

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Columbus Village Shopping Center
Association,
Appellant,

v.

Platte County Board of Equalization,
Appellee.

Case Nos: 16C 0059 & 16C 0060

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

For the Appellant:

Steven D. Davidson,
Baird Holm, LLP

For the Appellee:

Elizabeth Lay
Deputy Platte County Attorney

These appeals were heard at a consolidated hearing before Commissioners Robert W. Hotz and James D. Kuhn.

I. THE SUBJECT PROPERTY

The Subject Property is two commercial parcels located in Platte County, Nebraska. The parcels are improved with retention ponds that collect water and trash runoff from adjacent parcels. A shopping complex with various stores, parking areas, roads, and other improvements is located on the adjacent parcels to the south of the Subject Property. The legal description of the parcels is found at Exhibits 1 and 2. The property record card for the parcels is found at Exhibit 3.

II. PROCEDURAL HISTORY

The Platte County Assessor (the County Assessor) determined that the assessed value of the Subject Property identified as Lot 7 was \$161,540, and the assessed value of Subject Property identified as Lot 8 was \$133,155, for tax year 2016. Columbus Village Shopping Center Association (the Taxpayer) protested these assessments to the Platte County Board of

Equalization (the County Board). The County Board determined that the taxable values of Lot 7 and Lot 8 for tax year 2016 were \$161,540 and \$133,155 respectively.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 as ordered by the Commission. The parties stipulated to the receipt of Exhibits 1 through 9, which were received into evidence at the hearing held on October 10, 2017. Commissioner Hotz presided at the hearing.

III. STANDARD OF REVIEW

The Commission's review of a 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 evidence adduced on appeal to the contrary.⁴ 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

¹ Exhibit 1, Exhibit 2.

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 But see, *Pittman v. Sarpy Cty. Bd. of Equal.*, 258 Neb 390, 398, 603 N.W.2d 447, 453 (1999), and *Cain v. Custer Cty. Bd. of Equal.* 291 Neb. 730, 747-748, 868 N.W.2d 334, 347 (2015).

⁵ *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted).

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 [and] 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,

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.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

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(8) (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).

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

Lots 7 and 8 are part of a commercial development previously divided into nine lots, originally purchased and developed into a shopping center by Dial-Columbus LLC (Dial). On October 8, 2004, when it was the fee simple owner of all nine lots, Dial recorded a Declaration of Easements, Covenants, and Restrictions (hereinafter referred to as Declarations) with the Platte County Register of Deeds. Among other things, this Declaration established the Taxpayer as manager of the property, required the Taxpayer to obtain fee simple title to Lots 7 and 8, required the Taxpayer to pay real estate taxes on Lots 7 and 8, and provided that Lots 7 and 8 were to “be used for water retention in perpetuity,” and to “be used for detention lots.”¹⁹ The Declaration provided that all owners of any of the lots were “members of the Association [i.e., the Taxpayer],” but where it devised three classes of membership in the Association for the purpose of electing board members, no election rights were granted to the owners of Lots 7 and 8.²⁰

Over time, entities including the Taxpayer purchased the lots from Dial, gaining membership in the Association (Taxpayer). Most of those lots are now improved with retail stores, including a J.C. Penney, a Maurices, banks, restaurants, and a Menards home improvement store. Lot 1, where the primary shopping center building is located, is owned by Village Center Ventures, a subsidiary of Dial. Lots 7 and 8 contain detention ponds, which collect water and trash runoff from the shopping center and its parking lots. They are otherwise covered by tall grass and trees. The Taxpayer bears the costs of maintaining Lots 7 and 8.

At some point after the Declaration was recorded, the Taxpayer transferred a portion of “Lot 8” referenced in the Declaration to Menards for development as a lumberyard. The Taxpayer purchased an additional adjacent parcel to compensate for the lost detention area, and re-platted

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).

¹⁹ Exhibit 7 at 2.

²⁰ Exhibit 7 at 6.

the land.²¹ Neither party presented evidence on the legal or financial details of the transfer to Menards except to describe the transaction as a purchase.

The Taxpayer's primary witness was David C. Wellsandt, a certified general real property appraiser. Mr. Wellsandt conducted a land use analysis of four parcels, including Lots 7 and 8, in accordance with the 2016-2017 Uniform Standards of Professional Appraisal Practice (USPAP), which was the basis of his testimony before the Commission. In analyzing the highest and best use of the property, Mr. Wellsandt considered both physical and legal restrictions. Regarding physical restrictions, he ruled out agricultural use due to the size of the parcels. He noted that the lots "currently have significant coverage for water detention areas," but added, "[p]resumably, the lots could be built-up such that the soils could support construction."²² Regarding legal restrictions, he noted that the lots were zoned for single-family residential, multiple-family residential, or commercial development.

However, the lots are bounded by covenants and restrictions that restrict use only as retention ponds to support the adjacent shopping center. As a result, the subject lots have no productive use.

It is noteworthy that the use of the lots for water retention purposes supports the adjacent shopping center. As such, the subject lots enhance the utility of the lots in the shopping center as [the shopping center lots] are fully buildable and do not have to allocate parts of the parcels for water purposes as wasted/unbuildable areas.²³

Because Mr. Wellsandt concluded that Lots 7 and 8 had no productive use, he was unable to identify comparable properties to determine value under sales comparison or income approaches to valuation. In his testimony he concluded that the market value of Lots 7 and 8 "would not be higher than zero. It could potentially be lower, based on ... liability factors and maintenance costs[.]"

Mr. Wellsandt acknowledged that Lots 7 and 8 add value to the adjacent lots containing the shopping center, but testified that the County Board should account for this by increasing its assessed value of the shopping center lots rather than assigning any value to Lots 7 and 8. He also acknowledged that a portion of Lot 8 had been transferred to Menards, but explained that he regarded this as irrelevant to calculating market value because Menards, with a large store

²¹ As a result, the "Lot 8" at issue here has been modified at least twice from the "Lot 8" described in the Declaration.

²² Exhibit 4 at 26.

²³ *Id.*

located on adjacent property, was a “captive buyer,” needing to buy land adjacent to the parcel it already owned.

The County Board declined to present evidence beyond what was contained in its exhibits. It appears that the County valued Lot 7 at \$1 per square foot and Lot 8 at \$15,000 per acre (approximately \$0.344 per square foot).²⁴ The record contains no substantive evidence to explain how the County Board assigned those values.

C. Analysis

As discussed above, a presumption exists that the County Board has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action. That presumption remains until the Taxpayer has presented competent evidence to the contrary. The County Board assigned a per-square-foot value to Lot 7 and a per acre value to Lot 8, but the record contains no further detail as to how those values were determined. It is also unclear how the County Board accounted for the conditions considered by Mr. Wellsandt, such as the presence of surface water, the necessity of dirt fill to make the parcels suitable for building, and the covenants restricting use of the lots to water detention.

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.²⁵ The evidence presented at the hearing included a land use analysis completed under appropriate professional standards and the testimony of the appraiser who completed the report as to the likely value of the property. The Commission finds that Mr. Wellsandt’s report and testimony constitute competent evidence to rebut the presumption in favor of the determination by the County Board.

When the presumption has been rebutted, the burden remains with the Taxpayer to demonstrate, by clear and convincing evidence, that the County Board’s determination was arbitrary or unreasonable. A decision is “arbitrary” when it is made in disregard of the facts and circumstances and without some basis which could lead a reasonable person to the same conclusion.²⁶ It is “unreasonable” only if the evidence presented leaves no room for differences

²⁴ Exhibit 3 at 6, 14.

²⁵ *JQH La Vista Conference Center Development LLC v. Sarpy County Board of Equal.*, 285 Neb. 120, 126, 825N.W.2d 447, 452-453 (2013).

²⁶ 442 NAC Ch. 2 § 001.04.

of opinion among reasonable minds.²⁷ And “clear and convincing evidence” is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.²⁸ The Taxpayer has not carried this evidentiary burden.

The Taxpayer’s case rests upon the premise that Lots 7 and 8 have no productive use, and thus, a market value of zero. However, that conclusion is based upon the assumption that the covenant recorded by Dial actually prevents the use or development of the parcels for some purpose other than water detention. The record shows that the Taxpayer retains the ability to divide, sell, and augment the subject parcels, and also that the portions sold can be used by the new owners for purposes other than water detention. Specifically, the evidence presented at the hearing demonstrates that the Taxpayer transferred a portion of Lot 8 (as it was platted in 2004) to Menards, which, in turn, built a commercial building on it. Whatever price Menards may have paid for that portion of Lot 8, the Taxpayer was able to separate it and transfer it to Menards without running afoul of the covenant. Even if this did not constitute an arm’s length transaction for the purpose of determining market value, it goes counter to the Taxpayer’s assertions that (1) the land cannot be used for any purpose other than water detention because of the restrictive covenant, and (2) no buyer would purchase the land because of the restrictive covenant. As a result, the Commission is not persuaded that the Subject Property has an actual value of zero.

Mr. Wellsandt’s analysis of the property value did not include comparison with similar properties under either a sales comparison approach or an income approach to calculating value, and no evidence was presented as to the value of the property under the cost approach.²⁹ The Commission finds no clear and convincing evidence that the County Board’s determination of value was arbitrary or unreasonable.

V. 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. However, the Commission also finds that there is not clear and convincing evidence that the determination of value by the County Board was arbitrary or unreasonable.

²⁷ 442 NAC Ch. 2, § 001.59.

²⁸ *In re Interest of Zachary D. and Alexander D.*, 289 Neb. 763, 768, 875 N.W.2d 561, 566 (2015).

²⁹ Mr. Wellsandt did not testify that there had been no sales of comparable property; rather, he testified that he was unable to determine what properties should be considered comparable to the subject lots for the purpose of sales comparisons. Cf. *Lincoln Tel. and Tel. Co.*

For all of the reasons set forth above, the decisions of the County Board should be affirmed.

VI. ORDER

IT IS ORDERED THAT:

1. The decisions of the Platte County Board of Equalization determining the taxable value of the Subject Properties for tax year 2016 are affirmed.
2. The taxable value of the Subject Property for tax year 2016 is:

Case No. 16C 0059, Parcel ID 710134032 (Lot 7): \$161,540

Case No. 16C 0060, Parcel ID 710134039 (Lot 8): \$133,155
3. This Decision and Order, if no appeal is timely filed, shall be certified to the Platte County Treasurer and the Platte County Assessor, pursuant to Neb. Rev. Stat. § 77-5018 (2016 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 2016.
7. This Decision and Order is effective for purposes of appeal on January 8, 2018.³⁰

Signed and Sealed: January 8, 2018

Robert W. Hotz, Commissioner

SEAL

James D. Kuhn, Commissioner

³⁰ 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.