

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Patricia Lafever,
Appellant,

v.

Douglas County Board of Equalization,
Appellee.

Case No: 11C 218

Decision Affirming
County Board of Equalization

GENERAL BACKGROUND & PROCEDURAL HISTORY

1. The Subject Property is a commercial parcel improved with an 18,900 square foot storage warehouse located at 4880 G Street, Omaha, Nebraska.
2. The Douglas County Assessor assessed the Subject Property at \$640,400 for tax year 2011.
3. Patricia Lafever (herein referred to as the “Taxpayer”), protested this value to the Douglas County Board of Equalization (herein referred to as the “County Board”) and requested an assessed value of \$398,950 for tax year 2011.
4. The County Board determined that the assessed value of the Subject Property was \$604,000 for tax year 2011.
5. The Taxpayer appealed the determination of the County Board to the Tax Equalization and Review Commission (herein referred to as the “Commission”).
6. A Single Commissioner hearing was held on March 26, 2013, at the Omaha State Office Building, 1313 Farnam Street, Conference Room 227, Omaha, Nebraska, before Commissioner Thomas D. Freimuth.
7. John L. Kelly was present at the hearing for Patricia Lafever, the Taxpayer. Mr. Kelly is the General Manager of the Bill Doran Company’s Omaha location, which is situated on the Subject Property. The Bill Doran Company is an Illinois entity engaged in the business of floral distribution. Bill Lafever, the Taxpayer’s son, is the owner of the Bill Doran Company. The Taxpayer owns the Subject Property and leases the parcel to the Bill Doran Company on a triple-net basis. Thus, the Bill Doran Company is responsible for the Subject Property’s real estate taxes, thereby enabling Mr. Kelly to participate in the hearing before the Commission.
8. Greg Weisheipl, an employee of the Douglas County Assessor’s Office, was present for the County Board.

SUMMARY OF HEARING DOCUMENTS & STATEMENTS

9. The County Board submitted an Assessment Report for tax year 2011 at the hearing. The Assessment Report contains a one-page “PVAL” document that indicates that the County Board’s \$604,000 determination for tax year 2011 includes \$137,900 for land and \$466,100 for the improvement component. The Commission notes that the PVAL page indicates that the County Board’s determinations for tax years 2005 through 2010 amounted to \$583,400 (land: \$137,900; improvements: \$445,500).

10. The PVAL page indicates that the County Assessor's \$640,400 notice value for tax year 2011 is based on a reappraisal of the Subject Property (land: \$137,900; improvements: \$502,500). The Assessment Report contains a Commercial Income Worksheet that is the basis of the County Assessor's \$640,400 notice value for tax year 2011.
11. The PVAL page indicates that the County Board's \$604,000 determination for tax year 2011 rejected the County Assessor's \$640,400 income approach valuation. The "Referee Notes" portion of the Assessment Report indicates that the County Board based its \$604,000 (\$31.96 per sq. ft.) actual value determination for tax year 2011 upon the Referee's recommendation to increase the County Assessor's income approach capitalization rate from 8.5% to 9%, based on information concerning the condition of the Subject Property's improvement component provided by the Taxpayer. Thus, County Board's \$604,000 determination is based on the following income approach factors: \$4 rental rate; 10% vacancy & collection loss rate; 20% expense ratio; and a 9% capitalization rate applied to net operating income in the amount of \$54,432.
12. The 2011 Property Profile contained in the Assessment Report states that the Subject Property's 18,900 sq. ft. improvement is classified by the County as "Storage Warehouse" under "Occupancy" code 406.
13. The Assessment Report contains a document entitled "Equalization Comparables," which sets forth five storage warehouses in the Subject Property's market area with 2011 assessed values that range from \$33.88 per sq. ft. to \$35.75 per sq. ft. The Subject Property is assessed at \$31.96 per sq. ft. for tax year 2011.
14. Mr. Kelly, the Taxpayer's representative, supplied the Commission with interior building photos and a summary of actual income and expenses for the Subject Property for tax years 2009 through 2012.
15. Based on Mr. Kelly's statements, photos and documentation submitted at the hearing, the Taxpayer made the following assertions concerning the actual value of the Subject Property: (1) the Subject Property had lower actual income (\$43,355) as compared to the County's income approach documentation (\$75,600 potential gross income based on \$4 rental rate; \$68,040 effective gross income based on 10% vacancy & collection loss rate); the condition of the Subject Property's improvement component adversely affected its value; (3) contrary to the Assessment Report's "Account Notes," the Subject Property's coolers do not enhance value; and (4) based on the Taxpayer's income approach documentation, the actual value of the Subject Property should be \$398,952 for tax year 2011.
16. The Taxpayer's documentation states that the above-noted \$398,952 opinion of value is derived as follows: "Present Value of 15 years at 5.6% interest." While the Taxpayer's representative was not able to explain the details of this valuation approach, the Commission assumes that it uses 2009 - 2012 actual income/expense information and is calculated as follows: \$40,000 average annual net income invested for a period of 15 years at a 5.6% interest rate amounts to a present value of \$398,952.

STANDARD OF REVIEW

17. 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 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
18. 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
19. 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
20. Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.⁶

GENERAL VALUATION LAW

21. 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
22. “Actual value, market value, and fair market value mean exactly the same thing.”⁸
23. Taxable value is the percentage of actual value subject to taxation as directed by Nebraska Statutes section 77-201 and has the same meaning as assessed value.⁹
24. All real property in Nebraska subject to taxation shall be assessed as of January 1.¹⁰
25. All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.¹¹
26. Nebraska Statutes section 77-112 defines actual value as follows:

Actual value of real property for purposes of taxation means the market value of real property in the ordinary course of trade. Actual value may be

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).

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) (2011 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 *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).

⁹ Neb. Rev. Stat. §77-131 (Reissue 2009).

¹⁰ See, Neb. Rev. Stat. §77-1301(1) (Reissue 2009).

¹¹ Neb. Rev. Stat. §77-201(1) (Reissue 2009).

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. Actual 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.¹²

VALUATION ANALYSIS

27. The Taxpayer's opinion of value relies on the use of the above-referenced present value calculation, which is a variation on the income approach to valuation.
28. For appraisal purposes under Nebraska Statutes section 77-112, the income approach is 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. This conversion can be accomplished in two ways. One year's income expectancy can be capitalized at a market-derived rate or at a capitalization rate that reflects a specified income pattern, return on investment, and change in the value of the investment. Alternatively, the annual cash flows for the holding period and the reversion can be discounted at a specified yield rate."¹³
29. The income approach requires the analysis and use of competitive market information.¹⁴ In this regard, *The Appraisal of Real Estate* published by The Appraisal Institute states: "To derive pertinent income and expense data, an appraiser investigates comparable sales and rentals of competitive income-producing properties of the same type in the same market. ... Appraisers try to obtain all income and expense data from the income-producing properties used as comparables."¹⁵ "Vacancy and collection loss is commonly expressed as a percentage of potential annual gross income, and it should be based on market research, not the actual rental history of a property."¹⁶ "Published studies are useful, but the appraiser must still develop operating expense ratios from comparable properties in the subject property's market or verify the applicability of the published ratios to this market."¹⁷ Finally, *The Appraisal of Real Estate* states that the income approach "employs capitalization rates and multipliers extracted from market data."¹⁸
30. In addition to market data, the income approach also requires analysis of subject property income and expense information.¹⁹

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

¹³ Appraisal Institute, *The Dictionary of Real Estate Appraisal*, at 143 (4th ed. 2002).

¹⁴ Fisher and Martin, *Income Property Valuation*, Dearborn Financial Publishing, Inc., 2004, at p. 43.

¹⁵ *The Appraisal of Real Estate*, 13th Edition, The Appraisal Institute, 2008, at p. 473.

¹⁶ *Mass Appraisal of Real Property*, International Association of Assessing Officers, 1999, at 404.

¹⁷ *The Appraisal of Real Estate*, 13th Edition, The Appraisal Institute, 2008, at p. 494.

¹⁸ *The Appraisal of Real Estate*, 13th Edition, The Appraisal Institute, 2008, at p. 499.

¹⁹ *The Appraisal of Real Estate*, 13th Edition, The Appraisal Institute, 2008, at p. 466.

31. With respect to the proper use of the income approach in the mass appraisal context, “gross income, allowable expenses, net incomes, gross income multipliers, and overall rates can all be estimated in one of two basic ways: by developing typical per-unit values through stratification, often using spreadsheet software, or through statistical models.”²⁰ In order to avoid reflecting differences in management, it is acceptable for an appraiser to use median vacancy, collection loss ratio and income per unit when valuing a property under the income approach.²¹ Whether the appraiser uses actual subject property income/expense information or estimated medians is “a matter of appraiser judgment” based upon whether the reported actual figures appear reasonable or typical when compared to the median figure for the model.²²
32. *Mass Appraisal of Real Property* states the basic concept that for purposes of ad valorem taxation of real property, only the value of the real property and not that value of the business which is attributable to individual management style or experience is to be valued. The use of estimated figures instead of actual figures for each business is intended to prevent the inappropriate taxation of management.²³
33. Because of these principles of mass appraisal, it is not enough to rebut the presumption in favor of the County Board for the Taxpayer to present evidence that there is a difference between the Subject Property’s actual figures and the estimates utilized by the County Assessor and adopted by the County Board in its determination. The Taxpayer must show something more in the form of clear and convincing evidence that the County Assessor or County Board inappropriately derived the estimated figures, or inappropriately included the Subject Property in a model comprised of incomparable properties, or any other error or calculation that evidences that the model or process utilized by the County Assessor and/or relied upon by the County Board determined the value of the Subject Property in such a way that the decision was “made in disregard of the facts or circumstances and without some basis which would lead a reasonable person to the same conclusion”²⁴ or evidences that there is “no room for differences of opinion among reasonable minds.”²⁵
34. The Taxpayer’s income approach valuation is based on actual income and expenses, together with a 5.6% present value rate. The Commission finds that the Taxpayer did not present local market data to support its income approach valuation for the Subject Property for tax year 2011.
35. On the other hand, Mr. Weisheipl stated that the rates (i.e., \$4 rent psf; 10% vacancy/collection loss; 20% expense ratio; and 8.5% capitalization rate) used in the County’s Income Worksheet were derived from the local market.²⁶ Mr. Weisheipl submitted documentation published by LoopNet to support the County’s use of a \$4 rental rate for income approach purposes. Additionally, Mr. Weisheipl stated that the \$2.29 actual lease rate noted by Mr. Kelly is not a reliable rate for income approach

²⁰ *Mass Appraisal of Real Property*, International Association of Assessing Officers, 1999, at p. 132.

²¹ *Mass Appraisal of Real Property*, International Association of Assessing Officers, 1999, at p. 158.

²² *Mass Appraisal of Real Property*, International Association of Assessing Officers, 1999, at p. 158.

²³ *Mass Appraisal of Real Property*, International Association of Assessing Officers, 1999, at p. 158.

²⁴ *Phelps Cty. Bd. of Equal. v. Graf*, 258 Neb 810, 606 N.W.2d 736 (2000) (citations omitted) (defining “arbitrary”).

²⁵ See, *Pittman v. Sarpy Cty. Bd. of Equal.*, 258 Neb 390, 401-02, 603 N.W.2d 447, 455-56 (1999) (defining “unreasonable”).

²⁶ As noted above, the “Referee Notes” portion of the Assessment Report indicates that the County Board based its \$604,000 actual value determination for tax year 2011 upon the Referee’s recommendation to increase the County Assessor’s income approach capitalization rate from 8.5% to 9%, based on information concerning the condition of the Subject Property’s improvement component provided by the Taxpayer.

purposes because the lessor, the Taxpayer, is related to the owner of the lessee, the Bill Doran Company.

36. The Commission finds that the Taxpayer did not present sufficient local market data to demonstrate that the County Board's decision to reduce the County Assessor's notice value from \$640,400 to \$604,000 for tax year 2011 was unreasonable or arbitrary.
37. The Taxpayer did not submit a fee appraisal of the Subject Property at the hearing before the Commission. The Commission notes, however, that valuation guidance is widely available in the case where a Taxpayer determines that it is not cost effective to obtain a fee appraisal. For example, the Commission is allowed by statute and by its rules and regulations to consider many publications that provide guidance regarding the sales comparison approach and other valuation techniques. These publications, which are listed at the Commission's "Rules/Regulations" website link (Chapter 5, section 031), can be found at area public libraries and law school libraries. Guidance regarding valuation techniques can also be found at the Commission's "Decisions" website link.
38. The Commission also notes that section 8 of the Order for Single Commissioner Hearing issued to the parties in this matter at least 30 days prior to the hearing provides as follows:

NOTE: *Copies of the County's Property Record File for any parcel you will present as a comparable parcel should be provided so that your claim can be properly analyzed. The information provided on the County's web page is not a property record file. A property Record File is only maintained in the office of the County Assessor and should be obtained from that office prior to the hearing.*

GENERAL EQUALIZATION LAW

39. "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."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
40. 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
41. 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

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).

proportionately, even though the result may be that it is assessed at less than the actual value.³²

42. 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
43. “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

EQUALIZATION ANALYSIS

44. As indicated above, an order for equalization requires evidence that either: (1) similar properties were assessed at materially different values;³⁷ or (2) a comparison of the ratio of assessed value to market value for the Subject Property and other real property **regardless of similarity** indicates that the Subject Property was not assessed at a uniform percentage of market value.³⁸
45. The Taxpayer did not submit properties for the Commission to analyze for equalization relief purposes.

CONCLUSION

46. The Taxpayer has not produced competent evidence that the County Board failed to faithfully perform its duties and to act on sufficient competent evidence to justify its actions.
47. The Taxpayer has not adduced sufficient, clear and convincing evidence that the determination of the County Board was unreasonable or arbitrary and the decision of the County Board should be affirmed.

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. That the taxable value of the Subject Property for tax year 2011 is:

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

³⁸ See, *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623, 635 (1999).

Land	\$137,900
Improvements	\$466,100
Total	\$604,000

3. This decision and order, if no further action is taken, 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 order is denied.
5. Each Party is to bear its own costs in this proceeding.
6. This decision shall only be applicable to tax year 2011.
7. This order is effective on February 12, 2014.

Signed and Sealed: February 12, 2014.

Thomas D. Freimuth, Commissioner