

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Village Green Townhouses, Inc.,
Appellant,

v.

Douglas County Board of Equalization,
Appellee.

Case Nos: 13C 541 & 14C 424

Decision and Order

For the Appellant:

Grant A. Forsberg,
Forsberg Law PC, LLO.

For the Appellee:

Shakil A. Malik,
Douglas County Attorney.

These appeals were heard before Commissioners Steven A. Keetle and Nancy J. Salmon.

I. THE SUBJECT PROPERTY

The Subject Property is a commercial parcel located in Douglas County. The parcel is improved with 24 buildings containing multiple townhouse living units. The legal description of the parcel is found at Exhibit 3 page 3 and Exhibit 4 page 3. The property record card for the Subject Property is found at Exhibits 3 and 4.

II. PROCEDURAL HISTORY

The Douglas County Assessor determined that the assessed value of the Subject Property was \$5,595,600 for tax year 2013. Village Green Townhouses, Inc. (the Taxpayer) protested this assessment to the Douglas County Board of Equalization (the County Board) and requested an assessed valuation of \$3,925,618.98. The Douglas County Board determined that the taxable value for tax year 2013 was \$5,595,600.¹

The Douglas County Assessor determined that the assessed value of the Subject Property was \$5,595,600 for tax year 2014. The Taxpayer protested this assessment to the Douglas County

¹ Exhibit 1.

Board of Equalization (the County Board) and requested an assessed valuation of \$3,925,618.98. The Douglas County Board determined that the taxable value for tax year 2014 was \$5,595,600.²

The Taxpayer appealed the decision of the County Board to the Tax Equalization and Review Commission (Commission). Prior to the hearing, the parties exchanged exhibits. The parties stipulated to the receipt of the exchanged exhibits. The Commission held a hearing on September 29, 2015.

III. STANDARD OF REVIEW

The Commission's review of the determination by a County Board of Equalization is de novo.³ 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."⁴

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.⁵

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.⁶ Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.⁷

² Exhibit 2.

³ 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). "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).

⁴ *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted).

⁵ *Id.*

⁶ Neb. Rev. Stat. §77-5016(9) (2014 Cum. Supp.).

⁷ *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.⁸ 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.⁹

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

⁸ 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).

⁹ *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).

¹⁰ Neb. Rev. Stat. §77-5016(9) (2014 Cum. Supp.).

¹¹ Neb. Rev. Stat. §77-5016(6) (2014 Cum. Supp.).

¹² Neb. Rev. Stat. §77-5018(1) (2014 Cum. 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).

subject to taxation as directed by section 77-201 of Nebraska Statutes and has the same meaning 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 Subject Property consists of 13.679 acres of land improved with 24 buildings containing 180 total living units and pavement for parking and roads. The Subject Property is owned by a legal entity, Village Green Townhouses, Inc., formed in 1965 under the Nebraska Nonprofit Corporation Act to provide housing for moderate and low income families.¹⁹

The Subject Property is operated as a co-op, which in part means that the residents of the Subject Property are also the members of the corporation.²⁰ Members do not own their individual living units, but have executed Subscription Agreements and Occupancy Agreements covering a specific unit in the housing complex which allow them possessory rights, but no specific property rights in the unit.²¹ Members may only sell their memberships to a person approved in accordance with the Taxpayer's Articles of Incorporation and By-Laws.²² Seventy-five percent of the regular Membership would have to approve the sale of the Subject Property.²³

Members pay a monthly co-op fee, ranging from \$257 to \$393 per month.²⁴ That fee includes: Property tax, sewer, water, garbage/recycling, maintenance of grounds (members are asked to water grass in the summer), and maintenance of everything original to the units including furnace, hot water heater, refrigerator, and stove.²⁵ In the event of the liquidation, dissolution, or winding down of the Village Green Townhouses, Inc., the members would receive, after the payment of all debts of the corporation, the original purchase price of the membership from the corporation (\$100) plus simple interest on that purchase price at six

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 E5:5.

²⁰ E8:178-181

²¹ See, E8.

²² See, E8.

²³ See, E5:9

²⁴ E9:2

²⁵ E8:187

percent per annum.²⁶ Any remaining assets of the Taxpayer cannot be kept by the Taxpayer or its members and would escheat to the State of Nebraska or any other charitable organization permitted by law to receive the remaining assets and designated by the members.²⁷

The Taxpayer argues that because of the ownership structure of the Subject Property, it should be assessed at an amount 30% lower than the average per square foot amount for multi-unit rental properties in the general eastern/southern portions of Omaha. The Taxpayer utilized seven multi-unit apartment buildings to determine the average per square foot assessment amount for multi-unit apartment buildings. The Taxpayer did not present the Property Record Files for these properties to allow the Commission to determine their comparability to the Subject Property as required by the Order for Hearing, but rather presented web shots from the Assessor's web site.²⁸ The Taxpayer asserts that this 30% discount reasonably reflects the costs and expenses to convert the Subject Property from a co-op to multi-unit rental property. The Taxpayer offered no evidence regarding what the costs and expenses necessary to convert the Subject Property from a co-op to multi-unit rental property are, or any quantitative basis for the 30% discount requested.

The Taxpayer called Mark Jenkins, a commercial real estate appraiser for the Douglas County Assessor/Register of Deeds Office (the Appraiser). The Appraiser testified that in Douglas County there is only one co-op of the size and scale of the Subject Property and that is the Subject Property. The Appraiser testified that the County assessed the Subject Property using the same model as an apartment building.

The Appraiser inspected the Subject Property to determine its characteristics for purposes of assessment. He stated that he knew of the unique ownership of the Subject Property and believed that its value is lower because of this ownership. He accounted for this in his assessment of the Subject Property by applying a lower condition rating. The Appraiser testified that based on his inspection of the Subject Property its condition rating is "Average" but that he utilized a lower condition rating of "Fair" so that the County's appraisal model would produce a lower assessed valuation. This lower condition rating would result in the model using a lower

²⁶ E5:7

²⁷ E5:7.

²⁸ E5:11-54,6:12-56

rental rate, higher expense rate and a higher capitalization rate to produce a lower assessed value than a higher condition rating would produce. The Appraiser made this adjustment to the assessment model because of the unique co-op ownership of the Subject Property.

The Appraiser testified that he did not assess the Subject Property as a Low Income Housing Tax Credit (LIHTC) property. The Appraiser further testified that if he assessed the Subject Property as a LIHTC property the assessed value would be higher than the assessed value determined by the County for the Subject Property. LIHTC properties are valued using a statutorily defined valuation methodology which utilizes a different valuation model. The Appraiser testified that Section 8 and other types of low income housing property such as OHA properties are valued as market value apartment buildings.

The Taxpayer alleges, and the Appraiser agrees, that the value of the Subject Property is less due to the unique ownership structure. Both the Taxpayer and the County indicated that the lack of any other co-op properties in Douglas County make the determination of the amount of this reduction difficult. The Taxpayer argues that the Commission should adopt their determination of value that averages the per square foot value of several multi-unit apartment buildings and then applies a 30% discount to this value for the improvements.

The fundamental problem with the suggested 30% discount is that it is not supported by evidence and was arbitrarily proposed by the Taxpayer. The evidence before the Commission does not demonstrate that the multi-unit apartment buildings are comparable to the Subject Property or the basis for the requested 30% discount. The Appraiser testified that without any other co-op properties or statutory guidelines to indicate how to assess a co-op property such as the Subject Property he reduced the quality rating to reduce the assessed value determined by the County's assessment model.

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.”²⁹ Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value.³⁰ 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.³¹ 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.³² 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.³³ Taxpayers are entitled to have their property assessed uniformly and proportionately, even though the result may be that it is assessed at less than the actual value.³⁴ The constitutional requirement of uniformity in taxation extends to both rate and valuation.³⁵ 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].”³⁶ There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity.³⁷

B. Summary of the Evidence

The Taxpayer did not present 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.

²⁹ *Neb. Const.*, Art. VIII, §1.

³⁰ *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).

³¹ *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).

³² *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).

³³ *Banner County v. State Board of Equalization*, 226 Neb. 236, 411 N.W.2d 35 (1987).

³⁴ *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).

³⁵ *First Nat. Bank & Trust Co. v. County of Lancaster*, 177 Neb. 390, 128 N.W.2d 820 (1964).

³⁶ *Newman v. County of Dawson*, 167 Neb. 666, 670, 94 N.W.2d 47, 49-50 (1959) (Citations omitted).

³⁷ *Id.* at 673, 94 N.W.2d at 50.

VI. CONCLUSION

The Commission finds that there is not 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 not clear and convincing evidence that the County Board’s decision was arbitrary or unreasonable.

For all of the reasons set forth above, the appeal of the Taxpayer is denied.

VII. ORDER

IT IS ORDERED THAT:

1. The decision of the Douglas County Board of Equalization determining the value of the Subject Property for tax year 2013 and 2014 are affirmed.³⁸
2. The assessed value of the Subject Property for tax year 2013 is:

Land:	\$ 629,200
Improvements:	<u>\$4,966,400</u>
Total:	\$5,595,600

3. The assessed value of the Subject Property for tax year 2014 is:

Land:	\$ 629,200
Improvements:	<u>\$4,966,400</u>
Total:	\$5,595,600

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 (2014 Cum. Supp.).
5. Any request for relief, by any party, which is not specifically provided for by this decision and Decision and Order is denied.
6. Each party is to bear its own costs in this proceeding.
7. This Decision and Order and order shall only be applicable to tax years 2013 and 2014.

³⁸ Taxable 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.

8. This Decision and Order and order is effective for purposes of appeal on January 27, 2017.³⁹

Signed and Sealed: January 27, 2017.

Steven A. Keetle, Commissioner

SEAL

Nancy J. Salmon, Commissioner

Appeals from any decision of the Commission must satisfy the requirements of Neb. Rev. Stat. §77-5019 (2014 Cum. Supp.) and other provisions of Nebraska Statutes and Court Rules.

³⁹ Appeals from any decision of the Commission must satisfy the requirements of Neb. Rev. Stat. §77-5019 (2014 Cum. Supp.) and other provisions of Nebraska Statutes and Court Rules.