

**NEBRASKA TAX EQUALIZATION
AND REVIEW COMMISSION**

GARY L. GOLDSTEIN, TRUSTEE,)	
GARY L. GOLDSTEIN LIVING TRUST)	
#1,)	CASE NOs 05C-149 and 05C-150
)	
Appellant,)	DECISION AND ORDER AFFIRMING
)	THE DECISION OF THE DOUGLAS
v.)	COUNTY BOARD OF EQUALIZATION
)	
DOUGLAS COUNTY BOARD OF)	
EQUALIZATION,)	
)	
Appellee.)	

The above-captioned cases were called for a hearing on the merits of appeals by Gary L. Goldstein, Trustee, Gary L. Goldstein Living Trust #1, to the Tax Equalization and Review Commission ("the Commission"). The hearing was held in the Commission's Hearing Room on the sixth floor of the Nebraska State Office Building in the City of Lincoln, Lancaster County, Nebraska, on April 7, 2006, pursuant to a Notice and Order for Hearing issued January 13, 2006. Commissioners Wickersham, Warnes, Lore, and Hans were present. Commissioner Wickersham presided at the hearing.

Gary L. Goldstein, Trustee of Gary L. Goldstein Living Trust #1, ("the Taxpayer"), was present at the hearing without legal counsel.

The Douglas County Board of Equalization ("the County Board") appeared through legal counsel, James R. Thibodeau, a Deputy County Attorney for Douglas County, Nebraska.

The Commission took statutory notice, received exhibits and heard testimony.

The Commission is required by Neb. Rev. Stat. §77-5018 (Supp. 2005) to state its final decision and order concerning an appeal, with findings of fact and conclusions of law, on the record or in writing. The final decision and order of the Commission in this case is as follows.

**I.
FINDINGS**

The Commission finds and determines that:

1. The Taxpayer is the owner of record of certain real property described as shown in the following table ("the subject property").
2. Taxable value of each parcel of the subject property placed on the assessment roll as of January 1, 2005, ("the assessment date") by the Douglas County Assessor, value as proposed by the Taxpayer in timely protests, and taxable value as determined by the County Board is shown in the following tables:

Case No. 05C-149

Description: All of Lot 5 except the West 28.5 feet and the North 94.87 feet, All of Lot 6 except the North 94.82 feet, Lot 7 and ½ of the vacated alley on the South, Block 1, Sherwood Park Addition, Omaha, Douglas County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$30,300.00	\$-0-	\$ 30,300.00
Improvement	\$456,700.00	\$-0-	\$407,700.00
Total	\$487,000.00	\$403,127.00	\$438,000.00

Case No. 05C-150

Description: North 94.82 feet and the West 28.5 feet Lot 6, and the North 94.82 feet Lot 7 88.5 X 94.82, Block 1, Sherwood Park Addition, Omaha, Douglas County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$12,100.00	\$-0-	\$12,100.00
Improvement	\$73,900.00	\$-0-	\$65,100.00
Total	\$86,000.00	\$71,266.00	\$77,200.00

3. The Taxpayer timely filed appeals of the County Board's decisions to the Commission.
4. The County Board was served with Notices in Lieu of Summons and duly answered those Notices.
5. The Taxpayer's appeals were consolidated for hearing by order of the Commission.
6. An Order for Hearing and Notice of Hearing issued on January 13, 2006, set a hearing of the Taxpayer's appeals for April 7, 2006, at 10:00 a.m. CDST.
7. An Affidavit of Service which appears in the records of the Commission establishes that a copy of the Order for Hearing and Notice of Hearing was served on all parties.
8. For reasons stated below, the Taxpayer has not adduced sufficient, clear and convincing evidence that the decisions of the County Board are unreasonable or arbitrary, and the decisions of the County Board should be affirmed.
9. Taxable value of each parcel for the tax year 2005 is:

Case No. 05C-149

Land value	\$ 30,300.00
Improvement value	<u>\$407,700.00</u>
Total value	<u>\$438,000.00.</u>

Case No. 05C-150

Land value	\$12,100.00
Improvement value	<u>\$65,100.00</u>
Total value	<u>\$77,200.00.</u>

II. CONCLUSIONS OF LAW

1. Subject matter jurisdiction of the Commission in this appeal is over all issues raised during the county board of equalization proceedings. *Arcadian Fertilizer, L.P. v. Sarpy County Bd. of Equalization*, 7 Neb.App. 655, 584 N.W.2d 353, (1998)
2. The Commission has jurisdiction over the parties to this appeal.
3. “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 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 2003).
4. 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 2003).
5. Use of all of the statutory factors for determination of actual value is not required. All that is required is use of the applicable factors. *First National Bank & Trust of Syracuse v. Otoe Cty.*, 233 Neb. 412, 445 N.W.2d 880 (1989).

6. "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).
7. 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 2003).
8. All taxable real property, with the exception of qualified agricultural land and horticultural land, shall be valued at actual value for purposes of taxation. Neb. Rev. Stat. §77-201(1) (Cum. Supp. 2004).
9. The Taxpayer must establish by clear and convincing evidence that the action of the County Board was unreasonable or arbitrary. Neb. Rev. Stat. §77-5016 (7) (Supp. 2005)
Garvey Elevators, Inc. v. Adams County Board of Equalization, 261 Neb. 130, 621 N.W.2d, 523, (2001).
10. "Clear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved."
Castellano v. Bitkower, 216 Neb. 806, 812, 346 N.W.2d 249, 253 (1984).
11. A decision is "arbitrary" when it is made in disregard of the facts and circumstances and without some basis which could lead a reasonable person to the same conclusion. *Phelps Cty. Bd. of Equal. v. Graf*, 258 Neb 810, 606 N.W.2d 736, (2000).
12. A decision is unreasonable only if the evidence presented leaves no room for differences of opinion among reasonable minds. *Pittman v. Sarpy Cty. Bd. of Equal.*, 258 Neb 390, 603 N.W.2d 447, (1999).

13. “An owner who is familiar with his property and knows its worth is permitted to testify as to its value.” *U. S. Ecology v. Boyd County Bd. Of Equalization*, 256 Neb. 7, 16, 588 N.W.2d 575, 581, (1999).

III. DISCUSSION

The subject property consists of two parcels. Both parcels are improved with apartment housing. The parcel described in Case No. 05C-149 is improved with a three story apartment building constructed in 1966. (E14:2). The property address is 3833 Cuming St. (E14:1). For convenience that parcel will be referred to as the “3833 property”. The parcel described in Case No. 05C-150 is improved with a three story residence constructed in 1867 with a subsequent conversion to apartments. (E21:2). The property address for that parcel is 3837 Cuming St. (E21:1). For convenience that parcel will be referred to as the “3837 property”.

The Taxpayer testified that he believed that both parcels should be valued using the income approach. Actual value of the 3833 property was determined by the County Board using the income approach. (E13:12). Actual value of the 3837 property was also determined by the County Board using the income approach. (E20:12). The Income Approach can be defined as “a set of procedures through which an appraiser derives a value indication for an income-producing property by converting its anticipated benefits (cash flows and reversion) into property value. This conversion can be accomplished in two ways. One year’s income expectancy can be capitalized at a market-derived rate or at a capitalization rate that reflects a specified income pattern, return on investment, and change in the value of the investment. Alternatively, the annual cash flows for the holding period and the reversion can be discounted

at a specified yield rate.” *The Dictionary of Real Estate Appraisal*, Fourth Edition, Appraisal Institute, p.143, (2002). The steps required for use of the income approach with direct capitalization may be summarized as (1) estimate potential gross income; (2) deduct estimated vacancy and collection loss to determine effective gross income; (3) deduct estimated expenses to determine net operating income; (4) divide net operating income by an estimated capitalization rate to yield indicated value. *The Appraisal of Real Estate* 12th Edition, The Appraisal Institute, 2001, pp. 493 - 494. A variety of techniques may be used to quantify various components of any application of the approach. *Supra*, at chs 20-24, (2001).

Three major methods are used to develop an indication of value using the income approach: direct capitalization; yield capitalization; and a discounted cash flow analysis. *Id.* The direct capitalization method produces an indication of value based on a single year’s estimated income. *Supra*, at 529. A yield capitalization method requires an analysis of income and expected returns over multiple years. *Supra*, at 549. Discounted cash flow analysis is a refinement of the yield capitalization method in which a reversionary value is added to the indicated value of the income stream. *Supra*, at 569. A reversionary value is added on the assumption that the asset producing an income stream still exists and has value at the end of the period. *Id.* That value is discounted to present value as of the valuation date and added to the value of the income stream. *Supra*, at ch 24.

The income approach method used by the County Board was the direct capitalization method. (E13:11 and E20:10). The Taxpayer testified that he did not object to the capitalization rates employed by the County Board nor did he object to the Vacancy and collection loss rate used by the Board. The areas of disagreement were potential gross income and the expense rate.

Approved procedures for use of the income approach require that a comprehensive study be made of historical income and expenses for the subject property. *The Appraisal of Real Estate*, 12th Edition, The Appraisal Institute, 2001, p. 493. That study is to be combined with an analysis of typical income and expense levels for comparable properties. *Id.* The Taxpayer presented evidence of actual income and expenses for the year 2004 for both properties. The Taxpayer's property manager testified that he managed several apartment properties similar in size to the two parcels comprising the subject property. The Taxpayer's property manager testified that he believed the rents charged at the subject property were market rents. The Taxpayer's property manager did not know whether expenses shown were comparable to expenses incurred at similar properties. While actual expenses are an important consideration it is the comparison of those expenses to typical expenses that discounts management decisions such as a decision to defer or accelerate expenses. The effect of deferral can be seen in the information submitted by the Taxpayer. (E10:1). The Nebraska Supreme Court in effort to determine actual value for a railroad has recognized that earning capacity must be determined as opposed to actual income. *Chicago, B. & Q. R.R. Co. v. State Bd. of Equalization & Assessment*, 170 Neb. 77, 92, 101 N.W.2d 856, 866 (1980). Even if the Commission accepted the Taxpayer's evidence concerning gross income it has not received evidence of typical expenses for either parcel. The taxpayer has failed to present clear and convincing evidence on which relief can be granted.

**V.
ORDER**

IT IS THEREFORE ORDERED THAT:

1. The decisions of the County Board determining taxable value of the subject property as of the assessment date, January 1, 2005, are affirmed.
2. Taxable value of each parcel of the subject property for the tax year 2005 is:

Case No. 05C-149

Land value	\$ 30,300.00
Improvement value	<u>\$407,700.00</u>
Total value	<u>\$438,000.00.</u>

Case No. 05C-150

Land value	\$12,100.00
Improvement value	<u>\$65,100.00</u>
Total value	<u>\$77,200.00.</u>

3. This decision, if no appeal is timely filed, shall be certified to the Douglas County Treasurer, and the Douglas County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Supp. 2005).
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 year 2005.
7. This order is effective for purposes of appeal April 13, 2006.

Signed and Sealed. April 13, 2006.

Wm. R. Wickersham, Commissioner

Susan S. Lore, Commissioner

William C. Warnes, Commissioner

SEAL

ANY PARTY SEEKING REVIEW OF THIS ORDER MAY DO SO BY FILING A PETITION WITH THE APPROPRIATE DOCKET FEES IN THE NEBRASKA COURT OF APPEALS. THE PETITION MUST BE FILED WITHIN THIRTY DAYS AFTER THE DATE OF THIS ORDER AND MUST SATISFY THE REQUIREMENTS OF STATE LAW CONTAINED IN NEB. REV. STAT. §77-5019 (SUPP. 2005). IF A PETITION IS NOT TIMELY FILED, THIS ORDER BECOMES FINAL AND CANNOT BE CHANGED.

Commissioner Hans, concurring in part,

Even though errors in the County records (Property Record Files. E14:2, E21:2, E20:4) as to which parcel had the parking lot, which of the two sizes the lot was, and which of the three values was the correct value raise questions as to any of the County's "facts", I concur with the final decision that the taxpayer did not overcome the presumption.

Robert L. Hans, Commissioner