

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Ten K Development, LLC,
Appellant,

v.

Douglas County Board of Equalization,
Appellee.

Case Nos: 11C 501 & 12C 753

Decision Reversing
County Board of Equalization

GENERAL BACKGROUND & PROCEDURAL HISTORY

1. The Subject Property is a commercial parcel located at 606 South Saddle Creek Road, Omaha, Nebraska.
2. The Douglas County Assessor assessed the Subject Property at \$74,900 for tax years 2011 and 2012.
3. Larry E. Welch, Jr., a Member of Ten K Development, LLC (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 \$25,000 for tax years 2011 and 2012.
4. The County Board determined that the assessed value of the Subject Property was \$74,900 for tax years 2011 and 2012.
5. The Taxpayer appealed the determinations of the County to the Tax Equalization and Review Commission (herein referred to as the “Commission”).
6. A Single Commissioner hearing was held on January 30, 2013, at the Tax Equalization and Review Commission Hearing Room, Sixth Floor, Nebraska State Office Building, 301 Centennial Mall South, Lincoln, NE, before Commissioner Thomas D. Freimuth.
7. Larry E. Welch, Jr., a Member of Ten K Development, LLC, the Taxpayer, was present at the hearing.
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 Assessment Reports for tax years 2011 and 2012 at the hearing. The Property Profile contained in the Assessment Reports for the Subject Property indicates that the County Board’s \$74,900 determinations for tax years 2011 and 2012 includes \$64,900 for land and \$10,000 for the improvement component.
10. The Property Profile also indicates that the Taxpayer purchased the Subject Property for \$200,000 in 2006. The Commission notes that the Taxpayer’s hearing was held contemporaneously with the 2011/2012 hearing on its property located at 608 South Saddle Creek, which is adjacent to the Subject Property. The Taxpayer stated that the \$200,000 purchase price referenced in the Property Profile for each of these parcels was the total amount paid to acquire both properties in 2007 rather than 2006 as indicated in the Property Profiles. The Taxpayer also stated that the purchase price included \$20,000 to acquire a signage lease.

11. The Assessment Reports contain a one-page “PVAL” document that indicates that the land component of the Subject Property was increased in 2006 from \$18,200 to \$64,900 pursuant to a reappraisal by the County Assessor. The Assessment Reports also indicate that the County’s land valuation is based on vacant land sales.
12. The Assessment Reports indicate that the County Board’s \$10,000 determination attributable to the Subject Property’s improvement component (i.e., an asphalt parking lot) for tax years 2011 and 2012 was based on the cost approach. The Taxpayer stated that the Subject Property is not improved with an asphalt parking lot.

STANDARD OF REVIEW

13. 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
14. 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
15. 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
16. Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.⁶

GENERAL VALUATION LAW

17. 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
18. “Actual value, market value, and fair market value mean exactly the same thing.”⁸
19. 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

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) (2010 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).

20. All real property in Nebraska subject to taxation shall be assessed as of January 1.¹⁰
21. All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.¹¹
22. 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 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

23. The Taxpayer asserted that the County overvalued the Subject Property due to failure to consider the adverse impact of a plan announced in 2010 by the City of Omaha and the University of Nebraska Medical Center ("UNMC") to explore options involving Saddle Creek Road, including relocation of the thoroughfare to the west where the Subject Property is situated. In support of its assertion, the Taxpayer submitted an Omaha World Herald article dated September 4, 2010, which summarizes the City/UNMC plan involving Saddle Creek Road.
24. The Taxpayer stated that the exploratory plan announced by the City and UNMC in 2010 had not reached any conclusions as of the date of the hearing.
25. The Taxpayer also submitted an Affidavit by Jon Pesce, a broker with World Group Commercial Real Estate, which states that the uncertainty created by the City/UNMC Saddle Creek Road plan prevented the sale of the Subject Property from September 3, 2010, through June 30, 2012. The Affidavit states that World Group listed the Subject Property during this period without any offers.
26. The Taxpayer did not submit a fee appraisal of the Subject Property at the hearing before the Commission.
27. In light of the uncertainty created by the City/UNMC Saddle Creek Road plan, the Taxpayer asserted that the actual value of the Subject Property amounted to \$25,000 for tax years 2011 and 2012.
28. The Taxpayer's method to determine its \$25,000 opinion of value is not clear. Therefore, the Commission finds that the Taxpayer's opinion of value is not derived from commonly

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).

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

accepted appraisal techniques for determining the actual value of real property under Nebraska Statutes section 77-112.

29. The valuation approaches identified under Nebraska Statutes section 77-112 include the sales comparison approach, the income approach, the cost approach, and other professionally accepted mass appraisal methods. The Taxpayer's method to determine his opinion of value is not based on the methods identified under Nebraska Statutes section 77-112.
30. Guidance for purposes of applying the methods identified under Nebraska Statutes section 77-112 are 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 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.
31. 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.*

32. The Taxpayer stated that the asphalt parking lot depicted in a photo contained in the County's 2011 and 2012 Assessment Reports was not on the Subject Property. Greg Weisheipl, an employee of the Douglas County Assessor's Office, offered a revised opinion of value for the Subject Property's improvement component at the hearing based on his review of this photo and an aerial photo contained in the County's 2011 Assessment Report. Mr. Weisheipl agreed that the Subject Property did not include an asphalt parking lot and stated that the improvement value should be lowered from \$10,000 to zero (\$0) for tax years 2011 and 2012.

GENERAL EQUALIZATION LAW

33. "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."¹³ Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value.¹⁴ The purpose of equalization of assessments is to bring the assessment of different parts of a taxing

¹³ *Neb. Const.*, Art. VIII, §1.

¹⁴ *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).

district to the same relative standard, so that no one of the parts may be compelled to pay a disproportionate part of the tax.¹⁵

34. 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.¹⁶
35. 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.¹⁷ 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.¹⁸
36. The constitutional requirement of uniformity in taxation extends to both rate and valuation.¹⁹ 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].”²⁰ “There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity.”²¹
37. “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.”²²

EQUALIZATION ANALYSIS

38. As indicated above, an order for equalization requires evidence that either: (1) similar properties were assessed at materially different values;²³ 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.²⁴
39. The Taxpayer did not submit properties for the Commission to analyze for equalization relief purposes.

CONCLUSION

40. 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.
41. The Taxpayer has adduced sufficient, clear and convincing evidence that the determinations of the County Board are unreasonable or arbitrary and the decisions of the County Board should be vacated and reversed.

¹⁵ *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).

¹⁶ *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).

¹⁷ *Banner County v. State Board of Equalization*, 226 Neb. 236, 411 N.W.2d 35 (1987).

¹⁸ *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).

¹⁹ *First Nat. Bank & Trust Co. v. County of Lancaster*, 177 Neb. 390, 128 N.W.2d 820 (1964).

²⁰ *Newman v. County of Dawson*, 167 Neb. 666, 670, 94 N.W.2d 47, 49-50 (1959) (Citations omitted).

²¹ *Id.* at 673, 94 N.W.2d at 50.

²² *Scribante v. Douglas County Board of Equalization*, 8 Neb.App. 25, 39, 588 N.W.2d 190, 199 (1999).

²³ See, *Scribante v. Douglas County Board of Equalization*, 8 Neb.App. 25, 39, 588 N.W.2d 190, 199 (1999).

²⁴ See, *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623, 635 (1999).

ORDER

IT IS ORDERED THAT:

1. The decisions of the Douglas County Board of Equalization determining the value of the Subject Property for tax years 2011 and 2012 are vacated and reversed.
2. That the taxable value of the Subject Property for tax years 2011 and 2012 is:

Land	\$ 64,900
Improvements	\$ 0
Total	\$ 64,900

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 years 2011 and 2012.
7. This order is effective on January 24, 2014.

Signed and Sealed: January 24, 2014.

Thomas D. Freimuth, Commissioner