

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Jefferson Square, LLC,
Appellant,

v.

Dawson County Board of Equalization,
Appellee.

Case No: 12C 041 & 042

Decision Affirming
County Board of Equalization

1. A Single Commissioner hearing was held on August 16, 2013, at Hamilton County Courthouse, LL NE Corner, 1111 13th, Aurora, Nebraska, before Commissioner Salmon.
2. Andrew Willis was present at the hearing for Jefferson Square, LLC (Taxpayer).
3. John Moore was present for the Dawson County Board of Equalization (the County).
4. The Subject Property (Subject Property) is two IRS Section 42 rent restricted commercial properties, with a legal description of: 12C 041 Lots 6,7,8, & N ½ Lot 18 Goshen Sub and 12C 042 Lot 8 Goshen 2nd Sub; all in Gothenburg, Dawson County, Nebraska.

Background

5. The Dawson County Assessor assessed the Subject Property at \$817,524 for 12C 041 and \$200,945 for 12C 042 for tax year 2012.
6. The Taxpayer protested this value to the Dawson County Board of Equalization and requested an assessed value of \$521,404 for 12C 041 and \$128,160 for 12C 042 for tax year 2012.
7. The Dawson County Board of Equalization determined that the assessed value of the Subject Property was \$587,000 for 12C 041 and \$158,000 for 12C 042 for tax year 2012.
8. The Taxpayer appealed the determination of the County to the Tax Equalization and Review Commission (the Commission).

Issues & Analysis

9. The Commission’s review of the determination of the County Board of Equalization is de novo.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

¹ 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).

been held in the first place, and evidence is taken anew as such evidence is available at the time of the trial on appeal.”²

10. When considering an appeal 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
11. 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
12. Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.⁶
13. 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
14. The Taxpayer stated that the Subject Properties are Section 42 rent restricted properties. He asserted that the Subject Property is rent restricted for 45 years, and the Housing Authority has the right to purchase the Subject Property for \$100 after the 45 years. He further stated that the tax credits were for 10 years.
15. The Taxpayer asserted that Nebraska Statutes section 77-1333 required the county assessor to perform an income approach on the Subject Properties, but that other approaches could be used to assess the Subject Properties. He asserted that if the county assessor valued the Subject Property using the cost approach an economic obsolescence should be applied to take into consideration the rent restrictions and added expenses. It was his opinion that the income approach was the most reliable methodology to use for this type of property.
16. He noted that the Subject Property consisted of 13 units; 11 were rented as LIHTC units and 2 were rented at market rent.
17. The Taxpayer presented the Commission with an income approach to value. The Taxpayer used the max LIHTC rent minus utility allowance for the per unit income for

² *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) (2012 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).

the LIHTC units, and an alleged market rent for the remaining two unrestricted units, a 45% expense ratio, and a loaded capitalization rate of 9.71%.

18. The Taxpayer arrived at the capitalization rate using sales of 5 properties in Nebraska that had land use restriction agreements attached to them. He noted that they were no longer receiving the tax credits, but were rent restricted for 30 to 45 years. The range of the capitalization rates was 10.71% to 16.87%. He assumed the lowest ratio, loaded with a 2% effective tax rate and subtracted 3% because the Subject Properties were still receiving tax credits. $(10.71 - 0.03 = 10.71)$. The Taxpayer asserted that the Nebraska Supreme Court held in *Schuyler Apartment Partners, LLC v. Colfax County Board of Equalization* that a 2% adjustment to a capitalization rate was reasonable to account for tax credits resulting from a property's participation in LIHTC.⁸ He stated that he arrived at the 3% by using the Supreme Court decision and adding 1%.
19. The Appraiser for the county explained he had performed an income approach for the Subject Properties. It is noted on the protest forms that the County Board relied upon the income approach in setting their values.
20. The County Assessor had previously valued the Subject Properties using the cost approach. The Appraiser stated that he performed an income analysis for the leased fee interest and one for the fee simple interest.
21. As an Appraiser, he noted he values fee simple interest and his opinion was that using 77-1333 income approach would arrive at leased fee interest for the Subject Properties.
22. He notes on the report for the leased fee interest that he used the reported effective gross income for 2011 as reported by the Taxpayer and a 50% expense ratio. The NOI used by the Taxpayer and the leased fee interest NOI used by the Appraiser were only \$2,234 different. The Appraiser used a loaded capitalization rate of 4.2%. He noted that with regard to Section 42 properties, his market research indicated that the capitalization rate should range between 2% to 5.25%. He also loaded the capitalization rate with a 2.2% effective tax rate. His leased fee valuation for the Subject Properties was \$773,000.
23. In the Appraiser's fee simple estate, he used a market rent for 2011 and an expense ratio of 25% as found in the market. He used a market capitalization rate of 8% and loaded it with a 2.2% tax rate for a total market cap rate of 10.2%. His opinion of the fee simple valuation for the Subject Properties for 2012 was \$746,000. The Appraiser also used a gross rent multiplier to arrive at a market value and leased fee value for the Subject Property.
24. The County Board adopted the Appraiser's fee simple estate income approach values.⁹
25. The Commission finds that the decision of the County Board to adopt the Appraiser's opinion of value, which he labeled the "fee simple estate" value, was unreasonable and arbitrary.

⁸ 279 Neb. 989, 783 N.W.2d 587 (2010).

⁹ See, Casefile.

26. The Appraiser contends that Nebraska Statutes section 77-1333 require an income approach opinion of value based upon the “leased fee interest” of the Subject Property and not the “fee simple estate” interest. However, the Commission finds that instead Nebraska Statutes section 77-1333 indicates that Section 42 housing units operate in a separate market then unrestricted properties.
27. Affordable housing, including Section 42 housing, comprises a different market then traditional rental units.¹⁰ Individual analysis is necessary in order to determine the appropriate market area.¹¹ When using the income approach to determine the actual value of the Subject Property, an appraiser should use the maximum allowable rent for an LIHTC property.¹² The rent restriction is an encumbrance placed on the property which impacts the actual value of the property, and must, therefore, be taken into consideration when determining the actual value of the Subject Property.¹³
28. Both the Taxpayer and the Appraiser expressed an opinion of value based upon the actual value of the Subject Property with current rent restrictions.
29. The Taxpayer’s income approach was presented by legal counsel. The Commission notes that Mr. Willis is not a licensed appraiser.
30. The Taxpayer asserted that an appropriate capitalization rate was derived for the Subject Property based on comparable sales. The Taxpayer provided the Commission with a spreadsheet of the comparable sales. The Commission notes that the comparable sales used by the Taxpayer to determine the capitalization rate are located in Custer, Dawes, Adams, Cheyenne, and Box Butte Counties, but the Subject Property is located in Dawson County. The Taxpayer provided the lores, actual expenses, and actual income for the alleged comparable properties. However, no witness was called to verify the information contained in the lores. Additionally, the Commission notes that all alleged comparable sales were made to the same buyer entity.
31. The Commission gives little weight to the capitalization rate derived from sales without evidence that the alleged comparable properties are located in the same market area, and without further evidence that multiple sales to an individual buyer were actually arm’s length transactions and indicative of the market.
32. Further, when determining the final capitalization rate, the Taxpayer subtracted 3% to account for the tax credits the owner received for participating in the LIHTC. The Taxpayer asserted that the 3% adjustment was based upon the Nebraska Supreme Court’s holding in *Schuylar Apartment Partners, LLC v. Colfax County Board of Equalization* that a 2% adjustment by the county assessor in that case, and an additional 1% adjustment just to be sure.¹⁴ The Commission finds the determination of the 3% adjustment arbitrary.

¹⁰ *Valuation of Market Studies fo Affordable Housing*, Polton, Richard E., Appraisal Institute (2005) pg 42-50.

¹¹ *Id.* at 42-44.

¹² *Id.* at 94-95.

¹³ See generally, *Id.*

¹⁴ 279 Neb. 989, 783 N.W.2d 587 (2010).

33. While the Nebraska Supreme Court did hold that a 2% adjustment was appropriate in a single case, the amount of tax credits and length of rent restrictions vary between LIHTC properties.¹⁵ An appropriate adjustment to the capitalization rate would need to be calculated using actual market data to determine the amount of decreased risk to buyers.
34. Clear and convincing evidence was not offered at the hearing indicating that the Appraiser’s opinion of value described as a “leased fee interest” appraisal was arbitrary or unreasonable. However, the Appraiser’s opinion of value based on this method is more than the County Board’s determined value. The Commission cannot increase an assessed value more than a previously noticed value in this case.¹⁶
35. The Taxpayer has produced competent evidence that the County Board failed to faithfully perform its duties and to act on sufficient competent evidence to justify its actions.
36. The Taxpayer has adduced sufficient, clear and convincing evidence that the determination of the County Board is unreasonable or arbitrary, but the decision of the County Board should be affirmed.

ORDER

IT IS ORDERED THAT:

1. The Decision of the Dawson County Board of Equalization determining the value of the subject property for tax year 2012, is Affirmed.
2. That the Taxable value of the Subject property for tax year 2012 is:

12C 041

Land	\$ 33,603
<u>Improvements</u>	<u>\$553,397</u>
Total	\$587,000

12C 042

Land	\$ 7,565
<u>Improvements</u>	<u>\$150,435</u>
Total	\$158,000

¹⁵ *Valuation of Market Studies fo Affordable Housing*, Polton, Richard E., Appraisal Institute (2005) pg 10.

¹⁶ 350 Neb. Admin. Chapter 5 §016.02A (06/06/11).

3. This Decision and Order, if no further action is taken, shall be certified to the Dawson County Treasurer and the Dawson 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 2012.
7. This Decision and Order is effective on September 24, 2013.

Signed and Sealed: September 24, 2013

Nancy J. Salmon, Commissioner