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The district court erred in ordering Kearney County to refund the $480,411.50.

We acknowledge that this construction of § 77-1734.01 leads to the harsh result of double taxation in this case. But a contrary construction would have led to the harsh result of Kearney County's being required to refund tax receipts which it collected and has long since paid over to other taxing authorities within its jurisdiction. In the end, we can only interpret the existing statute under our established principles, as we have done here. If the Legislature wishes to provide broader relief to taxpayers under similar circumstances in the future, it has the power to enact a statute or statutes specifically providing such relief.

CONCLUSION

For the reasons discussed, we reverse the judgment of the district court and remand the cause with directions to reinstate the order of the Board denying Kaapa's claim for a refund.

REVERSED AND REMANDED WITH DIRECTIONS.

JQH LA VISTA CONFERENCE CENTER DEVELOPMENT LLC, APPELLANT, V. SARPY COUNTY BOARD OF EQUALIZATION, APPELLEE.

825 N.W.2d 447

Filed January 25, 2013. Nos. S-12-054, S-12-055.

1. **Taxation: Judgments: Appeal and Error.** Appellate courts review decisions rendered by the Tax Equalization and Review Commission for errors appearing on the record.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Taxation: Valuation: Presumptions: Evidence.** A presumption exists that 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 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 of the evidence presented.

4. **Taxation: Valuation: Proof: Appeal and Error.** The burden of showing a valuation to be unreasonable rests upon the taxpayer on appeal from the action of the board of equalization.
5. **Taxation: Valuation: Proof.** The burden of persuasion imposed on a complaining taxpayer is not met by showing a mere difference of opinion unless it is established by clear and convincing evidence that the valuation placed upon his property when compared with valuations placed on other similar property is grossly excessive and is the result of a systematic exercise of intentional will or failure of plain duty, and not mere errors of judgment.
6. **Taxation: Valuation: Real Estate: Words and Phrases.** The actual value of real property is the market value of real property in the ordinary course of trade.
7. **Taxation: Valuation: Real Estate.** Actual value may be determined using professionally accepted mass appraisal methods, including, but not limited to, the (1) sales comparison approach, (2) income approach, and (3) cost approach.
8. **Taxation: Valuation: Real Estate: Words and Phrases.** Actual 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 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.
9. **Taxation: Valuation: Evidence.** 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.

Appeals from the Tax Equalization and Review Commission. Affirmed.

Rosalynd J. Koob, of Heidman Law Firm, L.L.P., for appellant.

Michael A. Smith, Deputy Sarpy County Attorney, for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

HEAVICAN, C.J.

INTRODUCTION

This appeal arises from a property tax protest filed by JQH La Vista Conference Center Development LLC (JQH). The property at issue is a convention center located off Interstate 80 in La Vista, Nebraska, known as the La Vista Conference

Center. In both the 2009 and 2010 tax years, the conference center was valued by the Sarpy County assessor at a total of $23,400,000. In both years, JQH protested that valuation to the Sarpy County Board of Equalization, which denied the protest. JQH then appealed both denials to the Tax Equalization and Review Commission (TERC). The cases were consolidated into one hearing before TERC. TERC denied JQH's appeal and valued the conference center at $23,400,000 for both tax years. JQH appealed TERC's decision as to both the 2009 and 2010 tax years. We affirm.

FACTS

Construction on the conference center and an adjoining hotel began in 2007, and both opened for business in July 2008. Originally, the city of La Vista was the entity building the conference center, but during construction, it was determined that this arrangement was not financially feasible. JQH, which was developing the hotel project, agreed to continue construction on the conference center in return for certain enticements, including $3 million from the city toward construction costs and a low-interest loan in the amount of $18 million.

In May 2009, another adjoining hotel was opened. The conference center is now located between two connecting hotels. Both hotels and the conference center are owned by JQH and are managed as one entity. In addition, the conference center and one of the hotels are located under the same roof and have joint financial records. However, the three properties are located on separate parcels of land and are assessed separately for tax purposes. According to the record, the conference center comprises 42,032 square feet and construction costs were about $17.8 million.

In both 2009 and 2010, the county assessor placed a total valuation on the conference center of $23,400,000 ($1,710,475 for the land and $21,689,525 for the improvements). JQH protested that valuation to the Sarpy County Board of Equalization and requested for 2009, a valuation of $12,710,475 ($1,710,475 for the land and $11 million for the improvements), and for 2010, a valuation of $11,700,000 ($1,500,000 for the land and

$10,200,000 for the improvements). Both protests were denied, and JQH appealed those decisions to TERC.

JQH presented evidence before TERC from an appraisal JQH had done on the property. That appraisal valued the property under the income, sales, and cost approaches to valuation, but relied most heavily on the income approach. JQH's appraiser ultimately recommended a value of $7,100,000 for 2009 and $10,100,000 for 2010.

The Sarpy County Board of Equalization presented the testimony of the county assessor who conducted the assessment of the conference center. The county assessor relied upon the cost approach, concluding that the income and sales approaches were not valid because of a lack of data.

TERC rejected the opinion of JQH's appraiser, specifically finding that JQH

> has not provided competent evidence to rebut the presumption that the [board of equalization] faithfully performed its duties and had sufficient competent evidence to make its determination. [TERC] also finds that [JQH] has not provided clear and convincing evidence that the determination by the [board of equalization] was arbitrary or unreasonable.

JQH appeals.

ASSIGNMENT OF ERROR

On appeal, JQH assigns, restated and consolidated, that TERC erred in determining that JQH had failed to meet its burden of establishing that the market value as assessed by the Sarpy County Board of Equalization was arbitrary, capricious, and unreasonable.

STANDARD OF REVIEW

[1,2] Appellate courts review decisions rendered by TERC for errors appearing on the record.[1] When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported

[1] *Republic Bank v. Lincoln Cty. Bd. of Equal.*, 283 Neb. 721, 811 N.W.2d 682 (2012).

by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[2]

ANALYSIS

On appeal, JQH assigns that TERC erred in affirming the valuation of the Sarpy County Board of Equalization.

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

> In all appeals, excepting those [involving the taxpayer-initiated appeal of a county tax levy], if the appellant presents no evidence to show that the order, decision, determination, or action appealed from is incorrect, the commission shall deny the appeal. If the appellant presents any evidence to show that the order, decision, determination, or action appealed from is incorrect, such order, decision, determination, or action shall be affirmed unless evidence is adduced establishing that the order, decision, determination, or action was unreasonable or arbitrary.

[3-5] We have held that this language creates

> "a presumption that 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 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."[3]

And we have further held that

> "the burden of persuasion imposed on the complaining taxpayer is not met by showing a mere difference of

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[2] *Id.*

[3] *Brenner v. Banner Cty. Bd. of Equal.*, 276 Neb. 275, 283-84, 753 N.W.2d 802, 811 (2008) (quoting *Ideal Basic Indus. v. Nuckolls Cty. Bd. of Equal.*, 231 Neb. 653, 437 N.W.2d 501 (1989)).

> opinion unless it is established by clear and convincing evidence that the valuation placed upon his property when compared with valuations placed on other similar property is grossly excessive and is the result of a systematic exercise of intentional will or failure of plain duty, and not mere errors of judgment."[4]

[6-8] The "actual value" of real property is

> the market value of real property in the ordinary course of trade. Actual value may be determined using professionally accepted mass appraisal methods, including, but not limited to, the (1) sales comparison approach . . . , (2) income approach, and (3) cost approach. Actual 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 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 consideration of the full description of the physical characteristics of the real property and an identification of the property rights being valued.[5]

JQH makes several arguments regarding the county's valuation and TERC's affirmance of that value. JQH first argues that TERC erred in its standard of review when it found that JQH did not present sufficient "competent evidence" to rebut the presumption that the "board of equalization ha[d] faithfully performed its official duties." JQH agrees that the burden of persuasion always remained with it, but distinguishes between that burden and the initial presumption afforded to a decision of a county board of equalization.

The county defends TERC's order by suggesting that the appraisal of David Sangree, a certified appraiser, offered a mere difference of opinion and that such was insufficient to

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[4] *Id.* at 284, 753 N.W.2d at 812 (quoting *Bumgarner v. County of Valley*, 208 Neb. 361, 303 N.W.2d 307 (1981)).

[5] Neb. Rev. Stat. § 77-112 (Reissue 2009).

overcome the presumption of validity for the county's valuation. But as is argued by JQH, this argument conflates the presumption of validity offered by § 77-5016(9) with the burden of persuasion. The former is overcome by the production of competent evidence,[6] while the latter requires a showing of more than a mere difference of opinion.[7]

[9] And in this case, we conclude that TERC was incorrect when it concluded that the presumption of correctness was not overcome by competent evidence. This court held in *US Ecology v. Boyd Cty. Bd. of Equal*.[8] 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.[9] And at the hearing before TERC, JQH offered the 2009 and 2010 appraisals of Sangree. Sangree testified that the appraisals were prepared in conformity with the uniform standards of appraisal practice. The appraisals provided three alternative valuations of the conference center, using each of the three methods provided for by § 77-112. We therefore agree with JQH insofar as it argues that TERC incorrectly applied the standard of review and concluded that JQH had not overcome the presumption of validity under § 77-5016(9).

Because JQH overcame the presumption of validity for the county's valuation, the reasonableness of the valuation fixed by the board of equalization becomes a question of fact based upon all of the evidence presented.[10] The burden of showing such valuation to be unreasonable rests upon the taxpayer on appeal from the action of the board.[11]

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[6] See, § 77-5016(9); *Brenner, supra* note 3.

[7] See *Brenner, supra* note 3.

[8] See *US Ecology v. Boyd Cty. Bd. of Equal.*, 256 Neb. 7, 588 N.W.2d 575 (1999).

[9] See, also, *Schmidt v. Thayer Cty. Bd. of Equal.*, 10 Neb. App. 10, 624 N.W.2d 63 (2001).

[10] See *Brenner, supra* note 3.

[11] *Id.*

With respect to valuation, JQH argues that TERC erred in concluding that it had failed to overcome its burden to show that the market value of the property as assessed by the county was unreasonable or arbitrary. JQH essentially contends that Sangree's appraisal was correct and that the county assessor's was not. JQH primarily takes issue with the assessor's (1) failure to value the property under all three approaches allowed under § 77-112: income, sales, and cost; (2) incorrect classification of the property when applying the Marshall Valuation Service cost factors; (3) failure to take into account physical depreciation of the property; and (4) failure to consider external or locational depreciation. We conclude that JQH has not overcome its burden of showing that the county's valuation was unreasonable or arbitrary.

Under Neb. Rev. Stat. § 77-201(1) (Reissue 2009), all nonexempt real property is subject to taxation and should be valued at its actual value. As is set forth above, actual value is defined under state law,[12] and that definition provides for three methods to determine that actual value—the income approach, the sales approach, and the cost approach.

As is argued by JQH, Sangree utilized all three approaches when valuing the conference center. But it does not follow that Sangree's use of all three methods means that the county's valuation was incorrect simply because it utilized just one of those methods. First, the plain language of the statute requires the use of only one method. The county assessor's cost approach is obviously permitted under § 77-112.

Moreover, the county assessor had an explanation for his failure to utilize the other methods. The county assessor indicated that at the time of the 2009 assessment, he lacked market data with which to perform an income approach. And he further indicated that there were few, if any, sales of stand-alone conference centers to use as a basis for the sales approach. Indeed, though Sangree does provide an appraisal under the sales approach, he acknowledges that in his search, he was unable to find comparable sales for stand-alone conference centers.

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[12] § 77-112.

Because the county assessor was not provided with the actual costs of construction, he utilized the Marshall Valuation Service, which is a mass appraisal tool approved by Nebraska's Tax Commissioner and the Department of Revenue. The Marshall Valuation Service was also used by Sangree in his appraisal under the cost approach.

JQH contends that the county assessor improperly classified certain building materials when entering data into the Marshall Valuation Service—particularly taking issue with the county assessor's classification of the building materials as "Class B" rather than "Class C." But the county assessor noted in his testimony that he was able to visit the building site during construction and was also able to discuss the property with the city building inspector.

JQH next argues that the county assessor's valuation did not take into account physical depreciation in the 2010 appraisal. But when questioned about it, the county assessor noted that the county would be required to make such an adjustment only when reassessing an entire class, which occurs only every 4 to 5 years. Upon further questioning, the county assessor also indicated that if he were accounting for physical depreciation, he would also update his "manual date," and that under the cost approach, this update would likely result in an increase of the cost of the building.

JQH also contends that the county's valuation was incorrect in that it did not account for external depreciation. External, or locational, depreciation allows for a decrease in value based upon either the location of real property or other external factors.[13] But the county assessor testified that he did not make any deductions for external depreciation, because he "did not see any or observe any. . . . [T]his is one the hottest locations in Sarpy County, probably the hottest."

JQH acknowledges that it has the burden to overcome the county's valuation. Unless the taxpayer shows that the county's valuation was unreasonable or arbitrary, that valuation should be affirmed. And we conclude that JQH has not met its burden.

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[13] See *Darnall Ranch v. Banner Cty. Bd. of Equal.*, 276 Neb. 296, 753 N.W.2d 819 (2008).

A review of the county assessor's testimony shows a reasonable basis for the differences between the county's valuation and Sangree's appraisals. We further question Sangree's appraisals to the extent that the appraisals showed a substantial difference in 2009 and 2010 between the income and cost methods. It was only after deductions in those respective amounts were made for external depreciation that the income and cost approaches were equal to each other. These large deductions are suspect under the record in this case.

JQH is correct insofar as TERC erred when it found that JQH had not rebutted the presumption of validity of the county's valuation. Nevertheless, TERC did not err in affirming the valuation of the property, because JQH failed to meet its burden of showing that the county's valuation was unreasonable and arbitrary. TERC's decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. JQH's assignment of error to the contrary is without merit.

CONCLUSION

The decisions of TERC are affirmed.

AFFIRMED.

CASSEL, J., not participating.