capitalization rates of 7.75%.²² The Assessor's income approach value for Building 1 was \$166,200.²³ The Assessor's income approach value for Building 2 was \$215,600.²⁴

Peter J. Fink purchased the Subject Property for \$405,000 on November 7, 2008.²⁵ He testified that the Subject Property was adjacent to another property that he owned and he purchased it for similar commercial purposes. He did not dispute the land value, and he agreed with the Assessor's rating of the Subject Property as average quality and good condition. Fink asserted that the income approach does not adequately account for the unique characteristics of the Subject Property. However, he offered no evidence to quantify any adjustments to the assessed value of the Subject Property.

The Commission finds that the income approach to valuation is a commonly accepted mass appraisal technique and approved by Nebraska Statutes for the appraisal of real property for ad valorem tax purposes.²⁶ The Commission finds that there is not clear and convincing evidence that the County Board's opinion of value which relied upon the Assessor's income approach is arbitrary or unreasonable.

V. EQUALIZATION

A. Law

"Taxes shall be levied by valuation uniformly and proportionately upon all real property and franchises as defined by the Legislature except as otherwise provided in or permitted by this

²⁰ E2:18-19.

²¹ E2:7; E2:8.

²² E2:18; E2:19.

²³ E2:18.

²⁴ E2:19.

²⁵ E2:6.

²⁶ See, Neb. Rev. Stat. §77-112 (Reissue 2009).

Constitution.”²⁷ Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value.²⁸ The purpose of equalization of assessments is to bring the assessment of different parts of a taxing district to the same relative standard, so that no one of the parts may be compelled to pay a disproportionate part of the tax.²⁹ In order to determine a proportionate valuation, a comparison of the ratio of assessed value to market value for both the subject property and comparable property is required.³⁰ Uniformity requires that whatever methods are used to determine actual or taxable value for various classifications of real property that the results be correlated to show uniformity.³¹ Taxpayers are entitled to have their property assessed uniformly and proportionately, even though the result may be that it is assessed at less than the actual value.³² The constitutional requirement of uniformity in taxation extends to both rate and valuation.³³ If taxable values are to be equalized it is necessary for a Taxpayer to establish by “clear and convincing evidence that valuation placed on his or her property when compared with valuations placed on similar property is grossly excessive and is the result of systematic will or failure of a plain legal duty, and not mere error of judgment [sic].”³⁴ “There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity.”³⁵ “To set the valuation of similarly situated property, i.e. comparables, at materially different levels, i.e., value per square foot, is by definition, unreasonable and arbitrary, under the Nebraska Constitution.”³⁶

B. Summary of the Evidence

Fink asserted that the County Board relied upon other properties that were not comparable to the Subject Property because they had quality and condition ratings that were superior to the Subject Property.³⁷ However, Fink offered no property record cards of parcels with comparable quality and condition ratings. Further, the County Board did not rely upon a sales comparison

²⁷ *Neb. Const.*, Art. VIII, §1.

²⁸ *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).

²⁹ *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991); *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623, (1999).

³⁰ *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).

³¹ *Banner County v. State Board of Equalization*, 226 Neb. 236, 411 N.W.2d 35 (1987).

³² *Equitable Life v. Lincoln County Bd. of Equal.*, 229 Neb. 60, 425 N.W.2d 320 (1988); *Fremont Plaza v. Dodge County Bd. of Equal.*, 225 Neb. 303, 405 N.W.2d 555 (1987).

³³ *First Nat. Bank & Trust Co. v. County of Lancaster*, 177 Neb. 390, 128 N.W.2d 820 (1964).

³⁴ *Newman v. County of Dawson*, 167 Neb. 666, 670, 94 N.W.2d 47, 49-50 (1959) (Citations omitted).

³⁵ *Id.* at 673, 94 N.W.2d at 50.

³⁶ *Scribante v. Douglas County Board of Equalization*, 8 Neb.App. 25, 39, 588 N.W.2d 190, 199 (1999).

³⁷ E2.

approach to value the Subject Property, but rather exclusively relied upon a determination of taxable value based upon the income approach.

Fink acknowledged that the income approach values the land and the improvements as a whole, but he asserted that the value attributed to the improvement component only of the Subject Property should be equalized with the value attributed to the improvement component only of other parcels. In other words, since the County Board determined that the taxable value of the improvement component of the Subject Property was \$314,700, based upon the improvements' size of 7,970 square feet, Fink asserted that the Subject Property improvement component was valued at \$39.49 per square foot ($\$314,700 / 7,970 \text{ square feet} = \$39.49 \text{ per square foot}$). Fink made similar calculations for the parcels offered by the County Board. Based upon the assessed value allocated to the improvement components of those properties, divided by the size of the improvements, the per square foot values of the alleged comparable improvements ranged from \$31.60 to \$50.49 per square foot.³⁸

Fink asserted that he had made a comparison of the comparable properties and the Subject Property and had determined the weighted average of the alleged comparable properties, including the quality and condition ratings, as well as the age of the improvements, to reach a conclusion that the improvements of the Subject Property should be valued at \$29.30 per square foot, or \$233,500 ($\$29.30 \times 7,970$). Fink did not quantify the methodology that went into these calculations other than to assert that they resulted in a value of \$29.30 per square foot. Fink testified that he had made these calculations in detail, but he did not offer them as evidence.³⁹

In the income approach, individual values for the land and improvements are not separately calculated; instead the income approach utilizes the income capability of the parcel as a whole, adjusted for the expenses and risks associated with ownership of the property, in order to determine the actual value of the parcel as a whole.⁴⁰ The Taxpayer's method of comparison is contrary to the income approach.

³⁸ E2:23-24 ($\$549,960 / 13,200 \text{ sq. ft.} = \$41.66 / \text{sq. ft.}$); E2:27-28 ($\$172,760 / 4,880 = \$35.40 / \text{sq. ft.}$); E2:31-32 ($\$605,865 / 12,000 \text{ sq. ft.} = \$50.49 / \text{sq. ft.}$); E2:39-40 ($\$560,968 / 15,900 \text{ sq. ft.} = \$35.28 / \text{sq. ft.}$); E2:43-44 ($\$395,037 / 12,500 \text{ sq. ft.} = \$31.60 / \text{sq. ft.}$).

³⁹ Fink also testified that he had a fee appraisal that supported his assertions, but he also did not have the appraisal report to offer as evidence.

⁴⁰ See, *The Appraisal of Real Estate*, 13th Edition, The Appraisal Institute, 2008, 466.

Nebraska Statutes require county assessors to maintain assessment rolls which must include, among other data, the value of the improvement component of all taxable real property.⁴¹ In the assessment of the Subject Property, the Assessor made a determination of the value of the improvement component of the Subject Property separate from the determination of the assessed value of the Subject Property as a whole.⁴² The Taxpayer's attempt to equalize the allocated component values of the real property which was assessed using the income approach does not achieve the purpose of equalization to ensure properties within a taxing district are assessed at a uniform percentage of actual value.⁴³

Even if the amount of value attributed to the improvement component did affect the County Board's determination of the taxable value of the Subject Property, an order for equalization requires evidence that either: (1) similarly situated properties were assessed at materially different values;⁴⁴ or (2) a comparison of the ratio of assessed value to market value for the Subject Property and other real property indicates that the Subject Property was not assessed at a uniform percentage of market value.⁴⁵ While Fink has asserted that the Subject Property's allocated improvement component is assigned a materially different taxable value from the County Board's alleged comparable properties, Fink admits that the Subject Property and the alleged comparable properties are not similarly situated. Additionally, Fink has brought no evidence of the ratios of assessed values to actual values for any properties.

VI. 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 determination of value was arbitrary or unreasonable.

Further, the Commission finds that there is not clear and convincing evidence that valuation placed on the Subject Property when compared with valuations placed on similar property is

⁴¹ Neb. Rev. Stat. §77-1303(2) (2012 Cum. Supp.).

⁴² See, E2:6.

⁴³ See, *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).

⁴⁴ See, *Scribante v. Douglas County Board of Equalization*, 8 Neb.App. 25, 39, 588 N.W.2d 190, 199 (1999).

⁴⁵ See, *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623, 635 (1999).

grossly excessive and is the result of systematic will or failure of a plain legal duty, and not mere error of judgment.

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

VII. 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 2011 is affirmed.
2. The taxable value of the Subject Property for tax year 2011 is:

Land	\$67,100
<u>Improvements</u>	<u>\$314,700</u>
Total	\$381,800

3. This Decision and 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 (2012 Cum. Supp.).
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 year 2011.
7. This Decision and Order is effective for purposes of appeal on June 25, 2013.

Signed and Sealed: June 25, 2013.

Robert W. Hotz, Commissioner

SEAL

Nancy J. Salmon, Commissioner

Appeals from any decision of the Commission must satisfy the requirements of Neb. Rev. Stat. §77-5019 (2012 Cum. Supp.) and other provisions of Nebraska Statutes and Court Rules.