

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Nash Finch Company,
Appellant,

v.

Douglas County Board of Equalization,
Appellee,

Case No: 10C-226, 11C-155, & 12C-391

Decision and Order Reversing the Decisions
of the Douglas County Board of
Equalization

For the Appellant:

Steven D. Davidson,
Baird Holm, LLP,

For the Appellee:

Malina M. Dobson,
Deputy Douglas County Attorney

Heard before Commissioners Robert W. Hotz and Nancy J. Salmon

I. THE SUBJECT PROPERTY

The Subject Property is a commercial parcel improved with more than 600,000 square feet of cold storage and distribution warehouses located at 4228 S. 72nd Street, in the City of Omaha, Douglas County, Nebraska. The improvements consist of four separate buildings, located on 37.22 acres of land. The improvements were constructed in 1958 and some were remodeled in 2002. The legal description of the parcel is found at Exhibit 4, page 8. The property record cards for the Subject Property are found in Exhibits 4, 5, and 6 for each applicable tax year.

II. PROCEDURAL HISTORY

The Douglas County Assessor determined that the assessed value of the Subject Property was \$15,225,900 for tax years 2010, 2011, and 2012.¹ Nash Finch Company (the Taxpayer) protested these assessments to the Douglas County Board of Equalization (the County Board) and requested an assessed valuation of \$11,200,000 for tax years 2010, 2011, and 2012.² The

¹ E1, E2, and E3. The land was assessed at \$1,962,500 and the improvements were assessed at \$13,263,400 for each of the three tax years.

² E7, E8, and E9.

County Board determined that the taxable value for tax years 2010, 2011, and 2012 was \$15,225,900.³

The Taxpayer appealed the decisions of the County Board to the Tax Equalization and Review Commission (Commission). Prior to the hearing, the parties exchanged 25 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 January 29, 2013.

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

³ E1, E2, and E3. The County Board determined the taxable value of the land to be \$1,962,500 and the taxable value of the improvements to be \$13,263,400 for each of the three tax years.

⁴ 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).

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

⁶ *Id.*

⁷ Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.).

⁸ *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.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

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

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).

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).

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

The Taxpayer called Greg Weisheipl, a Senior Commercial Property Appraisal Manager for the Douglas County Assessor (Assessor) and also a Certified General appraiser since 1991. Weisheipl signed the Assessment Reports that were offered into evidence by the County Board.¹⁹

Weisheipl testified that the Assessor valued the Subject Property for tax years 2010, 2011, and 2012 using the cost approach. He testified that the sales comparison approach was not utilized but that three comparable properties were considered to test and support the conclusions of the cost approach; no adjustments were made based on differences of size, usage, or age.²⁰ He testified that an income approach value was also calculated for tax year 2010, but that the Assessor relied upon the cost approach for value. The Taxpayer and Weisheipl generally agreed that using an income approach the vacancy and collection loss rate was 10%, the expenses were 20-25%, and that the capitalization rate should be 10.5%. Weisheipl testified that the rental rate was originally set at \$2.25 per square foot but was adjusted after additional market research was completed. He further testified that the typical economies of scale were not applicable to the uses of the improvements of the Subject Property. He testified that his reconciled value for tax years 2010, 2011, and 2012 was \$15,225,900, with \$1,962,500 attributable to the land and \$13,263,400 attributable to the improvements.

Weisheipl acknowledged that the cost approach is most effective when utilized to determine the actual value of newer properties, and because the actual age of the Subject Property is 42 years and the effective age is 34 years there is an inherent difficulty determining the appropriate depreciation using mass appraisal. He testified that the cost approach was based upon square footages entered into computer-assisted mass appraisal (CAMA) software using Marshall Valuation Service costing factors to determine the replacement cost new (RCN) of the Subject

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 See, E4, E5, and E6.

²⁰ See also, E6:24.

Property. Weisheipl testified that depreciation was then deducted from the RCN to arrive at the replacement cost new less depreciation (RCNLD).

Weisheipl testified that an exterior inspection was completed by the Assessor subsequent to the 2010 determination of actual value using the cost approach, and that a new opinion of value was formed by the Assessor after the inspection. He testified that after the inspection Building 1 was determined to be: (1) 275,377 square feet in size; (2) constructed in 1958 and remodeled in 2002, with an effective age of 34 years; (3) of average quality in 2010 and 2011, and of fair quality in 2012; and (4) subject to a depreciation factor of 58% in tax years 2010 and 2011, and a depreciation factor of 55% in tax year 2012.²¹

Weisheipl testified that after the inspection Building 2 was determined to be: (1) 14,364 square feet in size; (2) constructed in 1958, with an effective age of 52 years; (3) of fair quality for all three tax years; and (4) subject to a depreciation factor of 58% in 2010, and 55% in 2011 and 2012.²² Weisheipl testified that Building 2 depreciated more slowly than Building 1 because it was smaller.

He testified that after the inspection Building 3 was determined to be: (1) 353,547 square feet in size; (2) constructed in 1958, with an effective age of 43 years; (3) of fair quality in all relevant tax years; and (4) subject to a depreciation factor of 58% for all three years. Weisheipl could not explain why Building 3 had the same depreciation as Building 1, when Building 3 had a much older effective age.²³

Weisheipl testified that after the inspection Building 4 was determined to be: (1) 2,925 square feet in size; (2) constructed in 1978, with an effective age of 32 years; (3) of average quality in all relevant tax years; and (4) subject to a depreciation factor of 50% for tax year 2010, and 43% for tax years 2011 and 2012.²⁴

²¹ See also, E4:20, E4:24, E5:15, and E6:15. The Taxpayer argued that depreciation should not have been lower when the improvement was older.

²² See also, E4:21, E4:25, E5:16, and E6:16.

²³ See also, E4:22, E4:26, E5:17, and E6:17. The Taxpayer also argued that depreciation should not have been lower in 2012 than in 2010.

²⁴ See also, E4:23, E4:27, E5:18, and E6:18. Again, the Taxpayer argued that depreciation should not have been lower when the improvement was older.

Weisheipl testified that the 2011 and 2012 cost approaches calculated after the inspections indicated an actual value of \$16,603,519,²⁵ but the County Board maintained \$15,225,900 as the actual value for 2011 and 2012.²⁶

Michael J. Moynagh testified on behalf of the Taxpayer. Moynagh was a licensed Certified General appraiser since 1987. He testified that he conducts 40 to 50 appraisals per year and that he prepared two appraisal reports for the Subject Property. These appraisal reports were received as Exhibits 10 and 11. Moynagh testified that the appraisal reports were prepared in conformity with accepted appraisal practices.

Moynagh testified that he did not use the cost approach because of the age of the Subject Property. In his opinion, since the effective age of the Subject Property was 32 years, with an expected life of 50 years, it would require too much subjectivity to estimate depreciation. Moynagh testified that under these conditions the cost approach was “relatively useless,” and that instead he relied upon the sales comparison approach and income approach, with the sales comparison approach given the most weight. He testified that while the buildings could easily be used for other purposes, they were functioning at their highest and best uses.

Moynagh testified that his appraisal report for both tax years 2011 and 2012 was retrospective to January 1, 2011 and January 1, 2012.²⁷ He testified that he relied most upon the sales comparison approach, which required him to look outside of Omaha and Nebraska to find comparable sales with improvements of at least 600,000 square feet.²⁸ He testified that he relied most on Comparable Properties 1 and 5, and that he made the appropriate adjustments.²⁹

Moynagh testified that Comparable 5 was the “most relevant sale,” because the Subject Property and Comparable 5 were both large cold storage buildings with similar amounts of cold storage space. He disagreed with Weisheipl’s assertion that economies of scale do not affect the Subject Property because of its specialized use; he testified that in his opinion the per square foot value would decrease as the size of the improvement increased.

²⁵ See also, E5:14-18 and E6:14-18.

²⁶ See also, E1:1, E2:1, and E3:1.

²⁷ Exhibit 11, Valuation Report.

²⁸ See also, E11:68 (containing a summary of the alleged comparable properties and statement of methodology for determining comparable properties).

²⁹ See also, E11:73 (adjustment grid).

Moynagh testified that the sales comparison approach indicated a value for tax year 2011 of \$11,250,000,³⁰ and a value for tax year 2012 of \$11,400,000.³¹ He testified that the difference in values was attributable in part to the more limited use of more recent sales in the 2011 appraisal.

Moynagh also testified that his appraisal report for tax year 2010 was retrospective to January 1, 2010.³² He testified that his sales comparison approach value for 2010 was \$11,210,000.³³ Moynagh testified that he relied upon the sales comparison approach for his opinion of value and that he used comparable properties different from those used in his appraisal for 2011 and 2012. He stated that there were few sales available in 2008, 2009, and 2010, because lending was restricted by the recession. Moynagh testified that the availability of sales increased throughout 2010 as lending steadily increased.

Moynagh testified that he also performed an income approach analysis of the Subject Property for all three tax years.³⁴ He stated that he developed relevant market factors using comparably-sized improvements throughout the Midwest. For tax years 2011 and 2012, Moynagh testified that Comparables 1-4 were of a comparable size, but were not cold storage improvements, while Comparables 5-8 required downward adjustments to rental rates because of location and size. He testified that he arrived at conclusions of market rental rates of: (1) Dry = \$1.75 per square foot; (2) Cold = \$2.50 per square foot; and (3) Office = \$5 per square foot.³⁵ Moynagh testified that the rental rate of the Subject Property would be lower than the Comparable Properties because the improvements on the Subject Property were larger and the prospective renter pool was much smaller. He opined that the weighted average market rental rate for the Subject Property should be \$2.15 per square foot.³⁶ Moynagh's income approaches indicated a value of \$11,110,000 for tax year 2010,³⁷ \$11,630,000 for tax year 2011,³⁸ and \$11,920,000 for tax year 2012.³⁹

³⁰ See also, E11:96.

³¹ See also, E11:74.

³² Exhibit 10, Self-Contained Appraisal Report.

³³ See also E10:70.

³⁴ See also E10:71-90 (2010 Income Approach); E11:75-94, 96-100 (2011 and 2012 Income Approach).

³⁵ See also E11:79-80 (2011 and 2012 Income Approaches); E10:72-76 (2010 Income Approach).

³⁶ See also E11:82.

³⁷ See also E10:89.

³⁸ See also E11:100.

³⁹ See also E11:100.

Moynagh stated that, based on the foregoing, his opinion of market value for the Subject Property was \$11,200,000 for tax year 2010,⁴⁰ \$11,300,000 for tax year 2011,⁴¹ and \$11,500,000 for tax year 2012.⁴²

The portion of market value attributable to the land component was never put in question by either the Taxpayer or the County Board.

The Commission finds that Moynagh's appraisals are competent evidence to rebut the presumption that the County Board faithfully performed its duties and had sufficient competent evidence to make its determination for each of the three tax years.⁴³ Because the Taxpayer has rebutted the presumption, "the reasonableness of the valuation fixed by the board of equalization becomes a question of fact based upon all of the evidence presented."⁴⁴ The burden remains on the Taxpayer to show by clear and convincing evidence that the County Board's decision was arbitrary or unreasonable.⁴⁵

The Commission finds that the testimony and evidence received amounted to clear and convincing evidence that the determinations of taxable value by the County Board were arbitrary or unreasonable. The Commission finds that the opinions of value expressed by the appraisal reports prepared by Moynagh are the best evidence of the market value of the Subject Property for tax years 2010, 2011, and 2012. The Commission finds that the determinations by the County Board regarding the contribution to value of the land component of the Subject Property are the best evidence of the market value attributable to the land component of Subject Property.⁴⁶

⁴⁰ See also E10:2.

⁴¹ See also E11:100.

⁴² See also E11:100.

⁴³ See, *JQH La Vista Conf. Ctr. V. Sarpy Cty. Bd. Of Equal.*, 285 Neb. 120, 127, --- N.W.2d --- (2013).

⁴⁴ *Id.*

⁴⁵ E10 (2010 Appraisal Report); E11 (2011 and 2012 Appraisal Report).

⁴⁶ Moynagh did not offer an opinion of the portion of total value attributable to the land component of the Subject Property, and there was no evidence contradicting the County Board's determination of the portion of the taxable value attributable to the land component of the Subject Property. Unlike the cost approach, the income approach does not determine a separate taxable value for the land component of the Subject Property. Nebraska Statute Section 77-1303(2) (2012 Cum. Supp.) requires assessment rolls to include a statement of the value of the land component of the Subject Property.

V. CONCLUSION

There is competent evidence to rebut the presumption that the County Board faithfully performed its duties and had sufficient competent evidence to make its determinations. There is also clear and convincing evidence that the County Board's decisions were arbitrary or unreasonable.

For all of the reasons set forth above, the decisions of the County Board are vacated and reversed for tax years 2010, 2011, and 2012.

VI. ORDER

IT IS ORDERED THAT:

1. The decisions of the Douglas County Board of Equalization determining the value of the Subject Property for tax year 2010, 2011 and 2012 are vacated and reversed.⁴⁷
2. The taxable value of the Subject Property for tax year 2010 is:

Land	\$1,962,500
<u>Improvements</u>	<u>\$9,237,500</u>
Total	\$11,200,000

3. The taxable value of the Subject Property for tax year 2011 is:

Land	\$1,962,500
<u>Improvements</u>	<u>\$9,337,500</u>
Total	\$11,300,000

4. The taxable value of the Subject Property for tax year 2012 is:

Land	\$1,962,500
<u>Improvements</u>	<u>\$9,537,500</u>
Total	\$11,500,000

⁴⁷ Assessed 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.

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 (2012 Cum. Supp.)
6. Any request for relief, by any party, which is not specifically provided for by this Decision and Order is denied.
7. Each party is to bear its own costs in this proceeding.
8. This Decision and Order shall only be applicable to tax years 2010, 2011, and 2012.
9. This Decision and Order is effective for purposes of appeal on April 1, 2013.

Signed and Sealed: April 1, 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.) and other provisions of Nebraska Statutes and Court Rules.