

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Peter J. Fink,
Appellant,

v.

Douglas County Board of Equalization,
Appellee.

Case No: 11C 270

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 9767 I Street, Omaha, Douglas County, Nebraska. The parcel is improved with a 22,880 square foot distribution warehouse. The legal description of the parcel is found at Exhibit 2, page 5. 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 \$965,200 for tax year 2011.¹ Peter J. Fink (the Taxpayer) protested this assessment to the Douglas County Board of Equalization (the County Board) and requested an assessed valuation of \$724,500.² The County Board determined that the taxable value for tax year 2011 was \$965,200.³

¹ E1:1. The land component was valued at \$170,900 and the improvement component was valued at \$794,300.

² E3:1. The Taxpayer requested a taxable value of the land component of \$724,500 and a taxable value for the improvement component of \$553,600.

³ E1:1. The County Board determined the land component to have a taxable value of \$170,900 and the improvement component to have a taxable value of \$794,300.

The Taxpayer appealed the decision of the County Board to the Tax Equalization and Review Commission (the 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.⁴ 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."⁵

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.⁶

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.⁷ Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.⁸

A Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued.⁹ 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.¹⁰

⁴ 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).

⁵ *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted).

⁶ *Id.*

⁷ Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.).

⁸ *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

⁹ 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).

¹⁰ *Bottof 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.”¹¹ 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.”¹²

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.¹³

“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.”¹⁴ “Actual value, market value, and fair market value mean exactly the same thing.”¹⁵ 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.¹⁶ All real property in Nebraska subject to taxation shall be assessed as of January 1.¹⁷ All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.¹⁸

¹¹ Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.).

¹² Neb. Rev. Stat. §77-5016(6) (2012 Cum. Supp.).

¹³ Neb. Rev. Stat. §77-112 (Reissue 2009).

¹⁴ *Id.*

¹⁵ *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).

¹⁶ Neb. Rev. Stat. §77-131 (Reissue 2009).

¹⁷ See, Neb. Rev. Stat. §77-1301(1) (Reissue 2009).

¹⁸ Neb. Rev. Stat. §77-201(1) (Reissue 2009).

B. Summary of the Evidence

The Assessor valued the Subject Property using the income approach.¹⁹ The County Board relied upon the assessment based upon the income approach. 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 purposes.²⁰ The County Board offered property record cards for five other commercial parcels.²¹ The Taxpayer offered no evidence to dispute the valuation, but instead argued and offered evidence that the Subject Property was not equalized with similar properties.²²

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 Constitution.”²³ Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value.²⁴ 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.²⁵ 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.²⁶ 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.²⁷ 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.²⁸ The constitutional requirement of

¹⁹ E2:16.

²⁰ See, Neb. Rev. Stat. §77-112 (Reissue 2009).

²¹ E2:20-42.

²² E5 and E6 were offered by the Taxpayer.

²³ *Neb. Const.*, Art. VIII, §1.

²⁴ *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).

²⁵ *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).

²⁶ *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).

²⁷ *Banner County v. State Board of Equalization*, 226 Neb. 236, 411 N.W.2d 35 (1987).

²⁸ *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).

uniformity in taxation extends to both rate and valuation.²⁹ 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].”³⁰ “There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity.”³¹

B. Summary of the Evidence

The Taxpayer asserted that the Subject Property was not equalized with similar commercial properties. The most relevant characteristics of these properties are as follows:

Exhibit	Land (sq. ft.)	Improvement (sq. ft.)	Quality	Condition	Rent	Vacancy	Expenses	Capitalization Rate
Subject Property 2:5-6, 16	80,977	22,880	Average	Average	\$5.00	10%	25%	8%
2:20-22	88,427	19,129	Average	Average	\$5.50	10%	25%	8%
2:24-26	79,715	13,740	Average	Average	\$5.50	10%	20%	8%
2:28-30	128,502	34,764	Good	Average	\$5.00	10%	25%	8%
2:36-38	104,108	30,000	Average	Average	\$5.00	10%	25%	8%
2:40-42	119,513	44,970	Average	Average	\$5.00	10%	25%	8%
4:1-2, 6	144,245	54,000	Average	Average	\$3.75	10%	25%	8%
5:1-2, 5	145,039	72,200	Average	Average	\$3.75	10%	25%	8%

The Taxpayer asserted that the land component of the Subject Property was overassessed as compared to other similar commercial properties. The Assessor used the income approach to value the Subject Property and each of the comparable properties. 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.³² When using the income approach, the Assessor valued each property as a whole (combining the land and the improvement) based upon rates for rent, vacancy and collection loss, expenses, and capitalization. Once a value was indicated for the

²⁹ *First Nat. Bank & Trust Co. v. County of Lancaster*, 177 Neb. 390, 128 N.W.2d 820 (1964).

³⁰ *Newman v. County of Dawson*, 167 Neb. 666, 670, 94 N.W.2d 47, 49-50 (1959) (Citations omitted).

³¹ *Id.* at 673, 94 N.W.2d at 50.

³² See, *The Appraisal of Real Estate*, 13th Edition, The Appraisal Institute, 2008, 466.

combined land and improvements the Assessor then allocated a separate value for the land and for the improvements.

Nebraska Statutes require county assessors to maintain assessment rolls which must include, among other data, the value of the allocation of land and improvement components of all taxable real property.³³ In the assessment of the Subject Property, the Assessor made a determination of the value of the land and improvement components of the Subject Property separate from the determination of the assessed value of the Subject Property as a whole.³⁴ The Taxpayer's attempt to equalize the allocated component values of the real property which was assessed using the income approach method is contrary to the income approach and does not achieve the purpose of equalization to ensure properties within a taxing district are assessed at a uniform percentage of actual value.³⁵

Even if the amount of value attributed to the land 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;³⁶ 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.³⁷

Concerning the properties found in Exhibit 2, the Commission finds that the land size of each property is similar to the Subject Property and that each of the income approach rates are either equal to the Subject Property or, with four of the properties, the rental rate is higher than the Subject Property (which would indicate a higher value for the Subject Property).

Concerning the properties in Exhibit 4 and Exhibit 5, all of the income approach rates are the same as the Subject Property except that the rental rate is lower at \$3.75 per square foot.

³³ Neb. Rev. Stat. §77-1303(2) (2012 Cum. Supp.).

³⁴ See, E2:5.

³⁵ See, *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).

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

³⁷ See, *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623, 635 (1999).

However, the size of the land for both of these properties is more than 75% larger than the Subject Property. Economies of scale could explain this difference.³⁸

Likewise, the Taxpayer asserted that the improvement component of the Subject Property was also overassessed as compared to other similar commercial properties. Again, the Assessor used the income approach to value the Subject Property and the comparable properties, and valued each property by combining the land and the improvements, based upon the income approach rates, and then allocated separate values for the land and the improvements.

Concerning the properties found in Exhibit 2 (as shown in the chart above) the Commission notes that regardless of their size, each of the income approach rates are again either equal to the Subject Property or, with four of the properties, the rental rate is higher, which would indicate a higher value than the Subject Property.

Regarding the properties at Exhibit 4 and Exhibit 5, as noted above, the income approach rates are all the same as the Subject Property except that the rental rate is lower, at \$3.75 per square foot. Again, economies of scale would explain this difference, in that the improvement on the Subject Property is 22,800 square feet in size and the improvements in Exhibit 4 and Exhibit 5 are 54,000 square feet and 72,200 square feet respectively; both more than twice the size of the Subject Property.³⁹

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 decision was arbitrary or unreasonable. The Commission finds there is not clear and convincing evidence that valuation placed on the Subject Property when compared

³⁸ "Size differences can affect value and are considered in site analysis. Reducing sale prices to consistent units of comparison facilitates the analysis of comparable sites and can identify trends in market behavior. Generally, as size increases, unit prices decrease. Conversely, as size decreases, unit prices increase. The functional utility or desirability of a site often varies depending on the types of uses to be placed on the parcel. Different prospective uses have ideal size and depth characteristics that influence value and the highest and best use." Appraisal Institute, *The Appraisal of Real Estate*, 13th Ed. (2008) at 212.

³⁹ *Id.*

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.

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 County Board 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	\$170,900
<u>Improvements</u>	<u>\$794,300</u>
Total	\$965,200

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.