

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

W Henry Looby, Mgr, Springfield Lake
Development Co., LLC,
Appellant,

v.

Sarpy County Board of Equalization,
Appellee.

Case Nos: 11R 231, 11R 232, 11R 233,
11R 234, 11R 235 & 11R 236; 12R 291,
12R 292, 12R 293, 12R 294, 12R 295 &
12R 296

Decision Affirming County Board in Part
and Reversing in Part

For the Appellant:

Kevin J. Dostal & Ralph A. Froehlich,
Locher Pavelka Dostal Braddy & Hammes, LLC.

For the Appellee:

Nicole O' Keefe, Deputy
Sarpy County Attorney.

Heard before Commissioners Thomas D. Freimuth and Nancy J. Salmon.

I. THE SUBJECT PROPERTY

The Subject Property consists of six unimproved residential parcels located in Sarpy County (herein referred to as the "Subject Property parcels" or "Subject Properties"). The legal descriptions of the parcels are found at Exhibits 1 – 6. The Property Record Cards for the Subject Property parcels for tax year 2011 are found at Exhibits 8, 12, 16, 20, 24 and 28. The Property Record Cards for the Subject Property parcels for tax year 2012 are found at Exhibits 98, 101, 104, 107, 110 and 113.

II. PROCEDURAL HISTORY

The Sarpy County Assessor determined that the assessed value of each of the Subject Property parcels in Case Nos. 11R-231 - 11R-236 and Case Nos. 12R-291 - 12R-296 was \$15,000 for tax years 2011 and 2012. W. Henry Looby, a Member and Manager of Springfield Lake Development Co., LLC (herein referred to as the "Taxpayer"), protested this assessment to the Sarpy County Board of Equalization (herein referred to as the "the County Board"). The

County Board determined that the assessed value for each of the Subject Property parcels was \$15,000 for tax years 2011 and 2012.¹

The Taxpayer appealed the decisions of the County Board for tax years 2011 and 2012 to the Tax Equalization and Review Commission (herein referred to as 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 January 4, 2013, which was recessed until February 7, 2013. The hearing was concluded on February 7, 2013.

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

¹ E1.

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 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).

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 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

IV. VALUATION

A. Law

Under Nebraska law,

[a]ctual 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.¹¹

“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.”¹² “Actual value, market value, and fair market value mean exactly the same thing.”¹³ Taxable value is the percentage of actual value subject to taxation as directed by section 77-201 of Nebraska Statutes and has the same meaning

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 *Bottorf 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. §77-112 (Reissue 2009).

¹² *Id.*

¹³ *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).

as assessed value.¹⁴ All real property in Nebraska subject to taxation shall be assessed as of January 1.¹⁵ All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.¹⁶

B. Summary of the Evidence

The Subject Properties are vacant residential lots (sometimes referred to herein as “Lots 103 – 106” and “Lots 112 and 113”) that are adjacent to the Platte River, which runs by or near the southern borders of the lots.¹⁷ The northern border of each of the Subject Properties is a street that runs between the lots and improved properties that surround Villa Springs Lake.¹⁸

The Commission received appraisals of the Subject Properties for 2008 and 2010 offered by the Taxpayer that were prepared by Robert Charlson.¹⁹ The 2008 and 2010 appraisals value each of the Subject Properties in the amount of \$1,600.²⁰ For purposes of tax years 2011 and 2012, the Taxpayer relies on Charlson’s 2008/2010 opinion of value in the amount of \$1,600 for each of the six Subject Properties.

Charlson, a licensed appraiser through 2010, testified regarding his 2008 and 2010 appraisals of the Subject Properties and the actual value thereof for tax year 2011 and 2012 purposes. He stated that the Subject Properties are unique because they are situated in a floodway, which prevents the construction of improvements. He further stated that the Subject Properties are often underwater, with the exception of the aftermath of drought in the area in 2012, and that some of the lots have become landlocked due to shifting of the Platte River.

Charlson testified that appropriate sales from the immediate area of the Subject Properties were not available. Thus, Charlson’s 2008 and 2010 appraisals rely on vacant land sales from Beaver Lake, which is located in Cass County approximately 15 miles from the Subject Properties.²¹ Charlson’s appraisals apply \$500 adjustments to these vacant land sales that did not

¹⁴ Neb. Rev. Stat. §77-131 (Reissue 2009).

¹⁵ See, Neb. Rev. Stat. §77-1301(1) (Reissue 2009).

¹⁶ Neb. Rev. Stat. §77-201(1) (Reissue 2009).

¹⁷ E82.

¹⁸ E82.

¹⁹ Exhibits 50, 51, 56, 57, 62, 63, 68, 69, 74, 75, 80, 81.

²⁰ Exhibits 50, 51, 56, 57, 62, 63, 68, 69, 74, 75, 80, 81.

²¹ Exhibits 50, 51, 56, 57, 62, 63, 68, 69, 74, 75, 80, 81. The 2008 appraisals relied on three sales amounting to \$3,500, \$3,500 and \$4,000. The 2010 appraisals relied on three sales amounting to \$5,000, \$3,000 and \$4,500.

include views of Beaver Lake comparable to the views of the Platte River from the Subject Properties.²²

The Beaver Lake vacant land sales used in Charlson's appraisals do not include building restrictions. Thus, due to floodway restrictions that prohibit improvement of the Subject Properties, Charlson's 2008 and 2010 appraisals apply adjustments to the Beaver Lake vacant land sales ranging from 50% to 67%.²³

Charlson asserted that the significant adjustments to Beaver Lake vacant land sales were justified due to the unique characteristics of the Subject Properties.²⁴ Charlson's appraisals and his testimony also indicate that his adjustments to the Beaver Lake sales are justified because those transactions include boating and fishing rights, while the Subject Properties only include fishing rights at nearby Villa Springs Lake.²⁵

Charlson stated that the \$15,000 per lot sales of several parcels near the Subject Properties in 2004 relied upon by the County are not comparable. In this regard, Charlson stated that the County's alleged comparable sales are dissimilar because the 2004 buyers owned adjacent lots, and that the motivation to purchase stemmed from a desire to prevent unwanted purchasers or non-owners from occupying the properties, so that the purchasers could enjoy their own "parks" leading to the Platte River.

W. Henry Looby, a Member and Manager of Springfield Lake Development Co., LLC, also testified on behalf of the Taxpayer. Mr. Looby asserted that the Subject Properties are unique and that comparable sales in Sarpy County do not exist. Thus, his opinion of value of the Subject Properties for tax years 2011 and 2012 relies on the \$1,600 valuation contained in Charlson's 2008/2010 appraisals.

²² Exhibits 50, 51, 56, 57, 62, 63, 68, 69, 74, 75, 80, 81.

²³ Exhibits 50, 51, 56, 57, 62, 63, 68, 69, 74, 75, 80, 81.

²⁴ "It was necessary to exceed normal net and/or gross adjustment guidelines. These sales were selected after careful review of limited available data for this type of property and are considered the best available." Exhibits 50:3, 51:3, 56:3, 57:3, 62:3, 63:3, 68:3, 69:3, 74:3, 75:3, 80:3, 81:3.

²⁵ Exhibits 50:2, 51:2, 56:2, 57:2, 62:2, 63:2, 68:2, 69:2, 74:2, 75:2, 80:2, 81:2. Charlson testified that he mistakenly noted in his appraisals that Villa Springs Lake fishing and boating rights are attached to the Subject Properties. Rather, he testified that only fishing rights are attached to the Subject Properties.

Mr. Looby testified that the actual value of the Subject Properties is diminished by homeowner association covenants that prohibit firearm hunting and camping.²⁶ He also asserted that these covenants distinguish the Subject Properties from the properties in the County's sales model.

Mr. Looby also testified that the actual value of four (Lots 103 – 106) of the six Subject Properties is diminished by “berms” constructed by the Corps of Engineers.²⁷ Mr. Looby stated that requirements and liability concerns associated with these Corps of Engineers berms inhibits interest in Lots 103 – 106. He also indicated that the berms reduce the “park” or other recreational appeal of Lots 103 - 106 as compared to the Platte River floodway lots that sold for \$15,000 in 2004.

Mr. Looby further testified that the remaining two Subject Properties (Lots 112 and 113) have no adjacent landowners with a compelling purchase interest. Mr. Looby, however, acknowledged that either he or his deceased father's estate owned an improved parcel across the street from Lots 112 and 113 during tax years 2011 and 2012. He also acknowledged that his father, who developed Villa Springs, owned this improved parcel in 2004 when the above-noted \$15,000 sales occurred.

Mr. Looby asserted that several \$15,000 sales of lots adjacent to the Platte River in 2004 relied upon by the County are not comparable, for the reason that these sales were to adjacent homeowners desirous of access to the Platte River.²⁸ In part, Mr. Looby asserted that the Subject Properties are not comparable to the lots sold for \$15,000 in 2004 because they were not sold at that time or since that time to owners of several improved properties in close proximity.

Tim Ederer, an employee of the Sarpy County Assessor's Office, testified concerning the valuation of the Subject Properties. He stated that the County originally based its \$15,000 per parcel valuation on its vacant land model that includes sales of recreational properties designated as “Floodway” by the Federal Emergency Management Agency (“FEMA”). After discovering the existence of the restrictive covenants noted above during the 2011 County Board protest period, however, Ederer determined that the County's sales model did not sufficiently determine

²⁶ See, E44.

²⁷ The word “berm” is defined as follows: “strip of ground along a dike.” *Webster's Third New International Dictionary*, Merriam-Webster, Inc. (2002).

²⁸ See, E36 – E42.

the actual value of the Subject Properties. Thus, he testified that he based the \$15,000 per parcel valuation on the 2004 sales of lots adjacent to the Platte River that are near the Subject Properties because these transactions were subject to similar restrictive covenants. He also stated that he was unaware that berms constructed by the Corps of Engineers are situated on Lots 103 – 106.

The County asserted that the Taxpayer's reliance on Charlson's 2008/2010 appraisals is misplaced due to reliance on Cass County sales 15 miles from the Subject Properties. The County also asserted that Charlson's appraisal license expired at the end of 2010, so that he could not offer an opinion of value for the Subject Properties for tax years 2011 and 2012.

C. Analysis

The evidence before the Commission demonstrates that the County's valuation did not account for the impact of the Corps of Engineers berms located on Lots 103-106. The presence of Corps of Engineers berms on Lots 103-106 is a characteristic that differentiates these parcels from Lots 112 & 113 and impacts their value. Failure to consider this factor when making a determination of the value of the Subject Properties upon which a berm was located demonstrates that the County Board didn't act on sufficient evidence. Because the Taxpayer has rebutted these presumptions in regard to the berm properties, "the reasonableness of the valuation[s] fixed by the board of equalization becomes a question of fact based upon all of the evidence presented."²⁹

The Commission is persuaded that Lots 103 – 106, which the unrefuted evidence indicates are burdened with berms constructed by the Corps of Engineers, are not comparable to the lots adjacent to the Platte River that sold for \$15,000 in 2004. Based on a review of Exhibit 82, six improved lots are situated directly across the street from Lots 103 – 106. If Lots 103 – 106 were indeed comparable to the many nearby Platte River lots purchased for \$15,000 by owners of adjacent improved lots in 2004, it seems likely that they would have also been purchased at some point by one or more of the owners of the six improved lots across the street. Thus, the Commission finds that the Taxpayer adduced sufficient evidence that the County Board's reliance on these \$15,000 sales for purposes of valuing Lots 103 – 106 for tax years 2011 and 2012 was unreasonable or arbitrary. The Commission further finds that the Taxpayer's opinion

²⁹ *Id.*

of value in the amount of \$1,600 per parcel is the best evidence of the actual values of Lots 103 - 106 for tax years 2011 and 2012.

Lots 112 and 113 are distinguishable from Lots 103 – 106 for the following reasons: (1) berms are not situated on Lots 112 and 113; and (2) either the developer or his estate or his son has owned a parcel directly across the street from Lots 112 and 113 for decades. The Taxpayer has failed to demonstrate that the County Board failed to act on sufficient competent evidence when determining the assessed value of Lots 112 & 113. Further, the Commission finds that the Taxpayer has not adduced sufficient evidence that the County Board's \$15,000 valuations of Lots 112 and 113 were unreasonable or arbitrary for tax years 2011 and 2012.

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 determination with respect to all cases considered in this matter.

The Commission also finds that there is clear and convincing evidence that the County Board's decisions were arbitrary or unreasonable with respect to the parcels that are the subject of appeal in Case Nos. 11R-231 – 11R-234 and 12R-291 – 12R-294, and that the County Board's determinations of actual value should be vacated and reversed in these cases. The Commission further finds that \$1,600 is the best evidence of value for tax years 2011 and 2012 with respect to each of the parcels that are the subject of appeal in Case Nos. 11R-231 – 11R-234 and 12R-291 – 12R-294.

The Commission further finds that the Taxpayer did not adduce sufficient clear and convincing evidence that the County Board's decisions were arbitrary or unreasonable with respect to the two Subject Property parcels that are the subject of appeal in Case Nos. 11R-235, 11R-236, 12R-295 and 12R-296, and that the County Board's determinations of actual value should be affirmed in these cases.

VI. ORDER

IT IS ORDERED THAT:

1. The decisions of the Sarpy County Board of Equalization determining the value of the Subject Property parcels that are the subject of appeal in Case Nos. 11R-231 – 11R-234 and 12R-291 – 12R-294 for tax years 2011 and 2012 are vacated and reversed.³⁰
2. The assessed values of the Subject Property parcels that are the subject of appeal in Case Nos. 11R-231 – 11R-234 for tax year 2011 are:

11R-231	
<u>Land</u>	\$1,600
Total	\$1,600

11R-232	
<u>Land</u>	\$1,600
Total	\$1,600

11R-233	
<u>Land</u>	\$1,600
Total	\$1,600

11R-234	
<u>Land</u>	\$1,600
Total	\$1,600

3. The assessed values of the Subject Property parcels that are the subject of appeal in Case Nos. 12R-291 – 121R-294 for tax year 2012 are:

12R-291	
<u>Land</u>	\$1,600
Total	\$1,600

12R-292	
<u>Land</u>	\$1,600
Total	\$1,600

12R-293	
<u>Land</u>	\$1,600
Total	\$1,600

12R-294	
<u>Land</u>	\$1,600
Total	\$1,600

³⁰ Assessed 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 of equalization at the protest proceeding.

4. The decisions of the Sarpy County Board of Equalization determining the value of the Subject Property parcels that are the subject of appeal in Case Nos. 11R-235 – 11R-236 and 12R-295 – 12R-296 for tax years 2011 and 2012 are affirmed.
5. The assessed values of the Subject Property parcels that are the subject of appeal in Case Nos. 11R-235 – 11R-236 for tax year 2011 are:

11R-235	
<u>Land</u>	\$15,000
Total	\$15,000

11R-236	
<u>Land</u>	\$15,000
Total	\$15,000

6. The assessed values of the Subject Property parcels that are the subject of appeal in Case Nos. 12R-295 – 12R-296 for tax year 2012 are:

12R-295	
<u>Land</u>	\$15,000
Total	\$15,000

11R-296	
<u>Land</u>	\$15,000
Total	\$15,000

7. This decision and order, if no appeal is timely filed, shall be certified to the Sarpy County Treasurer and the Sarpy County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (2012 Cum. Supp.)
8. Any request for relief, by any party, which is not specifically provided for by this order is denied.
9. Each party is to bear its own costs in this proceeding.
10. This decision shall only be applicable to tax years 2011 and 2012.
11. This order is effective for purposes of appeal on June 13, 2014.

Signed and Sealed: June 13, 2014.

Thomas D. Freimuth, 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.), other provisions of Nebraska Statute and Court Rules.