

**NEBRASKA TAX EQUALIZATION  
AND REVIEW COMMISSION**

RAY D. BARR, TRUSTEE, RAY D.	)	
BARR TRUST,	)	
	)	CASE NO 05C-087
Appellant,	)	
	)	DECISION AND ORDER AFFIRMING
v.	)	THE DECISION OF THE DOUGLAS
	)	COUNTY BOARD OF EQUALIZATION
DOUGLAS COUNTY BOARD OF	)	
EQUALIZATION,	)	
	)	
Appellee.	)	

The above-captioned case was called for a hearing on the merits of an appeal by Ray D. Barr, Trustee, Ray D. Barr Trust 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 July 18, 2006, pursuant to a Notice and Order for Hearing issued March 24, 2006. Commissioners Wickersham, Warnes, and Lore were present. Commissioner Wickersham presided at the hearing.

Ray D. Barr, Trustee of Ray D. Barr Trust, ("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 Lot 3, Block 15, Isaacs and Seldens Addition, Omaha, Douglas County, Nebraska, ("the subject property").
2. Taxable value 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 a timely protest, and taxable value as determined by the County Board is shown in the following table:

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Description: Lot 3, Block 15, Isaacs and Seldens Addition, Omaha, Douglas County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$12,300.00	\$	\$ 12,300.00
Improvement	\$221,700.00	\$	\$168,700.00
Total	\$234,000.00	\$110,000.00	\$181,000.00

3. The Taxpayer timely filed an appeal of the County Board's decision to the Commission.
4. The County Board was served with a Notice in Lieu of Summons and duly answered that Notice.
5. An Order for Hearing and Notice of Hearing issued on March 24, 2006, set a hearing of the Taxpayer's appeal for July 18, 2006, at 9:00 a.m. CDST.

6. 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.
7. For reasons stated below, the Taxpayer has not adduced sufficient, clear and convincing evidence that the decision of the County Board is unreasonable or arbitrary, and the decision of the County Board should be affirmed.
8. Taxable value of the subject property for the tax year 2005 is:

Land value	\$ 12,300.00
Improvement value	<u>\$168,700.00</u>
Total value	<u>\$181,000.00.</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. A presumption exists that the County Board has faithfully performed its duties and has acted on competent evidence. *Omaha Country Club v. Douglas County Bd. of Equalization*, 11 Neb.App. 171, 645 N.W.2d 821 (2002).

10. The presumption that a county board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action 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. *Omaha Country Club v. Douglas County Bd. of Equalization*, 11 Neb.App. 171, 645 N.W.2d 821 (2002).
11. The presumption in favor of the county board may be classified as a principle of procedure involving the burden of proof, namely, a taxpayer has the burden to prove that action by a board of equalization fixing or determining valuation of real estate for tax purposes is unauthorized by or contrary to constitutional or statutory provisions governing taxation. *Gordman Properties Company v. Board of Equalization of Hall County*, 225 Neb. 169, 403 N.W.2d 366 (1987) (citations omitted)
12. The Commission can grant relief only if the Taxpayer establishes by clear and convincing evidence that the action of the County Board was unreasonable or arbitrary. See. Neb. Rev. Stat. §77-5016 (7) (Supp. 2005).
13. "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).
14. 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).

15. 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).
16. “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 is an improved parcel. The improvements are a 4,608 square foot two story, apartment building with a full basement built in 1969 and associated parking. (E7:2). There are nine units in the apartment building. (E3:1).

The Taxpayer’s Partner testified that comparables shown in material submitted by the County Board should not be considered because there was insufficient information to determine whether the proffered comparables were in fact comparable to the subject property. The Taxpayer testified that the subject property has a flat roof and that the comparables offered by the County do not have flat roofs. Factors discussed by the Taxpayer’s Partner would affect comparability of properties. It is unnecessary, however, in this case to consider comparability of the subject property with other properties because the Taxpayer did not offer comparables and the County Board did not utilize the comparables described in its material to determine actual value for the subject property. The County Board’s determination of value was based on the income approach. (E6:12). The income approach developed by the county relied on mass

appraisal techniques rather than direct comparison with other income producing properties. (E6:9-11 and E9).

Likewise the Taxpayer produced evidence of value determined through application of the income approach. 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* 12<sup>th</sup> 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 Taxpayer's evidence can best be understood if analyzed in the context of the direct capitalization method. The County Board utilized a base capitalization rate of 8.5%. The Taxpayer testified that the market expects a 9% rate of return. The higher the capitalization rate, the lower the final indicated value. *Property Assessment Valuation, 2<sup>nd</sup> Ed.*, International Association of Assessing Officers, 1996, p. 232. Capitalization rates for use in the direct capitalization method can be determined using several accepted techniques. *The Appraisal of Real Estate 12<sup>th</sup> Edition*, The Appraisal Institute, 2001, p530. All of the techniques require use of market data. *Id.* The Taxpayer's unsupported testimony is not clear and convincing evidence that the base capitalization rate determined by the County Board is incorrect. A "loaded" capitalization rate includes the effective tax rate. *Property Assessment Valuation, 2<sup>nd</sup> Ed.*, International Association of Assessing Officers, 1996, p. 233. The County Board used a loaded cap rate. (E6:11). The Taxpayer did not dispute the effective tax rate added by the County Board to the base capitalization rate.

The Taxpayer's estimate of total income for the subject property is substantially the same as the estimate of effective gross income determined by the County Board. (E4:1 and E6:10).

The major difference in the evidence concerning factors to be applied in use of the income approach were in the actual expenses produced by the Taxpayer versus the expense

estimates of the County Board. The Taxpayer's Partner testified that the evidence presented by the Taxpayer was of actual expenses derived from its income tax returns for the years 2003 and 2004. Income and expenses that are proper and acceptable for income tax purposes are not the same as those that are appropriate for the income approach. Only the reasonable and typical expenses necessary to support and maintain the income-producing capacity of the property should be allowed." *Property Assessment Valuation*, 2<sup>nd</sup> Ed., International Association of Assessing Officers, 1996, p. 204. See. *Spencer Holiday House, Inc., v. Board of Equalization of Hall County*, 220 Neb. 607, 611, 371 N.W.2d 286, 288, (1985).

Expenses as shown by the Taxpayer include taxes. As noted above the more appropriate treatment of the that item is to include the effective tax rate in the capitalization rate. If adjusted for taxes, actual expenses shown by the Taxpayer still exceed estimates made by the County Board. The Taxpayer's Partner testified that some expense items with a long life, such as major repairs, were sometimes deducted in one year or while in other instances they were deducted over several years whichever treatment was appropriate for income tax treatment. The two years of expense data submitted by the Taxpayer are insufficient to determine typical expenses given that accounting approach. The Taxpayer's Partner testified that actual expenses for the subject property were higher than typical expenses because it rented to qualified Section 8 tenants. The County Board considered the effect of Section 8 participation as a component of the capitalization rate. (E9). The Taxpayer's Partner also testified that actual expenses for the subject property were higher than typical expenses due to problems with the structure such as settling and a desire to keep the subject property in good condition. The Commission is unable to determine the stabilized expenses for the subject property with only two years of expense data

which may or may not include major repair items. Major repairs are more appropriately reflected in a reserve for replacement or other accounting technique which would more properly reflect the stabilized expenses of the subject property.

The Commission cannot conclude that the evidence presented by the Taxpayer is sufficient to make a determination that the decision of the County Board was unreasonable or arbitrary.

**V.  
ORDER**

**IT IS THEREFORE ORDERED THAT:**

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

Land value	\$ 12,300.00
Improvement value	<u>\$168,700.00</u>
Total value	<u>\$181,000.00.</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 August 4, 2006.

**Signed and Sealed.** August 4, 2006.

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Wm. R. Wickersham, Commissioner

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Susan S. Lore, Commissioner

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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.**