BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

TJ2010 Corporation,
Appellant,

v.

Dawson County Board of Equalization,
Appellee.

Case No: 13C 081

Decision and Order Affirming the Determination of the Dawson County Board of Equalization

For the Appellant:
Steven P. Vinton,
Bacon & Vinton, LLC

For the Appellee:
Kurt McBride,
Dawson County Attorney

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

I. THE SUBJECT PROPERTY

The Subject Property is a commercial parcel located in Dawson County. The parcel is improved with a 44,000 square foot 74 room hotel operating under a Comfort Suites franchise. The legal description of the parcel is found at Exhibit 1. The property record card for the Subject Property is found at Exhibit 2, pages 6–16.

II. PROCEDURAL HISTORY

The Dawson County Assessor (Assessor) determined that the assessed value of the Subject Property was $4,510,230 for tax year 2013.[1] TJ2010 Corporation (the Taxpayer) protested this assessment to the Dawson County Board of Equalization (the County Board) and requested an assessed valuation of $2,800,000.[2] The County Board determined that the taxable value for tax year 2013 was $4,510,230.[3]

The Taxpayer appealed the decision of the County Board to the Tax Equalization and Review Commission (Commission).[4] Prior to the hearing, the parties exchanged exhibits and submitted

[1] E1:1.
[2] E1:1.
[3] E1.
[4] Case File.

a Pre-Hearing Conference Report, as ordered by the Commission. The Commission held a hearing on March 27, 2014.

III. STANDARD OF REVIEW

The Commission's review of the determination by a County Board of Equalization is de novo.[5] 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."[6]

> 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.[7]

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.[8] Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.[9]

A Taxpayer must introduce competent evidence of actual value of the Subject Property in order to successfully claim that the Subject Property is overvalued.[10] 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.[11]

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[5] 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).

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

[7] *Id.*

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

[9] *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

[10] 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).

[11] *Bottorf v. Clay County Bd. of Equalization,* 7 Neb.App. 162, 580 N.W.2d 561 (1998).

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."[12] 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."[13] The Commission's Decision and Order shall include findings of fact and conclusions of law.[14]

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.[15]

"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."[16] "Actual value, market value, and fair market value mean exactly the same thing."[17] 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 as assessed value.[18] All real property in Nebraska subject to taxation shall be assessed as of January 1.[19] All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.[20]

[12] Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.).
[13] Neb. Rev. Stat. §77-5016(6) (2012 Cum. Supp.).
[14] Neb. Rev. Stat. §77-5018(1) (2012 Cum. Supp.).
[15] Neb. Rev. Stat. §77-112 (Reissue 2009).
[16] *Id*.
[17] *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).
[18] Neb. Rev. Stat. §77-131 (Reissue 2009).
[19] See, Neb. Rev. Stat. §77-1301(1) (Reissue 2009).
[20] Neb. Rev. Stat. §77-201(1) (Reissue 2009).

B. Summary of the Evidence

Terry Jessen, President of TJ2010 Corporation, testified that the Subject Property was constructed with funds secured from his personal contributions, a mortgage, and tax increment financing (TIF).[21] Jessen described the Subject Property as a 74 room hotel with a 12 person meeting room and an eating area. He testified that the Subject Property holds a franchise license with Comfort Suites and opened for business on July 17, 2010 while still under construction. Jessen asserted that the swimming pool was not completed until sometime after the opening due to delays caused by problems with contractors. As a result, he asserted that the occupancy of the Subject Property was negatively affected by the ongoing construction activity.

Jessen testified that he owns 5 hotels in Nebraska and one in Wyoming. He opined that the best method for valuing hotels is the income approach. The Taxpayer submitted the profit and loss statements for the Subject Property.[22] The profit and loss statements indicate that the Subject Property suffered a net income loss of $155,000 that includes a $250,000 depreciation deduction.[23] Jessen testified that before the application of his derived depreciation factor the Subject Property indicated a net income of $50,000. He also asserted that the occupancy rate for the Subject Property was 45.13% with a room rate of $78.91.[24] Jessen indicated that of the rented rooms, 50 percent were the result of individuals visiting Gothenburg, 15 to 20 percent were the result of interstate travelers stopping without a reservation, and the remainder constituted online bookings through Comfort Suites or other online sources.

Jessen asserted that the actual value of the Subject Property was $2,907,754.[25] He derived his opinion of value by using a multiple of the annual gross revenue of the Subject Property. Jessen posited that the applicable multiple for comparable hotels was between 2.8 and 3.0. He indicated that in his experience the appropriate range for such a multiple is between 2.75 and 3.2.

[21] Jessen testified that as part of the TIF agreement with the City of Gothenburg, Nebraska, the Taxpayer agreed not to assert an actual value for the Subject Property of less than $2,800,000 in subsequent property tax protests or appeals.
[22] See, E40.
[23] See, E40:2.
[24] See, E40:5.
[25] See, E40:1.

The County Board relied upon an appraisal opinion developed by Stanard Appraisal Services. Jessen asserted that the opinion of value of the appraiser, which was relied upon by the County Board, was based on incorrect data, including the room rate, the expense factor, the effective age, and the vacancy rate. Jessen asserted that the actual room rates were lower than listed or displayed at the hotel. He testified that hotel staff members are instructed to never let any prospective customer leave the hotel without offering them a lower room rate if necessary to prevent the customer from going to another hotel. Jessen asserted that the average room rate was $78.

Finally, Jessen asserted that truly comparable properties would need to be located in a similar size town, along I-80, in a location that could not be classified as a destination location.

Mark Stanard, a licensed appraiser with Stanard Appraisal Services, contracted by the Assessor to do appraisal work and by the County Board to assist with property valuation appeals, testified that he determined the assessed value for the Subject Property for tax year 2013. Stanard testified that both a cost approach and an income approach were calculated for purposes of valuing the Subject Property. He indicated that he visited the Subject Property and obtained information concerning room rates from the staff on site. He further asserted that he reviewed the internet listing prices and reported vacancy rates and expenses for other hotels that he determined were comparable to the Subject Property. Stanard indicated that his expense ratio was at the high end of the market-derived range. He did not use reported income factors for the Subject Property because it was his opinion that the ongoing construction at the hotel during previous years prevented profit and loss statements from indicating a stabilized income for the Subject Property in 2013. Stanard based his 30% vacancy rate on reported vacancies from other hotel properties located on I-80. He derived the capitalization rate through an examination of the most recent comparable sales he could find. He indicated that he was unaware of the TIF financing when he developed his income approach, but that after testimony from the Taxpayer he felt it would not have affected his opinion of value.

Stanard provided property record cards for several alleged comparable properties, but did not complete a sales comparison approach to value. Instead, the alleged comparable properties were provided as general supporting evidence of his opinion of the actual value of the Subject

Property. Stanard did not quantify necessary adjustments to the alleged comparable properties sufficient to allow a direct comparison of the alleged comparable properties and the Subject Property. He testified that sales contained in the County's Report constituted the sales he used for any market evaluation.[26] Of his alleged comparable properties, only Comparable 1 is located in Dawson County.[27] Stanard posited that Comparable 1 was older and inferior in quality and condition to the Subject Property.

Stanard also indicated that a cost approach analysis was performed for the Subject Property.[28] He opined that generally the income approach is more applicable to income producing properties, but for newer properties the cost approach develops a better indicator of the actual value of real property. Stanard utilized the *Marshall and Swift 2010* costing tables to determine the value of the Subject Property under the cost approach as of January 1, 2013. Stanard testified that a more current version of the tables would more accurately indicate the actual value of the Subject Property as of the assessment date.

C. Analysis

The Taxpayer asserted that the actual value of the Subject Property could be derived by applying a multiplier to the gross income of the Subject Property. The Taxpayer's methodology may be a valid and effective investment tool, but is not a commonly accepted real property appraisal methodology. Further, the derivation of the applicable multiplier is dependent only on Jessen's own experience, and was not supported by supplied market data.

The Commission finds that Stanard's valuation approach contained errors in the application of accepted mass appraisal techniques. Stanard asserted that he conducted a cost approach, and an income approach supported by an examination of sales of alleged comparable properties.[29] However, Stanard indicated that the examination included properties from dissimilar locations without appropriate adjustments.[30] The Commission finds that without appropriate adjustments,

[26] See, E2:17-19 (list of alleged comparable properties).
[27] See, E2:20.
[28] See, E2:12-14 (cost detail for the Subject Property).
[29] See, E2.
[30] During cross-examination Stanard asserted that he had utilized sales of properties in York, Kearney, and Lexington in his market valuation. He also indicated that these properties would require adjustments to be considered comparable.

the alleged comparable properties are less relevant indicators of the actual value of the Subject Property for tax year 2013.

In the cost approach, Stanard utilized *Marshall and Swift 2010* costing tables even though the applicable date of assessment was January 1, 2013. The Commission finds that the use of outdated costing tables is less likely to produce the actual value of the Subject Property as of January 1, 2013.

Finally, Stanard testified that he had given the most weight to the direct capitalization income approach. The direct capitalization method produces an indication of value based on a single year's estimated income.[31] The steps required for use of the income approach with direct capitalization may be summarized as (1) estimate potential gross income; (2) deduct estimated vacancy and collection loss to determine effective gross income; (3) deduct estimated expenses to determine net operating income; (4) divide net operating income by an estimated capitalization rate to yield indicated value.[32] A variety of techniques may be used to quantify various components of any application of the approach.[33] The actual operating history of a subject property can be considered for appraisal purposes.[34] "For properties with reported figures the assessor has two choices: (1) use the reported figures for instances in which they have been verified or are consistent with estimated (typical) figures, or (2) consistently use estimated figures in all cases."[35]

Stanard asserted that he did not have access to the profit and loss statement for the Subject Property when he conducted his income analysis, but that even if he would have had access at the time he would have elected to use market indicated factors instead of the Subject Property's actual figures because he was unsure whether the Subject Property's 2012 figures accurately indicated a stabilized income, and because it was difficult to determine to what extent, if any, management practices either positively or negatively impacted the performance of the Subject Property. These assertions comport with accepted appraisal practices.[36] However, the

[31] See, The Appraisal Institute, *The Appraisal of Real Estate*, at 465 (13th ed. 2001).
[32] See, *Id.,* at 466 (13th ed. 2008).
[33] *Id*. at chs 20-24.
[34] The Appraisal Institute, *The Appraisal of Real Estate*, at 481-83 (12th ed. 2008).
[35] International Association of Assessing Officers, *Fundamentals of Mass Appraisal*, at 175 (2011).
[36] *Id.*, at 175 (2011) ("Because it is difficult for an assessor to evaluate management quality, typical income and expense figures are deemed to reflect typical management. Income flows are averaged across comparable businesses to reflect *typical*

Commission has concerns about the methods employed by Stanard to develop his market factors for the income approach.

A determination of value based on an income approach is only reliable if its data is accurate and comparable. During the hearing, Jessen asserted that it would be inappropriate to compare the Subject Property, located in a rural community, to destination hotels: hotels located in a larger community which attracted visitors based upon recreational attractions or commerce. Jessen asserted that the Subject Property was not a destination hotel. Stanard asserted that the most important factor for purposes of comparability was the distance of a hotel from I-80, and that no adjustments had been quantified for the alleged comparable properties.

Further, while Stanard indicated that some of his factors were derived from self-reporting of owners or managers of properties in his case files, he also indicated that he reviewed listed room rates to derive his potential gross income. Listed room rates may reasonably indicate an owner's preferred room rate, which may not be the same as actual room rates. Jessen testified that while he had a published room rate of $99, he had instructed staff to negotiate in order to keep people from staying elsewhere. The indicated actual room rate for the Subject Property was $78. While it is true that an appraisal may choose to use market rates instead of actual rates, the evidence indicates that listed room rates cannot be assumed to represent a property's actual room rates.

Finally, Stanard testified that he derived his capitalization rate from comparable sales; however, Stanard also testified that he did not perform a true sales comparison approach of the Subject Property because of a lack of truly comparable properties and the unique nature of the Subject Property. Derivation of the capitalization rate from comparable sales requires access to sales of comparable properties.[37] Stanard's statements are inconsistent.

The Commission finds that while the above expressed concerns call into question the reliability of Stanard's appraisal, no market data was received in evidence supporting a different opinion of any of the income approach factors. The Commission finds that the actual factors as contained in the Subject Property's profit and loss statement are similarly unreliable because the Subject Property had not reached stabilization by the end of 2012. The Commission therefore

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management and smoothed or *stabilized* across years to eliminate random fluctuations. In mass appraisal, expenses frequently are expressed as percentages instead of fixed amounts. They may also be analyzed and expressed on a per-unit basis.").

[37] Appraisal Institute, *The Appraisal of Real Estate,* at 495 (14th ed. 2013).

finds that there is not clear and convincing evidence that the County Board's determination of value was unreasonable or arbitrary.

V. EQUALIZATION

A. Law

"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."[38] Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value.[39] 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.[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.[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.[42] 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.[43] The constitutional requirement of uniformity in taxation extends to both rate and valuation.[44] 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]."[45] There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity.[46]

[38] *Neb. Const.,* Art. VIII, §1.
[39] *MAPCO Ammonia Pipeline v. State Bd. of Equal*., 238 Neb. 565, 471 N.W.2d 734 (1991).
[40] *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).
[41] *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).
[42] *Banner County v. State Board of Equalization*, 226 Neb. 236, 411 N.W.2d 35 (1987).
[43] *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).
[44] *First Nat. Bank & Trust Co. v. County of Lancaster*, 177 Neb. 390, 128 N.W.2d 820 (1964).
[45] *Newman v. County of Dawson,* 167 Neb. 666, 670, 94 N.W.2d 47, 49-50 (1959) (Citations omitted).
[46] *Id.* at 673, 94 N.W.2d at 50.

B. Summary of the Evidence

Jessen also asserted that the Subject Property was not equalized with other comparable hotels. He provided a list of alleged comparable properties.[47] The Commission notes that of the 17 alleged comparable properties provided, 16 are located in taxing jurisdictions outside of the taxing district of the Subject Property.[48] Jessen asserted that the Commission could determine that the alleged comparable properties were not equalized with the Subject Property by comparing the assessed values per room.

Jessen alleged that the Holiday Inn located in Lexington, Dawson County, Nebraska was of a higher quality than the Subject Property because it had a larger meeting room. He asserted that the Holiday Inn is located on I-80 and that it was incorrect to value the Holiday Inn at less than the Subject Property. He testified that although the Holiday Inn was 10 years older than the Subject Property, franchise requirements ensured that the Holiday Inn had frequent repairs and upgrades. Jessen asserted that the most comparable property to the Subject Property was the Comfort Inn, located in Lincoln, Lancaster County, Nebraska.

C. Analysis

Equalization requires that property within the same taxing district must be valued at a uniform level.[49] The Commission cannot equalize alleged comparable properties that are not located in the same taxing district.

The only alleged comparable property within the same taxing district as the Subject Property is the Holiday Inn, located in Lexington, Dawson County, Nebraska.[50] The property record card for the Holiday Inn is found at Exhibit 49.

The effective age of income-producing properties may contribute to both the potential of a property to generate revenue and the cost of depreciation and maintenance of a property. The evidence concerning the Holiday Inn is minimal. Jessen generally expressed that franchise

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[47] See, E5 (list of alleged comparable properties and relevant factors). See also, E41-72 (property records cards for the alleged comparable properties).
[48] See, E5.
[49] *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).
[50] E5.

agreements often require extensive and frequent renovation, however, there was no specific evidence indicating the type or frequency of the required renovations of the Holiday Inn. Further, even if frequent changes in painting, signage, or fenestration are requisite under the franchise agreement, the foundation and structural components of the Holiday Inn had been in service for a decade more than the Subject Property. The Commission finds that the differences in the assessed values of the Subject Property and the Holiday Inn may reasonably be attributable to the differences between the properties.

The Commission finds that there is not clear and convincing evidence that valuation placed on the Subject Property when compared with valuations placed on similar property is grossly excessive.

VI. 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. The Commission finds that there is not clear and convincing evidence that the County Board's decision was arbitrary or unreasonable. The Commission also finds that there is not clear and convincing evidence that valuation placed on the Subject 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.

For all of the reasons set forth above, the determination of the County Board is affirmed.

VII. ORDER

IT IS ORDERED THAT:

1. The decision of the Dawson County Board of Equalization determining the value of the Subject Property for tax year 2013 is affirmed.
2. The taxable value of the Subject Property for tax year 2013 is $4,510,230.
3. This Decision and Order, if no appeal is timely filed, shall be certified to the Dawson County Treasurer and the Dawson 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 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 2013.
7. This Decision and Order is effective for purposes of appeal on June 24, 2014.

Signed and Sealed: June 24, 2014

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Robert W. Hotz, Commissioner

SEAL

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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.