

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

JQH LaVista Conference Center
Development LLC
Appellant,

v.

Sarpy County Board of Equalization
Appellee

Case No: 09C-286 & 10C-158

Order Affirming
The Determination of the
Sarpy County Board of Equalization

For the Appellant:
Rosalynd Koob,
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For the Appellee:
Michael A. Smith
Sarpy County Attorney

Heard before, Commissioners Hotz and Salmon.

I. THE SUBJECT PROPERTY

The Subject Property is a 7.86 acre commercial parcel located in Sarpy County, Nebraska. (E2:8). The parcel is improved with a 78,549 square foot conference center (E3:7) with 42,032 square feet of meeting space (E3:7). The legal description of the parcel is found at Exhibit 1.

II. PROCEDURAL HISTORY

The Sarpy County Assessor determined that the assessed value of the subject property was \$23,400,000 for both tax years 2009 and 2010, consisting of \$1,710,475 for the land and \$21,689,525 for the improvements. JQH LaVista Conference Center Development LLC (Taxpayer) protested these assessments to the Sarpy County Board of Equalization (BOE) and requested an assessed valuation of \$12,710,475, consisting of \$1,710,475 for the land and \$11,000,000 for the improvements. The BOE determined that the assessed value for both tax years 2009 and 2010 was \$23,400,000. (E1).

The Taxpayer appealed the decisions of the BOE to the Tax Equalization and Review Commission (Commission). Prior to the hearing, the parties exchanged 15 exhibits in each

appeal. The Commission held a consolidated hearing on June 11, 2011. At the beginning of the hearing, the parties stipulated to the receipt of several of the exchanged exhibits.

III. STANDARD OF REVIEW

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.”

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

(Citations omitted).

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.

Id. 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. Neb. Rev. Stat. §77-5016(8) (2010 Cum. Supp.). Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence. *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. 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) . 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. *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).

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.

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

Neb. Rev. Stat. §77-112 (Reissue 2009). "Actual value, market value, and fair market value mean exactly the same thing." *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002). 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. Neb. Rev. Stat. §77-131 (Reissue 2009). All real property in [Nebraska] subject to taxation shall be assessed as of January 1. See, Neb. Rev. Stat. §77-1301(1) (Reissue 2009). All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation. Neb. Rev. Stat. §77-201(1) (Reissue 2009).

B. Summary of the Evidence

The Taxpayer offered four exhibits (Exhibits 3, 13, 15, and 16) and three witnesses. Anthony E. Moody testified he was the General Manager of two hotels adjacent to the subject property, the Embassy Suites and the Marriot Courtyard, and that all three properties were commonly owned by the Taxpayer. Moody testified that the subject property and the Embassy Suites were operated as a unit and shared a unified profit and loss statement. He described negotiations in 2007 between the city of LaVista and the Taxpayer relating to occupation taxes and other economic development-related inducements. Mr. Moody opined that the subject property would not have been built had the Taxpayer been able to predict the subsequent economic downturn.

Ed Schreiber testified that he was the corporate tax department head for the Taxpayer. He asserted that construction costs for the subject property were \$17,735,294. The building permit in March 2007 was for \$27,059,286 (E2:7).

David Sangree, a certified appraiser, testified as an expert witness on behalf of the Taxpayer. He testified that he inspected the subject property in January 2011, and again in June 2011, and that his associate did an inspection in April 2011.¹ Sangree stated that negotiations with the city resulted in the city paying \$3,000,000 toward construction costs and providing a loan to the Taxpayer in the amount of \$18,000,000, with a balloon payment in 2014. He also testified that the costs to build the subject property were \$17,716,454.

Sangree testified he considered all three approaches to value. His opinion was that the income approach was the most relevant approach to value because of the income-producing nature of the subject property. Sangree prepared appraisal reports, (Exhibit 3 in each appeal), including his opinion of value of the subject property for both January 1, 2009, and January 1, 2010. His opinion of value for 2009 was \$7,100,000, (E3 in Case No. 09C-286). His opinion of value for 2010 was \$10,100,000, (E3 in Case No. 10C-158). Sangree relied most heavily in both appraisals on the income approach to value.

The income approach to valuation supports two basic methodologies: direct capitalization² and yield capitalization.³ Both of these methods “require a comprehensive study of historical income and expenses for the subject property. This study is combined with an analysis of typical income and expense levels for comparable properties. A reconstructed operating statement is [then] developed for the subject property.” *The Appraisal of Real Estate*, 13th Edition, The Appraisal Institute, 2001, at 465. “Only the reasonable and typical expenses necessary to support and maintain the income-producing capacity of the property should be allowed.” *Property Assessment Valuation*, 2nd Ed., International Association of Assessing Officers, 1996, p. 318.

Sangree testified that he gleaned income and expense data from unified profit and loss

¹ Each of these inspections was made at least two years after the completion of construction.

² The direct capitalization method produces an indication of value based on a single year’s estimated income. See, *The Appraisal of Real Estate*, 13th Edition, The Appraisal Institute, 2001, at 465.

³ A yield capitalization method requires an analysis of income and expected returns over multiple years. See, *Id.*

statements for the conference center and the Embassy Suites Hotel.⁴ Since the conference center did not begin operating until July 1, 2008, Sangree relied upon actual income and expense data from that date forward. As a result, Sangree was unable to conduct a “comprehensive study of historical income and expenses for the subject property” due to its relatively short operating history. His appraisals also provided no evidence indicating typical income or expenses for any comparable properties. Any “reconstructed operating statement” that may have otherwise been developed would have been significantly limited for use in the income approach.

Sangree testified that his appraisals did not include an analysis of sales of comparable properties due to a dearth of sales of stand-alone conference centers. In his sales comparison approach he states, “[w]e have conducted an extensive search in the Omaha region and nationally and did not find sales of any comparable stand-alone conference centers.” (E3:98 in Case No. 09C-286), (E3:171 in Case No. 10C-158).

Sangree reached a cost approach opinion of value of \$8.4 million for both years. (E3:115 in Case No. 09C-286), (E3:190 in Case No. 10C-158). He testified his cost approach estimate of value was based in part upon his opinion that Class C materials were used to construct the building, resulting in a replacement cost new of \$13,060,585 in both appraisals, which included \$100,000 for site improvements. He then deducted 2.5% for physical depreciation and \$8.7 million for external (economic) obsolescence, resulting in a total depreciated value of the building and site improvements of \$4,036,570. He then added the depreciated value of furniture, fixtures, and equipment of \$1,681,280 and the land value of \$3,100,000, arriving at a cost approach value indication of \$8,400,000. (E3:115 in Case No. 09C-286), (E3:190 in Case No. 10C-158). Sangree testified that external obsolescence was a measure of market factors affecting the performance of the property. He measured external obsolescence (a type of economic depreciation) by “comparing the estimated value [indicated by] the cost approach to that of the final estimate of value,” which in this case relied heavily on the income approach to value. (E3:113 in Case No. 09C-286), (E3:188 in Case No. 10C-158). However, Sangree also testified that Omaha and Sarpy County had a “relatively strong economy” during the relevant time period. We find that his opinion of value based upon a reconciliation of the values estimated using the income approach and cost approach is not clear and convincing evidence that the determination by the BOE was arbitrary or unreasonable.

⁴ The profit and loss statements were not included in the appraisal reports or otherwise in evidence.

Richard John, a certified general appraiser in the Sarpy County Assessor's office, testified as an expert witness for the BOE. He testified he visited the site more than once during construction, reviewed blueprints, inspected, took measurements, and discussed characteristics of the building with the city building inspector. He testified the location of the subject property, in proximity to Cabela's, a new bank, and the two hotels, was the "hottest" commercial location in Sarpy County.

John testified that he was unable to find market data for comparable sales in Sarpy County or elsewhere. He also stated there was no market income data available for similar properties. He testified he used the cost approach to assess the subject property on behalf of the Sarpy County Assessor's office using a computer-assisted mass appraisal system called TerraScan, which incorporated the Marshall Valuation Service costing factors as of June 2008. E2:8. In his judgment and observation, the materials used to construct the building were Class B, a higher quality of material than Class C. John also assessed the refinements associated with the building, including a sprinkler system, and parking lot concrete and lighting. E2:10. His determination of the replacement cost new of the building plus refinements was \$21,713,934. E2:8. John testified he made no deduction for depreciation for either 2009 or 2010 since construction was completed in 2008. The Commission has the authority to consider and utilize the Marshall Valuation Service under Neb. Rev. Stat. Section 77-5016(3) and has reviewed its application to the present appeal, including depreciation tables,⁵ as applicable to the cost approach.

John testified he appraised the land, consisting of 342,095 square feet (7.85 acres) at \$5 per square foot, (E2:8) based upon commercial land sales in the area. The unimproved land component of the subject property sold for \$1,710,397 in October 2007. His determination of the land value was \$1,710,475. The Taxpayer did not dispute the valuation of the land.⁶

John testified his opinion of value of the subject property for both 2009 and 2010 was \$23,400,000.

⁵ Whether the convention center is rated at Class B or Class C, with an effective age of one year, depreciation is 0% per the Marshall Valuation Service.

⁶ In fact, Sangree's Cost Approach appraised the land at much higher value of \$3,100,000. (E3:115 in Case No. 09C-286), (E3:190 in Case No. 10C-158).

V. CONCLUSION

The Commission finds that the Taxpayer has not provided competent evidence to rebut the presumption that the BOE faithfully performed its duties and had sufficient competent evidence to make its determination. The Commission also finds that the Taxpayer has not provided clear and convincing evidence that the determination by the BOE was arbitrary or unreasonable.

For all of the reasons set forth above, the appeal of the Taxpayer is denied.

VI. ORDER

IT IS ORDERED THAT:

1. The Decision of the Sarpy County Board of Equalization determining the value of the subject property for tax year 2009 and 2010 is affirmed.
2. That the Assessed value of the Subject property for both tax years 2009 and 2010 is:

Land	\$1,710,475
Improvements	<u>\$21,689,525</u>
Total	\$23,400,000

3. This decision and order, if no appeal is timely filed, shall be certified to the Sarpy County Treasurer and the Any County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (2010 Cum. Supp.)
4. Any request for relief, by any party, which is not specifically provided for by this order is denied.
5. Each Party is to bear its own costs in this proceeding.
6. This decision shall only be applicable to tax years 2009 and 2010.

7. This order is effective for purposes of appeal on December 23, 2011.

Signed and Sealed: December 23, 2011

SEAL

Robert W. Hotz, Commissioner

Nancy J. Salmon, Commissioner

Appeals from any decision of the Commission must satisfy the requirements of Neb. Rev. Stat. §77-5019 (2010 Cum. Supp.), other provisions of Nebraska Statute and Court Rules.