

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

The Village at Gering, LP,
Appellant,

v.

Scotts Bluff County Board of Equalization,
Appellee.

Case No: 13C 216

Decision and Order Affirming the Decision
of the Scotts Bluff County Board of
Equalization

For the Appellant:

William E. Peters,
Peters & Chunka, PC LLO,
and
Christopher A. Stafford,
Fredrikson & Byron,
Pro Hac Vice.

For the Appellee:

No appearance

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 75 L. Street, in the City of Gering, Scotts Bluff County, Nebraska. The parcel is improved with rent-restricted housing that receives low-income housing tax credits (LIHTC).

II. PROCEDURAL HISTORY

The Scotts Bluff County Assessor (the County Assessor) determined that the assessed value of the Subject Property was \$1,344,670 for tax year 2013. The Village at Gering, LP (the Taxpayer) protested this assessment to the Scotts Bluff County Board of Equalization (the County Board) and requested an assessed valuation of \$1,200,000. The Scotts Bluff County Board of Equalization (the County Board) determined that the taxable value of the Subject Property for tax year 2013 was \$1,344,670.¹

¹ Exhibit 1.

The Taxpayer appealed the decision of the County Board to the Tax Equalization and Review Commission (Commission). The Commission held a hearing on June 4, 2014. Neither the County Board nor a representative of the County Board attended the hearing.

III. STANDARD OF REVIEW

The Commission's review of the 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. 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.⁴

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.⁵ Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.⁶

A Taxpayer must introduce competent evidence of actual value of the Subject Property in order to successfully claim that the Subject Property is overvalued.⁷ 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.⁸

² 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).

³ *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted).

⁴ *Id.*

⁵ Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.).

⁶ *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

⁷ 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).

⁸ *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.”⁹ 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.”¹⁰ The Commission’s Decision and Order shall include findings of fact and conclusions of law.¹¹

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.¹²

“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.”¹³ “Actual value, market value, and fair market value mean exactly the same thing.”¹⁴ 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.¹⁵ All real property in Nebraska subject to taxation shall be assessed as of January 1.¹⁶ All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.¹⁷

⁹ Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.).

¹⁰ Neb. Rev. Stat. §77-5016(6) (2012 Cum. Supp.).

¹¹ Neb. Rev. Stat. §77-5018(1) (2012 Cum. Supp.).

¹² Neb. Rev. Stat. §77-112 (Reissue 2009).

¹³ *Id.*

¹⁴ *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).

¹⁵ Neb. Rev. Stat. §77-131 (Reissue 2009).

¹⁶ See, Neb. Rev. Stat. §77-1301(1) (Reissue 2009).

¹⁷ Neb. Rev. Stat. §77-201(1) (Reissue 2009).

Nebraska Statutes require county assessors to perform an income approach calculation for all rent-restricted housing projects¹⁸ and prohibit county assessors from including as income in this calculation any tax credits received.¹⁹ Such tax credits may be considered when determining the capitalization rate when capitalizing the income stream.²⁰ Rules and regulations adopted by the Nebraska Department of Revenue further establish procedures for determining the actual value of rent-restricted properties for ad valorem tax purposes.²¹ Specifically, rent for rent-restricted units should not include the allowance for utilities.²² Contract rent, economic rent or market rent, Fair Market Rent (FMR), and Maximum Restricted Rent, are terms of art in the assessment of rent-restricted property in Nebraska.²³

Contract rent, also known as actual rent, is the rent actually received for the units at any given time.²⁴ Economic rent or market rent is the amount of rent a property would receive on the open market for non-restricted units.²⁵ FMR is a term that describes “the maximum rent allowed to be collected on housing units subject to federal subsidy payments.”²⁶ FMR is developed by the Department of Housing and Urban Development (HUD) for the Lincoln area, Omaha area, South Sioux City area, and then for any individual county in Nebraska not included in the preceding three areas.²⁷ FMR is published annually.²⁸ “Maximum restricted rent is the maximum rent allowed to be collected on housing units subject to the applicable restrictions.”²⁹ Maximum restricted rent may be different for each rent-restricted property, and depends upon the unique target levels contained in the land use restriction agreement (LURA) for each property and the median incomes published by HUD.³⁰

Rules and Regulations promulgated by the Nebraska Department of Revenue contain instructions for use of the cost approach, sales comparison approach, and income approach when

¹⁸ See, Neb. Rev. Stat. §77-1333 (Reissue 2009). The requirement applies to projects where rent restrictions are allowed under Section 42 of the Internal Revenue Code and which have been approved by the Nebraska Investment Finance Authority (NIFA).

¹⁹ See, Neb. Rev. Stat. §77-1333 (Reissue 2009).

²⁰ See, Neb. Rev. Stat. §77-1333 (Reissue 2009).

²¹ See, 350 Neb. Admin. Code, Ch. 51 (3/09).

²² See, 350 Neb. Admin. Code, Ch. 51 §002.01A(6) (3/09).

²³ See, 350 Neb. Admin. Code, Ch. 51 §002.01 E, F, G, and H (3/09).

²⁴ See, 350 Neb. Admin. Code, Ch. 51 §002.01 E; See also, 350 Neb. Admin. Code, Ch. 51 §004.06C (3/09).

²⁵ See, 350 Neb. Admin. Code, Ch. 51 §002.01 F; See also, 350 Neb. Admin. Code, Ch. 51 §004.06A (3/09).

²⁶ See, 350 Neb. Admin. Code, Ch. 51 §002.01 G (3/09).

²⁷ See, 350 Neb. Admin. Code, Ch. 51 §002.01 G (3/09).

²⁸ See, 350 Neb. Admin. Code, Ch. 51 §002.01 G (3/09).

²⁹ See 350 Neb. Admin. Code, Ch. 51 §002.01 H (3/09); See also, 350 Neb. Admin. Code, Ch. 51 §004.06B (3/09).

³⁰ See, 350 Neb. Admin. Code, Ch. 51 §002.01 H (3/09); See also, 350 Neb. Admin. Code, Ch. 51 §004.06B (3/09).

valuing rent-restricted properties.³¹ When an assessor or appraiser uses the income approach to value a rent-restricted property the potential gross income (PGI) should be calculated “using the lesser of market rent or the Maximum Restricted Rent[.]”³² When determining the capitalization rate, the assessor or appraiser must consider the tax credits, rental rates, and restrictions using generally accepted appraisal methods.³³

B. Summary of the Evidence

George Tesar, Jr., a Nebraska Certified General Appraiser,³⁴ conducted an appraisal and prepared an appraisal report for the Subject Property. In reaching his opinion of value, Tesar utilized a sales comparison approach,³⁵ a direct capitalization income approach,³⁶ and a gross multiplier income approach.³⁷

Tesar testified that the Subject Property contained seven buildings; six two-story buildings containing two or three bedrooms per unit, and one one-story building consisting of an office, a manager’s apartment, and other amenities for tenants. He indicated that there were 48 units rent-restricted under a LURA, and a 49th unit for use of the manager.

In his sales comparison approach, Tesar utilized five alleged comparable sales, and reached a value conclusion for the Subject Property of \$864,000.³⁸ In his direct capitalization income approach, he reached a value conclusion for the Subject Property of \$768,000.³⁹ Tesar reached a value conclusion for the Subject Property of \$808,000 in his gross multiplier income approach.⁴⁰ He reconciled the income approaches to reach a value conclusion of \$788,000.⁴¹ He testified that he gave equal weight to the sales comparison approach and the income approaches and asserted a final opinion of value for the Subject Property of \$826,000.⁴²

³¹ See, 350 Neb. Admin. Code, Ch. 51 §005 (3/09).

³² 350 Neb. Admin. Code, Ch. 51 §005.04A (3/09).

³³ 350 Neb. Admin. Code, Ch. 51 §005.04E (3/09).

³⁴ See, Exhibit 2:113-114 (profession qualifications).

³⁵ Exhibit 2:85-104.

³⁶ Exhibit 2:105-109.

³⁷ Exhibit 2:110-111.

³⁸ Exhibit 2:85-104. None of the alleged comparable sales were from Scotts Bluff County.

³⁹ Exhibit 2:105-109.

⁴⁰ Exhibit 2:110-111.

⁴¹ Exhibit 2:111.

⁴² See, *Id.* at 2.

During his testimony, Tesar corrected an error in his appraisal report which, when corrected, indicated a reconciled final opinion of value revised from \$775,000 to \$826,000.⁴³

The Property Record Card for the Subject Property is found in Tesar's appraisal report.⁴⁴ The Property Record Card indicates that the Subject Property was valued by the County Assessor using the cost approach.⁴⁵ The County Board upheld the County Assessor's opinion of value.⁴⁶

C. Analysis

Tesar conducted an appraisal of the Subject Property and certified that it was performed according to professional appraisal standards.⁴⁷ The Commission finds that the appraisal report constitutes competent and relevant evidence concerning the County Board's determinations. The Commission, therefore, finds that the presumption in favor of the County Board's determination is rebutted.

Having determined that the presumption in favor of the County Board's determination is rebutted, the reasonableness of the County Board's determination of value based upon the evidence in the appeals is a question of fact.⁴⁸ The Taxpayer has the burden to show that the valuation determination by the County Board was unreasonable or arbitrary.⁴⁹ This burden is only met by clear and convincing evidence.⁵⁰ Where clear and convincing evidence shows that the County Board's determination was arbitrary or unreasonable, the Taxpayer is entitled to relief.⁵¹

The Commission finds that Tesar's opinion of value is erroneous. Tesar's appraisal relied upon maximum rents given the current configuration of the tenants, referred to as the Maximum

⁴³ Exhibit 2:2.

⁴⁴ See, Exhibit 2:130-142.

⁴⁵ See, *Id.*

⁴⁶ See, Exhibit 1.

⁴⁷ See generally, Exhibit 16.

⁴⁸ See, Neb. Rev. Stat. 77-5016(9) (Cum. Supp. 2012); See also, *JQH La Vista Conference Center Development LLC v. Sarpy Cty. Bd. Of Equal.*, 285 Neb. 120, 124-125, 825 N.W.2d 447, 451-452 (2013).

⁴⁹ See, Neb. Rev. Stat. 77-5016(9) (Cum. Supp. 2012); See also, *JQH La Vista Conference Center Development LLC v. Sarpy Cty. Bd. Of Equal.*, 285 Neb. 120, 124-125, 825 N.W.2d 447, 451-452 (2013).

⁵⁰ See, *JQH La Vista Conference Center Development LLC v. Sarpy Cty. Bd. Of Equal.*, 285 Neb. 120, 124-125, 825 N.W.2d 447, 451-452 (2013).

⁵¹ Neb. Rev. Stat. § 5016(8) (Reissue 2009).

Allowable Rents,⁵² rather than the Maximum Restricted Rents.⁵³ Tesar testified that Maximum Allowable Rents and Maximum Restricted Rents are not synonymous.

Maximum Restricted Rent is defined as, “[T]he maximum rent allowed to be collected on housing units subject to the applicable restriction.”⁵⁴ When an assessor or appraiser uses the income approach to value a rent-restricted property, the PGI should be calculated “using the lesser of market rent or the Maximum Restricted Rent[.]”⁵⁵ The Taxpayer submitted evidence of the Maximum Allowable Rents given the current configuration of lessees, but a different configuration of tenants could result in higher Maximum Restricted Rents.⁵⁶ In order to determine the Maximum Restricted Rent for the Subject Property, an examination of the LURA is necessary. A LURA generally establishes the rent restrictions for the property. The LURA for the Subject Property is not in evidence, and had not been reviewed by Tesar, per his testimony.

Additionally, Tesar’s capitalization rate was calculated based on sales that the Commission finds are not comparable to the Subject Property. In all of his approaches, Tesar used sales of apartment buildings without rent restrictions. Only Comparable Sale No. 1 was subject to any rent restrictions at the time of sale. However, Tesar gave the same weight to the data from the partially rent-restricted property as any other property. When calculating the capitalization rate using a direct capitalization method the derived capitalization rate for Comparable Sale No. 1 was 9.21%.⁵⁷ Tesar derived a base capitalization rate for the Subject Property of 11.00%, higher than any of the alleged comparable sales.⁵⁸ Tesar attempted to support this rate with a band of investment formula.⁵⁹ However, his band of investment formula relied upon the typical equity distribution of properties that were not rent-restricted.⁶⁰ Tesar asserted that investors in rent-restricted properties often use the money garnered from the sale of tax credits to increase the equity in the property. Additionally, Tesar’s computation of the mortgage constant is not based on comparable properties.

⁵² See, Exhibit 2:105.

⁵³ See, Exhibit 16:73.

⁵⁴ 350 Neb. Admin. Code, ch. 51 §002.01H.

⁵⁵ 350 Neb. Admin. Code, Ch. 51 §005.04A.

⁵⁶ See, Exhibit 2:105 (Maximum Allowable Rents given current configuration of tenants).

⁵⁷ See, Exhibit 2:109.

⁵⁸ See, Exhibit 2:109.

⁵⁹ See, Exhibit 2:108.

⁶⁰ See, *Id.*

While Tesar asserted that the cost approach is a problematic approach for valuing rent-restricted properties, Nebraska Statutes permit the use of the cost approach for these purposes.⁶¹ Further, the Nebraska Department of Revenue has adopted Rules and Regulations governing the use of the cost approach to value rent-restricted properties.⁶² The Commission finds that there is not clear and convincing evidence that the County Assessor failed to follow any of the applicable Statutes or Rules and Regulations concerning the use of the cost approach when determining the assessed value of rent-restricted property. The County Board relied upon the County Assessor's cost approach. The Commission finds that Tesar's appraisal opinion does not constitute clear and convincing evidence that the County Board's determination was arbitrary or unreasonable because of the errors in his income approach and the differences between his alleged comparable properties and the Subject Property.

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 County Board's decision was arbitrary or unreasonable.

For all of the reasons set forth above, the decision of the County Board is affirmed.

VI. ORDER

IT IS ORDERED THAT:

1. The decision of the Scotts Bluff County Board of Equalization determining the value of the Subject Property for tax year 2013 is affirmed.
2. The taxable value of the Subject Property for tax year 2013 is \$1,344,670.
3. This Decision and Order, if no appeal is timely filed, shall be certified to the Scotts Bluff County Treasurer and the Scotts Bluff County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (2012 Cum. Supp.).
4. Any request for relief, by any party, which is not specifically provided for by this Decision and Decision and Order is denied.

⁶¹ Neb. Rev. Stat. §77-1333(1) (Reissue 2009).

⁶² See, 350 Neb. Admin. Code, Ch. 51 §005.02 (3/09).

5. Each party is to bear its own costs in this proceeding.
6. This Decision and Order and order shall only be applicable to tax year 2013.
7. This Decision and Order is effective for purposes of appeal on August 22, 2014.

Signed and Sealed: August 22, 2014

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.