

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Cheryl L. Kiel Living Trust, Kordon L. Kiel,
Trustee,
Appellant,

v.

Douglas County Board of Equalization,
Appellee.

Case No: 12R 1160

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

GENERAL BACKGROUND AND PROCEDURAL HISTORY

1. The parcel subject to appeal (herein referred to as the “Subject Property”) is a residential property located at 11829 N 173 Circle, Douglas County, Nebraska, with a legal description of: BENNINGTON LAKE LOT 43 BLOCK 0 IRREG.
2. The Douglas County Assessor assessed the Subject Property at \$246,300 for tax year 2012.
3. Cheryl L. Kiel Living Trust (herein referred to as the “Taxpayer”) protested this value to the Douglas County Board of Equalization (herein referred to as the “County Board”).
4. The County Board determined that the assessed value of the Subject Property was \$246,300 for tax year 2012.
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 October 21, 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. Kordon L. Kiel, trustee of Cheryl L. Kiel Living Trust, was present at the hearing for the Taxpayer.
8. Larry Thomsen, an assessor with the Douglas County Assessor’s Office, was present for the County Board.

STANDARD OF REVIEW

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 ⁸

SUMMARY OF HEARING DOCUMENTS & STATEMENTS

14. The Subject Property’s improvements were not completely constructed as of the date of assessment on January 1, 2012.⁹
15. The Taxpayer asserted that the assessed value of the Subject Property was too high. He specifically asserted that the assessed value of the Subject Property had exceeded the cost to purchase the land and construct the unfinished improvements existing on the Subject Property as of the date of assessment. The Taxpayer provided the Commission with invoices and receipts totaling \$81,554. The Taxpayer asserted that he had paid the contractor an additional \$5,000 not shown by the receipts, and had purchased the land component of the Subject Property in February of 2011 for \$109,000. The Taxpayer

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).

⁸ 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).

⁹ See, Construction Progress Inspection Report (indicating that the Subject Property was 26% complete as of December 12, 2011 and 41% complete as of January 12, 2012); See also, Assessment Report (indicating the Subject Property was 30% complete as of the date of January 1, 2012).

asserted that the assessed value of the Subject Property should not exceed \$195,554,¹⁰ which is the total amount of capital invested in the Subject Property as of the date of assessment.

16. Thomsen asserted that the Subject Property was valued using the cost approach. The County Board provided an Assessment Report which contains the Property Record File of the Subject Property, including the cost approach calculation and Property Record Files for equalization comparable properties.¹¹
17. Thomsen asserted that cost does not always equal the actual value of real property. He further asserted that the County Assessor assigned a 30% completion factor to the Subject Property to account for its incomplete construction status as of January 1, 2012.¹²
18. Thomsen further asserted that the finished basement area as recorded in the Cost Detail of Building was incorrect and should be decreased by 30%.

GENERAL VALUATION LAW

19. A Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued.¹³
20. “Actual value, market value, and fair market value mean exactly the same thing.”¹⁴
21. 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.¹⁵
22. All real property in Nebraska subject to taxation shall be assessed as of January 1.¹⁶
23. All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.¹⁷
24. 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

¹⁰ \$109,000 (land price) + \$81,554 (invoices/receipts) + \$5,000 (undocumented to contractor) = \$195,554.

¹¹ See, Assessment Report.

¹² See, Assessment Report, pg. 12 (indicating the replacement cost new was decreased by 70% to account for the incomplete portions of the improvements).

¹³ 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).

¹⁴ *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).

¹⁵ Neb. Rev. Stat. §77-131 (Reissue 2009).

¹⁶ See, Neb. Rev. Stat. §77-1301(1) (Reissue 2009).

¹⁷ Neb. Rev. Stat. §77-201(1) (Reissue 2009).

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.¹⁸

VALUATION ANALYSIS

25. The County Board relied upon the County Assessor's opinion of the actual value of the Subject Property as determined by a cost approach.¹⁹

26. The cost approach includes six steps:

(1) Estimate the land (site) value as if vacant and available for development to its highest and best use; (2) Estimate the total cost new of the improvements as of the appraisal date, including direct costs, indirect costs, and entrepreneurial profit from market analysis; (3) Estimate the total amount of accrued depreciation attributable to physical deterioration, functional obsolescence, and external (economic) obsolescence; (4) Subtract the total amount of accrued depreciation from the total cost new of the primary improvements to arrive at the depreciated cost of improvements; (5) Estimate the total cost new of any accessory improvements and site improvements, then estimate and deduct all accrued depreciation from the total cost new of these improvements; (6) Add site value to the depreciated cost of the primary improvements, accessory improvements, and site improvements, to arrive at a value indication by the cost approach.²⁰

27. The cost approach includes steps that estimate the cost to complete components of the Subject Property, however, cost estimating is not the same as appraising.²¹ When estimating the cost to complete components, the assessor should use typical costs obtained from the market, instead of actual costs to construct the real property.²²

28. Actual costs to construct items may vary significantly, in part because bids for projects vary substantially based upon contractor and owner needs or the business model from project to project.²³ In order to account for this variance, the assessor must either use nationally published cost manuals that contain indexes for adjusting to local markets, or construct their own cost manual using known market data.²⁴

29. For these reasons, the Commission finds that the County Board's opinion of value was the statutorily permissible assessment method, and that it was not unreasonable or

¹⁸ Neb. Rev. Stat. § 77-112 (Reissue 2009).

¹⁹ See, Assessment Report.

²⁰ International Association of Assessing Officers, *Property Assessment Valuation*, at 230 (3rd ed. 2010).

²¹ See, International Association of Assessing Officers, *Property Assessment Valuation*, at 238 (3rd ed. 2010).

²² See, International Association of Assessing Officers, *Property Assessment Valuation*, at 237 (3rd ed. 2010).

²³ See, International Association of Assessing Officers, *Property Assessment Valuation*, at 237-238 (3rd ed. 2010).

²⁴ See, International Association of Assessing Officers, *Property Assessment Valuation*, at 238 (3rd ed. 2010).

arbitrary for the County Board's determination to exceed the actual costs of construction as of the date of assessment.

30. Thomsen indicated, however, that the Subject Property's finished basement area was incorrectly calculated for cost approach purposes and should be reduced by 30%.
31. In order to render a reliable opinion of value using the cost approach, the components must be correctly identified and calculated.²⁵
32. Based on the miscalculation of finished basement area and its contribution to value regarding the Subject Property's actual value as of the date of assessment, the Commission finds that the County Board's determination is unreasonable or arbitrary.
33. The Commission finds that the contribution to value of the finished basement area should be reduced by 30% to \$50,824,²⁶ resulting in an actual value of the Subject Property's improvement component of \$125,998.²⁷

CONCLUSION

34. 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.
35. The Taxpayer has adduced sufficient, clear and convincing evidence that the determination of the County Board is unreasonable or arbitrary and the decision of the County Board should be vacated.

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 2012 is Vacated and Reversed.
2. The taxable value of the Subject Property for tax year 2012 is:

Land	\$113,800
<u>Improvements</u>	<u>\$125,998</u>
Total	\$239,798

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.).

²⁵ See, International Association of Assessing Officers, *Property Assessment Valuation*, at 233-234 (3rd ed. 2010).

²⁶ See, Assessment Report, pg. 12 (\$72,606 x .7 = \$50,824).

²⁷ See, Assessment Report, pgs. 12 - 13 ((\$272,428 (GLA) + \$48,455 (Bsmnt Conc 9 ft) + \$50,824 (Finished) + \$3,832 (Walkout) + \$36,444 (Attached) + \$2,180 (Plumbing Adjustment) - \$613 (Rough In Adjustment) + \$6,443 (Appliance Allowance p. 13)) x .3 = \$125,998).

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 July 8, 2014.

Signed and Sealed: July 8, 2014

Thomas D. Freimuth, Commissioner