

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Chad R. Lemburg,
Appellant,

v.

Merrick County Board of Equalization,
Appellee.

Case No: 14R 018

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

1. A Single Commissioner hearing was held on July 6, 2015, at the Hamilton County Court House, 1111 13th Street Lower Level, Aurora, Nebraska, before Commissioner Nancy J. Salmon.
2. Chad R. Lemburg (the Taxpayer) was present at the hearing.
3. Jan Placke, Merrick County Assessor (County Assessor), was present for the Merrick County Board of Equalization (the County Board).
4. The Subject Property (Subject Property) is residential parcel, with a legal description of: Podraza’s SubLots 4-5-6. Tax Lot V5-30 SCV. Section 33, Township 16 North, Range 3 West.

Background

5. The County Assessor assessed the Subject Property at \$274,185 for tax year 2014.
6. The Taxpayer protested this value to the County Board and requested an assessed value of \$220,000 for tax year 2014.
7. The County Board determined that the taxable value of the Subject Property was \$281,265 for tax year 2014.
8. The Taxpayer appealed the determination of the County Board to the Tax Equalization and Review Commission (the Commission).

Issues & Analysis

9. The Commission’s review of the determination of the County Board of Equalization is de novo.¹ “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.”²

¹ See, Neb. Rev. Stat. §77-5016(8) (2014 Cum. Supp.), *Brenner v. Banner Cty. Bd. of Equal.*, 276 Neb. 275, 286, 753 N.W.2d 802, 813 (2008).

² *Koch v. Cedar Cty. Freeholder Bd.*, 276 Neb. 1009, 1019 (2009).

10. When considering an appeal 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
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.⁵
12. Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.⁶
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.⁷
14. The Commission’s Decision and Order shall include findings of fact and conclusions of law.⁸
15. The Taxpayer asserted that the valuation of the Subject Property was more than market value. Specifically he asserted that the Subject Property’s location was remote and in a small community making the Subject Property less desirable than it would otherwise be in another location.
16. During appeals from a determination of the County Board, there is both a presumption in favor of the County Board and a burden of persuasion placed upon an appealing party.⁹ The presumption in favor of the County Board, and the burden of persuasion cannot be conflated, and require separate analysis.¹⁰ Both the presumption and burden of persuasion relate to the determinations of the County Board.¹¹
17. The presumption is:

[T]hat a board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action. That

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) (2014 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 Neb. Rev. Stat. §77-5018(1) (2014 Cum. Supp.).

⁹ See generally, *JQH La Vista Conference Center Development LLC v. Sarpy Cty. Bd. Of Equal.*, 285 Neb. 120, 825 N.W.2d 447 (2013).

¹⁰ See, *JQH La Vista Conference Center Development LLC v. Sarpy Cty. Bd. Of Equal.*, 285 Neb. 120, 125-126, 825 N.W.2d 447, 452-453 (2013).

¹¹ See generally, *JQH La Vista Conference Center Development LLC v. Sarpy Cty. Bd. Of Equal.*, 285 Neb. 120, 125-126, 825 N.W.2d 447, 452-453 (2013).

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.¹²

18. Competent evidence is defined as relevant and material evidence or that evidence “which the very nature of the thing to be proven requires.”¹³ The Nebraska Supreme Court has held that, “when an independent appraiser using professionally approved methods of mass appraisal certifies that an appraisal was performed according to professional standards, the appraisal is considered competent evidence under Nebraska law.”¹⁴
19. The Taxpayer provided an appraisal of the Subject Property which certified that it was performed according to professional appraisal standards. The Commission finds that this appraisal constitutes competent and relevant evidence concerning the County Board’s determinations. Since the appraisal reaches a value conclusion that differs from the determination by the County Board, the Commission finds that the presumption in favor of the County Board’s determination is rebutted.
20. Having determined that the presumption in favor of the County Board’s determination has been rebutted by competent evidence, the reasonableness of the County Board’s determination of value based upon the evidence in the appeal is a question of fact.¹⁵ The Taxpayer has the burden to show that the valuation determination by the County Board was unreasonable or arbitrary.¹⁶ This burden is only met by clear and convincing evidence.¹⁷ Where clear and convincing evidence shows that the County Board’s determinations were arbitrary or unreasonable, the Taxpayer is entitled to relief.¹⁸ An appraisal may constitute competent evidence sufficient to rebut the presumption in favor of the County Board’s determination yet not amount to clear and convincing evidence that the County Board’s determination is unreasonable or arbitrary.¹⁹
21. The Taxpayer provided an appraisal dated September 20, 2013, which expressed an opinion of value of \$200,000 for the Subject Property based on the sales comparison approach. The appraiser was not present to ask questions regarding adjustments he used in his sales comparison approach. The Commission notes that the intended use of the appraisal was “for the lender/client to evaluate the property that is the subject of this

¹² See, *JQH La Vista Conference Center Development LLC v. Sarpy Cty. Bd. Of Equal.*, 285 Neb. 120, 124, 825 N.W.2d 447, 451-452 (2013) (citing *US Ecology v. Boyd Cty. Bd of Equal.*, 256 Neb. 7, 588 N.W.2d 575 (1999) and *Schmidt v. Thayer Cty. Bd. Of Equal.*, 10 Neb.App. 10, 624 N.W.2d 63 (2001)).

¹³ *Black’s Law Dictionary 6th Edition*, West Group, p. 284 (1990).

¹⁴ *JQH La Vista Conference Center Development LLC v. Sarpy Cty. Bd. Of Equal.*, 285 Neb. 120, 126, 825 N.W.2d 447, 453 (2013) (citations omitted).

¹⁵ 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).

¹⁶ 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).

¹⁷ 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).

¹⁸ Neb. Rev. Stat. § 5016(8) (Reissue 2009).

¹⁹ See generally, *JQH La Vista Conference Center Development LLC v. Sarpy Cty. Bd. Of Equal.*, 285 Neb. 120, 126, 825 N.W.2d 447, 453 (2013)

appraisal for a mortgage finance transaction.” The appraisal also lists the incorrect gross living area for the Subject Property.²⁰

22. Finally, The Taxpayer asserted that in his opinion the actual value of the Subject Property was greater than the appraisal value and that he had visited with several other appraisers who informed him that with the location of the property, they would be unable to raise the opinion of value. The Commission finds that the appraisal is not clear and convincing evidence that the County Board’s determination was arbitrary or unreasonable.
23. The Taxpayer asserted that the cost of construction was \$238,000. He had purchased 2 lots for \$6,000 and had \$2,000 in demolition costs and dirt work. He purchased the 3rd lot from the city for the cost of one year’s back taxes. He did not dispute the County Board’s land value of \$15,000 for the three lots.
24. The Taxpayer’s opinion of value was \$225,000.
25. “Typical costs should be used for estimating any of the four types of cost. Actual costs for similar properties sometimes vary unpredictably, just as sales prices vary among similar properties.”²¹ The Taxpayer’s actual construction costs are relevant evidence as to the value of the Subject Property, but without further evidence that the costs for the construction of the Subject Property were typical for the market, the actual costs of construction are not clear and convincing evidence that the County Board’s determination was unreasonable or arbitrary.
26. The County Board relied upon the County Assessor’s opinion of value when determining the assessed value of the Subject Property.
27. The County Assessor hired an appraiser, Darrel Stanard, to assess some properties, including the Subject Property, for tax year 2014. The Subject Property was assessed using the cost approach.
28. The cost approach includes six steps: “(1) Estimate the land (site) value as if vacant and available for development to its highest and best use; (2) Estimate the total cost new of the improvements as of the appraisal date, including direct costs, indirect costs, and entrepreneurial profit from market analysis; (3) Estimate the total amount of accrued depreciation attributable to physical deterioration, functional obsolescence, and external (economic) obsolescence; (4) Subtract the total amount of accrued depreciation from the total cost new of the primary improvements to arrive at the depreciated cost of improvements; (5) Estimate the total cost new of any accessory improvements and site improvements, then estimate and deduct all accrued depreciation from the total cost new of these improvements; (6) Add site value to the depreciated cost of the primary improvements, accessory improvements, and site improvements, to arrive at a value indication by the cost approach.”²²

²⁰ The County inspected the Subject Property in January 2015 and took measurements. The Taxpayer was present when the county measured the improvement and agreed with the measurements of the county.

²¹ Association of Assessing Officers, *Property Assessment Valuation*, at 237 (3rd ed. 2010).

²² International Association of Assessing Officers, *Property Assessment Valuation*, at 230 (3rd ed. 2010).

29. The Commission notes that no economic depreciation was applied to the Subject Property in the County appraiser's or the Taxpayer's appraiser's cost approach.
30. Economic depreciation or obsolescence is defined as, "is loss in value as a result of impairment in utility and desirability caused by factors external to the property (outside the property's boundaries) and is generally deemed to be incurable. External obsolescence can be caused by a variety of factors, such as changes in the highest and best use of a property due to market shifts or governmental actions, tariffs, regulated rate or return, restrictions on income, zoning, neighborhood decline, lack of property demand, and nation economic conditions (war, oil prices, and interest rates)"²³
31. The Commission finds of particular interest the concept that the Subject Property may be experiencing economic obsolescence due to a "lack of property demand."²⁴
32. The Commission notes that both the Taxpayer and the County's appraiser failed to find comparable sales in the same community. Instead the appraiser's moved out to similar communities within a reasonable distance from the Subject Property. However, even after expanding the geographic area it appears that the appraisers had difficulty finding comparable properties.
33. The County appraiser's sales of comparable properties are based on properties from significantly different communities and developments. Most of the comparable sales are from Cairo, Nebraska, a bedroom community for the larger city of Grand Island. Similarly, another sale is from Phillips, Nebraska, another bedroom community for Grand Island. In addition to being located near Grand Island, the Phillips sale is from a development that consists of homes with similar construction, size, and amenities.
34. The evidence indicates that this is not true for the Subject Property. The Subject Property is located much farther from Grand Island, and the County's appraiser did not find an acceptable comparable sale within twenty miles of the Subject Property.
35. The Taxpayer's appraiser's comparable sales were located in communities more comparable to the Subject Property, but again were not in the Subject Property's community.
36. Finally, the Taxpayer's appraiser derived a sale's comparison approach opinion of value which was significantly less than his replacement cost new opinion of value without depreciation.
37. The Commission finds that it is reasonable and likely that there is economic obsolescence associated with the Subject Property due to a lack of demand for comparable properties in the Subject Property's community. However, the burden is on the Taxpayer to show by clear and convincing evidence that the County Board's determination is arbitrary or unreasonable.
38. A determination is arbitrary "when it is made in disregard of the facts or circumstances and without some basis which would lead a reasonable person to the same conclusion."²⁵

²³ Association of Assessing Officers, *Property Assessment Valuation*, at 261 (3rd ed. 2010).

²⁴ *Id.*

A determination is unreasonable only if the evidence presented leaves no room for differences of opinion among reasonable minds.²⁶ “Clear and convincing evidence is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.”²⁷

39. The Taxpayer did not quantify a specific amount of economic obsolescence. Additionally, there is insufficient evidence for the Commission to derive an economic obsolescence factor of its own. Without sufficient evidence to quantify the applicable economic obsolescence, the Commission is unable to determine the extent that an appropriate economic obsolescence factor would affect the Subject Property.
40. Finally, the County Board stipulated that the assessed value of \$12,970 for the detached garage was too high in the initial assessment. The County Board presented a new opinion of value of the detached garage of \$4,000. Additionally, the County Assessor asserted that following an interior inspection she determined that assessed value of the Subject Property should be increased due to a greater level of basement finish than originally included in the assessment. She expressed a new overall opinion of value of \$314,285. The Commission notes that this new opinion of value also failed to take into account any economic obsolescence.
41. The Merrick County Assessor assessed the Subject Property at \$274,185. On appeal to the County Board, the Merrick County Assessor recommended an increased actual value of \$281,265. The County Board determined the actual value of the Subject Property was \$281,265. There is no evidence that the Taxpayer was given notice in these proceedings of a higher value than \$281,265. The Commission’s Rules and Regulations do not allow the Commission to set taxable value of real property at an amount higher than previously noticed to the Taxpayer by the County Assessor, County Board of Equalization, or Property Tax Administrator without specific notice from the opposing party prior to the hearing that the opposing party intends to offer evidence and assert that the taxable value for the Subject Property is higher than any previously noticed value.²⁸ The Commission notes that no notice as required by the Commission’s Rules and Regulations was ever perfected. The Commission finds that it cannot set the taxable value of the Subject Property at an amount higher than previously noticed to the Taxpayer by the County Assessor, County Board of Equalization, or Property Tax Administrator in these appeals.
42. The Commission finds that it was unreasonable and arbitrary for the County Board, which relied upon the adjusted County Assessor’s opinion of value, to assess the detached garage at level greater than actual value. It is undisputed that the actual value of the detached garage is \$4,000.

²⁵ *Phelps Cty. Bd. of Equal. v. Graf*, 258 Neb 810, 606 N.W.2d 736 (2000) (citations omitted).

²⁶ See, *Pittman v. Sarpy Cty. Bd. of Equal.*, 258 Neb 390, 401-02, 603 N.W.2d 447, 455-56 (1999).

²⁷ *State v. Payne-McCoy*, 284 Neb. 302, 308, 818 N.W.2d 608 (2012) (quoting *State v. Floyd*, 277 Neb. 502, 763 N.W.2d 91 (2009)).

²⁸ 442 Neb. Admin. Code, ch 5, §016.02A (06/06/11).

43. The Commission finds that the County Board's determination should be decreased by \$8,970 to account for this error.
44. The Taxpayer has produced competent evidence that the County Board failed to faithfully perform its duties and to act on sufficient competent evidence to justify its actions.
45. The Taxpayer has adduced sufficient, clear and convincing evidence that the determination of the County Board is unreasonable or arbitrary and the decision of the County Board should be vacated.

ORDER

IT IS ORDERED THAT:

1. The decision of the Merrick County Board of Equalization determining the taxable value of the Subject Property for tax year 2014 is Vacated and Reversed.
2. The taxable value of the Subject Property for tax year 2014 is:

Land	\$15,000
<u>Improvements</u>	<u>\$257,295</u>
Total	\$272,295

3. This Decision and Order, if no further action is taken, shall be certified to the Merrick County Treasurer and the Merrick County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (2014 Cum. Supp.).
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 2014.
7. This Decision and Order is effective on July 15, 2015.

Signed and Sealed: July 15, 2015

Nancy J. Salmon, Commissioner