

**NEBRASKA TAX EQUALIZATION
AND REVIEW COMMISSION**

RUDLOFF HASTINGS LLC, DBA)	
IMPERIAL MALL,)	
)	CASE NOs 05C-171, 05C-172, 05C-173,
Appellant,)	& 05C-174
)	
v.)	DECISION AND ORDER REVERSING
)	THE DECISION OF THE ADAMS
ADAMS COUNTY BOARD OF)	COUNTY BOARD OF EQUALIZATION
EQUALIZATION,)	
)	
Appellee.)	

The above-captioned cases were called for a hearing on the merits of appeals by Rudloff Hastings LLC, dba Imperial Mall 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 May 24, 2006, pursuant to a Notice and Order for Hearing issued February 7, 2006. Commissioners Wickersham, Warnes, Lore, and Hans were present. Commissioner Wickersham presided at the hearing.

Ryan E. Dirks, Property Manager was present at the hearing on behalf of Rudloff Hastings LLC, dba Imperial Mall ("the Taxpayer"), with Douglas G. Pauley as legal counsel.

The Adams County Board of Equalization ("the County Board") appeared through legal counsel, Charles A. Hamilton, a Deputy County Attorney for Adams County, Nebraska.

The Commission took statutory notice, received exhibits and heard testimony. The Commission without objection reformed its case captions to reflect ownership of the Subject property.

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 the consolidated cases 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 tables for the consolidated cases ("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 Adams 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-171

Description: IOLL Located on Parcel A-B, Block 9, Imperial Village Addition, Mini Mall Area, Hastings, Adams County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Improvement	\$398,890.00	\$-0-	\$363,590.00
Total	\$398,890.00	\$213,599.30	\$363,590.00

Case No. 05C-172

Description: Parcels A&B, Main Mall, Block 9, Imperial Village Addition, Hastings , Adams County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$1,939,985.00	\$1,038,831.35	\$1,939,985.00
Improvement	\$4,992,565.00	\$2,673,439.77	\$4,379,065.00
Total	\$6,932,550.00	\$3,712,271.12	\$6,319,050.00

Case No. 05C-173

Description: Lot 1, Imperial Theater Subdivision, Hastings, Adams County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$93,590.00	\$50,115.97	\$93,590.00
Improvement	\$414,905.00	\$222,175.08	\$369,910.00
Total	\$508,495.00	\$272,291.05	\$463,500.00

Case No. 05C-174

Description: Parcel C, Block 9, Imperial Village Addition, Hastings , Adams County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$98,310.00	\$52,643.45	\$89,610.00
Improvement	\$-0-	\$-0-	\$-0-
Total	\$98,310.00	\$52,643.45	\$89,610.00

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 February 7, 2006, set a hearing of the Taxpayer's appeals for May 24, 2006, at 11:00 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 adduced sufficient, clear and convincing evidence that the decisions of the County Board are unreasonable or arbitrary, taxable values as determined by the County Board are unreasonable or arbitrary, and the decisions of the County Board should be vacated and reversed.
9. Taxable value of the subject property without allocation among the parcels or land and improvements for the tax year 2005 is \$4,500,000.00.

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 Board has faithfully performed its duties and has acted on sufficient competent evidence. *Garvey Elevators, Inc. v. Adams County Board of Equalization*, 261 Neb. 130, 621 N.W.2d, 523, (2001).

10. The presumption that the County Board has faithfully performed its duties and has acted on sufficient competent evidence may be "more appropriately 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, 179, 403 N.W.2d 366, 373, (1987) (Citations omitted).
11. The Taxpayer may overcome the presumption and meet the statutory burden of proof with 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).
12. "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).
13. 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).
14. 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).

III. DISCUSSION

Four appeals were consolidated for hearing. The improvements on the parcels described in the appeals are a main mall, a theater, a mini-mall, and associated parking. The land described in the appeals includes land under a Kmart store and an airport restrictive easement area. (E10:24). Taxable value of the Kmart building as described in Exhibit 13 was not appealed. Neither the taxable value of the building or its associated land known as Sun Mart was appealed. That parcel is described in Exhibit 14. The subject property is shown in a map received as Exhibit 18. The parcels and improvements whose taxable values are subject to appeal are described in Assessor's records. (E12, E15, E16, and E17).

As noted above the Assessor had determined that taxable value of the subject property should be \$7,938,245 as of January 1, 2005. That determination was protested and the County Board determined that the Taxable value of the Subject property was \$7,235,750 as of January 1, 2005. A transcript of the County Board proceeding was received as Exhibit 9. An Appraiser for the County testified that the County Boards determination was a three per cent increase to the value of improvements only in lieu of the seventeen percent increase in value to both land and improvements determined by the Assessor. Exhibit 9 shows that there was no evidentiary basis for the County Board's decision. The decision of the County Board was arbitrary. *Phelps Cty. Bd. of Equal. v. Graf*, 258 Neb 810, 606 N.W.2d 736, (2000). The Taxpayer presented as its evidence of taxable value an appraisal and testimony by its author. The Taxpayer's appraiser testified that he reached his conclusion of taxable value as of January 1, 2005, based on the use of three approaches to a determination of value the cost approach, the sales comparison approach

and the income approach. The Taxpayer's appraisal details use of the three approaches. (E10 and E11). The Taxpayer's Appraiser testified that he gave the most weight to 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 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 Taxpayer's appraisal shows the development of one year's estimated net operating income to which a loaded capitalization rate is applied. (E10:61 and 62). The data provided is consistent with application of the direct capitalization method to determine value using the income approach. The indicated net operating income for the subject property developed in the appraisal was compared with the net operating income of comparable properties to verify the result. (E10:62). The Taxpayer's Appraiser did not provide data for all steps in an income approach analysis even though five steps were described as necessary in his appraisal report. The Taxpayer's Appraiser in effect collapsed two steps, the estimation of potential gross income followed by a deduction for vacancy and collection loss into one step and estimated total income. (E10:62). While providing data for all steps allows a more careful review there is no evidence that a different total income would have been obtained even if a calculation of potential gross income with an appropriate deduction for vacancy and collection loss had been explicitly made.

The Taxpayer's Appraiser derived a loaded capitalization rate, that is one which reflects the local tax rate, from sales of comparable properties, and his estimate of the extra risk an investment in the subject property would entail. No evidence was presented suggesting that the capitalization rate determined by the Taxpayer's Appraiser was not appropriate.

An Appraiser for the County testified that in his opinion actual value of the subject property as of the assessment date was the value determined by the Assessor. As noted above that value is higher than the value determined by the County Board.

On formation of the Commission the standard of review applicable to decisions of a County Board of Equalization was expressed in Section 77-1511 of Nebraska Statutes. The section read in pertinent part as follows: “The Tax Equalization and Review Commission shall hear appeals *and cross appeals* taken under section 77-1510 as in equity and without a jury and determine anew all questions raised before the county board of equalization which relate to the liability of the property to assessment or the amount thereof. The commission shall affirm the action taken by the board unless evidence is adduced establishing that the action of the board was unreasonable or arbitrary *or unless evidence is adduced establishing that the property of the appellant is assessed too low.*”. (*emphasis added*) Neb. Rev. Stat. §77-1510 (repealed 2001 Neb. Laws LB 465 §12). In 1999 the following provision was enacted and codified as section 77-5016(7) of Nebraska Statutes: “The Commission shall hear all appeals and cross appeals taken under section 77-5007 as in equity and without a jury and determine de novo all questions raised before the county board of equalization or the Property Tax Administrator which relate to the liability of the property to assessment or the amount thereof. The commission shall affirm the action of the board or Property Tax Administrator unless evidence is adduced establishing that the action of the board or the Property Tax Administrator was unreasonable or arbitrary.”. 1999 Neb. Laws LB 140 §4. After enactment of LB 140 in 1999, two sections with differing provisions governed Commission review of appeals from a county board of equalization. In 2001 Section 77-1511 of Nebraska Statutes was repealed. 2001 Neb. Laws LB 465 §12.

Finally in 2002 a provision providing for the taxing of costs in the event of a cross appeal by a county board of equalization was repealed. 2002 Neb. Laws LB 994 §33, repealing Section 77-1513 of Nebraska Statutes. After that repeal all references to cross appeals by a county board of equalization and to review by the Commission if it determined that an assessment was “too low” had been removed. The Commission is unaware of any section of Nebraska Statutes giving a County Board of Equalization authority to file a cross appeal from its own decision and none was filed in this case. The Taxpayer, like the County Board, is entitled to know the issues on appeal. *Gordman Properties Co. v. Board of Equalization*, 225 Neb. 169, 403 N.W.2d 366 (1987). Without a cross appeal and without the repealed section of statute giving notice that an increase in actual value could be determined on appeal, the Commission cannot find that actual value of the subject property exceeded actual value as determined by the board.

The actions of the County Board were arbitrary and the resulting value was not supported by any evidence received by the Commission. An Appraiser for the County testified that actual value of the subject property as of the assessment date was higher than the value determined by the County Board. The Commission is unable to act on that opinion for reasons stated above. The only evidence of actual value as of the assessment date upon which the Commission is able to make a decision is the opinion of the Taxpayer’s Appraiser. The decision of the County Board should be reversed and taxable value of the subject property determined to be \$4,500,000.00 as opined by the Taxpayer’s Appraiser.

**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 vacated and reversed.
2. Taxable value of the subject property without allocation among the parcels for the tax year 2005 is \$4,500,000.00.
3. This decision, if no appeal is timely filed, shall be certified to the Adams County Treasurer, and the Adams 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 June 21, 2006.

Signed and Sealed. June 21, 2006.

Wm. R. Wickersham, Commissioner

Susan S. Lore, Commissioner

Robert L. Hans, 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.