

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Sandelman Trustee/Susan

and

ESAN LLC,
Appellant(s),

v.

Sarpy County Board of Equalization,
Appellee.

Case Nos: 13C 099, 14C 205, & 15C 323

Decision and Order Reversing the Decisions
of the Sarpy County Board of Equalization

For the Appellant:

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

For the Appellee:

John W. Reisz,
Deputy 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 in Sarpy County, Nebraska. The parcel is improved with a 13,243 square foot retail pharmacy. The legal description of the parcel is found at Exhibits 4, 5, and 6. The property record card for the Subject Property is found at Exhibit 7.

II. PROCEDURAL HISTORY

The Sarpy County Assessor determined that the assessed value of the Subject Property was \$2,200,000 for tax years 2013, 2014, and 2015. Appellant and real party in interest Sandelman Trustee/Susan and ESAN, LLC (the Taxpayer) protested this assessment to the Sarpy County Board of Equalization (the County Board) and requested an assessed valuation of \$925,750 for

tax years 2013, 2014 and 2015. The County Board determined that the taxable value for each of the three tax years was \$2,200,000.¹

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 December 21, 2016.

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 evidence⁴ 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 Where clear and convincing evidence shows

¹ Exhibits 4, 5, and 6.

² See, Neb. Rev. Stat. §77-5016(8) (2016 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).

³ *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted).

⁴ Competent evidence is defined as relevant and material evidence or that evidence "which the very nature of the thing to be proven requires." *Black's Law Dictionary 6th Edition*, West Group, p. 284 (1990).

⁵ *Id.*

⁶ Neb. Rev. Stat. §77-5016(9) (2016 Cum. Supp.).

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

that the County Board’s determination was arbitrary or unreasonable, the Taxpayer is entitled to relief.⁸

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.⁹ The presumption in favor of the County Board, and the burden of persuasion cannot be conflated, and require separate analysis.¹⁰ Both the presumption and burden of persuasion relate to the determinations of the County Board.¹¹

A Taxpayer must introduce competent evidence of actual value of the Subject Property in order to successfully claim that the Subject Property is overvalued.¹² 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.¹³ The Nebraska Supreme Court has held that, “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

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.”¹⁵ 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

⁸ Neb. Rev. Stat. § 5016(9) (Reissue 2009).

⁹ See generally, *JQH La Vista Conference Center Development LLC v. Sarpy Cty. Bd. Of Equal.*, 285 Neb. 120, 825 N.W.2d 447 (2013).

¹⁰ See, *JQH La Vista Conference Center Development LLC v. Sarpy Cty. Bd. Of Equal.*, 285 Neb. 120, 125-126, 825 N.W.2d 447, 452-453 (2013).

¹¹ See generally, *JQH La Vista Conference Center Development LLC v. Sarpy Cty. Bd. Of Equal.*, 285 Neb. 120, 125-126, 825 N.W.2d 447, 452-453 (2013).

¹² 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).

¹³ *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).

¹⁴ *JQH La Vista Conference Center Development LLC v. Sarpy Cty. Bd. Of Equal.*, 285 Neb. 120, 126, 825 N.W.2d 447, 453 (2013) (citations omitted).

¹⁵ Neb. Rev. Stat. §77-5016(8) (2016 Cum. Supp.).

knowledge in the evaluation of the evidence presented to it.”¹⁶ The Commission’s Decision and Order shall include findings of fact and conclusions of law.¹⁷

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.¹⁸

“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.”¹⁹ “Actual value, market value, and fair market value mean exactly the same thing.”²⁰ 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.²¹ All real property in Nebraska subject to taxation shall be assessed as of January 1.²² All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.²³

A. Summary of the Evidence

Timothy Ederer, an employee of the Sarpy County Assessor’s Office, was the primary witness on behalf of the Sarpy County Board. Ederer holds an Assessor’s Certificate issued by the State of Nebraska, but is not a licensed appraiser. He provided testimony regarding his

¹⁶ Neb. Rev. Stat. §77-5016(6) (2016 Cum. Supp.).

¹⁷ Neb. Rev. Stat. §77-5018(1) (2016 Cum. Supp.).

¹⁸ Neb. Rev. Stat. §77-112 (Reissue 2009).

¹⁹ *Id.*

²⁰ *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).

²¹ Neb. Rev. Stat. §77-131 (Reissue 2009).

²² See, Neb. Rev. Stat. §77-1301(1) (Reissue 2009).

²³ Neb. Rev. Stat. §77-201(1) (Reissue 2009).

assessment of the Subject Property. In doing so, he stated that he utilized both the cost approach and income approach methods of assessment in compliance with Nebraska statutory law.²⁴

Mr. Ederer testified that the factors upon which the Subject Property assessment was based were selected during the 2008 Sarpy County revaluation cycle. He noted that no revaluation of the Subject Property was required or necessary since that cycle because the statutory standard for revaluation had not been triggered based on a sales ratio and that adjustments were not statutorily required during the intervening year period.²⁵

Although Ederer utilized both the cost and income approaches, he relied on the income approach in reaching his final opinion. He confirmed in his testimony that the data supporting the income assessment factors for 2008 was largely derived from information compiled in the 2006-2008 time period and could have been substantially affected by downward economic circumstances due to the 2007 depression and financial crises occurring in 2008. He did note that a published Lerner Report supported his decision to place the Subject Property in the upper range of rents.²⁶ He estimated the rent value to be \$18.00 per square foot.²⁷

The Taxpayer disagreed, contending that the selection of market rents skewed Ederer's conclusions. As such, the Taxpayer asserted that the method of assessment was arbitrary or unreasonable.

The Taxpayer offered the expert testimony of David C. Wellsandt, a licensed real estate appraiser. Mr. Wellsandt testified that he prepared an appraisal report, dated November 17, 2016, which considered the income and sales comparison approaches to value.²⁸ He also noted that he prepared a cost approach analysis in a supplemental appraisal report relating to the Subject Property.²⁹ He asserted that both his initial report and supplemental report were consistent with generally accepted appraisal practices and Uniform Standards of Professional Appraisal Practice (USPAP standards).

²⁴ Neb. Rev. Stat. §77-112 (Reissue 2009).

²⁵ Neb. Rev. Stat. §77-5023 (Reissue 2009), 77-1311.03 (2016 Cum. Supp.).

²⁶ Exhibits 65-67.

²⁷ See, Exhibit 7, page 17

²⁸ Exhibit 16.

²⁹ Exhibit 80.

The Taxpayer also provided testimony from Leo LaPierre, the National Property Tax Director for the tenant of the Subject Property, CVS Health (CVS), regarding CVS's financing mechanisms for construction of its stores in the United States. He testified that CVS would typically construct multiple stores through bulk sale/leaseback transactions. These transactions involved the construction of multiple stores and the aggregation of costs associated with such store construction. Funding was secured with lease agreements in which CVS would pay rents to the legal titleholder in excess of typical market rates.

The testimony of Mr. Wellsandt provided the Commission with information as to how he eliminated non-arms-length transactions in order to develop a reasonable approach to valuation. In his testimony, the Commission finds that Mr. Wellsandt appropriately relied upon arms-length fee simple transactions of retail property in the Omaha area.

Mr. Wellsandt provided considerable information to the Commission regarding his income approach analysis. Specifically, he indicated that he developed his opinion based upon six leases of what he considered comparable retail space in the area of the Subject Property. He looked at newer retail properties ranging from 7,404 to 28,430 square feet. Each comparable property had a lease commencement date between 2012 and 2014. Mr. Wellsandt testified that he made appropriate adjustments for time, location, size, physical features, and other factors. His analysis was well organized and resulted in a conclusion that the market rent per square foot was \$14.25 for 2103, \$14.75 for 2014 and \$15.75 for 2015. The Commission finds that his conclusions are more reliable than those of the County. He also provided considerable support for a rounded loaded capitalization rate of 8.94% for 2013, 8.95% for 2014, and 8.69% for 2015.

The final value estimates of Mr. Wellsandt's appraisal report were as follows: \$1,770,000 for 2013, \$1,810,000 for 2014, and \$1,970,000 for 2015. The Commission finds that the testimony of Mr. Wellsandt was credible, and that the conclusions of his appraisal report are to be given great weight.

IV. CONCLUSION

The Commission finds that the determination of actual value by the County Board was unreasonable as it was based upon stale data obtained in the 2006-2008 time period.

The Commission further 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 determination. The Commission further finds that the opinion of value by Mr. Wellsandt is clear and convincing evidence that the County Board's value determination was arbitrary or unreasonable.

For all of the reasons set forth above, the decisions of the County Board should be vacated and reversed.

V. ORDER

IT IS ORDERED THAT:

1. The decisions of the Sarpy County Board of Equalization determining the values of the Subject Property for tax years 2013, 2014, and 2015 are vacated and reversed.³⁰
2. The taxable value of the Subject Property for tax year 2013 is \$1,770,000.
3. The taxable value of the Subject Property for tax year 2014 is \$1,810,000.
4. The taxable value of the Subject Property for tax year 2015 is \$1,970,000.
5. 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 (2016 Cum. Supp.).
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 years 2013, 2014, and 2015.

³⁰ 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.

9. This Decision and Order is effective for purposes of appeal on July 12, 2017.³¹

Signed and Sealed: July 12, 2017

Steven A. Keetle, Commissioner

SEAL

Nancy J. Salmon, Commissioner

³¹ Appeals from any decision of the Commission must satisfy the requirements of Neb. Rev. Stat. §77-5019 (2016 Cum. Supp.) and other provisions of Nebraska Statutes and Court Rules.