

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Tower Group LLC,
Appellant,

v.

Douglas County Board of Equalization,
Appellee.

Case Nos: 10C 568, 11C 704, & 12C 692

Decision and Order Reversing the Decisions
of the Douglas County Board of
Equalization

For the Appellant:

Mark Holmberg,
Attorney at Law

For the Appellee:

Malina M. Dobson,
Deputy Douglas County Attorney

The appeals were heard before Commissioners Robert W. Hotz and Nancy J. Salmon.

I. THE SUBJECT PROPERTY

The Subject Property is a commercial parcel consisting of three separate buildings located at 151 N. 78th Street, in the City of Omaha, Douglas County, Nebraska. The parcel is improved with a 27,048 square foot discount store, a 300 square foot snack bar, and a 75,879 square foot neighborhood shopping center. The legal description of the parcel and the property record cards for the Subject Property are found at Exhibits 4, 5, and 6.

II. PROCEDURAL HISTORY

The Douglas County Assessor (the County Assessor) determined that the assessed value of the Subject Property was \$12,533,100 for tax years 2010, 2011, and 2012. Tower Group LLC (the Taxpayer) protested these assessments to the Douglas County Board of Equalization (the County Board). The County Board determined that the taxable value for tax years 2010, 2011, and 2012 was \$12,533,100.¹

¹ See, E1, E2, and E3.

The Taxpayer appealed the decisions of the County Board to the Tax Equalization and Review Commission (the Commission). Prior to the hearing, the parties exchanged exhibits and submitted a Pre-Hearing Conference Report, as ordered by the Commission. The Commission held a hearing on May 28, 2014.

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

² 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).

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).

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

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 The Commission’s Decision and Order shall include findings of fact and conclusions of law.¹¹

IV. 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.”¹² Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value.¹³ 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.¹⁴ 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.¹⁵ 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.¹⁶ Taxpayers are entitled to have their property assessed uniformly and proportionately, even though the result

⁸ *Botdorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).

⁹ Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.).

¹⁰ Neb. Rev. Stat. §77-5016(6) (2012 Cum. Supp.).

¹¹ Neb. Rev. Stat. §77-5018(1) (2012 Cum. Supp.).

¹² *Neb. Const.*, Art. VIII, §1.

¹³ *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).

¹⁴ *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).

¹⁵ *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).

¹⁶ *Banner County v. State Board of Equalization*, 226 Neb. 236, 411 N.W.2d 35 (1987).

may be that it is assessed at less than the actual value.¹⁷ The constitutional requirement of uniformity in taxation extends to both rate and valuation.¹⁸ 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].”¹⁹ “There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity.”²⁰

B. Summary of the Evidence

Kenneth J. Albrecht, treasurer and principal owner of the manager of the Taxpayer and leasing agent for the Subject Property,²¹ testified that the Subject Property consists of three separate buildings: (1) a 27,048 square foot discount store built in 1995, with 20,000 square feet occupied by Staples at \$15 per square foot rent and approximately 7,000 square feet vacant as of the dates of assessment;²² (2) a 75,879 square foot neighborhood shopping center constructed in 1995 in a strip center, with rents ranging from \$12 per square foot to \$15 per square foot;²³ and (3) a 300 square foot snack bar occupied by Scooters.²⁴ The Subject Property encompasses a rectangular lot that stretches along North 78th Street from Cass Street on the North to Dodge Street on the South.²⁵ The Subject Property has access from Dodge Street, North 78th Street, and Cass Street to a parking lot that traverses the entire length of the Subject Property.²⁶

Albrecht described the access to Dodge Street as limited or minimal, and asserted that visibility from Dodge Street to the Subject Property is restricted by a strip mall and multi-story building. The discount store component and Scooters are located near the Southern portion of the Subject Property and the strip center runs from the Northern edge of these structures to Cass

¹⁷ *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).

¹⁸ *First Nat. Bank & Trust Co. v. County of Lancaster*, 177 Neb. 390, 128 N.W.2d 820 (1964).

¹⁹ *Newman v. County of Dawson*, 167 Neb. 666, 670, 94 N.W.2d 47, 49-50 (1959) (Citations omitted).

²⁰ *Id.* at 673, 94 N.W.2d at 50.

²¹ Albrecht testified that by occupation he manages approximately 1.7 million square feet of commercial space in Nebraska.

²² See also, E4:2.

²³ See also, E4:2.

²⁴ See also, E4:2.

²⁵ See, E11 (map).

²⁶ See, E11 (map).

Street.²⁷ Albrecht testified that an electronic sign is located on Dodge Street with four fixed panels for store identification for some establishments located on the Subject Property.

Albrecht asserted that the property record cards for the Subject Property indicate that the County Assessor valued the Subject Property using an income approach for all three tax years. He asserted that the County Assessor assigned the strip center a \$14 rental rate, a 10% vacancy and collection loss rate, and a capitalization rate of 8.75% for all three years.²⁸ He testified the County Assessor's income approach assigned the discount store a rental rate of \$15 per square foot, a vacancy and collection loss rate of 30%, and a capitalization rate of 8.75%.²⁹ Albrecht asserted that in his experience the market rental rates for the discount store lease should have been closer to \$8.50 to \$9 per square foot.

Albrecht asserted that that the components of the Subject Property were similar to components of alleged comparable properties, and that the alleged comparable properties had been valued at materially different levels of value than the Subject Property. The Taxpayer provided property record cards for eight alleged comparable properties for all three tax years at issue: (1) 7609 Cass Street (Sage);³⁰ (2) 7540 Dodge Street (Heritage);³¹ (3) 7510 Dodge Street (Hixon);³² (4) 7300 Dodge Street (Crossroads Mall);³³ (5) 7200 Dodge Street (Target);³⁴ (6) 715 S 72nd Street (72nd Crossing);³⁵ (7) 7601 Pacific Street (Village Square);³⁶ and (8) 606 N. 114th Street (Perkins).³⁷

Albrecht testified that Heritage is similar to the Subject Property in location,³⁸ basic layout, types of tenants, and amount of Dodge Street frontage. Albrecht explained that similar to the Subject Property, Heritage has a strip shopping center and a stand-alone discount store.

²⁷ See, E11 (map).

²⁸ See, E4:26 (2010 property record card); See also, E5:22 (2011 property record card); See also, E6:22 (2012 property record card).

²⁹ See, E4:27 (2010 property record card); See also, E5:22 (2011 property record card). At the hearing the parties stipulated that even though income worksheet found at E5:22 was identical to the income worksheet and calculations that would have been used to assess the Subject Property for tax year 2012.

³⁰ See, E12-14 (property record cards).

³¹ See, E15-17 (property record cards).

³² See, E18-20 (property record cards).

³³ See, E21-23 (property record cards).

³⁴ See, E24-26 (property record cards).

³⁵ See, E27-29 (property record cards).

³⁶ See, E30-32 (property record cards).

³⁷ See, E33-35 (property record cards).

³⁸ Heritage is located only three blocks east of the Subject Property. See, E11.

Heritage's discount store consists of 51,413 square feet of leasable area.³⁹ Albrecht testified that two tenants, Toys 'R' Us and the Old Country Buffet, occupied the discount store component of Heritage. Additionally, Heritage's discount store is also located on the southern portion of the parcel.

Albrecht asserted that Heritage was valued using an income approach and assessed a rental rate of \$8.00 per square foot and a vacancy and collection loss rate of 5%, with a 9% capitalization rate for tax year 2010.⁴⁰ For tax years 2011 and 2012, the rental rate increased to \$8.50, the vacancy and collection loss rate increased to 10%, and the capitalization rate decreased to 8.75%.⁴¹ Albrecht asserted that while Heritage's discount store component was twice the size of the Subject Property's discount store component, Heritage's discount store's total area was divided among two tenants. He asserted that because of the smaller leases, economies of scale or the principle of diminishing returns would not explain a difference in the assessed rental rates for the Subject Property and Heritage.

Additionally, Albrecht asserted that 72nd Crossing was similar to the Subject Property in location and tenants. He opined that the location of 72nd Crossing is similar to the Subject Property's location on Dodge Street, and that 72nd Crossing benefits from being located directly across 72nd Street from Nebraska Furniture Mart. He asserted that Nebraska Furniture Mart draws people from all over the region. He testified that while the discount store component of 72nd Crossing was 84,103 square feet, it is divided among four discount stores including PetSmart and Office Depot.⁴² The Income Worksheet for the discount store portion of 72nd Crossing indicates that it was valued using the income approach and assigned an \$8 rental rate, 10% vacancy and collection loss rate, and 8.75% capitalization rate for tax year 2010,⁴³ similar to Heritage.⁴⁴ Unlike Heritage,⁴⁵ however, 72nd Crossing's assessed value attributable to the discount store did not change for tax years 2011 and 2012.

Albrecht asserted that the assessed values of the strip center located on Sage also indicated that the Subject Property was not equalized with comparable properties. Albrecht indicated that

³⁹ See, E15:4.

⁴⁰ See, E15:16.

⁴¹ See, E16:14 (2011 property record card); See also, E17:14 (2012 property record card).

⁴² See, E27:8.

⁴³ See, E27:8.

⁴⁴ See, E15:16.

⁴⁵ See, E16:14 (2011 property record card); See also, E17:14 (2012 property record card).

the strip center located on Sage consists of a 35,944 square foot building that faces Cass Street, about 2 blocks east of the Subject Property. The property record cards for Sage indicate that it was valued at \$10 per square foot for all three tax years.⁴⁶ Albrecht asserted that the strip center located on the Subject Property was more similar to Sage because it is closer to Cass Street than to Dodge Street. The property record cards indicate that the strip center located on the Subject Property was assigned a rental rate of \$14 and a capitalization rate of 8.75% for all three tax years.⁴⁷

Albrecht asserted that the strip center located on Heritage, the strip center located on 72nd Crossing, and the strip center located on the Subject Property were all valued using a similar model. The Commission notes that for tax year 2010 Heritage and 72nd Crossing were assigned similar but different factors in the income approach,⁴⁸ but that for tax years 2011 and 2012 the properties were assigned identical income factors including a rental rate of \$14 per square foot, a vacancy and collection loss rate of 10%, and a capitalization rate of 8.75%.⁴⁹ The strip center located on the Subject Property was assessed identically to the strip center on 72nd Crossing for all three tax years and identically to Heritage for tax years 2011 and 2012.⁵⁰

Linda Rowe, a commercial appraiser for the County Assessor, asserted that the Subject Property was equalized with similarly situated properties. Rowe asserted that the discount store portion of the Subject Property did not meet the assessment definition of a discount store because the gross leasable area did not exceed approximately 30,000 square feet. Rowe classified the discount store portion of the Subject Property as a retail store. Rowe indicated that the distinction is required by her income model.

Rowe asserted that the Taxpayer's alleged comparable properties were not truly comparable to the Subject Property. Rowe prepared a list of her reasons for determining that the alleged comparable properties were not comparable to the Subject Property.⁵¹ Rowe specifically

⁴⁶ See, E12:7, E13:7, and E14:7.

⁴⁷ See, E4:26 and E5:22.

⁴⁸ See, E15:14 (income worksheet for Heritage strip center); See also, E27:9 (income worksheet for 72nd Crossing strip center).

⁴⁹ See, E28:9 and E29:10 (income worksheets for 72nd Crossing strip center for tax years 2011 and 2012); See also, E16:13 and E17:13 (income worksheets for Heritage strip center for tax years 2011 and 2012).

⁵⁰ See, E4:26 and E5:22 (income worksheets for the Subject Property strip center); See also, E15:14 (income worksheet for Heritage strip center); See also, E27:9 (income worksheet for 72nd Crossing strip center); See also, E28:9 and E29:10 (income worksheets for 72nd Crossing strip center for tax years 2011 and 2012); See also, E16:13 and E17:13 (income worksheets for Heritage strip center for tax years 2011 and 2012).

⁵¹ See, E39.

asserted that Heritage's discount store was not similar to the discount store located on the Subject Property because the portion of the Subject Property described as the discount store is not a discount store, and Heritage's discount store is older, contained twice as much leasable area as the Subject Property's discount store, and would command less rent per square foot and operate in a different market. She further asserted that 72nd Crossing's discount store is not similar to the discount store located on the Subject Property because the portion of the Subject Property described as the discount store is not a discount store, and 72nd Crossing's discount store has an inferior location and consists of 84,000 square feet.

Rowe asserted that her comparable properties, as indicated in the Assessment Reports contained in Exhibits 4, 5, and 6, were more comparable to the Subject Property and indicated that the Subject Property was valued at the same material level as those comparable properties. Rowe testified that she had assigned the discount store portion of the Subject Property, containing Staples, an occupancy code of 353, retail store, but had assigned the discount store portion of 72nd Crossing, including that portion containing an Office Depot of similar size as the Staples located on the Subject Property, an occupancy code of 319, discount store. Rowe's testimony indicated that the subjectively assigned occupancy codes dictate to the model what factors are applied in the income approach, and that the different occupancy codes resulted in the two properties being assigned different assessed values. Rowe asserted that this was appropriate because the discount store on 72nd Crossing was approximately four times the size of the discount store located on the Subject Property.

C. Analysis

The Commission finds that the Subject Property is not substantially similar to Hixon, Crossroads Mall, Target, Village Square, or Perkins. The Commission finds that the discount store portion of the Subject Property is comparable to the discount store portions of Heritage and 72nd Crossing. Linda Rowe asserted that a distinction was necessary between the discount store portions of Heritage and 72nd Crossing and the discount store portion of the Subject Property because Heritage and 72nd Crossing contained two to four times the gross leasable area. The Commission finds that even though the buildings containing the discount stores located on Heritage and 72nd Crossing are two to four times larger than the building containing the discount store on the Subject Property, average area of leased space per lease is substantially similar. The

Commission finds that the principle of diminishing returns does not affect the comparability of the discount store on the Subject Property, Heritage, and 72nd Crossing because the unit of comparability, the area of each individual lease, is comparable.

Further, Rowe identifies the discount store located on the Subject Property as a “discount store” on the Property Profiles for the Subject Property.⁵² However, in the income worksheet she assigned the Subject Property’s discount store a different occupancy code; that of a retail store.⁵³ Additionally, while Rowe asserted that the Subject Property’s discount store operates in a different market than 72nd Crossing and Heritage, the occupying tenants are direct competitors. The contention that 72nd Crossing is an inferior location to the Subject Property is refuted by the County Assessor’s own worksheets which treat the strip center portions of the properties identically. Additionally, the discount store located on Heritage is on Dodge Street, similar to the Subject Property, but was valued similarly to 72nd Crossing for tax year 2010, and identically to 72nd Crossing for tax years 2011 and 2012. Similarly, the contention that the Subject Property is newer than Heritage, and therefore not comparable, is disputed by the County Assessor’s own income worksheets that valued Heritage similarly to 72nd Crossing for tax year 2010, and identically to 72nd Crossing for tax years 2011 and 2012, even though 72nd Crossing was built at approximately the same time as the Subject Property.

The Commission finds that the discount store located on the Subject Property is most similar to the discount store located on 72nd Crossing because of the year built. The Commission finds that there is clear and convincing evidence that the discount Store located on the Subject Property was not equalized with the discount store on 72nd Crossing for tax year 2010 and the discount stores located on Heritage and 72nd Crossing for tax years 2011 and 2012.

The Commission therefore finds that the taxable value of the discount store located on the Subject Property should be \$2,003,098 for each of the three tax years.⁵⁴

Conversely, the Commission finds that there is not clear and convincing evidence that the strip center located on the Subject Property was valued at a materially different level of value than substantially similar properties. The Commission finds that the strip center located on the

⁵² See, E4:10, E5:10, and E6:10.

⁵³ See, E4:27 and E5:23.

⁵⁴ 27,048 sq. ft. x \$8.00 rental rate x .9 vacancy and collection loss x .9 expenses / .0875 capitalization rate = \$2,003,098.

Subject Property is not substantially similar to the strip centers located on any of the Taxpayer's alleged comparable properties. Specifically, the strip center located on Sage is not substantially similar to the Subject Property. The Subject Property has access to Dodge Street, is visible to some degree from Dodge Street, and has a sign advertising the available tenants on Dodge Street. The Subject Property additionally has similar access to Cass Street. Sage, however, only has access from Cass Street and is located on the opposite side of the block from Dodge Street.

The Commission finds that the total taxable value of the Subject Property should be \$11,939,598 for all three tax years.⁵⁵

V. CONCLUSION

The Commission finds that there is competent evidence to rebut the presumption that the County Board faithfully performed its duties and had sufficient competent evidence to make its determinations. The Commission also finds that there is clear and convincing evidence that the County Board's decisions were arbitrary or unreasonable. The Commission finds that the Subject Property was valued at a materially different level of value than substantially similar property for all three tax years.

For all of the reasons set forth above, the decisions of the County Board are vacated and reversed.

VI. ORDER

IT IS ORDERED THAT:

1. The decisions of the Douglas County Board of Equalization determining the value of the Subject Property for tax year years 2010, 2011 and 2012 are vacated and reversed.⁵⁶
2. The taxable value of the Subject Property for tax years 2010, 2011, and 2012 is \$11,939,598.

⁵⁵ \$2,003,098 discount store (Infra, footnote 54) + \$9,833,900 strip center (E4:26, E5:22, and E6:22) + \$102,600 snack bar (E4:28, E5:24, and E6:24) = \$11,939,598.

⁵⁶ Taxable value, as determined by the County Board, was based upon the evidence at the time of the Protest proceeding. At the appeal hearing before the Commission, both parties were permitted to submit evidence that may not have been considered by the County Board at the protest proceeding.

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 years 2010, 2011 and 2012.
7. This Decision and Order is effective for purposes of appeal on August 20, 2014.

Signed and Sealed: August 20, 2014

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.