

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

SUP Family II, LLC,
Appellant,

v.

Lancaster County Board of Equalization,
Appellee.

Case Nos. 13C 189, 13C 190, 13C 191,
14C 396, & 15C 0541

Decision and Order Affirming the
Determinations of the Lancaster County
Board of Equalization in Case Nos.
13C 190 & 13C 191

Decision and Order Reversing the
Determinations of the Lancaster County
Board of Equalization in Case Nos.
13C 189, 14C 396 & 15C 0541

Cole CVS Lincoln NE, LLC, CVS 08606,
Cole CVS Lincoln NE, LLC,
Appellants,

v.

Lancaster County Board of Equalization,
Appellee.

Case Nos: 14C 198 & 15C 0540

Decision and Order Reversing the
Determinations of the Lancaster County
Board of Equalization

For the Appellants:

Christopher A. Stafford,
Fredrikson & Byron, P.A.

For the Appellee:

Kayla Hathcote,
Deputy Lancaster County Attorney

These appeals were heard before Commissioners Robert W. Hotz and James D. Kuhn.

I. THE SUBJECT PROPERTIES

The Subject Properties are all commercial parcels located in Lancaster County, Nebraska. Case Nos. 13C 189, 13C 190, 13C 191, 14C 396, and 15C 0541 relate to a property located at 140 N. 48th Street, Lincoln, Nebraska (the “48th Street Property”). For the 2013 tax year, the property comprised three parcels, which were subsequently combined and assessed as a single

parcel for the 2014 and 2015 tax years. These parcels are improved with a 13,153 square foot retail pharmacy. The legal description and property record cards for these Subject Properties are found at Exhibits 11, 12, 13, 23, and 24.

Case Nos. 14C 198 and 15C 0540 relate to a property located at 7000 O Street, Lincoln, Nebraska, which is improved with a 13,228 square foot retail pharmacy (the “O Street Property”). The legal description and property record cards for this Subject Property are found at Exhibits 31 and 32.

II. PROCEDURAL HISTORY

The Lancaster County Assessor (the County Assessor) determined that the assessed values of the three parcels comprising the 48th Street Property were \$1,651,800, \$578,110, and \$357,290 (\$2,587,200 in total) for the 2013 tax year. The County Assessor determined that the value of the combined single parcel was \$1,927,000 for the 2014 tax year, and \$1,946,200 for the 2015 tax year. SUP Family II, LLC (the Taxpayer¹) protested these assessments to the Lancaster County Board of Equalization (the County Board), and the County Board determined that the taxable values were the same as the values set by the County Assessor.²

The County Assessor determined that the assessed value of the O Street Property was \$1,938,000 for the 2014 tax year and \$1,957,200 for the 2015 tax year. The Taxpayer protested these assessments to the County Board, and in each case, the County Board determined that the taxable values were the same as the values set by the County Assessor.³

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 parties stipulated to the receipt of Exhibits 1 through 43. The Commission held a hearing on November 8, 2017, after which the hearing was recessed until November 30, 2017, to allow the County Board to present a case-in-chief. Prior to November 30, 2017, the County Board elected not to

¹ The real party in interest in all of these appeals is CVS Pharmacy Corporation, dba Nebraska CVS Pharmacy, LLC. All of the Appellants were jointly represented, and are hereafter referred to collectively as “the Taxpayer.”

² Ex. 1-5.

³ Ex. 6, 7.

present a case and the evidentiary record closed on November 30, 2017. The parties submitted written argument in accordance with a progression order issued by the Commission.

III. STANDARD OF REVIEW

The Commission's review of the determination by a County Board of Equalization is de novo.⁴ 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.⁵

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 a question 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.⁶

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.⁷ Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.⁸ Where clear and convincing evidence shows that the County Board's determination was arbitrary or unreasonable, the Taxpayer is entitled to relief.⁹

During appeals from a determination of the County Board, there is both a presumption in favor of the County Board and a burden of persuasion placed upon an appealing party.¹⁰ The presumption in favor of the County Board, and the burden of persuasion cannot be conflated, and

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

⁵ *Id.*

⁶ *Id.*

⁷ Neb. Rev. Stat. §77-5016(9) (2014 Cum. Supp.).

⁸ *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

⁹ Neb. Rev. Stat. §77-5016(9) (2014 Cum. Supp.).

¹⁰ See generally, *JQH La Vista Conf. Ctr. v. Sarpy Cty. Bd. Of Equal.*, 285 Neb. 120, 825 N.W.2d 447 (2013).

require separate analysis.¹¹ Both the presumption and burden of persuasion relate to the determinations of the County Board.¹²

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 When an independent appraiser using professionally approved methods of mass appraisal certifies that an appraisal was performed according to professional standards, the appraisal is considered competent evidence under Nebraska law.¹⁴ 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.¹⁵

IV. VALUATION

A. Law

Under Nebraska law,

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 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.¹⁶

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.¹⁷ Actual value, market value, and fair market value mean exactly the same thing.¹⁸ Taxable value is the percentage of actual value subject to taxation as directed by section 77-201 of the Nebraska Revised Statutes and has the same meaning as assessed value.¹⁹ All real property in Nebraska subject to taxation shall be

¹¹ *Id.*

¹² *Id.*

¹³ Cf. *Josten-Wilbert Vault Co. v. Bd. of Equal. for Buffalo Cty.*, 179 Neb. 415, 138 N.W.2d 641 (1965) (determination of actual value); *Lincoln Tel. and Tel. Co. v. Cty. Bd. Of Equal. of York County*, 209 Neb. 465, 308 N.W.2d 515 (1981) (determination of equalized taxable value).

¹⁴ *JQH La Vista Conf. Ctr.*, *supra* note 9.

¹⁵ *Bottorf v. Clay Cty. Bd. of Equal.*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).

¹⁶ Neb. Rev. Stat. §77-112 (Reissue 2009).

¹⁷ *Id.*

¹⁸ *Omaha Country Club v. Douglas Cty. Bd. of Equal., et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).

¹⁹ Neb. Rev. Stat. §77-131 (Reissue 2009).

assessed as of January 1.²⁰ All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.²¹

B. Summary of the Evidence

As discussed above, property valuation cases appealed to the Commission begin with a presumption in favor of the County Board's assessment of the property value. This presumption can be rebutted by competent evidence showing the County Board's determination to be incorrect. In this case, both the County Board and the Taxpayer offered appraisals by independent appraisers, made using professionally approved methods of mass appraisal, and certified to be performed according to professional standards. Each of these appraisals indicated that the County Board's determinations were incorrect. The presumption in favor of the County Board has thus been rebutted. The reasonableness of the valuation fixed by the board therefore becomes a question of fact based upon all of the evidence presented, with the burden on the taxpayer to show, by clear and convincing evidence, that the County Board's determination was unreasonable or arbitrary.

Three principal witnesses testified at the hearing. Cliff Bybee, Senior Commercial Appraiser for the the County Assessor's office, described the methodology used by the County Assessor in determining the taxable value of each parcel for each year in question. Mr. Bybee acknowledged, and the County Board concedes, that the 48th Street Property was incorrectly assessed for tax year 2013; the values of the unimproved parcels were counted both individually and as a part of the improved parcel's value. Mr. Bybee testified, and the County Board now asserts, that the correct value of the 48th Street Property for tax year 2013 was \$1,651,800, which corresponds to the assessed value determined by the County Board for the improved parcel in that tax year.²²

The Commission also heard expert testimony from licensed appraisers David C. Wellsandt, who prepared appraisals of the Subject properties for the Taxpayer, and Jason L. Pickerel, who

²⁰ Neb. Rev. Stat. §77-1301(1) (2014 Cum. Supp.).

²¹ Neb. Rev. Stat. §77-201(1) (Reissue 2009).

²² The Commission notes that Mr. Bybee testified that the County Assessor's use of \$12 per square foot as a market rental rate for the 48th Street Property in 2013 was an error. However, the amended valuation of \$1,651,800 is calculated on the basis of that rental rate. Thus, even the amended 2013 valuation proposed by the County Board relies upon erroneous information.

prepared appraisals for the County Board. The appraisers were similarly qualified on the basis of licensure, but Mr. Wellsandt had more education and experience directly related to the appraisal of retail property, including specific experience appraising free-standing retail pharmacies such as the Subject Properties. The final opinions of value of the two appraisers, together with the taxable value as determined by the County Board, is as follows:

48th Street Property

	County Board	Wellsandt	Pickerel
2013	\$2,587,200 ²³	\$1,530,000	\$2,800,000
2014	\$1,927,000	\$1,590,000	\$2,800,000
2015	\$1,946,200	\$1,750,000	\$2,800,000

O Street Property

	County Board	Wellsandt	Pickerel
2014	\$1,938,000	\$1,650,000	\$2,900,000
2015	\$1,957,200	\$1,810,000	\$2,900,000

Prior to the hearing, the County Board gave notice of its intent to show a higher value for the Subject Properties than it had previously determined. It attempted to show this higher value through Mr. Pickerel’s appraisal, which indicated a much higher taxable value than the determinations of the County Assessor and the County Board, or the appraisal of Mr. Wellsandt.

The Nebraska Supreme Court has recognized that, in tax valuation cases, actual value is largely a matter of opinion and without a precise yard-stick for determination with complete accuracy.²⁴ Despite this inherent room for disagreement among experts, the Commission finds Mr. Pickerel’s appraisal and testimony less persuasive than Mr. Wellsandt’s appraisal and testimony because, among other things, Mr. Pickerel’s appraisal relied extensively on leases for smaller retail bays and leases that did not represent arms-length transactions (such as build-to-

²³ This is the aggregate value of the three parcels as they were platted in 2013; the individual parcels were valued at \$1,651,800, \$578,110, and \$357,290.

²⁴ See *JQH La Vista Conf. Ctr.*, *supra* note 9, *Brenner*, *supra* note 5.

suit or sale/leaseback arrangements) in determining market rental rates.²⁵ Ultimately, Mr. Pickerel's appraisal made use of a rental rate of \$20 per square foot for each property in each tax year, as compared with \$12 to \$14 per square foot (County Assessor) and \$12 to \$13.25 per square foot (Wellsandt). For this reason, the Commission finds that Mr. Pickerel's opinions of value do not reflect the actual value of the Subject Properties.

The remaining question is whether Mr. Wellsandt's opinion constitutes clear and convincing evidence that the County Board's determination was arbitrary or unreasonable. "Arbitrary," in this context, means that the decision was made in disregard of the facts and circumstances and without some basis which could lead a reasonable person to the same conclusion.²⁶ A decision is "unreasonable" if the evidence presented leaves no room for a difference of opinion among reasonable minds.²⁷

In making the assessment upon which the County Board's determination is based, Mr. Bybee used both the cost and the income approaches to calculating value, but he determined that the cost approach resulted in an unreasonably high value and assessed the property at the value indicated by the income approach. Mr. Wellsandt explored all three of the commonly accepted methods for determining valuation, but he concluded that the number of comparable sales were insufficient to reach a reliable conclusion under either the cost approach or the sales comparison approach and performed his analysis using only the income approach. As a result, each of the analyses of value before the Commission relies primarily upon the income approach.

The income approach takes a variety of factors into consideration, but among the most significant are the market rental rates and market capitalization rates²⁸ for comparable properties. In determining the rental and the capitalization rates for the Subject Properties, Mr. Bybee relied on a pool of data accumulated by the County, with adjustments and allowances for the location,

²⁵ Pickerel used all three of the commonly accepted methods for determining valuation (the income, sales comparison, and cost approaches). However, the three approaches resulted in widely varying outcomes and Pickerel largely adopted the value indicated by the income approach, in which market rental rates are the key variable used to determine potential gross income for the property.

²⁶ *Phelps Cty. Bd. of Equal. v. Graf*, 258 Neb. 810, 606 N.W.2d 736 (2000).

²⁷ *Pittman v. Sarpy Cty. Bd. of Equal.*, 258 Neb. 390, 603 N.W.2d 447 (1999).

²⁸ "The capitalization rate is the factor that converts the stabilized net operating income (NOI) to a present value. It is the ratio of net income to value or sale price. $\text{NOI} \div \text{Sale Price} = \text{Capitalization Rate}$." Wellsandt appraisal, Ex. 37, p. 67.

age, and quality of the building.²⁹ However, the comparables used were not made part of the record, and Mr. Bybee was unable to provide specific details about the number or qualities of comparable properties used in determining market rent and capitalization rates.

In determining the market rent for the Subject Properties, Mr. Wellsandt selected five comparable properties from the Lincoln market area. Although the County Board argues that the comparable properties Mr. Wellsandt used to determine the rental rate were older than the Subject Properties, and in less favorable locations, Mr. Wellsandt applied adjustments to the base rent to account for those factors prior to calculating the market rental value of the Subject Properties, adjusting the rental rates of his comparables upwards between 8% and 21% to arrive at a reasonable range of potential rental values for the Subject Properties. Based on this analysis of market conditions, Mr. Wellsandt concluded that the market rent for the 48th Street Property was \$12 per square foot in 2013, \$12.50 per square foot in 2014, and \$13 per square foot in 2015;³⁰ he concluded that the market rent for the O Street Property was \$12.75 per square foot in 2014, and \$13.25 per square foot in 2015.³¹ Mr. Wellsandt also provided considerable support for his selection of capitalization rates of 9.6% for 2013 and 2014, and 9.1% for 2015.

Viewed as a whole, Mr. Wellsandt's appraisal reflects much greater precision in selection of comparable properties for the analysis of market rent and capitalization rates than the County Board's determination. Additionally, Mr. Wellsandt's experience performing appraisals of stand-alone commercial retail facilities in the Southeast Nebraska marketplace gives the Commission confidence in his ability to select appropriate comparable properties and to determine specific values to utilize when data analysis yields a range of potential values. The Commission finds that Mr. Wellsandt's opinion accurately reflects the market value of the Subject Properties in each of the tax years in issue.

For the 48th Street Property in tax year 2013, the total valuation must be divided between the three parcels. The determinations of the County Board with regard to the unimproved parcels in Case No. 13C 190 and Case No. 13C 191 should be affirmed. The determination of the County

²⁹ A note on the Property Record Card of the 48th Street Property and Mr. Bybee's testimony indicate that the rental value was set at \$14.00 to match a competing pharmacy across the street. Ex. 23, p. 2.

³⁰ Ex. 37, p 66.

³¹ Ex. 40, p 64.

Board with regard to the improved parcel, Case No. 13C 189, should be reversed, and the valuation should be set as the difference between the value of the unimproved parcels and the aggregate value proposed by the Taxpayer.

V. CONCLUSION

The Commission finds that the opinion of value by Mr. Wellsandt is competent evidence to rebut the presumption that the County Board faithfully performed its duties and had sufficient competent evidence to make its determinations. The Commission also finds that the opinion of value by Mr. Wellsandt is clear and convincing evidence that the County Board's decisions were arbitrary or unreasonable.

For all of the reasons set forth above, the decisions of the County Board should be affirmed as to the parcels in Case No. 13C 190 and 13C 191 in tax year 2013. The decisions of the County Board should be vacated and reversed as to the remaining Subject Properties.

VI. ORDER

IT IS ORDERED THAT:

1. The decisions of the Lancaster County Board of Equalization determining the value of the parcels in Case No. 13C 190 and Case No. 13C 191 for tax year 2013 are affirmed.
2. The decisions of the Lancaster County Board of Equalization determining the value of the remaining Subject Properties for tax years 2013, 2014, and 2015 are vacated and reversed.³²
3. The taxable value of the parcel in Case No. 13C 189 for tax year 2013 is \$594,600.
4. The taxable value of the parcel in Case No. 14C 396 for tax year 2014 is \$1,590,000.
5. The taxable value of the parcel in Case No. 15C 541 for tax year 2015 is \$1,750,000.
6. The taxable value of the parcel in Case No. 14C 198 for tax year 2014 is \$1,650,000.
7. The taxable value of the parcel in Case No. 15C 540 for tax year 2015 is \$1,810,000.

³² Taxable 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.

8. This Decision and Order, if no appeal is timely filed, shall be certified to the Lancaster County Treasurer and the Lancaster County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (2014 Cum. Supp.).
9. Any request for relief, by any party, which is not specifically provided for by this Decision and Order is denied.
10. Each party is to bear its own costs in this proceeding.
11. This Decision and Order shall only be applicable to tax years 2013, 2014, and 2015.
12. This Decision and Order is effective for purposes of appeal on March 2, 2018.³³

Signed and Sealed: March 2, 2018.

Robert W. Hotz, Commissioner

SEAL

James D. Kuhn, Commissioner

³³ 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.