

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Farnam 36 LLC,
Appellant,

v.

Douglas County Board of Equalization,
Appellee,

Case Nos: 10C-497 & 11C-576

Decision and Order to Affirm the
Determinations of the Douglas County
Board of Equalization

For the Appellant:

Thomas Barrett,
Attorney at Law,
Sean T. Mullen,
Hancock & Dana.

For the Appellee:

Matthew J. Boever,
Deputy Douglas 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 at 302 S. 36th Street, Omaha, Douglas County, Nebraska. The parcel is improved with an 8-Story, 98,097 square foot historic hotel building,¹ built in 1915. The legal description of the parcel is found at Exhibit 3, page 6. The property record card for the subject Property is found in Exhibit 3.

II. PROCEDURAL HISTORY

The Douglas County Assessor (the Assessor) determined that the assessed value of the Subject Property was \$7,682,900 for tax year 2010.² Farnam 36 LLC (the Taxpayer) protested this assessment to the Douglas County Board of Equalization (the County Board) and requested a

¹ The Subject Property has been known as the Blackstone Hotel.

² E1. The Assessor determined the contribution to value of the land component at \$576,600 and the contribution to value of the improvement at \$7,106,300.

taxable value of \$4,604,107.³ The County Board determined that the taxable value for tax year 2010 was \$6,500,000.⁴

For tax year 2011, the Assessor determined that the assessed value of the Subject Property was \$6,500,000.⁵ The Taxpayer protested this assessment to the County Board and requested a taxable value of \$5,400,000.⁶ The County Board determined that the taxable value for tax year 2011 was \$6,500,000.⁷

The Taxpayer appealed the decisions of the County Board to the Tax Equalization and Review Commission (Commission). Prior to the hearing, the parties exchanged exhibits and submitted a Pre-Hearing Conference Report, as ordered by the Commission. In the Pre-Hearing Conference Report the parties stipulated to the receipt of exchanged exhibits. The Commission held a consolidated hearing on November 27, 2012.⁸

III. STANDARD OF REVIEW

The Commission's review of the determination by a County Board of Equalization is de novo.⁹ 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."¹⁰

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

³ E1.

⁴ E1. The County Board determined the contribution to value of the land component at \$576,600 and the contribution to value of the improvement at \$5,923,400.

⁵ E2. The Assessor determined the contribution to value of the land component at \$576,600 and the contribution to value of the improvement at \$5,923,400.

⁶ E6:1 (Land \$576,600 + Improvements \$4,823,400).

⁷ E1. The County Board determined the contribution to value of the land component at \$576,600 and the contribution to value of the improvement at \$5,923,400.

⁸ This hearing was also consolidated for hearing purposes with Case Nos 10C-498 & 11C-577 and 10C-499 & 11C-578.

⁹ See, Neb. Rev. Stat. §77-5016(8) (2012 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).

¹⁰ *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted).

showing such valuation to be unreasonable rests upon the taxpayer on appeal from the action of the board.¹¹

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.¹² Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.¹³

A Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued.¹⁴ 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.¹⁵

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.”¹⁶ 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.”¹⁷

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

¹¹ *Id.*

¹² Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.).

¹³ *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

¹⁴ 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).

¹⁵ *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).

¹⁶ Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.).

¹⁷ Neb. Rev. Stat. §77-5016(6) (2012 Cum. Supp.).

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

B. Summary of the Evidence

The Taxpayer argued that its purchase price of the Subject Property of \$8,000,000 on September 27, 2007, exceeded the market value of the Subject Property. The Taxpayer asserted that at the time of the sale it underestimated the deferred maintenance costs.

Dale Ludwick, Building Operations Manager for Kiewit Headquarters, Kiewit Plaza, (which includes the Subject Property) testified on behalf of the Taxpayer. Ludwick asserted that the Taxpayer inherited many deferred maintenance and replacement issues when it purchased the Subject Property in 2007. He offered extensive testimony concerning these issues including rotted wood windows requiring replacement, brick mortar joint deterioration requiring extensive tuck pointing, and rainwater permeating the walls in the basement. He stated that since 2009, it was necessary for the Taxpayer to make several repairs to the Subject Property including the repair of the membrane of the flat roof, and the replacement of two boilers, an electrical vault, and a fire alarm panel. Additionally, Ludwick testified that the Taxpayer also made extensive repairs to windows and to three exterior fire escapes. The Taxpayer asserted that the Assessor

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).

and County Board did not properly account for all of these conditions when determining the actual value of the Subject Property.

Raymond J. Neary, President of Investor Realities Inc., a commercial brokerage firm, testified on behalf of the Taxpayer. Neary was a Certified Commercial Investment Member (CCIM) and member of the Society of Industrial and Office Realtors (SIOR). Neary stated that he was retained by the Taxpayer in 2007 as an agent in conjunction with the purchase of the Subject Property. He testified that he inspected the Subject Property in 2007 and that most of the deferred maintenance was a surprise to the Taxpayer after the transaction.

Neary testified to his opinion that the Subject Property should be rated as a Class B- or Class C+ Historical building. He asserted that his opinion was based upon the Subject Property having old bathrooms, its type of mechanical (HVAC) system, its lack of underground parking, its 8 foot ceiling heights, and its E-shaped floor plan. He asserted that these considerations amounted to economic obsolescence associated with the Subject Property.

After examining the Assessor's income worksheet,²⁴ Neary testified that the Assessor should have included an additional \$1.50 per square foot reserve rate in the calculations for the total expenses associated with the Subject Property, and should have subtracted this reserve amount from the net operating income (NOI) prior to dividing the capitalization rate. He further asserted that the rental rate should have been \$17-18 per square foot, and that the capitalization rate should have been 9% to 9.5%.

Neary asserted that the profit and loss statements²⁵ for the Subject Property should not have included tenant improvements in the expenses. He asserted that the Kiewit Engineering maintenance costs should also have been excluded because they related to deferred maintenance instead of general maintenance and upkeep.

Neary testified that he would estimate the market value of the Subject Property to be \$3,700,000.

The Taxpayer did not offer an appraisal report.

²⁴ E3:19.

²⁵ E9 for tax year 2009 and E23 for tax year 2010.

The Taxpayer also called Greg Weisheipl to testify. Weisheipl was a Senior Commercial Property Appraisal Manager for the Assessor and was also a General Certified Appraiser. He testified that he signed the Assessment Reports for the Subject Property for both tax years.²⁶ Weisheipl asserted his opinion that the improvement on the Subject Property was a Class B building, and the appropriate capitalization rate using the income approach was 8.5%.²⁷

Weisheipl stated that the income approach used to value the Subject Property for tax year 2010 indicated a market value of \$7,682,900,²⁸ but that the County Board reconciled the value to \$6,500,000²⁹ based upon a recommendation made by a referee during the 2010 protest proceeding.³⁰

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.”³¹ Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value.³² 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.³³ 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.³⁴ 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.³⁵ Taxpayers are entitled to have their property assessed uniformly and proportionately, even though the result

²⁶ E3, E4.

²⁷ See E3:18, E4:17.

²⁸ E3:19.

²⁹ E1; E3:21.

³⁰ E3:48-49.

³¹ *Neb. Const.*, Art. VIII, §1.

³² *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).

³³ *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).

³⁴ *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).

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

may be that it is assessed at less than the actual value.³⁶ The constitutional requirement of uniformity in taxation extends to both rate and valuation.³⁷ 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].”³⁸ “There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity.”³⁹

B. Summary of the Evidence

The Taxpayer asserted that the Subject Property was not equalized with other similar properties for tax years 2010 and 2011. The Taxpayer provided property record cards for 6 alleged comparable properties.⁴⁰

The Commission has reviewed all of the alleged comparable properties provided by the Taxpayer, examining the age, quality, condition, and size of each property and its improvements. The Commission finds that none of the alleged comparable properties are “similar” to the Subject Property for purposes of equalization analysis. For purposes of making a uniformity comparison between the Subject Property and these alleged comparable properties, the Taxpayer has not established by clear and convincing evidence that the alleged comparable properties are “similar” to the Subject Property.

Having failed to establish that the alleged comparable properties are “similar” to the Subject Property for the purposes of analysis under the Uniformity Clause,⁴¹ it is unnecessary to analyze whether the valuations placed upon the Subject Property when compared to similar properties are “grossly excessive and [are] the result of systematic will or failure of a plain legal duty, and not mere error of judgment.”⁴²

³⁶ *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).

³⁷ *First Nat. Bank & Trust Co. v. County of Lancaster*, 177 Neb. 390, 128 N.W.2d 820 (1964).

³⁸ *Newman v. County of Dawson*, 167 Neb. 666, 670, 94 N.W.2d 47, 49-50 (1959) (Citations omitted).

³⁹ *Id.* at 673, 94 N.W.2d at 50.

⁴⁰ E13-E18.

⁴¹ *Neb. Const.*, Art. VIII, §1.

⁴² *Newman v. County of Dawson*, 167 Neb. 666, 670, 94 N.W.2d 47, 49-50 (1959) (Citations omitted).

The Taxpayer also provided no evidence of any ratios between the taxable value and the market value of the Subject Property and any of its alleged comparable properties. Without this information, the Commission is unable to determine if the valuations are proportionate as required by law.⁴³

Based upon all the foregoing, the Commission finds that the Taxpayer has not produced clear and convincing evidence that the taxable values of the Subject Property, as determined by the County Board, were inconsistent with the principles of uniformity and proportionality as required by law.

VI. CONCLUSION

The Commission finds that Neary's testimony regarding the Subject property is competent evidence⁴⁴ 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 County Board's decision was arbitrary or unreasonable.

For all of the reasons set forth above, the determinations of the County Board for both tax years should be affirmed.

VII. ORDER

IT IS ORDERED THAT:

1. The decisions of the Douglas County Board of Equalization determining the values of the Subject Property for tax years 2010 and 2011 are affirmed.
2. The assessed value of the Subject Property for tax year 2010 is \$6,500,000.
3. The assessed value of the Subject Property for tax year 2011 is \$6,500,000.
4. 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 (2012 Cum. Supp.).

⁴³ See, *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).

⁴⁴ See *Black's Law Dictionary*. Competent evidence is both admissible and relevant.

5. Any request for relief, by any party, which is not specifically provided for by this Decision and Order is denied.
6. Each party is to bear its own costs in this proceeding.
7. This Decision and Order shall only be applicable to tax years 2010 and 2011.
8. This Decision and Order is effective for purposes of appeal on May 2, 2013.

Signed and Sealed: May 2, 2013.

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 (2012 Cum. Supp.), other provisions of Nebraska Statute and Court Rules.