

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

S & A Inc.
Appellant,

v.

Douglas County Board of Equalization,
Appellee,

Case No: 11C-134

Decision Reversing the Decision of the
Douglas County Board of Equalization

For the Appellant:
Bhasker Patel,
Pro Se

For the Appellee:
Matthew J. Boever,
Deputy Douglas County Attorney

This appeal was heard before Commissioners Robert W. Hotz and Nancy J. Salmon.

I. THE SUBJECT PROPERTY

The Subject Property is a commercial parcel located at 3511 S. 84th Street, in Omaha, Douglas County, Nebraska. The parcel is improved with an 80-room hotel under the Motel 6 brand, built in 1992. The property record card for the Subject Property is found at Exhibit 3. The legal description of the parcel is found at Exhibit 3, page 7.

II. PROCEDURAL HISTORY

The Douglas County Assessor determined that the assessed value of the Subject Property was \$1,734,400 for tax year 2011, including \$547,400 for the land and \$1,187,000 for the improvements.¹ S & A Inc. (the Taxpayer) protested this assessment to the Douglas County Board of Equalization (the County Board) and requested an assessed valuation of \$800,000 for tax year 2011, including \$300,000 for the land and \$500,000 for the improvements.² The County Board determined that the value for tax year 2011 was \$1,734,400.³

¹ E2:1.

² E6:1.

³ E2:1.

The Taxpayer appealed the decision of the County Board to the Tax Equalization and Review Commission (Commission). The Commission held a hearing on November 26, 2012.

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 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.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

A Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued.⁹ 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.¹⁰

⁴ See, Neb. Rev. Stat. §77-5016(8) (2010 Cum. Supp.), *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 286, 753 N.W.2d 802, 813 (2008).

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

⁶ *Id.*

⁷ Neb. Rev. Stat. §77-5016(8) (2010 Cum. Supp.).

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

⁹ 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).

¹⁰ *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).

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.”¹¹ 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.”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 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

¹¹ Neb. Rev. Stat. §77-5016(8) (2011 Supp.).

¹² Neb. Rev. Stat. §77-5016(6) (2011 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).

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).

B. Summary of the Evidence

The Assessor used the income approach when assessing the Subject Property for tax year 2011. The Assessor's income approach indicated a value of \$1,734,400.¹⁹

The income approach can be defined as “a set of procedures through which an appraiser derives a value indication for an income-producing property by converting its anticipated benefits (cash flows and reversion) into property value.”²⁰ Two major methods are used to develop an indication of value using the income approach: direct capitalization and yield capitalization.²¹ The direct capitalization method produces an indication of value based on a single year's estimated income.²² The steps required for use of the income approach with direct capitalization may be summarized as (1) estimate potential gross income; (2) deduct estimated vacancy and collection loss to determine effective gross income; (3) deduct estimated expenses to determine net operating income; (4) divide net operating income by an estimated capitalization rate to yield indicated value.²³ A variety of techniques may be used to quantify various components of any application of the approach,²⁴ but “[o]nly the reasonable and typical expenses necessary to support and maintain the income-producing capacity of the property should be allowed.”²⁵

The approach used by the Assessor may be best characterized as a direct capitalization approach. In the Assessor's income worksheet, the income approach factors included a room rate of \$40.75, an occupancy rate of 50%, expenses of 60%, and a loaded income capitalization rate of \$13.55%.²⁶

Bhasker Patel, President and Owner of S&A Inc., asserted that the values for the factors in the County Assessor's income approach were not indicative of the market value of the Subject Property. Patel testified to values for these factors from a document entitled, “Hotel Income Summary,” offered as Exhibit 7, page 9, which indicated actual income and expenses of the

¹⁹ E4:2. E4:15.

²⁰ *The Dictionary of Real Estate Appraisal, Fourth Edition, Appraisal Institute*, p.143, (2002).

²¹ See, *The Appraisal of Real Estate, 13th Edition, The Appraisal Institute*, 2001, at 465.

²² See, *Id.*

²³ See, *Id.* at 466.

²⁴ *Id.* at chs 20-24.

²⁵ *Property Assessment Valuation, 2nd Ed., International Association of Assessing Officers*, 1996, p. 318.

²⁶ E4:13-14.

Subject Property for calendar year 2010.²⁷ Based upon his review of the relevant actual income and expenses of the Subject Property for 2010, Patel asserted a value for the Subject Property for tax year 2011 of \$747,126.

Patel's use of actual income and expenses to value the Subject Property may have the inappropriate effect of valuing management rather than valuing the Subject Property.²⁸ The Assessment Report for tax year 2011, offered by the County Board, indicates that the Assessor used the typical room rates, occupancy rates, expenses, and capitalization rate based upon what is indicated in the market rather than from the actual income and expenses of the Subject Property.²⁹ The determination of whether to use actual income and expenses provided by a Taxpayer³⁰ or to use the typical values derived from a market study is left to the discretion of the assessor.³¹

Patel also testified that the Subject Property had been remodeled in approximately December of 2010. The renovation involved new windows and flooring as well as new furniture and televisions in each room. He testified that these renovations had been completed as of the assessment date of January 1, 2011.

Patel offered a fee appraisal prepared in July, 2010, valuing the Subject Property retrospectively to January 1, 2009.³² The appraisal was based upon an inspection of the Subject Property conducted on June 4, 2010.³³ The appraiser deemed the condition of the Subject Property to be "average to good."³⁴ It is important to note that the appraisal states that the Subject Property was considered to have had a similar condition on January 1, 2009, as it did on

²⁷ Patel testified that the document was authored by Lloyd Hinn, who Patel said assisted the Taxpayer in preparation for the appeal. Hinn testified that he was not an attorney or a licensed appraiser.

²⁸ *Mass Appraisal of Real Property*, International Association of Assessing Officers, 1999, 158.

²⁹ E4:12-14.

³⁰ Even if the Commission were to consider the actual income and expenses reported by the Taxpayer, Exhibit 7, page 9 improperly included amortization among the expenses. Amortization is an improper expense item because the capitalization rate takes this factor into account. See, *Property Assessment Valuation*, 3rd Ed., International Association of Assessing Officers (2010), 330.

³¹ *Mass Appraisal of Real Property*, International Association of Assessing Officers, 1999, 158 ("These choices are a matter of appraisal judgment.").

³² Exhibit 8. The Appraisal Report was received in evidence without objection, even though its author was not present to be subjected to cross examination. The Appraisal was prepared by Richard K. See, a Certified General Appraiser with Mitchell & Associates, Inc., and was submitted to the Taxpayer on July 10, 2010.

³³ Exhibit 8:4.

³⁴ Exhibit 8:44.

the date of the inspection, June 4, 2010.³⁵ It is also important to note that the Subject Property was appraised as if all “proposed interior renovations were completed” as of the date of inspection.³⁶

The opinion of value stated in the appraisal was \$1,000,000, including furniture, fixtures, and equipment.³⁷ All three approaches to value were considered, but an estimate of value was determined only for the sales comparison approach and the income approach.³⁸ Using the sales comparison approach, the estimate of value was \$1,360,000.³⁹ Using the income approach, the estimate of value was \$775,000.⁴⁰ The appraisal stated a reconciled final estimate of market value of \$1,000,000.⁴¹

We find that the fee appraisal is competent evidence to rebut the presumption in favor of the determination by the County Board. We also find that the fee appraisal is clear and convincing evidence that the determination made by the County Board is arbitrary or unreasonable, and that the taxable value of the Subject Property for tax year 2010 based on the evidence above should be \$1,000,000.

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.”⁴² Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value.⁴³ The purpose of equalization of assessments is to bring the assessment of different parts of a taxing district to the same relative

³⁵ Exhibit 8:5.

³⁶ Exhibit 8:44.

³⁷ Furniture, fixtures, and equipment (FF&E) are not real property. However, the appraisal deemed them to be “normal motel operating equipment,” and an “integral part of an ongoing hotel/motel operation. As such, separation of FF&E value from real estate is considered impractical and almost impossible because of the comingled nature and use of the assets. Therefore FF&E is included in the value estimate in this report.” Exhibit 8:4 See also Exhibit 8, page 2.

³⁸ Exhibit 8:7, 8:16

³⁹ Exhibit 8:7.

⁴⁰ *Id.*

⁴¹ *Id.* As noted above, this includes FF&E.

⁴² *Neb. Const.*, Art. VIII, §1.

⁴³ *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).

standard, so that no one of the parts may be compelled to pay a disproportionate part of the tax.⁴⁴ 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.⁴⁵ 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.⁴⁶ 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.⁴⁷ The constitutional requirement of uniformity in taxation extends to both rate and valuation.⁴⁸ 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].”⁴⁹ There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity.⁵⁰

B. Summary of the Evidence

Bhasker Patel testified that the Subject Property should be equalized with the 2011 tax year taxable value of another Motel 6, at 10706 M. Street, Omaha, in Douglas County (Comparable One).⁵¹ The Assessor used the income approach to determine an assessed value for Comparable One as of January 1, 2011, using the same income approach factors as were used for the Subject Property.⁵² Comparable One and the Subject Property were also both deemed by the Assessor to be of average condition and average quality as of January 1, 2011.⁵³ Using the income approach, the Assessor set the assessed value of Comparable One for tax year 2011 at \$2,261,249.⁵⁴

⁴⁴ *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).

⁴⁵ *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).

⁴⁶ *Banner County v. State Board of Equalization*, 226 Neb. 236, 411 N.W.2d 35 (1987).

⁴⁷ *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).

⁴⁸ *First Nat. Bank & Trust Co. v. County of Lancaster*, 177 Neb. 390, 128 N.W.2d 820 (1964).

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

⁵⁰ *Id.* at 673, 94 N.W.2d at 50.

⁵¹ The comparable property is identified in the Assessment Report offered by the County Board at Exhibit 4, pages 10-11, as Sales Comparable Number 1.

⁵² Compare Exhibit 4:20 (Comparable One) and Exhibit 4:13 (Subject Property); room rate of \$40.75, occupancy rate of 50%, expenses of 60%, and a loaded income capitalization rate of 13.55%.

⁵³ Compare Exhibit 4:19 (Comparable One) and Exhibit 4:7 (Subject Property).

⁵⁴ Exhibit 4:20-21.

Approximately five months after the January 1, 2011, assessment date, Comparable One sold for \$1,000,000.⁵⁵ The owners of Comparable One protested the assessed value of Comparable One, and the County Board conducted the protest proceeding shortly after the sale. After conducting a protest proceeding for Comparable One for tax year 2011, the County Board determined the actual value of Comparable One to be \$950,000, based upon its recent sale price of \$1,000,000.⁵⁶

Patel asserted that Comparable One and the Subject Property were comparable, and since they were comparable the taxable value of the Subject Property should be equalized with the taxable value of Comparable One as determined by the County Board. Patel further asserted that since Comparable One had about 100 rooms⁵⁷ and the Subject Property had 80 rooms⁵⁸, the equalized value of the Subject Property should be about 80% of the taxable value of Comparable One.

Regarding the comparison between the Subject Property and Comparable One, the evidence appears to be inconsistent. In the Assessment Report for the Subject Property, the County Assessor states that, “[t]he sale comparable is for a motel that is inferior in quality, condition and location to the subject motel.”⁵⁹ Consistent with that view are the comments by the Referee who was hired by the County Board,⁶⁰ stating that the Subject Property is “superior to the sale set forth and not comparable.”⁶¹

In apparent contradiction to this evidence are the property record cards for both the Subject Property and Comparable One, as noted above. The Assessor inspected the Subject Property on September 21, 2010, and noted that the Subject Property “was undergoing a major interior renovation to all of the guest rooms and lobby,” including “new windows, floors, paint, furniture, fixtures and equipment.”⁶² These renovations were completed prior to January 1, 2011, as noted

⁵⁵ The Assessment Report for the Subject Property indicates that Comparable One sold on June 8, 2011 for \$1,000,000, including furniture, fixtures, and equipment (FF&E). See Exhibits 4:15 and 4:17

⁵⁶ E4:15, E4:21.

⁵⁷ Comparable One had 103 rooms. E4:20.

⁵⁸ Patel testified that after the renovation in December 2010 the Subject Property had 80 rooms.

⁵⁹ E4:15.

⁶⁰ Per Neb. Rev. Stat. §77-1502.01, the County Board, “may appoint one or more suitable persons to act as referees” ... and “the referee shall transmit to the county board of equalization all papers relating to the case, together with his or her findings and recommendations in writing.”

⁶¹ E4:33.

⁶² E4:15.

in Patel’s testimony above. However, even after these renovations to the Subject Property, completed in December of 2010, both the Subject Property and Comparable One were not only valued by the Assessor using the same income approach factors (same room rate, occupancy rate, expense rate, and income capitalization rate),⁶³ but the improvements of both properties were also rated by the Assessor as good quality and good condition.⁶⁴ Treating the Subject Property and Comparable One as being comparable is further supported by the fee Appraisal Report,⁶⁵ provided by the Taxpayer and discussed above, which regarded Comparable One as one of the “most similar” to the Subject Property⁶⁶, even when assuming the “as if” that the Subject Property was renovated as contemplated.⁶⁷

For the Subject Property to be deemed as being comparable for purposes of applying the income approach, while at the same time as being incomparable for purposes of equalization, as in this appeal, is unreasonable. Based upon the evidence received, we conclude there are no meaningful differences between the Subject Property and Comparable One for equalization purposes. When properties are treated identically for assessment purposes, and barring any new evidence indicating that newly discovered differences would impact the market value of the properties,⁶⁸ the properties are comparable for equalization purposes. The Commission finds that while the Subject Property and Comparable One are not identical, there is no evidence that any differences between them affect the market value of the properties. The Commission finds this obvious disparity in taxable value to be significant enough to rebut the presumption in favor of the County Board, and that there is clear and convincing evidence that the Subject Property’s taxable value is grossly excessive and the result of a failure of a plain legal duty.

Courts in Nebraska have held that when properties are comparable the Commission may set equalized value by determining the value of the comparable property per best unit of measure and applying that value to the subject property.⁶⁹ Taxpayers are entitled to have their property

⁶³ Compare the income worksheets for the Subject Property, Exhibit 4:13-14, and Comparable One, Exhibit 4:20.

⁶⁴ For the January 1, 2011 assessment, after renovations as described above, the Subject Property was rated as good quality and good condition. Exhibit 4:7. In comparison, for the January 1, 2011 assessment Comparable One -was also rated as good quality and good condition. Exhibit 4:19.

⁶⁵ Exhibit 8.

⁶⁶ E8:30.

⁶⁷ E8:44.

⁶⁸ The Commission’s review of the determination by a County Board is de novo.

⁶⁹ See, *A.J. Scribante v. Douglas County Board of Equalization*, 8 Neb.App. 25, 588 N.W.2d 190 (1999).

assessed uniformly and proportionately, even though the result may be that it is assessed at less than the actual value.⁷⁰

As applied in this appeal, when using the income approach, a motel is valued by the aggregate capitalized income of the number of rooms available. In the assessments for tax year 2011, the Assessor valued both the Subject Property and Comparable One at \$21,954 per room (Subject property: \$1,734,356 / 79 rooms = \$21,954 per room) (Comparable One: \$2,261,249 / 103 rooms = \$21,954).⁷¹ The County Board determined that the taxable value of Comparable One for tax year 2011 was \$950,000, or \$9,223 per room (\$950,000 / 103 rooms = \$9,223 per room).⁷² Because of the comparability of the two properties, the Commission finds that the Subject Property should be equalized to the same per room value of the taxable value of Comparable One for tax year 2011. Therefore, the Commission finds that the equalized value of the Subject Property for tax year 2011 is \$737,840 (\$9,223 x 80 rooms).

VI. CONCLUSION

For tax year 2011, 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. The Commission also finds that there is clear and convincing evidence that the County Board's decision was arbitrary or unreasonable. The Commission also finds that there is clear and convincing evidence that the 2011 assessed value for the Subject Property was grossly excessive and the result of systematic will or failure of a plain legal duty.

The Commission has found that the taxable value of the Subject Property for tax year 2011 should be \$1,000,000 and upon further evidence that the equalized value should be \$737,840. Since "[t]axpayers 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,"⁷³ the Commission

⁷⁰ *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). See also, *Kearney Convention Center*, 216 Neb. at 304, 344 N.W.2d at 626 ("where it is impossible to secure both the standards of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law.") (citations omitted).

⁷¹ E4:13-14 (Subject Property income worksheet); E4:20 (Comparable One income worksheet).

⁷² E4:21.

⁷³ *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).

concludes that the Taxpayer in this appeal is entitled to an equalized value of the Subject Property for tax year 2011 of \$737,840.

For all of the reasons set forth above, the determination of the County Board 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 2011 is vacated and reversed.⁷⁴
2. The equalized value of the Subject Property for tax year 2011 is \$737,840.
3. This 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 (2011 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 Order shall only be applicable to tax year 2011.
7. This order is effective for purposes of appeal on December 19, 2012.

Signed and Sealed: December 19, 2012.

Robert W. Hotz, Commissioner

SEAL

Nancy J. Salmon, Commissioner

Appeals from any decision of the Commission must satisfy the requirements of Neb. Rev. Stat. §77-5019 (2011 Supp.) and other provisions of Nebraska Statutes and Court Rules.

⁷⁴ 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 at the protest proceeding.