

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Josephine A. Krenisky,
Appellant,

v.

Douglas County Board of Equalization,
Appellee,

Case Nos: 12C 064 & 13C 084

Decision and Order Affirming the Decisions
of the Douglas County
Board of Equalization

For the Appellant:
Michael Krenisky,
Pro Se

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

These appeals were heard before Commissioners Robert W. Hotz and Nancy J. Salmon.

I. THE SUBJECT PROPERTY

The Subject Property is a commercial parcel located at 8938 L. Street, Omaha, Douglas County, Nebraska. The parcel is improved with a 5,760 square foot warehouse. The legal description of the parcel is found at Exhibits 3 and 4. The property record card for the Subject Property is found at Exhibits 3 and 4.

II. PROCEDURAL HISTORY

The Douglas County Assessor (County Assessor) determined that the assessed value of the Subject Property was \$285,100 for tax year 2012. Josephine A. Krenisky (the Taxpayer) protested this assessment to the Douglas County Board of Equalization (the County Board). The County Board also determined that the taxable value for tax year 2012 was \$285,100.¹

For tax year 2013, the County Assessor again determined that the assessed value of the Subject Property was \$285,100. The Taxpayer protested this assessment to the County Board.

¹ Exhibit 1.

The County Board also determined that the taxable value of the Subject Property for tax year 2012 was \$285,100.²

The Taxpayer appealed the decisions of the County Board to the Tax Equalization and Review Commission (the Commission). Prior to the consolidated hearing, the parties exchanged exhibits, as ordered by the Commission. The Commission held a hearing on July 30, 2015.

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

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

² Exhibit 2.

³ See, Neb. Rev. Stat. §77-5016(8) (2014 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) (2014 Cum. Supp.).

⁷ *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

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).

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. Applicable 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 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 the

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) (2014 Cum. Supp.).

¹¹ Neb. Rev. Stat. §77-5016(6) (2014 Cum. Supp.).

¹² Neb. Rev. Stat. §77-5018(1) (2014 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).

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

effective date 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

The Income Approach can be defined as “a set of procedures through which an appraiser derives a value indication for an income-producing property by converting its anticipated benefits (cash flows and reversion) into property value. This conversion can be accomplished in two ways. One year’s income expectancy can be capitalized at a market-derived rate or at a capitalization rate that reflects a specified income pattern, return on investment, and change in the value of the investment. Alternatively, the annual cash flows for the holding period and the reversion can be discounted at a specified yield rate.”¹⁹

Because it is difficult [when using the income approach] 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* 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.²⁰

B. Findings of Fact and Conclusions of Law

The Subject Property was assessed for both tax years 2012 and 2013 using the income approach.²¹ An employee of the County Assessor had previously conducted an interior and exterior inspection of the Subject Property on October 25, 2010.²² When using the income approach for both tax years, the County Assessor determined the rental rate at \$5.50 per square foot, vacancy and collection losses at 10%, expenses at 10%, and the capitalization rate at 9%.²³ Of these determinations, the Taxpayer disputed only the capitalization rate.

Michael Krenisky testified for the Taxpayer and asserted that the 9% capitalization rate was not appropriate and that a 7% rate should be used instead. Krenisky noted that in a capitalization rate study done for the County Assessor, an industrial capitalization rate for Class C buildings,

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

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

¹⁹ Appraisal Institute, *The Dictionary of Real Estate Appraisal*, at 143 (4th ed. 2002).

²⁰ International Association of Assessing Officers, *Fundamentals of Mass Appraisal*, at 175 (2011).

²¹ Exhibit 3 and Exhibit 4.

²² See Exhibit 3:20, Exhibit 4:20.

²³ See Exhibit 3:17 and Exhibit 4:18.

including real estate taxes, was recommended to be at 7%.²⁴ Krenisky agreed that the Subject Property was a Class C building. Krenisky testified to his belief that an employee of the Assessor had adjusted the capitalization rate of 7%, as recommended by the study, to 9%.²⁵ Krenisky disagreed with this adjustment. The Commission notes that even if the Taxpayer is correct, changing the capitalization rate from 7% to 9% actually results in a lower determination of value, not a higher one.²⁶

The Taxpayer offered no other evidence of the actual value of the Subject Property. The Commission finds that the Taxpayer has not produced persuasive evidence that the actual value of the Subject Property was incorrect for either tax year at \$285,100.

V. EQUALIZATION

A. Applicable 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.”²⁷ Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value.²⁸ 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.²⁹ 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.³⁰ 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.³¹ Taxpayers are entitled to have their property assessed uniformly and proportionately, even though the result

²⁴ Exhibit 5:20-24.

²⁵ Krenisky testified he reached this conclusion based upon his interpretation of a sentence at Exhibit 5:19, which reads, “I adjusted the final rates based upon my knowledge of the current real estate market.”

²⁶ The last step in the income approach to value is to divide the Net Operating Income by the capitalization rate. Using a capitalization rate of 9% in the Assessor’s Commercial Income Worksheet at E3:17 results in an actual value of \$285,100 ($\$25,661 / 9\% = \$285,100$). Using a capitalization rate of 7% results in an actual value of \$366,586 ($\$25,661 / 7\% = \$366,586$).

²⁷ *Neb. Const.*, Art. VIII, §1.

²⁸ *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).

²⁹ *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).

³⁰ *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).

³¹ *Banner County v. State Board of Equalization*, 226 Neb. 236, 411 N.W.2d 35 (1987).

may be that it is assessed at less than the actual value.³² The constitutional requirement of uniformity in taxation extends to both rate and valuation.³³ 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].”³⁴ There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity.³⁵

B. Findings of Fact and Conclusions of Law

Krenisky asserted that he had conducted a study of all of the commercial warehouses in Douglas County. He provided a summary of his analysis comparing these properties to the Subject Property.³⁶

Property record cards for several properties asserted by either party to be comparable to the Subject Property for both tax years 2012 and 2013 were received in evidence. Each of these property record cards included a Commercial Income Worksheet showing the square footage of the improvement, and typical or market rates for rent, vacancy and collection losses, expenses, and capitalization. For each property record card, including the Subject Property, this data was the same for both tax years 2012 and 2013. The chart below indicates the data listed on the Commercial Income Worksheets for the Subject Property and the properties offered as comparables.

	Exhibit: Page	Rental Rate	Vacancy & Collection Loss Rate	Expense Rate	Capitalization Rate	Square Footage of Warehouse
Subject Property	3:17, 4:18, 5:18	\$5.50	10%	10%	9%	5,760 SF
8930 H St.	3:25, 4:56, 5:31	\$5.50	10%	10%	9%	6,960 SF
4524 S. 79th St.	3:30, 4:31, 5:36	\$6.00	10%	10%	8%	4,320 SF

³² *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).

³³ *First Nat. Bank & Trust Co. v. County of Lancaster*, 177 Neb. 390, 128 N.W.2d 820 (1964).

³⁴ *Newman v. County of Dawson*, 167 Neb. 666, 670, 94 N.W.2d 47, 49-50 (1959) (Citations omitted).

³⁵ *Id.* at 673, 94 N.W.2d at 50.

³⁶ See Exhibit 5:2.

	Exhibit: Page	Rental Rate	Vacancy & Collection Loss Rate	Expense Rate	Capitalization Rate	Square Footage of Warehouse
12875 Deauville	3:35, 4:36, 5:41	\$5.50	10%	10%	9%	8,540 SF
4344 S. 87th St.	3:40, 4:41	\$5.50	10%	10%	9%	4,800 SF
8944 H St.	3:45, 4:46	\$5.50	10%	10%	9%	6,000 SF
8934 H St.	3:50, 4:51	\$5.50	10%	10%	9%	7,000 SF
8616 I St.	3:60, 4:61	\$5.50	10%	10%	9%	4,000 SF
7630 L St.	3:65, 4:66	\$5.50	10%	10%	9%	6,200 SF
8529 K St.	4:26	\$6.00	10%	10%	8%	6,000 SF
9101 F St.	5:57	\$3.00	12%	20%	11%	75,056 SF
8906 L St. #1	5:61	\$5.00	10%	10%	8%	5,440 SF
8906 L St. #2	5:63	\$2.50	10%	20%	11%	7,980 SF
8906 L St. #3	5:65	\$2.50	10%	20%	11%	4,100 SF

The Commission has reviewed the property record cards, including the Commercial Income Worksheets, for each of the properties shown in the chart above. We find that the property at 9101 F. Street is not comparable to the Subject Property because the warehouse is more than thirteen times the size of the warehouse on the Subject Property.³⁷ We also find that the property at 8906 L Street, which includes three warehouse buildings, is not comparable to the Subject Property because of its total square footage of warehouse space of more than three times the square footage of the Subject Property,³⁸ and because one of its buildings is not heated.³⁹

As can be noted in the chart above, the Subject Property and all of the comparable properties were treated the same in terms of the vacancy & collection loss rate and the expense rate. We further note that two properties had rental rates at fifty cents per square foot more than the Subject Property, which would have been more favorable to the Subject Property in comparison to those comparables. In terms of comparison regarding the capitalization rates, we note that each comparable property had the same or a lower capitalization rate than the Subject Property, which, as discussed above, would not have resulted in a more favorable treatment for the

³⁷ 75,056 / 5,760 = 13.03.

³⁸ See Exhibit 5:61, Exhibit 5:63, and Exhibit 5:65, showing a total area of warehouse space of 17,520 square feet, as compared to the Subject Property warehouse area of 5,760 square feet (17,520 / 5,760 = 3.04). The total square footage of warehouse space shown in Exhibit 3:20, at 13,740 square feet, appears to be in error.

³⁹ See Exhibit 5:64.

comparables. We therefore find that the income approach was applied uniformly to the Subject Property as compared to the comparable properties.

Krenisky also argued that the land component of the Subject Property was overassessed as compared to the comparable properties. Under the income approach however, the land is not valued separately from the improvements, as it is when using the sales comparison approach or the cost approach. Under Nebraska law, the Assessor is required to prepare an assessment roll showing the assessed value of the land separate from the assessed value of the improvements for each parcel.⁴⁰ Even if we were to find that the value attributed to the land component of any of the comparable properties was less per square foot of land area than the value attributed to the land component of the Subject Property, we would not necessarily find that the Subject Property land component was overassessed or not equalized with the comparables. In these appeals, the Subject Property and all of the comparable properties were assessed for both tax years 2012 and 2013 using the income approach. We therefore find that the Subject Property was assessed uniformly and proportionately as compared to the comparable properties received in evidence.

VI. CONCLUSION

The Commission finds that there is not 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 there is not clear and convincing evidence to establish that the determinations of value by the County Board were unreasonable or arbitrary.

The Commission further finds that there is not clear and convincing evidence that valuation placed on the Subject Property, when compared with valuations placed on similar properties, was grossly excessive and 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 for each tax year 2012 and 2013 should be affirmed.

⁴⁰ Neb. Rev. Stat. §77-1303 (Reissue 2009).

VII. ORDER

IT IS ORDERED THAT:

1. The decision of the Douglas County Board of Equalization determining the taxable value of the Subject Property for tax years 2012 and 2013 is affirmed.
2. The taxable value of the Subject Property for each tax year 2012 and 2013 is \$285,100.
3. 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 (2014 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 years 2012 and 2013.
7. This decision and order is effective for purposes of appeal on August 11, 2015.⁴¹

Signed and Sealed: August 11, 2015

Robert W. Hotz, Commissioner

SEAL

Nancy J. Salmon, Commissioner

⁴¹ Appeals from any decision of the Commission must satisfy the requirements of Neb. Rev. Stat. §77-5019 (2014 Cum. Supp.) and other provisions of Nebraska Statutes and Court Rules.