

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Grand Island Mall Ltd.
Appellant,

v.

Hall County Board of Equalization
Appellee

Case No: 09C 194, 10C 113

Decision Reversing the Hall County
Board of Equalization

For the Appellant:
Kevin A. Brostrom,
Lauritsen, Brownell, Brostrom & Stehlik,
P.C., L.L.O.

For the Appellee:
Jack Zitterkopf
Chief Deputy Hall County Attorney

Heard before Commissioners Hotz and Salmon.

I. THE SUBJECT PROPERTY

The Subject Property is an improved commercial parcel located in Hall County. The street address of the subject property is 2208 North Webb Road, Grand Island, Nebraska. The parcel is improved with a shopping mall built in 1970. E33:2. The parcel consists of 437,567 square feet of land improved with a 154,043 square foot commercial building and 113,606 square feet of asphalt paving. E33:2. The legal description of the parcel is found at E33.

II. PROCEDURAL HISTORY

The Hall County Assessor determined that the assessed value of the subject property for both tax years 2009 and 2010 was \$2,499,442, including \$1,301,762 for land and \$1,197,680 for improvements. Grand Island Mall Ltd. (Taxpayer) protested this assessment to the Hall County Board of Equalization (County Board) and requested an assessed valuation of \$871,505, including \$476,948 for land and \$394,557 for improvements. The County Board determined that the assessed value for both tax years 2009 and 2010 was \$1,921,173, including \$1,301,762 for land and \$619,411 for improvements. E1:1.

The Taxpayer appealed the decision of the County Board to the Tax Equalization and Review Commission (Commission). The parties exchanged 58 exhibits prior to the appeal hearing. The Commission held a hearing on June 21, 2011.

III. STANDARD OF REVIEW

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

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.

Id. 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. Neb. Rev. Stat. §77-5016(8) (2010 Cum. Supp.). Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence. *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. 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) . 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. *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).

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.

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

Neb. Rev. Stat. §77-112 (Reissue 2009). "Actual value, market value, and fair market value mean exactly the same thing." *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002). 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. Neb. Rev. Stat. §77-131 (Reissue 2009). All real property in [Nebraska] subject to taxation shall be assessed as of January 1. See, Neb. Rev. Stat. §77-1301(1) (Reissue 2009). All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation. Neb. Rev. Stat. §77-201(1) (Reissue 2009).

B. Summary of the Evidence

The subject property lies between two other commercial retail buildings. One was occupied by Shopko, and the other, prior to January 1, 2009, had been used by Gordmans. A property manager for the Taxpayer testified that the retailer, Hastings, was a tenant of the subject property, but that prior tenants, Dollar General and Hobby Lobby, no longer rented space as of January 1, 2009. She testified that the improvements had not been remodeled or updated since original construction in 1970, and that there were problems with roof leaks and asphalt paving in "terrible disrepair." The property manager testified that the Taxpayer has had difficulty

maintaining the subject property, in part, due to higher vacancy rates. The property manager testified that vacancy rates were 75% in 2009, (see also E25), and 45% in 2010. The Taxpayer asserted that in the relevant time period expenses had exceeded income (2009 income \$178,081, expenses \$196,092) (2008 income \$216,681, expenses \$237,385). The property manager also testified that several easements across parts of the parking areas as well as low visibility of the retail stores had a negative impact on the value of the property. The Taxpayer did not offer an appraisal report or the opinion of a licensed appraiser.

1. Land

For both tax years 2009 and 2010, the County Assessor testified she set the value for commercial property lots at \$4.25 per square foot unless a size discount or developer's discount was given.¹ She said she typically gave a size discount when the lot was in excess of 100,000 to 150,000 square feet. The size discount amounted to a 30% reduction (usually calculated as $\$4.25 \times 0.7$). She testified a size discount was given for the subject property lot because it measured 437,567 square feet. As seen on the property record card for the subject property, the lot value was thus determined to be \$1,301,762 ($437,567 \times \$4.25 \times 0.7 = \$1,301,762$). E33:2.

The Taxpayer asserted that the value of the land should receive further discounts or deductions because of multiple easements and lower visibility from the roadways. However, no evidence was offered to *quantify* what effect the easements or visibility had on any reduction in value of the land. The County Board's determination of the actual value of the land at \$1,301,762 was not unreasonable or arbitrary.

2. Improvements: Cost Approach

The County Board relied upon the use of the cost approach when determining the value for the improvements on the subject property. At the time of the Protest hearing, the County Board determined the total building area to be 157,823 square feet, and determined the value of the improvements to be \$619,411, using the cost approach.² E2:31. Subsequent to the Protest hearing, the County Assessor corrected the total building area and the County Board recalculated the total building area to be 154,043 square feet, resulting in a reduced cost approach value of the

¹ The developer's discount was not at issue in this appeal.

² This is Replacement Cost New Less Depreciation (RCNLD).

improvements of \$615,284.³ The corrected cost approach estimation recognizes a total replacement cost new of \$8,789,775 and a depreciation factor of 93%, resulting in an improvement value of \$615,284 ($\$8,789,775 \times .07 = \$615,284$). E33:2.

The Taxpayer did not dispute the corrected total square footage of 154,043, but argued that the County Board's reliance upon the cost approach was misguided. The Taxpayer asserted that even if the cost approach were to be used, the depreciation factor should have been 97% rather than 93%.

Depreciation is the loss in value, from all causes, of property having a limited economic life. The loss in value may come from wear and tear or the presence of features that are deficient, excessive, or simply currently undesirable. There also may be external factors causing a loss in value. Total depreciation is from all causes from the time of construction to the effective date of the appraisal.

Property Assessment Valuation, Third Edition, International Association of Assessing Officers, 2010, page 257. The Taxpayer offered evidence that the subject property had very significant wear and tear, deficient and undesirable features, and external economic factors, all of which could contribute to physical depreciation using the cost approach. Based upon these conditions, the Taxpayer asserted that depreciation should be 97%. The Taxpayer offered no evidence to *quantify* depreciation, nor was there clear and convincing evidence that a depreciation factor of 93% was arbitrary or unreasonable.

3. Improvements: Income Approach

The County Board also considered, but did not rely upon, the income approach when valuing the subject property. Using the income approach, "an appraiser analyzes a property's capacity to generate future benefits and capitalizes the income into an indication of present value." *The Appraisal of Real Estate, Thirteenth Edition*, Appraisal Institute, 2008, page 445. With the corrected square footage of 154,043, the County Board's income approach at Exhibit 33:2 should have resulted in a value of \$2,156,602, rather than \$2,209,517, when it used a rental rate of \$3 per square foot, vacancy & collection losses of 20%, expenses of 30%, and a capitalization rate of 12% ($154,043 \times \$3 \times .8 \times 0.7 / .12 = \$2,156,602$). However, even with the corrected square footage, the estimated value per the County Board's income approach was less than the estimated value using the cost approach.

³ RCNLD

The Taxpayer disputed the County Board's income approach calculation in several respects: that the net rentable space should have been used instead of the total building area; that the rental rate was too high; that the vacancy rate was too low; and that the expenses were also too low. The Taxpayer did not dispute the capitalization rate.

a. Net Rentable Space and Gross Leasable Area

The Taxpayer asserted that only the net rentable space, rather than the total building area should have been included in the income approach calculation. The Taxpayer provided a Rentable Space document to show the square footage of space that was actually rented. E25.

When the square-foot unit is used with an office building or a shopping center, care must be exercised in the comparison process, because some leases refer to gross leasable area (GLA) and others are negotiated on the basis of net leasable area (NLA). The GLA includes common areas such as halls, restrooms, and vestibules. The NLA includes only the floor area occupied by the tenant.

Property Assessment Valuation, Third Edition, International Association of Assessing Officers, 2010, page 323. To calculate the income approach value, the County Board utilized the total building area of 154,043 square feet. E33:2. The property manager testified that the unrented common areas included 21,695 square feet, which would have resulted in 132,328 square feet of net rentable space (154,043 – 21,695 = 132,328). The County Board did not dispute the Taxpayer's claim that the unrented common area amounted to 21,695 square feet. However, there was no evidence that the use of the total building area (GLA) was inappropriate.⁴

b. Rental Rates and Market Rent

The Taxpayer provided evidence of cash receipts from tenants of the subject property for 2008 and 2009. E22, E23. The property manager also testified extensively regarding terms and conditions of several of the leases. She emphasized that one actual rental rate for a tenant of the subject property had been as low as \$1.25 per square foot, while another was \$1.54 per square foot during the relevant time period.

In the income approach, potential gross rent is "the rent that would be collected if the property were fully occupied at market rent." *Property Appraisal and Assessment*

⁴ Nor was there any evidence that the Income Approach used for comparable properties used the net rentable space (net leasable area).

Administration, (1990), International Association of Assessing Officers, page 253. For purposes of calculating market value using the income approach, market rent is “the rate prevailing in the market for comparable properties.” *Id.* The *actual* rental rates between the Taxpayer and tenants are not the indicator of market value. Market rent for the subject property was determined by the County Assessor to be \$3.00 per square foot.⁵ That market rent was less than what was used for the property abutting the subject property, previously used by Gordmans, which was \$3.27 per square foot.⁶ E28:2.

c. Vacancy & Collection Loss

The property manager testified that vacancy rates for the subject property were 75% in 2009, (E25), and 45% in 2010.

The losses expected from vacancies and bad debts are subtracted from potential gross income. These losses are calculated at the rate expected of typical management in a given market. A well[-] or poorly managed property may have rates different from the average, but that is attributable to management, not the property, and might change under new ownership.

Property Appraisal and Assessment Administration, (1990), International Association of Assessing Officers, page 255. The *actual* vacancies of the subject property are not the indicator of what is typical in the market. Vacancy and collection loss for the subject property was determined by the County Assessor to be 20%. That rate was higher than what was used for the property abutting the subject property, previously used by Gordmans, which was 5%.⁷ E28:2.

d. Operating Expenses

The property manager testified that expenses for the subject property had exceeded income (2009 income \$178,081, expenses \$196,092) (2008 income \$216,681, expenses \$237,385). The Taxpayer also provided income and expense statements. E17-19 & E22-23. When determining operating expenses, “only the reasonable and typical expenses necessary to support and maintain the income-producing capability of the property should be allowed.” *Property Assessment Valuation, Third Edition*, International Association of Assessing Officers, 2010, page 327. The

⁵ Market rent was not specifically shown, but could be calculated as follows: Effective Income / (100% - Vacancy & Collection Losses %) / Total Building Area.

⁶ Calculated as $\$260,709 / (100\% - 5\%) / 83,924 = \3.27 . In the Income Approach, a lower rental rate results in a lower market value.

⁷ In the Income Approach, a higher Vacancy & Collection Loss rate results in a lower market value.

actual operating expenses of the subject property are not the only indicator of what are reasonable and typical expenses. The operating expenses for the subject property were determined by the County Assessor to be 30%. That rate was higher than what was used for the property abutting the subject property, used previously by Gordmans, which was 5%.⁸ E28:2.

C. Valuation Conclusion

The determination of the actual value of the improvements at \$619,411 was unreasonable. There was clear and convincing evidence that the actual value of the improvements was instead \$615,284. E33:2. No other evidence, including evidence received relating to the income approach to valuation, was clear and convincing evidence that the County Board's determination of \$619,411 was arbitrary or unreasonable. No other evidence, including evidence relating to the income approach to valuation was clear and convincing evidence of actual value.

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.” *Neb. Const.*, Art. VIII, §1. Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value. *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991). 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. *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). Equalization to obtain proportionate valuation requires a comparison of the ratio of assessed to actual value for the subject property and comparable property. See, *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999). 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. *Banner County v. State Board of Equalization*, 226 Neb. 236, 411 N.W.2d 35 (1987). Taxpayers are

⁸ In the Income Approach, a higher rate for Operating Expenses results in a lower market value.

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. *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). The constitutional requirement of uniformity in taxation extends to both rate and valuation. *First Nat. Bank & Trust Co. v. County of Lancaster*, 177 Neb. 390, 128 N.W.2d 820 (1964). 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. There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity. *Newman v. County of Dawson*, 167 Neb. 666, 94 N.W.2d 47 (1959).

B. Summary of the Evidence

The Taxpayer asserted that the parcel was not equalized with other comparable parcels. Between the parties, more than twenty property record cards of alleged comparable parcels were received in evidence.

The County Assessor testified that she gave a size discount for certain commercial properties. As discussed above, she set the value for commercial property lots at \$4.25 per square foot unless a size discount was given. She said she typically gave a size discount when the lot was in excess of 100,000 to 150,000 square feet. The size discount amounted to a 30% reduction. It was calculated as $\$4.25 \times 0.7 = \2.98 .⁹ When receiving the size discount, some property record cards indicated unit (per square foot) value at \$4.25 and an adjustment of 0.7. Others simply indicated the unit value as \$2.98.¹⁰ As noted above, the subject property received a size discount of 0.7 because it measured 437,567 square feet.

On this point, the Taxpayer asserts that the lot shown at Exhibit 34 was valued more favorably than was the subject property when considering the size discount. The parcel shown in Exhibit 34 is a 250,906 square foot lot, improved only with concrete paving and parking lighting. E34:2. The unit (square foot) value is listed as \$2.98, and a 0.7 adjustment is also made. E34:2.

⁹ This is rounded. $\$4.25 \times 0.7 = \2.975 .

¹⁰ There were two comparable parcels that did not receive the size discount even though their lots measured more than 150,000 square feet. E4, E6.

The total lot value is shown as \$522,512 (250,906 x \$2.975 x 0.7). E34:2. The Taxpayer correctly emphasized that this effectively amounts to a lot value of \$2.08 per square foot as opposed to \$2.98 per square foot. The County Assessor testified that the County Board had made the additional 0.7 adjustment, as shown in E34:2. Neither the Taxpayer nor the County Board offered any other evidence to explain the reason for the additional adjustment given by the County Board to the parcel at Exhibit 34. However, it is noted that this parcel is improved only with a parking lot; there are no buildings.¹¹

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. There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity.

Newman v. County of Dawson, 167 Neb. 666, 94 N.W.2d 47 (1959). Based upon the evidence received, we do not conclude that the valuation of this parcel at \$2.08 per square foot was a failure of plain legal duty. Nor will we conclude that the valuation was the result of systematic will. The County Assessor testified that she attempted to uniformly apply a size discount of 30% to larger commercial properties based upon stated criteria. The parcel at E34 is the only parcel in evidence that would indicate a variation from those criteria resulting in a lower value. There is no evidence that the land valuation of \$2.08 was systematically applied.

The Taxpayer also raised an equalization argument as applied to those comparable parcels with more than 150,000 square feet that were valued at \$4.25 per square foot and were also given the 0.7 size discount. The property manager testified that many of these parcels did not suffer from having easements across their parking lots, and that many had better visibility from the main roadways than did the subject property. As was discussed above, the Taxpayer did not provide persuasive evidence quantifying these negative effects on the value of the land. Further, the Taxpayer did not provide any evidence quantifying any positive effects on the value of any comparable parcel due to good visibility or the absence of cross easements in the parking lots. Therefore, there was no persuasive evidence that relief should be granted relating to the valuation of the land based upon equalization.

¹¹ No other comparable properties were improved only with parking lots.

VI. CONCLUSION

The Commission finds 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 that the actual value of the land was \$1,301,762. The County Board's determination of the actual value of the land at \$1,301,762 was not arbitrary or unreasonable.

The Commission finds there is competent evidence to rebut the presumption in favor of the determination that the actual value of the improvements was \$619,411. There was clear and convincing evidence that the actual value of the improvements was \$615,284.

For all of the reasons set forth above, the decision of the County Board is vacated and reversed.¹²

VII. ORDER

IT IS ORDERED THAT:

1. The Decision of the Hall County Board of Equalization determining the value of the subject property for tax years 2009 and 2010 is vacated and reversed.
2. That the Assessed value of the Subject property for tax years 2009 and 2010 is:

Land:	\$1,301,762
Improvements:	<u>\$ 615,284</u>
Total:	\$1,917,046

3. This decision and order, if no appeal is timely filed, shall be certified to the Hall County Treasurer and the Hall County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (2010 Cum. Supp.)
4. Any request for relief, by any party, which is not specifically provided for by this order is denied.
5. Each Party is to bear its own costs in this proceeding.
6. This decision shall only be applicable to tax years 2009 and 2010.

¹² Assessed value, as determined by the county board of equalization, 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.

7. This order is effective for purposes of appeal on October 26, 2011

Signed and Sealed: October 26, 2011

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 (2010 Cum. Supp.), other provisions of Nebraska Statute and Court Rules.