

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Midwest Site 2 LLC,
Appellant,

v.

Douglas County Board of Equalization,
Appellee.

Case Nos: 14C 552 & 16C 0352

Decision and Order Affirming the
Determination of the County Board for Tax
Year 2014, and
Vacating and Reversing the Determination
of the County Board for Tax Year 2016

For the Appellant:

Sean T. Mullen,
Sean T. Mullen P.C., L.L.O.

For the Appellee:

Shakil A. Malik,
Deputy Douglas County Attorney

This appeals were heard before Commissioners Steven Keetle and Nancy Salmon.

I. THE SUBJECT PROPERTY

The Subject Property is a commercial parcel located in Douglas County. The parcel is a 1.668 acre commercial property improved with a 22,976 square foot full service car wash. The legal description of the parcel is found at Exhibit 1 & 2. The property record card for the Subject Property is found at Exhibit 5 & 6.

II. PROCEDURAL HISTORY

The Douglas County Assessor (County Assessor) determined that the assessed value of the Subject Property was \$2,007,700 for tax year 2014. Midwest Site 2 LLC (the Taxpayer) protested this assessment to the Douglas County Board of Equalization (the County Board) and requested an assessed valuation of \$1,307,246. The Douglas County Board determined that the taxable value for tax year 2014 was \$2,007,700.¹

¹ Exhibit 2.

The County Assessor determined that the assessed value of the Subject Property was \$2,283,500 for tax year 2016. The Taxpayer protested this assessment to the County Board and requested an assessed valuation of \$1,883,874. The County Board determined that the taxable value for tax year 2016 was \$2,283,500.²

The Taxpayer appealed the decisions of the County Board to the Tax Equalization and Review Commission (Commission). At the hearing the parties stipulated to the receipt of exchanged exhibits 2,3,5 and 6. The Commission held a hearing on May 19, 2017.

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 Exhibit 3.

³ 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).

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(9) (2016 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(9) (2016 Cum. Supp.).

¹¹ Neb. Rev. Stat. §77-5016(6) (2016 Cum. Supp.).

¹² Neb. Rev. Stat. §77-5018(1) (2016 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

Peter Zekauskas testified that he purchased the Subject Property in December of 2013 for a price of \$3,500,000, in order to get out of a “bad deal” of a lease agreement with the prior owner. Zekauskas testified that, regardless of this purchase price, his opinion of value for the Subject Property for tax year 2014 is \$1,572,474 and for tax year 2016 is \$880,895. Zekauskas testified that his opinions of value were based on the County Assessor’s determination of replacement cost along with the Commission’s depreciation rates applied in the 2012 and 2013 Findings and Orders regarding the Subject Property to both the “Building” and “Add On” components of the Subject Property, as well as the equalized value of land for tax year 2012 and 2013. The record before the Commission only contains the property record files for the Subject Property for tax years 2014 and 2016. The record does not contain the 2012 or 2013 Property Record Files for the Subject Property, or any Property Record Files for any other property upon which the Commission’s 2012 and 2013 determination was based. Additionally the Commission notes that the record in the present appeals do not contain any Property Record Files for any comparable properties for tax years 2014 or 2016 which are before the Commission in these appeals.

Mark Jenkins, an appraiser for the Douglas County Assessor/Register of Deeds office (the Appraiser) testified regarding how the County determined the value for tax year 2016 based on the Cost Detail of the Subject Property. The Appraiser testified that the costs determined by the County were derived using a Computer Assisted Mass Assessment (CAMA) program which utilized costs based on the Marshall and Swift Valuation service.

The record does not contain the Cost Detail of Building for the Subject Property for tax year 2014. Mark Jenkins testified that the value was derived from the 2013 tax year determination of

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).

the County Board, however the 2013 Cost Detail of Building was also not part of the record before the Commission in these appeals. The Commission cannot determine based on the information presented to it the depreciation rate applied to the improvements on the Subject Property or if it was or was not applied to any “add ons” on the Subject Property for tax year 2014. Based upon the foregoing the Commission finds that the actual value of the improvement component of the Subject Property is \$1,172,800 for tax year 2014.

The record does contain the tax year 2016 Cost Detail for the Subject Property which indicates that the County Assessor calculated the Replacement Cost New (RCN) of the buildings and calculated depreciation.¹⁹ After deducting depreciation, the total was multiplied by a Neighborhood Adjustment factor to calculate the Replacement Cost New Less Depreciation (RCNLD).²⁰ The canopies, the paved asphalt, and the light poles were labeled as “Add Ons” in the “Cost Detail of Building” (the Cost Detail) for the Subject Property.²¹ The County Assessor did not apply depreciation to the “Add Ons” for any of the Subject Properties. The County Assessor then added the RCNLD of the buildings, the “Add Ons,” the value of the automatic car wash, and the land value to determine the total assessed value.²² The Taxpayer argues that the County Assessor should have applied depreciation to the property designated as “Add Ons” in the cost detail of the Subject Property.

Despite the labeling by the County Assessor, the property designated as “Add Ons” were improvements for assessment purposes. An improvement is “any addition made to real property, amounting to more than a repair, such as sidewalks, streets, sewers or utilities.”²³ A structure is “anything constructed or erected, requiring permanent attachment to real property or attached to something permanently affixed to real property.”²⁴ Buildings and structures are both improvements.²⁵

The cost approach requires that improvements be depreciated. The Appraisal Institute describes the cost approach as when “value is estimated as the current cost of reproducing or

¹⁹ E6:7

²⁰ E6:7

²¹ E6:7

²² E6:7

²³ Title 350, Neb. Admin. Code, ch. 10 §002.18D

²⁴ Title 350, Neb. Admin. Code, ch. 10 §002.22

²⁵ Title 350, Neb. Admin. Code, ch. 10 §002.21A

replacing the improvements . . . minus the loss in value from depreciation, plus land value.”²⁶

The International Association of Assessing Officers states that the cost approach includes six steps:

1. Estimate the land (site) value as if vacant and available for development to its highest and best use. . .
2. Estimate the total cost new of the improvements as of the appraisal date, including direct costs, indirect costs, and entrepreneurial profit from market analysis;
3. Estimate the total amount of accrued depreciation attributable to physical deterioration, functional obsolescence, and external (economic) obsolescence;
4. Subtract the total amount of accrued depreciation from the total cost new of the primary improvements to arrive at the depreciated cost of improvements;
5. Estimate the total cost new of any accessory improvements and site improvements, then estimate and deduct all accrued depreciation from the total cost new of these improvements;
6. Add site value to the depreciated cost of the primary improvements, accessory improvements, and site improvements, to arrive at a value indication by the cost approach.²⁷

Both authorities state that depreciation must be applied to both the primary improvements and the accessory or “add on” improvements when using the cost approach.

Competent evidence was presented at the hearing that was clear and convincing proof that the County Assessor did not apply depreciation to the “add on” improvements on the Subject Property for tax year 2016. Therefore, the Commission finds that the County Assessor failed to correctly apply the cost approach with respect to the depreciation of all of the improvements on the Subject Property, specifically the “add on” improvements. Consequently, the County Board erred in adopting the value of the County Assessor for tax year 2016.

While it is clear that depreciation should have been applied to the “add on” improvements, the depreciation to be specifically applied to the “add on” improvements at an amount different than the depreciation applied to the building improvements was not quantified at the hearing. Therefore, the Commission must apply the same rate of depreciation that was used on the cost detail of the convenience store buildings for the Subject Properties for the “add on” improvements as it is the only rate of depreciation found in the record before the Commission.

²⁶ Appraisal Institute, *The Appraisal of Real Estate*, at 36 (14th ed. 2013).

²⁷ International Association of Assessing Officers, *Property Assessment Valuation*, at 230 (3rd ed. 2010).

The Cost Detail for the convenience stores in each of the appeals should therefore be corrected to account for depreciation to the improvements labeled as “Add Ons.”

The corrected calculation of the 2016 Replacement Cost New Less Depreciation for the Subject Property is as follows. \$2,297,200 Total Replacement Cost New w/o add ons + \$111,414 Total Add on Value = \$2,408,614 Total Replacement Cost New with add ons. \$2,408,614 x 40.24% = \$969,226 Physical Depreciation. \$2,408,614 Total Replacement Cost New with add ons - \$969,226 Physical Depreciation = \$1,439,388 Total Replacement Cost New After Depreciation. With a Neighborhood Adjustment of 1.00 the total Replacement Cost New Less Depreciation (RCNLD) is \$1,439,388. Based upon the foregoing the Commission finds that under the cost approach, using the corrected calculation of the RCNLD, the actual value of the improvement component of the Subject Property is \$1,439,388 for tax year 2016.

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.”²⁸ Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value.²⁹ 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.³⁰ 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.³¹ 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.³² 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.³³ The constitutional requirement of

²⁸ *Neb. Const.*, Art. VIII, §1.

²⁹ *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).

³⁰ *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).

³¹ *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).

³² *Banner County v. State Board of Equalization*, 226 Neb. 236, 411 N.W.2d 35 (1987).

³³ *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).

uniformity in taxation extends to both rate and valuation.³⁴ 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].”³⁵ There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity.³⁶

B. Summary of the Evidence

The Taxpayer alleged that the value of land component of the Subject Property wasn't equalized with the land component of two nearby properties. The Appraiser and Mr. Zekauskas testified that the two nearby properties were assessed at \$6 and \$5.50 per square foot and that they were located near to the Subject Property. The Property Record Files for these two nearby properties are not in the record before the Commission. The record in these appeals does not allow the Commission to determine if the two nearby properties are comparable to the Subject Property.

If taxable values are to be equalized it is necessary that the Taxpayer established by “clear and convincing evidence that the valuation 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 plain legal duty, and not mere error of judgment [sic].”³⁷ Based on the evidence presented as described above, the Commission finds that the Taxpayer has not met its burden of persuasion to obtain relief on the basis of lack of equalization.

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 for tax year 2014. The Commission also finds that there is not clear and

³⁴ *First Nat. Bank & Trust Co. v. County of Lancaster*, 177 Neb. 390, 128 N.W.2d 820 (1964).

³⁵ *Newman v. County of Dawson*, 167 Neb. 666, 670, 94 N.W.2d 47, 49-50 (1959) (Citations omitted).

³⁶ *Id.* at 673, 94 N.W.2d at 50.

³⁷ *Newman v. County of Dawson*, 167 Neb. 666, 670, 94 N.W.2d 47, 49-50 (1959) (Citations Omitted)

convincing evidence that the County Board's decision was arbitrary or unreasonable for tax year 2014.

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 for tax year 2016. The Commission also finds that there is clear and convincing evidence that the County Board's decision was arbitrary or unreasonable for tax year 2016.

For all of the reasons set forth above, the decision of the County Board for tax year 2014 is affirmed, and the decision of the County Board for tax year 2016 is vacated and reversed.

VII. 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 2014 affirmed.³⁸

2. The assessed value of the Subject Property for tax year 2014 is:

Land	\$ 834,900
Improvements	<u>\$1,172,800</u>
Total	\$2,007,700

3. The decision of the Douglas County Board of Equalization determining the value of the Subject Property for tax year 2016 vacated and reversed.³⁹

4. The assessed value of the Subject Property for tax year 2016 is:

Land	\$ 799,300
Improvements	<u>\$1,439,388</u>
Total	\$2,238,688

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 (2016 Cum. Supp.).

³⁸ 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.

³⁹ 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.

6. Any request for relief, by any party, which is not specifically provided for by this decision and Decision and Order is denied.
7. Each party is to bear its own costs in this proceeding.
8. This Decision and Order and order shall only be applicable to tax years 2014 and 2016.
9. This Decision and Order and order is effective for purposes of appeal on July 6, 2017.⁴⁰

Signed and Sealed: July 6, 2017

Steven A. Keetle, Commissioner

SEAL

Nancy J. Salmon, Commissioner

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

⁴⁰ 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.