

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Clinton C. Gard, et al.,
Appellant,

v.

Douglas County Board of Equalization,
Appellee.

Case No: 08R 431

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

For the Appellant:

Patricia Gard,
Pro Se.

For the Appellee:

Malina Dobson,
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 residential parcel located at 931 N. 121st Street, Omaha, Douglas County, Nebraska. The parcel is improved with a 1,508 square foot residence. The legal description of the parcel is found at Exhibit 8, page 2. The property record card for the Subject Property is found at Exhibit 8.

II. PROCEDURAL HISTORY

The Douglas County Assessor (the Assessor) determined that the assessed value of the Subject Property was \$124,700 for tax year 2008. Clinton C. Gard, et al. (the Taxpayer) protested this assessment to the Douglas County Board of Equalization (the County Board), requesting a taxable value of \$111,000. The County Board determined that the taxable value of the Subject Property for tax year 2008 was \$124,700.¹

The Taxpayer appealed the decision of the County Board to the Tax Equalization and Review Commission (the Commission).

¹ E1.

On January 14, 2010, the Commission issued an Order for Hearing and Notice of Hearing for the above captioned appeal to be heard March 11, 2010.² Following this Order, the Commission received a copy of First Request for Production of Records dated January 25, 2010, with an attached attestation that the Appellant had served the request via email to Thomas Barrett, then attorney of record for the Appellee County Board.³ On February 23, 2010, the Commission received a Motion to Compel Discovery from the Appellant concerning the document production requested in the First Request for Production of Records dated January 25, 2010.⁴ On March 5, 2010, the Commission issued an Order for Hearing and Notice of Hearing (Motion to Compel Evidence) to consider the Motion to Compel Discovery.⁵ The Commission conducted a hearing on the Motion to Compel Discovery on March 9, 2010. Thomas Barrett appeared as counsel for the Appellee, and Patricia Gard appeared telephonically.⁶

On March 10, 2010, the Commission issued an Order Granting Motion to Compel Discovery and Order Granting Continuance with Extension of Exchange Deadlines.⁷ The Commission found that the County Board had not complied with a properly perfected discovery request, and ordered the County Board to respond to the discovery request within thirty days.⁸

On April 14, 2010, the Appellant filed a Motion for Hearing indicating that the County Board had not complied with the Commission's March 10, 2010, Order Granting Motion to Compel Discovery and Order Granting Continuance with Extension of Exchange Deadlines, by failing to respond to her discovery requests.⁹ The Appellant moved for the Commission to apply sanctions as allowed under "Nebraska Discovery Rule §6-337." Appellant additionally moved to set the appeal for hearing.¹⁰

On April 23, 2010, the Appellee, through its counsel Thomas Barrett, responded to the Appellant's motion with an affidavit with averments from Mr. Barrett indicating that he had obtained the requested documents and had personally placed them in the Appellant's residential

² See, Case File.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ See, Order Granting Motion to Compel Discovery and Order Granting Continuance with Extension of Exchange Deadlines dated March 10, 2010 located in the Case File.

⁹ See, Case File.

¹⁰ See, Motion for Hearing dated April 14, 2010 located in the Case File.

mailbox on April 16, 2010, at 4:15 pm.¹¹ Mr. Barrett referred to this method of delivery as “hand-delivered.”¹²

Neither the Appellant nor the Appellee prosecuted the appeal by filing any motions or pleadings between April 23, 2010, and January 2014. The Commission did not issue any orders concerning this case during that same time frame.

On January 28, 2014, following a review of pending appeals, the Commission issued an Order for Hearing and Notice of Hearing setting a hearing date of April 7, 2014, for the appeal.¹³ On February 18, 2014, the Commission received from the Appellant a Motion to Strike Evidence and Witnesses and Request for Continuance of Hearing.¹⁴ On February 21, 2014, the Commission received the Appellee’s response to the Motion to Strike Evidence and Witnesses and Request for Continuance of Hearing, wherein the Appellee expressed no objection to the Motion for a Continuance of Hearing, but objected to the Appellant’s Motion to Strike Evidence and Witnesses.¹⁵

By an order dated March 11, 2014, The Commission granted the Request for Continuance of Hearing, and rescheduled the hearing for June 13, 2014.¹⁶ On or about May 2, 2014, the Taxpayer sent a Request for Admissions to the County Board, and the County Board asserted it received the Request for Admissions on May 7, 2014.¹⁷ The Appellee did not respond to the Request for Admissions within thirty days, as required by the Discovery Rules of the Commission.¹⁸ On June 10, 2014, the Commission issued an Order Granting Motion to Deem Admitted Unanswered Request for Admissions.

Prior to the hearing, the parties exchanged exhibits and submitted a Pre-Hearing Conference Report, as ordered by the Commission. The Commission held a hearing on June 13, 2014.

At the hearing, the County Board requested the withdrawal of Admissions #14 and #32. The Commission did not allow the County Board to withdraw or modify its admissions.

¹¹ See, Case File.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See, Case File (Appellee’s Amended Objection to Appellant’s Motion to Deem Unanswered Request For Admissions Set “A”).

¹⁸ See, *Id.*

III. STANDARD OF REVIEW

The Commission's review of the determination by a County Board of Equalization is de novo.¹⁹ 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."²⁰

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.²¹

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.²² Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.²³

A Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued.²⁴ 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.²⁵

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

¹⁹ 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).

²⁰ *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted).

²¹ *Id.*

²² Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.).

²³ *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

²⁴ 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).

²⁵ *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).

cross appeal.”²⁶ 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.”²⁷ The Commission’s Decision and Order shall include findings of fact and conclusions of law.²⁸

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.²⁹

“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.”³⁰ “Actual value, market value, and fair market value mean exactly the same thing.”³¹ 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.³² All real property in Nebraska subject to taxation shall be assessed as of January 1.³³ All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.³⁴

The Commission has statutory authority to establish rules of discovery consistent with the Nebraska Supreme Court rules.³⁵ The Commission’s rules and regulations permit discovery by

²⁶ Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.).

²⁷ Neb. Rev. Stat. §77-5016(6) (2012 Cum. Supp.).

²⁸ Neb. Rev. Stat. §77-5018(1) (2012 Cum. Supp.).

²⁹ Neb. Rev. Stat. §77-112 (Reissue 2009).

³⁰ *Id.*

³¹ *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).

³² Neb. Rev. Stat. §77-131 (Reissue 2009).

³³ See, Neb. Rev. Stat. §77-1301(1) (Reissue 2009).

³⁴ Neb. Rev. Stat. §77-201(1) (Reissue 2009).

³⁵ See, Neb. Rev. Stat. §77-5016(2) (2012 Cum. Supp.).

requests for admissions when appropriately served from one party on another party.³⁶ An answering party must respond within thirty days or the matters are admitted.³⁷ A matter that is admitted is considered conclusively established.³⁸

B. Summary of the Evidence

Discovery rules pertaining to admissions are self-enforcing.³⁹ Admission Set “A” was admitted into evidence as Exhibit 20. All foundational requirements for the admissions were met.⁴⁰ The Commission did not sustain any motions to withdraw admissions. The matters contained in Exhibit 20 are deemed conclusively established.⁴¹

The County Board’s Admissions include the following:

(14)

Douglas County determines the various levels of negative influence such as Traffic 1-5 or Location 1 – 8 by an arbitrary opinion of an employee of Douglas County rather than specific criteria determining each level.

(15)

Douglas County recently applied “Traffic 1” designation to Appellant’s property as well as abutting neighboring properties within the last 90 days. Prior to this, there were no specific negative influence levels noted on their property files.

.....

(19)

Under an order from TERC on April 16, 2010 Douglas County provided approx. 175 pages of residential properties coded with Location or Traffic influence in Douglas County, hand delivered to Appellants by Douglas County attorney Thomas Barrett.

.....

³⁶ See, 420 Neb. Admin. Code, ch. 12 §010.01 (06/09).

³⁷ *Id.*

³⁸ See, 420 Neb. Admin. Code, ch. 12 §010.02 (06/09).

³⁹ See, *U.S. Bank National Association v. Peterson*, 284 Neb. 820, 823 N.W.2d 460 (2012).

⁴⁰ See, *Id.* (listing foundational requirements).

⁴¹ See, 420 Neb. Admin. Code, ch. 12 §010.01 (06/09).

(22)

Douglas County stated in writing that the 175 pages referenced in #19 above include “every location or traffic influence in the county” in the Receipt of Requested Documents dated April 16, 2010.

.....

(27)

Larry Thomsen stated in writing on April 16, 2010 on the Receipt of Requested Documents that “Location 8” (-.8) is the highest negative influence adjustment applied in Douglas County.

(28)

According to the list provided by Douglas County on April 16, 2010 referenced in #19 above, there are 10 properties coded “residential” in Douglas County that share the “Location” negative adjustment of -.8.

(29)

According to their respective property files provided by Douglas County and Douglas County assessor GPS mapping, nine of these properties referenced in #28 above are unimproved lakefront lots in rural Douglas County.

(30)

Property files of the unimproved lakefront lots referenced in #28 above show a negative -.5 adjustment for “Traffic” in addition to the -.8 adjustment for negative “Location.”

(31)

The remaining property referenced in #28 above is an unimproved lot located in the City of Omaha.

(32)

A reasonable person would conclude after reviewing documentation attached to Appellants’ 2007 and 2008 tax protests that Appellants’ property is subject to higher locational

obsolescence and negative traffic influence than the unimproved rural lakefront properties or the unimproved city lot referenced in #29-30 or #31 above.

(33)

If it is determined or stipulated that Appellants' property is subject to higher obsolescence and negative traffic influence than the unimproved rural lakefront lots referenced in #28 above, the fair adjustments to Appellants Property would exceed Location $-.8$ and Traffic $-.05$, both adjustments applied concurrently as they are to the unimproved lots referenced in #29-30.

.....

(36)

Assuming 124,700 is agreed to be Appellants' subject property's valuation prior to adjusting for negative influence, if adjustments were made reflecting even the same $(-.8, -.05)$ as the properties referenced in #30 above, the resulting valuation would be less than \$111,000.

.....

(41)

The 2008 improvement value of Appellants' property located at 931 N 121 St. is \$107,100.⁴²

Based on these admissions, the Commission finds that the County Board's determination is unreasonable and arbitrary because it relied upon an opinion of value derived by the Assessor which arbitrarily assigned negative influences and failed to assign an appropriate negative traffic and location influence to the Subject Property.

In an admission against interest, Patricia Gard testified at the hearing that the Subject Property should only be given a $-.6$ adjustment for location to the improvement value of the Subject Property.

The Commission finds that all other opinions of value were offered by the County Board and contrary to its admissions and, therefore, gives them no weight.⁴³

⁴² E20.

The Commissions finds that it is conclusively established that, without a negative adjustment for location,⁴⁴ the improvement value for the Subject Property for tax year 2008 was \$107,100.⁴⁵ The Commission finds that based on the admissions and evidence in the present appeal the actual value for the improvement component of the Subject Property is \$42,840.⁴⁶ The Commission finds that the actual value of the Subject Property for tax year 2008 is \$60,440.⁴⁷

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. The Commission also finds that there is clear and convincing evidence that the County Board's decision was arbitrary or unreasonable.⁴⁸

For all of the reasons set forth above the decision of the County Board is vacated and reversed.

VI. ORDER

IT IS ORDERED THAT:

1. The decision of the Douglas County Board of Equalization determining the taxable value of the Subject Property for tax year 2008 is vacated and reversed.
2. The taxable value of the Subject Property for tax year 2008 is \$60,440.

Land:	\$17,600
<u>Improvement:</u>	<u>\$42,840</u>
Total	\$60,440

3. This Decision and Order, if no appeal is timely filed, shall be certified to the County Treasurer and the County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (2012 Cum. Supp.).

⁴³ See, *U.S. Bank National Association v. Peterson*, 284 Neb. 820, 823 N.W.2d 460 (2012) (“[a]n admission that is not withdrawn or amended cannot be rebutted by contrary [evidence] or ignored by the district court simply because it finds the evidence presented by the party against whom the admission operates more credible.” (citations omitted)).

⁴⁴ See E20:3 (Admission 15).

⁴⁵ See, E20:6 (Admission 41).

⁴⁶ \$107,100 x .4 = \$42,840.

⁴⁷ \$17,600 land component + \$42,840 improvement component = \$60,440.

⁴⁸ 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.

4. Any request for relief, by any party, which is not specifically provided for by this Decision and Order is denied.
5. Each party is to bear its own costs in this proceeding.
6. This Decision and Order shall only be applicable to tax year 2008.
7. This Decision and Order is effective for purposes of appeal on June 20, 2014.

Signed and Sealed: June 20, 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.