

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Anthony L. Milone,
Appellant,

v.

Douglas County Board of Equalization,
Appellee.

Case Nos: 12R 386 & 13R 526

Decision and Order Reversing the Decision
of the Douglas County Board of
Equalization in 12R 386 and
Affirming the Decision of the Douglas
County Board of Equalization in 13R 526

For the Appellant:
Anthony L. Milone,
Pro Se

For the Appellee:
Malina M. Dobson,
Deputy Douglas County Attorney

This appeal was heard before Commissioners Robert W. Hotz and Nancy J. Salmon.

I. THE SUBJECT PROPERTY

The Subject Property is a residential parcel located at 4102 N. 195th Street, City of Elkhorn, Douglas County, Nebraska. The parcel is improved with a 3,644 square foot residence. The legal description of the parcel is found at Exhibit 3, page 2. The property record card for the Subject Property is found at Exhibit 3.

II. PROCEDURAL HISTORY

The Douglas County Assessor (the Assessor) determined that the assessed value of the Subject Property was \$457,200 for tax year 2012. Anthony L. Milone (the Taxpayer) protested this assessment to the Douglas County Board of Equalization (the County Board), requesting an assessed value of \$357,500. The County Board determined that the taxable value for tax year 2012 was \$420,000.¹

The Assessor determined that the assessed value of the Subject Property was \$420,000 for tax year 2013. The Taxpayer protested this assessment to the County Board, requesting an

¹ E1.

assessment of \$301,500. The County Board determined that the taxable value for tax year 2013 was \$420,000.²

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 June 11, 2014.

III. STANDARD OF REVIEW

The Commission's review of the determination by a County Board of Equalization is de novo.³ 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."⁴

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.⁵

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.⁶ Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.⁷

² E2.

³ 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).

⁴ *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted).

⁵ *Id.*

⁶ Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.).

⁷ *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.⁸ 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.⁹

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.”¹⁰ 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.”¹¹ The Commission’s Decision and Order shall include findings of fact and conclusions of law.¹²

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.¹³

“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.”¹⁴ “Actual value, market value, and fair market value mean exactly the same thing.”¹⁵ Taxable value is the percentage of actual 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 *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).

¹⁰ Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.).

¹¹ Neb. Rev. Stat. §77-5016(6) (2012 Cum. Supp.).

¹² Neb. Rev. Stat. §77-5018(1) (2012 Cum. Supp.).

¹³ Neb. Rev. Stat. §77-112 (Reissue 2009).

¹⁴ *Id.*

¹⁵ *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).

subject to taxation as directed by section 77-201 of Nebraska Statutes and has the same meaning as assessed value.¹⁶ All real property in Nebraska subject to taxation shall be assessed as of January 1.¹⁷ All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.¹⁸

B. Summary of the Evidence

Larry Thomsen, Residential Supervisor for the Assessor, testified that based upon an inspection of the Subject Property on February 6, 2014, the Assessor had revised the characteristics of the Subject Property, including changing the condition rating from average to fair, and changing the area of the Subject Property's improvements from 3,797 square feet to 3,644 square feet.¹⁹

Based upon these changes, the Assessor revised the cost approach calculation for the Subject Property for both tax years. For tax year 2012, the revised cost approach detail indicated a value of the improvements of \$370,154 and a land value of \$70,000, for a total of \$440,154.²⁰ For tax year 2013, the revised cost approach detail indicated the same values.²¹ The Commission considers Thomsen's testimony and revised cost approach details as credible and persuasive evidence.

Anthony Milone asserted that the cost approach was a defective method to value the Subject Property. He asserted that a sales comparison approach should have been used. To further his argument, Milone offered the property record card for a property in the same mass appraisal neighborhood as the Subject Property.²² He testified that the property, located two houses away from the Subject Property, was a "mirror image" of the Subject Property. The property sold on October 28, 2011, for \$365,000,²³ and the County Board determined that its taxable value was

¹⁶ Neb. Rev. Stat. §77-131 (Reissue 2009).

¹⁷ See, Neb. Rev. Stat. §77-1301(1) (Reissue 2009).

¹⁸ Neb. Rev. Stat. §77-201(1) (Reissue 2009).

¹⁹ See, E3:8.

²⁰ See, E3:14-16.

²¹ See, E4:14-16.

²² See, E4:10 (Neighborhood 18129).

²³ See, E6:1.

\$400,000 for tax year 2012.²⁴ The Taxpayer asserted that the Subject Property should be valued at the sale price of the alleged comparable property in the amount of \$365,000.

The Subject Property is required to be assessed at 100% of actual value.²⁵ “Sale price is not synonymous with actual value or fair market value.”²⁶ Actual value may be determined using statutorily permissible mass appraisal methods, including the sales comparison approach.²⁷ In the sales comparison approach an opinion of value is developed by analyzing closed sales, listings, or pending sales of properties that are similar to the subject property.²⁸ An opinion of value based on use of the sales comparison approach requires use of a systematic procedure which includes quantifying and making adjustments for the differences between the subject property and any alleged comparable properties, and reviewing multiple sales before determining an opinion of value.²⁹ “[T]he statutory measure of actual value is not what an individual buyer may be willing to pay for property, but, rather, its market value in the ordinary course of trade.”³⁰

Additionally, the sales comparison approach requires the use of arm’s length transactions when determining the actual value of the Subject Property.³¹ Statutory guidelines indicate that many characteristics surrounding sales that result in non-arm’s length transactions should be considered when determining whether a sale constitutes a comparable sale.³² The record concerning the alleged comparable property is unclear whether the sale in 2011 was an arm’s length transaction. The Commission finds that the sale price of a single alleged comparable property is not clear and convincing evidence of the actual value of the Subject Property.

The County Board argued that since the County was not aware of the condition rating of fair at the time their determinations were made for tax years 2012 and 2013, those determinations should not be construed as being arbitrary or unreasonable. The County Board argues that the Commission should also consider that the Taxpayer denied previous inspection requests made

²⁴ See, E6:8.

²⁵ See, Neb. Rev. Stat. §77-201 (Reissue 2009).

²⁶ *Forney v. Box Butte County Bd. of Equalization*, 7 Neb.App. 417, 424, 582 N.W.2d 631, 637, (1998).

²⁷ See, Neb Rev. Stat. §77-112 (Reissue 2009).

²⁸ See, Appraisal Institute, *The Appraisal of Real Estate*, at 297 (13th ed. 2008).

²⁹ *Id.* at 301-302.

³⁰ *Cabela’s, Inc. v. Cheyenne County Board of Equalization*, 8 Neb.App. 582, 593, 597 N.W.2d 623, 632 (1999) (citations omitted).

³¹ See, Appraisal Institute, *The Appraisal of Real Estate*, at at 301-302 (13th ed. 2008) (requiring that the verification that transactions are arm’s length).

³² Neb. Rev. Stat. §77-1371 (Reissue 2009).

prior to the inspection on February 6, 2014. The Commission is not persuaded by this reasoning. The Commission's review of the County Board decision is not to determine whether the County Board acted reasonably or arbitrarily in its decision making process, but rather to determine whether the County Board's determinations of value were unreasonable or arbitrary.³³

The Assessor assessed the Subject Property for tax year 2012 at \$457,200 and the County Board determined the taxable value of the Subject Property for tax year 2012 at \$420,000.³⁴ The Commission notes that the County Board presented a new opinion of value for both tax years of \$440,154 through the testimony of Thomsen and his Revised Cost Details³⁵ in the hearing. For tax year 2012, the Commission finds that the Assessor's revised opinion of value of \$440,154 constitutes competent evidence to rebut the presumption that the County Board faithfully performed its duties and had sufficient competent evidence to make its determination. The Commission also finds that the Assessor's revised opinion of value constitutes clear and convincing evidence that the County Board's decision was arbitrary or unreasonable.³⁶

The Commission's Rules and Regulations permit the Commission to find that the actual value of the Subject Property is equal to or less than the highest value noticed to the Taxpayer by the County Assessor or the County Board without a prior pleading.³⁷ For tax year 2012, the Assessor's revised opinion of value, \$440,154,³⁸ is not higher than the Assessor's original noticed value, \$457,200.³⁹ The Commission finds that the Assessor's revised opinion of value is the most reasonable opinion of value presented in the case. The Commission finds that the actual value for the Subject Property for tax year 2012 is \$440,154.

The Commission's Rules and Regulations do not allow the Commission to set taxable value of real property at an amount higher than previously noticed to the Taxpayer by the Assessor or the County Board without specific notice from the opposing party prior to the hearing that the opposing party intends to offer evidence and assert that the taxable value for the Subject Property

³³ See, Neb. Rev. Stat. §77-5016(9) (2012 Cum. Supp.).

³⁴ E12.

³⁵ E3:14-16, E4:14-16.

³⁶ 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.

³⁷ 442 Neb. Admin. Code, ch 5, §016.02A (06/06/11).

³⁸ See, E12.

³⁹ See, E1.

is higher than any previously noticed value.⁴⁰ The Commission notes that no notice as required by the Commission's Rules and Regulations was ever perfected for the 2013 tax year. There is no evidence that the Taxpayer was given notice in these proceedings of a higher value than \$420,000 for tax year 2013.⁴¹ The Commission finds that it cannot set the taxable value of the Subject Property at an amount higher than previously noticed to the Taxpayer by the Assessor or County Board in these appeals. Therefore, the Commission finds that the taxable value of the Subject Property is \$420,000 for tax year 2013.

V. CONCLUSION

For tax year 2012, the determination by the County Board is vacated and reversed, but the taxable value should be higher than the taxable value determined by the County Board. For tax year 2013, the determination of the County Board should be affirmed.

VI. 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.⁴²
2. The decision of the Douglas County Board of Equalization determining the value of the Subject Property for tax year 2013 is affirmed.⁴³
3. The taxable value of the Subject Property for tax year 2012 is \$440,154.
4. The taxable value of the Subject Property for tax year 2013 is \$420,000.
5. 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.).

⁴⁰ 442 Neb. Admin. Code, ch 5, §016.02A (06/06/11).

⁴¹ Even though the Assessor's Cost Detail of Building in the Property Record File at Exhibit 4, pages 11-13, indicated a taxable value of \$457,200 (with land added), the Assessor noticed assessed value to the Taxpayer for tax year 2013 at the same taxable value as determined by the County Board for tax year 2012 of \$420,000.

⁴² 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.

⁴³ 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.

6. Any request for relief, by any party, which is not specifically provided for by this Decision and Order is denied.
7. Each party is to bear its own costs in this proceeding.
8. This Decision and Order shall only be applicable to tax year 2012.
9. This Decision and Order is effective for purposes of appeal on June 24, 2014.

Signed and Sealed: June 24, 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.