

**BEFORE THE NEBRASKA TAX EQUALIZATION
AND REVIEW COMMISSION**

R. W. INVESTMENTS, INC.,)	
)	
Appellant,)	CASE NO. 02C-110
)	
vs.)	
)	
WASHINGTON COUNTY BOARD OF)	FINDINGS AND ORDER
EQUALIZATION,)	
)	
Appellee.)	

Filed 21 November 2003

Appearances:

For the Appellant: Michael D. Kozlik, Esq.
Croker, Huck, Kasher, P.C.
2120 South 72nd Street, Suite 1250
Omaha, NE 68124

For the Appellee: Edmond E. Talbot, III, Esq.
Washington County Attorney
1555 Colfax Street
Blair, NE 68008

Before: Commissioners Hans, Lore, Wickersham and Reynolds.

Reynolds, Chair, for the Commission:

**I.
STATEMENT OF THE CASE**

R. W. Investments, Inc., ("the Taxpayer") owns a tract of land approximately 4.73 acres in size. (E33:1). The tract of land is legally described as Tax Lot 228, in Section 12, Township 18, Range 11, Washington County, Nebraska. (E33:1). The land is improved with an 80-unit low-income apartment complex known as the Fox Ridge Apartments. Construction on the first five buildings started in 1992, and on the second five buildings in

1994. (E33:80 - 84). The apartment complex was built with funding provided by the federal government as authorized by Title V, Section 515, of the Federal Housing Act of 1949, as amended. (E9:1 - 2).

The Washington County Assessor determined that the actual or fair market value of the subject property was \$3,705,135 as of the January 1, 2002, assessment date. (E1:1). The Taxpayer timely filed a protest of that determination, and requested that the actual or fair market value of the subject property be set at \$420,000. (E1:1). The Washington County Board of Equalization, after notice and hearing, denied the protest. (E1:1).

The Taxpayer filed an appeal of the Board's decision on August 26, 2002. The Commission served a Notice in Lieu of Summons on the Board on September 13, 2002, which the Board answered on September 23, 2002. The Commission issued a Second Amended Order for Hearing and Second Amended Notice of Hearing on June 26, 2003. An Affidavit of Service in the Commission's records establishes that a copy of the Order and Notice was served on each of the Parties.

The Commission called the case for a hearing on the merits of the appeal in the City of Lincoln, Lancaster County, Nebraska, on October 20, 2003, as required by the Second Amended Notice of Hearing. R. W. Investments, Inc., appeared at the hearing through Patricia J. Engel, President of the Corporation. The

Taxpayer also appeared through counsel, Michael D. Kozlik, Esq.. The Washington County Board of Equalization appeared through Edmond E. Talbot, III, the Washington County Attorney. The Commission took notice of its case file during the course of the hearing without objection from the Parties. The Commission also received certain exhibits.

The Taxpayer adduced the testimony of the Taxpayer's President; the Taxpayer's accountant; a Certified General Appraiser licensed by the State of Nebraska; an employee of the United States Department of Agriculture, Rural Housing Service; and a Charter Financial Analyst who is an instructor at Creighton Law School. The Taxpayer rested after the Board and the Commissioners were afforded an opportunity to cross-examine each of the Taxpayer's witnesses.

The Board moved to dismiss the appeal at the close of the Taxpayer's case. The Motion was overruled, and the Board called two witnesses, including an employee of the Washington County Assessor's Office. The Commission recessed the proceedings at 7:45 p.m.. The proceedings resumed on November 19, 2003, with the Parties and all Commissioners present. The Board called a third witness, and then resumed the interrupted direct examination of the Washington County Assessor's employee.

The Board rested after the Taxpayer and the Commissioners were afforded the opportunity to cross-examine each of the Board's witnesses.

The Taxpayer offered no rebuttal evidence. The Commission then took the matter under advisement after hearing the arguments of counsel.

II. ISSUES

The issues before the Commission are:

1. Whether the Taxpayer can overcome the statutory presumption without evidence of value?
2. Whether the Taxpayer adduced clear and convincing evidence establishing the Board's decision was incorrect and either unreasonable or arbitrary?
3. Whether the Taxpayer adduced clear and convincing evidence establishing the Board's determination of value was unreasonable?
4. Whether the Taxpayer adduced clear and convincing evidence that the assessed value was not equalized with other comparable property in Washington County?
5. Whether under Nebraska law the actual or fair market value of federally subsidized low-income housing must reflect the impact of both the advantages and the disadvantages of ownership?

III.
APPLICABLE LAW

The Taxpayer is required to demonstrate by clear and convincing evidence (1) that the decision of the Board was incorrect and (2) that the decision of the Board was unreasonable or arbitrary. (Neb. Rev. Stat. §77-5016(7) (2003 Supp.)). The "unreasonable or arbitrary" element requires clear and convincing evidence that the Board either (1) failed to faithfully perform its official duties; or (2) failed to act upon sufficient competent evidence in making its decision. The Taxpayer, once this initial burden has been satisfied, must then demonstrate by clear and convincing evidence that the Board's determination of value was unreasonable. *Garvey Elevators v. Adams County Bd.*, 261 Neb. 130, 136, 621 N.W.2d 518, 523-524 (2001).

A taxpayer who alleges his or her property is not equalized with comparable property as required by the Nebraska Constitution in Article VIII, §1(1) has the burden of going forward. That taxpayer also bears the burden of demonstrating by clear and convincing evidence that the value placed upon his or her property is grossly excessive when compared with the value placed on other similar property. *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597, 597 N.W.2d 623, 635 (1999). See also *Kearney Convention Center v. Buffalo County Board of Equalization*, 216 Neb. 292, 304, 344 N.W.2d 620, 626 (1984).

**IV.
FINDINGS OF FACT**

The Commission finds and determines that:

1. The Taxpayer's President had no opinion of actual or fair market value for the subject property as of the assessment date.
2. The Taxpayer's Certified General Appraiser did not offer an opinion of actual or fair market value for the subject property as of the assessment date.
3. Construction was financed by the USDA Rural Housing Service without any owner's equity. The owner was required to have a Letter of Credit for 3% of the value of the property.
4. Although the contract mortgage interest rates for the subject property are 7.25% and 7.75%, the effective mortgage interest rate for the subject property is 1%. This mortgage interest rate is substantially below typical or market mortgage interest rates for apartment complexes.
5. The Taxpayer is authorized by the Management Plan to receive a management fee. The fee amounted to 15% of Gross Income for 2000 and 16% for 2001. (E45). The only evidence of typical or market management fees is a range of 3 to 10%. *Property Assessment Valuation, 2nd Ed., International Association of Assessing Officers, 1996, p. 216.* The rate afforded under the USDA agreement is higher than the typical

or market management fee expense listed in *Property Assessment Valuation*.

6. The Taxpayer cannot payout dividends exceeding \$7,304 or 8% of the initial investment. (E9:4; E9:12). This component of the Taxpayer's return on investment is contingent on positive cash flow.
7. Rental rates for the subject property are subject to annual review and approval by the USDA Rural Housing Agency. (E14:8). That Agency has never rejected the Taxpayer's request for an increase in rent.
8. Prepayment of the mortgage loans is prohibited. (E7:4).
9. Any sale of the subject property is subject to review and approval by the USDA Rural Housing Service. (E8:7).
10. The stock of R. W. Investments, Inc., cannot be sold without review and approval of the USDA Rural Housing Service. (E9:5).
11. Ms. Engel, the current president of R.W. Investments, purchased the corporation after construction of the property was completed. The Taxpayer had never owned or operated multi-family housing projects or a federally subsidized low-income housing project prior to the acquisition of the subject property. The Service did not reject the Taxpayer's offer to purchase R.W. Investments, Inc., a corporation which owned five federally subsidized

housing complexes, including the subject property. The assets of R. W. Investments, Inc., included the purchase of several management contracts for other low-income housing properties.

12. The contract between the Taxpayer and the USDA requires a Reserve for Replacement fund for long-term improvements. This fund is used to keep and maintain the property according to standards maintained by the USDA Rural Housing Service. Contributions to the Reserve for Replacement fund are considered an expense item and therefore reduce the Net Operating Income. This fund benefits the subject property by providing funding to keep the property in a condition mandated by the standards of the USDA Rural Housing Service.
13. The contract between the Taxpayer and the USDA Rural Housing Service requires that any rent collected over the "base rent" must be paid to the USDA Rural Housing Agency as an excess mortgage interest payment. The contract prohibits the Taxpayer from collecting any rent in excess of the "note rent."

**V.
ANALYSIS**

**A.
CAN THE TAXPAYER OVERCOME THE PRESUMPTION
IN THE ABSENCE OF EVIDENCE OF ACTUAL OR FAIR MARKET VALUE?**

The Taxpayer can only prevail if it establishes that the Board's decision was incorrect, and either unreasonable or arbitrary. The Taxpayer, once it meets this burden, must then prove that the Board's determination of value was unreasonable. *Garvey Elevators v. Adams County Bd.*, 261 Neb. 130, 136, 621 N.W.2d 518, 523-524 (2001).

The Taxpayer adduced the testimony of five witnesses as well as a number of exhibits. The Taxpayer's first witness, the President of the Corporation, had no opinion of actual or fair market value for the subject property. The Taxpayer's second witness was a Certified General Appraiser licensed by the State of Nebraska. The Appraiser's assignment did not include a request to prepare an opinion of actual or fair market value.

The Taxpayer adduced the testimony of three other witnesses. None of these witnesses offered an opinion of actual or fair market value.

The Taxpayer did adduce testimony concerning components of the Income Approach to value which it asserted should be used to value the subject property. The Taxpayer's evidence lacked information on critical components essential to proper application of the Income Approach.

The Nebraska Court of Appeals considered similar circumstances in an appeal concerning the actual or fair market value of a grain elevator. The Court held in that appeal:

"We are not impressed with the Board's evidence, but absent valid evidence contradicting the Board's finding, the [Tax Equalization and Review] Commission and this court must give effect to the [statutory] presumption."

DeBruce Grain, Inc. v. Otoe County Bd. of Equalization, 7 Neb.App. 688, 696, 584 N.W.2d 837, 842 - 843, (Neb.App. 1998). . The law is clear: the Taxpayer cannot prevail against the statutory presumption in the absence of evidence of actual or fair market value. The Commission must affirm the Board's determination of value under Neb. Rev. Stat. §77-5016(7) (2003 Supp) in the absence of evidence of actual or fair market value.

**B.
WAS THE BOARD'S DECISION INCORRECT AND
EITHER UNREASONABLE OR ARBITRARY?**

The Taxpayer must demonstrate by clear and convincing evidence that the Board's decision was incorrect and either unreasonable or arbitrary. *Garvey Elevators v. Adams County Bd.*, 261 Neb. 130, 136, 621 N.W.2d 518, 523-524 (2001). The "unreasonable or arbitrary" element requires clear and convincing evidence that the Board either (1) failed to faithfully perform

its official duties; or (2) failed to act upon sufficient competent evidence in making its decision. *Garvey Elevators v. Adams County Bd.*, 261 Neb. 130, 136, 621 N.W.2d 518, 523-524 (2001).

The Taxpayer alleges the Board's decision was incorrect and both unreasonable and arbitrary in that the Board's decision failed to consider the impact on actual or fair market value of the disadvantages of ownership of Section 515 housing. The Board's witness, an employee of the Washington County Assessor's office, testified that he believed that such considerations were not necessary to determine the actual or fair market value of the subject property, and therefore consideration was not given to the disadvantages of ownership of §515 housing.

Real property is to be valued at its "actual value." Neb. Rev. Stat. §77-201(Cum. Supp. 2002). The term "actual value" is defined as "the market value of real property in the ordinary course of trade." Neb. Rev. Stat. §77-112 (2003 Supp.).

"Market Value," in turn, is defined as:

"the most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeably, and assuming the price is not affected by undue stimulus. Implicit in this definition is the consummation of a sale as of a

specified date and the passing of title from seller to buyer under conditions whereby (1) both buyer and seller are typically motivated; (2) both parties are well informed or well advised, and acting in what they consider their best interests; (3) a reasonable time is allowed for exposure in the open market; (4) payment is made in terms of cash in United States dollars or in terms of financial arrangements comparable thereto; (5) the price represents the normal consideration for the property sold unaffected by special or creative financing or sales concessions granted by anyone associated with the sale."

Property Assessment Valuation, 2nd Ed., International Association of Assessing Officers, 1996, p. 100. See also, *Title 350 Neb. Admin. Code, Chapter 10, Reg. 001.15 (3/2001)*. Properly adopted rules and regulations have the force and effect of law.

Alexander v. J. D. Warehouse, 253 Neb. 153, 568 N.W.2d 892 (1997). The Board's determination of actual or fair market value for the subject property must include consideration of all of the factors influencing value, whether those factors are positive or negative. The Board's determination of actual value must reflect the actual value of real property shall be the value which a willing buyer would be willing to pay for the fee simple

interest. *Omaha Country Club v. Douglas County Bd. of Equalization*, 11 Neb.App. 171, 182, 645 N.W.2d 821, 831 (2002).

Ownership of federally subsidized low-income housing presents both advantages and disadvantages to the real estate investor. Advantages of ownership of §515 property include the low "down payment" for the property (a Letter of Credit for 3% of the property's value as improved); the one percent (1%) effective mortgage interest rate; the management fee (15% for 2000, and 16% for 2001) if owner managed; the income stream generated by the rents and the rate of return on the borrower's initial contribution at 8% (\$7,304 per year). The Taxpayer alleges that disadvantages of ownership of §515 property include rent restrictions; higher operating expenses; higher management expenses if the management is contracted to someone other than the owner; the limitation on the immediate return on the borrower's initial contribution, in this case \$7,304 per year assuming a positive cash flow; and the 7.25% and 7.75% contract mortgage interest rate, since funding for reducing the contract interest rate is left to Congress' discretion, while refinancing is prohibited without government consent, and restrictions on the sale of the subject property or its owner, R.W. Investments, Inc..

Well-informed or well-advised buyers and sellers of §515 low-income housing would be aware of both the advantages and

disadvantages of ownership. These factors would therefore influence value.

The Taxpayer adduced clear and convincing evidence that the Board's decision failed to include consideration of the disadvantages of ownership of \$515 low-income housing. There is also no evidence that the Board's decision included consideration of the advantages of ownership of \$515 low-income housing. The Board's decision was not based on sufficient competent evidence. The Board's decision was therefore unreasonable and arbitrary.

C.

WAS THE BOARD'S DETERMINATION OF VALUE UNREASONABLE?

State law specifically recognizes three approaches to value: the sales comparison approach; the income approach, and the cost approach. Neb. Rev. Stat. §77-112 (2003 Supp.). Only one of these methodologies need be used in order to value real property for purposes of *ad valorem* taxation. *Schmidt v. Thayer County Bd. of Equalization*, 10 Neb.App. 10, 18, 624 N.W.2d 63, 69 - 70, (2001).

I.

THE SALES COMPARISON APPROACH

The Taxpayer alleges that \$515 low-income housing projects suffer from lower Gross Income, higher expenses, and higher capitalization rates.

There were no sales of property subject to §515 agreements presented to the Commission and therefore there is no direct evidence of the impact on actual or fair market value of the advantages and disadvantages of ownership of §515 federally subsidized low income housing. The Sales Comparison Approach could not be used to value the subject property for tax year 2002.

ii.

THE INCOME CAPITALIZATION APPROACH

The Income Approach is typically used to determine the value of income-producing properties. *Property Assessment Valuation*, 2nd Ed., International Association of Assessing Officers, 1996, pp. 203. The Income Approach derives the value of an asset based on the present value of anticipated future benefits. *Income Property Valuation*, Dearborn Financial Publishing, Inc., 1994, p. 109. The Income Approach converts the income stream into an opinion of value based on the

“notion that an investor anticipates a complete recovery of invested capital - plus a payment for the use of capital. The term *return of capital* refers to the recovery of invested capital; the term *return on investment* refers to the additional amount received as compensation for use of the investor's capital until it

is recaptured. Investors are concerned with both types of return. The rate of return on capital is analogous to the yield rate or the interest rate earned or expected."

The Appraisal of Real Estate, 12th Ed., Appraisal Institute, 2001, p. 488.

The subject property is an income-producing property. The Income Approach is, under the circumstances, the most appropriate methodology for use in determining the value of the subject property.

The Income Approach values property using the following method:

- "1. Estimate potential gross income from market data.
2. Estimate vacancy and collection loss and subtract it from gross income.
3. Add miscellaneous income to arrive at effective gross income.
4. Analyze and estimate operating expenses.
5. Subtract operating expenses from effective gross income to arrive at net operating income.
6. Select an appropriate capitalization method, technique, and rate.
7. Compute value by capitalizing the net operating income."

Property Assessment Valuation, 2nd Ed., 1996, p. 46. This described procedure is valid for both professionally accepted fee and mass appraisal methodologies. *Appraisal of Real Estate*, 12th Ed., Appraisal Institute, 2001, p. 493.

Proper application of the Income Approach requires market data. The market data necessary to determine an opinion of value includes "typical or market" income information, "typical or market" expense information, and "typical or market" capitalization rates. *Property Assessment Valuation*, 2nd Ed., International Association of Assessing Officers, 1996, p. 204. The use of typical or market factors is required in order to meet the fundamental goal of the Income Approach. This goal is to predict "the stabilized annual net income that the property is expected to produce, assuming competent management and a typical year." *Id.*, p. 215. Actual income and actual expenses are not used to predict income under mass appraisal methods, since the use of that data would ". . . penalize the competent and diligent and to reward the incompetent or indolent." *In re: Pine Raleigh Corp.*, 258 N.C. 398, 403, 128 S.E.2d 855, 859 (1963).

Typical or market data can only be derived from the sales of comparable properties or actual income and expense data from a number of comparable properties. Collection and analysis of this data is difficult. Most owners are unwilling to disclose actual

income and expense data. The derivation of the appropriate market capitalization rate also requires a degree of expertise.

"[T]he conversion of income into property value should represent the annual rate of return the market indicates is necessary to attract investment capital. This rate is influenced by many factors: The degree of perceived risk; Market expectations regarding future inflation; The prospective rates of return for alternative investments; The rates of return earned by comparable properties in the past; Availability of debt financing; the prevailing tax law."

The Appraisal of Real Estate, 12th Ed., Appraisal Institute, 2001, p. 491.

The Taxpayer alleges that actual income and actual expenses should be used to value the subject property for tax year 2002. Professionally accepted mass appraisal methods prohibit the use of actual income, expenses, and capitalization rates for the reasons set forth above. Even professionally accepted fee appraisal methodologies require both actual income and expense data and typical or market income and expense data. *Appraisal of Real Estate*, 12th Ed., Appraisal Institute, p. 492.

The Taxpayer adduced no evidence of typical or market income and expense factors for \$515 housing. Such evidence must be drawn from sales of such property or actual income and expense

data from a number of comparable properties. There were no sales of \$515 low-income housing as noted above. The Washington County Assessor's Office's employee testified as to the difficulty of obtaining actual income and expense data due to the confidential nature of that data. The income and expense data essential to proper application of the Income Approach is not available to either the Taxpayer or the Board.

The Taxpayer did adduce the testimony of a Charter Financial Analyst regarding the discount rate. The term "discount rate" describes "any rate used to convert future cash flows over time into a present value. Because investors expect their total return to exceed the invested amount, the present value of a prospective benefit is less than the expected future worth of that benefit - thus the 'discount.'" *The Appraisal of Real Estate*, 12th Ed., Appraisal Institute, 2001, p. 488.

The Taxpayer's expert based his opinion of the discount rate on an investment publication. The discount rates derived from the publication were for professionally managed Real Estate Investment Trusts (REITs) and very secure governmental entity bonds maturing in 2043. The publication does not include any evidence of the typical or market discount rate or capitalization rates appropriate for the purchase of \$515 low-income housing property in Washington County, Nebraska.

There is no evidence that the types of investments considered by the Taxpayer's expert were similar to investments with a 1% effective mortgage interest rate, the 97% loan to value ratio (based on a 3% Letter of Credit) at issue here, or the 15% to 16% management fee.

The Parties disagree as to the appropriate capitalization rate. A difference in capitalization or discount rates is critical in determining value under the Income Approach. A small difference in the capitalization or discount rate will result in estimates of value which differ substantially. *Property Assessment Valuation*, 2nd Ed., International Association of Assessing Officers, 1996, p. 233.

Finally, even if an appropriate capitalization rate is available, it is of no use under the Income Approach if the factor to which that rate is applied (typical or market Net Operating Income) is unavailable.

iii. THE COST APPROACH

The Cost Approach is the third professionally accepted appraisal methodology. This approach is typically used to value new properties, unique properties, or properties for which sales and income data are scarce. *Property Assessment Valuation*, 2nd Ed., International Association of Assessing Officers, 1996, p. 127. While the subject property is neither new nor unique, the

Taxpayer offered no sales of truly "comparable" property. The Taxpayer adduced no evidence of actual or fair market value under the Cost Approach.

iv.
THE BOARD'S EVIDENCE OF VALUE

The Board determined that the subject property's actual or fair market value was \$3,705,135 as of the assessment date. (E1:1). The Board based its decision on the Cost Approach. (E34; E35).

The Board, at the hearing before the Commission, adduced the testimony of an appraiser employed by the Washington County Assessor to assist the Assessor in the valuation of real property within Washington County.

The Board's witness testified that his opinion of actual or fair market value was \$3,705,135 as of the assessment date. This is the only evidence of actual or fair market value in the record before the Commission.

The Board's witness supported the Board's determination of value using both the Sales Comparison Approach and the Income Approach. The Board's witness used sales of apartment complexes in Washington County, Nebraska, as the basis for these opinions. The sales were drawn from sales of apartment complexes which sold within the three-year period prior to the assessment date. (E37; E38, E40, E41; E42).

None of the sold properties were §515 low-income housing properties. The Board's witness testified that he did not believe he had to account for the factors of §515 low-income housing which impacted actual or fair market value.

Any information derived from these sales would not demonstrate the impact on actual or fair market value of the advantages or disadvantages of ownership of §515 property. This evidence supporting the Board's determination of value under the Cost Approach is not persuasive.

The Board evidence for use of the Income Approach was, as previously noted, incomplete. Specifically, it lacked evidence of typical or market expenses.

The Cost Approach is a professionally accepted mass appraisal methodology recognized by law. Neb. Rev. Stat. §77-112(2003 Supp.). The Board need only use one approach to value the subject property. *Schmidt v. Thayer Cty. Bd. of Equal.*, 10 Neb.App. 10, 18, 624 N.W.2d 63, 69 - 70 (2001).

The Taxpayer adduced no evidence of value using the Cost Approach, and adduced no evidence refuting the determination of value reached by the Board under the Cost Approach. The Board's evidence of value based on the Cost Approach is the only evidence of value. The Taxpayer has failed to demonstrate by clear and convincing evidence that the Board's value determination using the Cost Approach was unreasonable. The Taxpayer has therefore

failed to satisfy the second element of the burden of persuasion imposed by Neb. Rev. Stat. §77-5016(7) (2003 Supp.). The Board's determination of value must accordingly be affirmed.

D.
EQUALIZATION

The Taxpayer also alleged that the Board's value was not equalized with other comparable properties. The Taxpayer utilized the Board's evidence of sales of apartment projects within Washington County to support its contention. These apartment projects were not §515 housing projects. The Taxpayer's offered no clear and convincing evidence establishing allegation that it is essential to use §515 housing projects to determine value under the Income Approach, but that it is not necessary to use such properties as a basis for equalization, is not credible.

The elements of proof and the burden of persuasion imposed on a complaining taxpayer in an equalization appeal are well-settled:

"Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value. The purpose of equalization of assessments is to bring assessments from different parts of the taxing district to the same relative standard, so that no one part is compelled to

pay a disproportionate share of the tax. Where it is impossible to secure both the standards of the true value of a property for taxation and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law. If a taxpayer's property is assessed in excess of the value at which others are taxed, then the taxpayer has a right to relief. However, the burden is on the taxpayer to show by clear and convincing evidence that the valuation placed upon the taxpayer's property when compared with valuation placed on other similar property is grossly excessive."

Cabela's Inc. v. Cheyenne County Bd. of Equalization, 8 Neb.App. 582, 597, 597 N.W.2d 623, 635 (1999).

The Taxpayer adduced evidence that on a "per unit" basis, the assessed value of the subject property differed from apartment complexes which the Taxpayer deemed "comparable" to the subject property.

"Comparable properties" share similar quality, architectural attractiveness (style), age, size, amenities, functional utility, and physical condition. *Property Assessment Valuation*, 2nd Ed., International Association of Assessing Officers, 1996, p. 98. When using "comparables" to determine value, similarities and differences between the subject property and the comparables must

be recognized. *Property Assessment Valuation, 2nd Ed., 1996,* p.103. Most adjustments are for physical characteristics. *Property Assessment Valuation, 2nd Ed., 1996,* p.105. "Financing terms, market conditions, location, and physical characteristics are items that must be considered when making adjustments . . . " *Property Assessment Valuation, 2nd Ed., 1996,* p. 98.

The apartment complexes offered as "comparables" by the Taxpayer differed from the subject property in terms of age, size, number of units and amenities. The Taxpayer adduced no evidence of the adjustments necessary to account for these differences. The Taxpayer's evidence concerning an alleged lack of equalization does not rise to the level of clear and convincing evidence. The Taxpayer has failed to meet its burden of persuasion.

E. CONCLUSION

The Taxpayer adduced clear and convincing evidence that the Board's decision failed to account for the disadvantages of ownership. The Board's decision also failed to account for the advantages of ownership. The Taxpayer has met the first part of its burden of proof.

The burden of demonstrating that the Board's determination of value was unreasonable, however, remains on the Taxpayer. *Garvey Elevator, supra.* The Taxpayer can only satisfy this

burden by adducing clear and convincing evidence of value. The Taxpayer failed to satisfy this element of its burden of proof. The Commission must, therefore, affirm the Board's determination of value.

VI.
CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the Parties and over the subject matter of this appeal.
2. The Commission is required to affirm the decision of the Board unless evidence is adduced establishing that the action of the Board was unreasonable or arbitrary. Neb. Rev. Stat. §77-5016(7) (2003 Supp.).
3. The Board is presumed to have faithfully performed its official duties in determining the actual or fair market value of the property. The Board is also presumed to have acted upon sufficient competent evidence to justify its decision. These presumptions remain until the Taxpayer presents competent evidence to the contrary. If the presumption is extinguished 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 on the Taxpayer. *Garvey Elevators, Inc. v. Adams County Board of Equalization*, 261 Neb. 130, 136, 621 N.W.2d 518, 523 (2001).

4. A taxpayer who alleges his or her property is not equalized with comparable property as required by the Nebraska Constitution in Article VIII, §1(1) has the burden of going forward. That taxpayer also bears the burden of demonstrating by clear and convincing evidence that the value placed upon his or her property is grossly excessive when compared with the value placed on other similar property. *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597, 597 N.W.2d 623, 635 (1999). See also *Kearney Convention Center v. Buffalo County Board of Equalization*, 216 Neb. 292, 304, 344 N.W.2d 620, 626 (1984).
5. The Commission must affirm the Board's determination of value under Neb. Rev. Stat. §77-5016(7) (2003 Supp) in the absence of Taxpayer evidence of actual or fair market value. *DeBruce Grain, Inc. v. Otoe County Bd. of Equalization*, 7 Neb.App. 688, 696, 584 N.W.2d 837, 842 - 843, (Neb.App. 1998).
6. Professionally accepted mass appraisal methods must be used to value real property for purposes of *ad valorem* taxation. Neb. Rev. Stat. §77-112(2003 Supp.).
7. A county board of equalization need only use one approach to value real property. *Schmidt v. Thayer Cty. Bd. of Equal.*, 10 Neb.App. 10, 18, 624 N.W.2d 63, 69 - 70 (2001).

8. The Income Approach, under professionally accepted mass appraisal methods, requires the use of typical or market income data, typical or market expense data, and typical or market capitalization rate data. *Property Assessment Valuation*, 2nd Ed., International Association of Assessing Officers, 1996, p. 204. See also *Harrison Square Partnership v. Sarpy County Bd. of Equalization*, 6 Neb.App. 454, 458, 574 N.W.2d 180,184 (1998).
9. The Taxpayer failed to demonstrate by clear and convincing evidence that the Board's determination of value was unreasonable.
10. The burden is on the taxpayer to show by clear and convincing evidence that the valuation placed upon the subject property, when compared with valuation placed on other similar property, is grossly excessive." *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597, 597 N.W.2d 623, 635 (1999).
11. The Taxpayer failed to demonstrate by clear and convincing evidence that the assessed value of the subject property was not equalized with comparable property.
12. The Board's determination was not unreasonable, and must be affirmed.

**VII.
ORDER**

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. The order of the Washington County Board of Equalization setting the assessed value of the subject property for tax year 2002 is affirmed.

2. The Taxpayer's real property legally described as Tax Lot 228, in Section 12, Township 18, Range 11, in Washington County, Nebraska, more commonly known as the Fox Ridge Apartments, shall be valued as follows for tax year 2002:

Land	\$ 309,060
Improvements	\$3,396,075
Total	\$3,705,135

3. Any request for relief by any Party not specifically granted by this order is denied.

4. This decision, if no appeal is filed, shall be certified to the Washington County Treasurer, and the Washington County Assessor, pursuant to Neb. Rev. Stat. §77-5016(7) (2003 Supp.).

5. This decision shall only be applicable to tax year 2002.

6. Each Party is to bear its own costs in this matter.

IT IS SO ORDERED.

Dated this 21st day of November, 2003.

Robert L. Hans, Commissioner

Susan S. Lore, Commissioner

Wm. R. Wickersham, Vice-Chair

Seal

Mark P. Reynolds, Chair