

ORIGINAL

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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SUPREME COURT

APR 18 '00

Dakota Northwestern)
Associates Limited)
Partnership,)

Appellant,)

-vs-)

Burleigh County Board of)
Commissioners,)

Appellee.)
.....)

Supreme Court No.
20000039

20000039

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

APR 18 2000

STATE OF NORTH DAKOTA

BRIEF OF APPELLEE

Appeal from Judgment Affirming
Burleigh County Board of County Commissioners
Burleigh County District Court

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STATEMENT OF ISSUES

I. Is the decision of the Burleigh County Board of County Commissioners on the applications for abatement of real estate taxes for the years 1995, 1996, and 1997, arbitrary, capricious, or unreasonable, or not supported by substantial evidence?

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2 ARGUMENT

3 A. Scope of Review

4 Judicial review of a decision by a local
5 governing body is very limited by the doctrine of
6 separation of powers. Pic v. City of Grafton, 1998 ND
7 202, ¶6, 586 N.W.2d 159 (1998). Courts must not
8 substitute their judgment for that of the local
9 governing body who initially made the decision. Id.
10 at ¶11. Judicial review is limited to determining if
11 the governing body's decision is arbitrary,
12 capricious, or unreasonable. Id. A decision is not
13 arbitrary, capricious or unreasonable if the exercise
14 of discretion is the product of a rational mental
15 process by which the facts and the law relied upon are
16 considered together for the purpose of achieving a
17 reasoned and reasonable interpretation. Graber v.
18 Logan County Water Resource Board, 1999 ND 168, ¶7,
19 598 N.W.2d 846 (1999).

20 The scope of review for the North Dakota Supreme
21 Court is the same as it was for the District Court.
22 Id. The Court's function is to independently
23 determine the propriety of the decision, without
24 according any special deference to the district
25 court's decision, and unless the Board acted
26 arbitrarily, capriciously or unreasonably, or there is
27 not substantial evidence to support the decision, it
must be affirmed. Id.

1 In this case, Dakota Northwestern Associates
2 Limited Partnership's (hereinafter "Dakota
3 Northwestern") appeal is from a determination by the
4 Burleigh County Board of County Commissioners
5 (hereinafter "the Board") that the "true and full
6 value" of the subject property for property tax
7 assessment is \$4,200,000 for the years 1995, 1996, and
8 1997. The "true and full value" means the "value
9 determined by considering the earning or productive
10 capacity, if any, the market value, if any, and all
11 other matters that affect the actual value of the
12 property to be assessed" See NDCC §57-02-
13 01(15). The Court's function in this case is not to
14 re-weigh the evidence presented to the Board or
15 determine which evidence was more persuasive. The
16 Court's function is simply to determine whether the
17 Board's decision was the product of a rational mental
18 process by which the facts and the law relied upon
19 were considered together for the purpose of achieving
20 a reasoned and reasonable interpretation.

21 This limited scope of review is significant in
22 the present appeal. The Board was presented with
23 evidence from two or more competing experts on the
24 value of the subject property, based upon appraisals
25 or assessments done by those experts. As the record
26 makes clear, the appraisal process itself is not an
27 exact science where numbers may simply be plugged in

1 and a result achieved. See Appendix, p. A27. The
2 appraisal process is an art form in which differing
3 experts may arrive at differing opinions. This Court
4 has recognized the element of subjectivity in opinions
5 regarding the value of property. See Ulvedal v. Board
6 of County Commissioners of Grand Forks County, 434
7 N.W.2d 707, 710 (N.D. 1989).

8 This Court's function is not to determine whether
9 the Board should have accepted the Dakota Northwestern
10 experts' appraisals as the "true and full value" of
11 the subject property, or whether the greater weight of
12 the evidence suggested those appraisals to be more
13 accurate or reliable. Previous court decisions have
14 affirmed county board of commissioners decisions where
15 this Court has suggested that the city assessor's
16 opinion about value was not overpowering, particularly
17 when compared with the appraisal by the taxpayers'
18 experts. Ulvedal, 434 N.W.2d at 710. This Court's
19 function is simply to determine whether the Board
20 considered the Dakota Northwestern's experts
21 appraisals along with the evidence presented by the
22 assessors, and whether the Board had some rational,
23 evidentiary basis for fixing the "true and full value"
24 at the figure it did.
25
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1 B. The decision of the Burleigh County Board of
2 County Commissioners was not arbitrary,
3 capricious, or unreasonable, and was supported by
4 substantial evidence.
5

6 All assessments of any taxable property in excess
7 of the full and true value in money are subject to
8 correction and abatement and refund under the
9 provisions of Chapter 57-23 of the North Dakota
10 Century Code. See N.D.C.C. §57-23-01. Upon
11 application filed in the office of the county auditor
12 on or before November 1 of the year following the year
13 in which the tax becomes delinquent, the board of
14 county commissioners may abate or refund, in whole or
15 in part, any assessment or tax upon real property when
16 the assessment on the complainant's property is
17 invalid, inequitable, or unjust. See N.D.C.C. §57-23-
18 04(1)(h). Taxing authorities are required to set the
19 value of property for taxation purposes at its "true
20 and full value". See N.D.C.C. §57-02-27.1. The "true
21 and full value" of property means the value determined
22 by considering the earning or productive capacity, if
23 any, the market value, if any, and all other matters
24 that affect the actual value of the property to be
25 assessed. See N.D.C.C. §57-02-01(15).

26 It is under these legal guidelines that the
27 Burleigh County Board of County Commissioners

1 determined the "true and full value" of the subject
2 property to be \$4,200,000 for the years 1995, 1996,
3 and 1997. The record of the proceedings before the
4 Board provide substantial evidence from which the
5 Board was able to establish this value.
6

7 A. The assessor's valuation was supported by
8 substantial evidence.

9 Dakota Northwestern argues that there was no
10 evidence presented to justify the assessors' valuation
11 of the subject property, and it was therefore
12 inappropriate for the Board to grant any consideration
13 to the same. Had that been the case, the Board indeed
14 would have been remiss in considering the valuation.
15 "An opinion alone, unsupported by relevant reasons, is
16 not substantial evidence." National Sun Industries,
17 Inc. v. Ransom County By and Through Ransom County Bd.
18 Of Com'rs, 474 N.W.2d 502, 507 (N.D. 1991).
19

20 The assessor's initially valued the subject
21 property at \$5,191,000, and recommended that the Board
22 partially grant Dakota Northwestern's abatement,
23 setting the "true and full value" at \$4,791,000,
24 therein recognizing deferred maintenance of \$400,000.
25 See Appendix, pp. A215 - A226. Contrary to Dakota
26 Northwestern's assertions, this value had a basis in
27 fact which was presented to the Board.

1 The assessors explained to the Board that this
2 value was based upon their appraisal of the subject
3 property utilizing three appraisal valuation
4 approaches: 1) the sales comparison approach; 2) the
5 cost approach; and 3) the income approach. See
6 Appendix, pp. A10 - A11, and A215 - A225. Scott
7 Stromme, the city assessor, explained each of these
8 approaches to the Board, and provided the Board with
9 exhibits demonstrating the various figures used to
10 calculate the valuation using each method. Id. This
11 included a listing of the comparable sales used, and
12 an explanation of the differences between the various
13 properties sold therein. See Appendix, pp. A197,
14 A213. It further included an analysis of the figures
15 used calculate the valuation under the cost approach
16 utilizing Marshall & Swift, a nationally known cost
17 manual. See Appendix, pp. A197, A212. Mr. Stromme
18 underscored that the cost approach was more accurate
19 on new or unique properties, but noted that it did
20 tend to support his market estimate. See Appendix, p.
21 A197. Finally, Mr. Stromme explained that the figures
22 he used in calculating value utilizing the income
23 approach, and noted they were significantly different
24 from the income approach valuations being presented by
25 Dakota Northwestern as Mr. Stromme perceived the
26 "market rent" to be higher than the "actual rent"
27

1 being paid by the various tenants. See Appendix, p.
2 A195.

3 The assessors identified each estimated value
4 arrived at utilizing the three approaches. See
5 Appendix, p. A197. The final estimate of value was
6 set at \$5,191,000. See Appendix, p. A198. The
7 assessors then recognized the deferred maintenance of
8 \$400,000 related to the property, and recommended the
9 Board set a valuation of \$4,791,000. Id.

10
11 B. The Board properly considered the assessor's
12 valuations and accurately applied the law to
13 its decision.

14 Throughout its brief, Dakota Northwestern implies
15 that the "true and full value" of this particular
16 property should only be determined by the "earning or
17 productive capacity" of the property, i.e., the income
18 generated by rents to the building owner, as that is
19 the manner in which a buyer of the property and the
20 lending institution financing the buyer's purchase
21 would assess the same. Dakota Northwestern goes
22 further by indicating that only the Ibach and Reid
23 appraisals should have been considered by the Board as
24 they are the only appraisals to use "actual" numbers
25 resulting in a realistic valuation of the property.
26 It argues that the assessor's valuation utilizing the
27 income approach, which does not utilize actual

1 figures, ignores the requirements of law. This
2 statement is incorrect.

3 Section 57-02-01(15) of the North Dakota Century
4 Code does not require "actual" rental figures be
5 utilized. While the statute contemplates valuation of
6 the property at its "actual value", it also
7 contemplates an assessment using "all factors" which
8 affect that value, not simply actual figures
9 associated with the property. See N.D.C.C. §57-02-
10 01(15). Restricting valuation to that based only upon
11 actual rental figures would allow manipulation of the
12 valuation of the property by the owner to the extent
13 that the "actual value" of the property would not
14 reflect the true market value.

15 For example, in order to reduce the valuation of
16 the property utilizing the "gross income multiplier"
17 or "GIM" methodology noted in Dakota Northwesterns'
18 brief, a building owner could execute short term
19 leases for rents far below the market rent in the
20 area. Or, the rental income may be considerably lower
21 than the market rent for similar office space if, as
22 in this case, the tenant is allowed to "own" the
23 improvements made in the occupied space.

24 The assessors calculations utilizing the GIM
25 methodology, which Dakota Northwestern criticizes,
26 reflect these concerns. Mr. Stromme assessed a \$20.00
27 per square foot rent to the office space utilized by

1 Norwest Bank based upon a comparable sale involving a
2 building with a savings and loan tenant. See
3 Appendix, p. A195. The March, 1998, Ibach appraisal
4 suggests this as a possibility. At page 90 of that
5 appraisal, Mr. Ibach states:

6 "The question also arises as to whether the rent
7 paid by Norwest Bank is below market as financial
8 institutions historically pay significantly higher
9 rent. However, higher rent is generated only if the
10 landlord has provided all tenant improvements to
11 include drive-through lanes, tenant improvements, etc.
12 In this particular case, the tenant has provided the
13 amenities and, for this reason, the space occupied by
14 Norwest Bank is regarded simply as standard office
15 space. . . ." See Appendix, p. A76.

16 Mr. Ibach also suggested the necessity of
17 comparing actual figures to market figures during his
18 presentation to the Board. At the July 6, 1998,
19 meeting, Mr. Ibach stated:

20 " . . . when I do the appraisal, I take their net
21 income which means gross income, less expenses, is net
22 income. The expenses have to be checked for
23 reasonableness. Were the expenses reasonable within
24 the market. I don't just sit there and say, these are
25 the expenses, that's it. I say these are the
26
27

1 expenses, how do they compare to the market? Are they
2 reasonable?"

3 See Appendix, p. A14 (emphasis added).

4 Here, the rent being paid by Norwest Bank does
5 not reflect the improvements made to the occupied
6 space. Yet, the improvements are there and have
7 value. The statute requires that true and full value
8 of the entire property, not just its shell, be
9 assessed. How does one go about assessing that value
10 where rents being paid do not include tenant
11 improvements? The answer is to look for a comparable
12 sale where rents which include the improvements were
13 being paid. That is what the assessors did, and that
14 is what was explained to the Board.

15 Dakota Northwest also criticizes the assessors'
16 utilization of the GIM from the Provident Life
17 building, which it indicates was the highest GIM found
18 for comparable sales. Again, the assessors explained
19 their use of that GIM to the Board. On page 4 of his
20 letter to the Board, Mr. Prochnow explains that the
21 Provident Life GIM was utilized because (1) both the
22 Dakota Northwestern building and the Provident Life
23 building are local buildings located within two blocks
24 of each other, (2) both buildings are well known
25 locally, and (3) the properties are similar in that
26 each has six stories, and both have a considerable
27 amount of deferred maintenance. See Appendix, p.

1 A219. While Dakota Northwestern may not view the
2 comparison of the two buildings as the most
3 appropriate, there is nothing within the statutes
4 requiring the assessors to utilize the same GIM as Mr.
5 Ibach or Mr. Reid. Whether it was an appropriate
6 comparison was a decision for the Board to weigh.

7 Given all of these considerations, it is clear
8 that the Board was not required to simply ignore the
9 assessor's valuations simply because they did not
10 utilize actual figures or the same figures as Ibach
11 and Reid. Neither does the law necessitate that the
12 assessors' valuations be ignored. In Trollwood
13 Village Ltd. Partnership v. Cass County Bd. Of County
14 Commissioners, 557 N.W.2d 732, 737 (N.D. 1996), this
15 Court indicated that "our statutes . . . provide
16 flexibility for making assessments and do not confine
17 the determination of true and full value to any single
18 consideration." In Ulvedal v. Board of County Com'rs
19 of Grand Forks County, 434 N.W.2d 707, 711 (N.D.
20 1989), this Court also stated:

21 "As amended, the statute does not confine
22 determination of value to any single consideration.
23 There is no statutory reason why taxing authorities
24 cannot employ replacement and reproduction cost
25 methods. The statute allows consideration of 'all
26 other matters that affect the actual value of the
27 property to be assessed.' NDCC 57-02-01(15). . .

1 Taxing authorities are not tied down to earnings or
2 transactions as select measures of value, although
3 they are obvious references for appraising unimproved
4 real estate."

5 Here, the assessors explained their reasoning in
6 not utilizing actual figures in the income approach
7 calculations. Those explanations justified the
8 Board's consideration of the assessor's valuation, and
9 it was the Board's prerogative to determine what
10 weight to give the assessor's valuation.

11 C. The "leased fee" versus "fee simple"
12 appraisal is a distinction with a
13 difference.

14 Dakota Northwestern argues that the distinction
15 made between a "leased fee" appraisal and a "fee
16 simple" appraisal is a distinction without a
17 difference. From the perspective of an owner of this
18 building trying to sell it on the market, that may
19 very well be correct. However, from the perspective
20 of general property taxation, it is not.

21 A buyer of this property would take the property
22 subject to all of the leases in place, and may very
23 well offer a purchase price based primarily upon the
24 rental income generated from the various leases.
25 Since the tenants own the improvements, the buyer will
26 receive the shell of the building and the income from
27 the rentals. Therefore, to him, a leased fee or fee

1 simple appraisal may make no difference. He will
2 receive the same thing.

3 However, for purposes of property taxation, the
4 value of the entire real property on site, including
5 improvements to the building even if made by the
6 tenant, must be assessed. While the owner of the
7 building only receives the shell, the improvements to
8 that building are nevertheless still present and have
9 value. A "fee simple" appraisal contemplates
10 "absolute ownership unencumbered by any other interest
11 or estate, subject only to limitations imposed by the
12 governmental powers of taxation, eminent domain,
13 police power, and escheat". See Appendix, pp. A190 -
14 A191. In other words, it is an assessment or
15 valuation of all of the real property at the location,
16 regardless of ownership. A "leased fee" appraisal
17 only takes the landlord's rights in account. Id.
18 This would exclude the improvements owned by a tenant.
19 Thus, a difference does exist.

20 Dakota Northwestern urges this Court to take
21 "equity" into consideration. The "equity" in this
22 case is ensuring that all property within the same
23 area, regardless of ownership, is taxed equally among
24 the citizens. That means all the property. Not only
25 parts thereof.

1 D. Substantial evidence existed for the Board
2 to set the final valuation at \$4,200,000.

3 The Board made its decision to set the valuation
4 at \$4,200,000, which Dakota Northwestern indicates is
5 a compromise which is completely arbitrary. While the
6 valuation set was not that urged by either Dakota
7 Northwestern or the assessors, the Court must remember
8 that valuation of property is a discretionary process,
9 subject to differing opinions. The Board clearly
10 believed the assessors valuation was somewhat high
11 given the earning capacity information presented by
12 Dakota Northwestern. See Appendix, pp. A29, A30.
13 They were justified in reducing the valuation as they
14 determined appropriate. At the same time, the Board
15 believed the Dakota Northwestern experts' appraisals
16 were somewhat low. See Appendix, pp. A17, A33.
17 Therefore, the Board was justified in increasing the
18 valuation from that recommended by Dakota
19 Northwestern's experts.

20 The statute defining "true and full value"
21 requires an assessment of "all" factors affecting
22 value. The valuation set by the Board was within the
23 range of value being urged by the various
24 participants. The range of values had a substantial
25 basis in fact, the various opinions of the experts.
26 The Board reasonably could have set the valuation
27

1 anywhere within this range. The District Court
2 recognized this, and opined:

3 "The decision made by the commissioners was not
4 a decision to adopt any single evaluation of the
5 building. Instead, they decided the true and full
6 value of the property was \$4.2 million - an amount
7 they had agreed was the true and full value for 1999.
8 The decision appears to be a consensus reached by a
9 well-informed group and well within the boundaries of
10 the evaluations of the values set by the assessor and
11 the appraisers. It would not have been unreasonable
12 for the county commissioners to accept the value set
13 by the assessor or either of the appraisers and it was
14 not unreasonable for them to agree that the property
15 was worth more than the appraisers indicated and less
16 than the assessor indicated."

17 See Opinion of the District Court, Appendix, pp.
18 A45 - A46.

19 The valuation designated by the Board, \$4.2
20 million, reflected the valuation established for 1999,
21 which recognized the loss of a major tenant within the
22 building. See Appendix, p. A36. This loss certainly
23 could have swayed the Board in believing the market
24 rents for the property were lower than what the
25 assessors originally estimated them to be, thus
26 lowering the entire value of the property, even during
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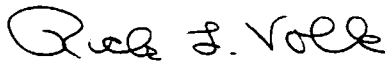
1 the time period the tenant was present. The Board's
2 \$500,000 reduction from the assessor's valuation
3 recommendation of \$4.7 million was appropriate and
4 based upon substantial evidence.
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CONCLUSION

The action of the Burleigh County Board of County Commissioners in setting the value of the subject property at \$4,200,000 for the years 1995, 1996, and 1997 was not arbitrary, capricious or unreasonable, and was supported by substantial evidence. Therefore, the Appellant Burleigh County Board of County Commissioners respectfully request that this Court AFFIRM the District Court's order and judgment.

Dated this 18th day of April, 2000.



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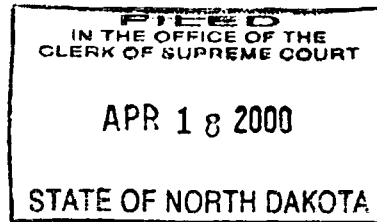
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STATE OF NORTH DAKOTA 20000039

Dakota Northwestern)
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AFFIDAVIT OF
MAILING

Supreme Court No.
20000039



STATE OF NORTH DAKOTA)
COUNTY OF BURLEIGH) ss

Ardyth Volesky, being first duly sworn, depose
and say that I am a United States citizen over 21
years old, and on the date of April 18, 2000, I
deposited in a sealed envelope a true copy of the
attached:

1. Brief of Appellee
2. Affidavit of Mailing

in the United States mail at Bismarck, North
Dakota, postage prepaid, addressed to:

Lawrence R. Klemin
Attorney at Law
PO Box 955
Bismarck, ND 58502-0955

which address is the last known address of the
addressee.

Ardyth Volesky
Ardyth Volesky

Subscribed and sworn to before me this 18th day
of April, 2000.

Gwen L. Tardif
Gwen L. Tardif, Notary Public
Burleigh County, North Dakota
My Commission Expires: 5-23-2003