

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

GARDEN CHATEAU, LP,	)	
	)	
Appellant,	)	CASE NO. 05C-021
	)	
vs.	)	FINDINGS AND ORDER
	)	AFFIRMING THE DECISION OF THE
SARPY COUNTY BOARD OF	)	SARPY COUNTY BOARD OF
EQUALIZATION,	)	EQUALIZATION
	)	
Appellee.	)	

The above-captioned case was called for a hearing on the merits of an appeal by Garden Chateau, LP, 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 February 13, 2006, pursuant to a Notice and Order for Hearing issued November 30, 2005. Commissioners Wickersham, Warnes, Lore, and Hans were present. Commissioner Wickersham presided at the hearing.

Brad Kyles, Vice President of EQK Holdings, Inc., the general partner of Garden Chateau, LP, ("the Taxpayer's representative") appeared at the hearing on behalf of Garden Chateau, LP ("the Taxpayer") without counsel.

The Sarpy County Board of Equalization ("the County Board") appeared through counsel, Brett S. Charles, Esq., a Deputy County Attorney for Sarpy 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. STANDARD OF REVIEW

The Taxpayer, in order to prevail, is required to demonstrate that the decision of the County Board was incorrect and arbitrary or unreasonable. Neb. Rev. Stat. §77-5016(8)(Supp. 2005). The presumption created by the statute can be overcome if the Taxpayer shows by clear and convincing evidence that the County Board either failed to faithfully perform its official duties or that the County Board failed to act upon sufficient competent evidence in making its decision. *Garvey Elevators, Inc. v. Adams County Bd. of Equalization*, 261 Neb. 130, 136, 621 N.W.2d 518, 523-524 (2001). It is the Taxpayer's burden to overcome the presumption with clear and convincing evidence of more than a difference of opinion. *Garvey Elevators, Inc. v. Adams County Bd. of Equalization*, 261 Neb. 130, 136, 621 N.W.2d 518, 523-524 (2001). The Taxpayer, once this initial burden has been satisfied, must then demonstrate by clear and convincing evidence that the value as determined by the County Board was unreasonable. *Garvey Elevators, Inc. v. Adams County Bd. of Equalization*, 261 Neb. 130, 136, 621 N.W.2d 518, 523-524 (2001).

## II. FINDINGS

The Commission finds and determines that:

1. The Taxpayer is the owner of record of certain real property described in the appeal as Lots 1 & 2 Clermont Court, Sarpy County, Nebraska ("the subject property").
2. The actual or fair market value of the subject property, placed on the assessment roll as of January 1, 2005, ("the assessment date") by the Sarpy County Assessor was:

Land value	\$ 400,532.00
Improvement value	<u>\$3,685,468.00</u>
Total value	<u>\$4,086,000.00.</u> (E1:1)

3. The Taxpayer timely protested that value to the County Board. The Taxpayer proposed the following value for the subject property:

Land value	\$ 400,532.00
Improvement value	<u>\$2,399,468.00</u>
Total value	<u>\$2,800,000.00.</u> (E2:1).

4. The County Board denied the protest. (E:1).
5. The Taxpayer timely filed an appeal of that decision to the Commission.
6. The County Board was served with a Notice in Lieu of Summons, and duly answered that Notice.
7. An Order for Hearing and Notice of Hearing issued on November 30, 2005, set a hearing of the Taxpayer's appeal for February 13, 2006, at 1:00 p.m. CST.
8. 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.
9. The Taxpayer has not adduced sufficient, clear and convincing evidence to overcome the statutory presumption in favor of the County Board.
10. Based on the entire record before it, the Commission finds and determines that the actual or fair market value of the subject property for the tax year 2005 is:

Land value	\$ 400,532.00
Improvement value	<u>\$3,685,468.00</u>

Total value            \$4,086,000.00.

11. The value of the subject property as of the assessment date determined by the County Board is supported by the evidence.
12. The decision of the County Board was correct and neither arbitrary nor unreasonable.
13. The decision of the County Board should be affirmed.

### III. CONCLUSIONS OF LAW

1. Subject matter jurisdiction of the Commission 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 and the subject matter of this appeal.
3. The Commission, while making a decision, may not consider testimony, records, documents or other evidence which is not a part of the hearing record except those identified in the Commission's rules and regulations or Section 77-5016 (3). Neb. Rev. Stat. §77-5016 (3) (Supp 2005).
4. All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation. Neb. Rev. Stat. §77-201(1) (Cum. Supp. 2004).
5. "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).

6. Actual value of real property for purposes of taxation means the market value of real property in the ordinary course of trade. Neb. Rev. Stat. §77-112 (Reissue 2003).
7. “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).
8. “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).
9. 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).
10. The Taxpayer must adduce evidence establishing that the action of the County Board was incorrect and unreasonable or arbitrary. Neb. Rev. Stat. §77-5016 (7) (Supp. 2005). The Nebraska Supreme Court, in considering similar language, has held that “There is a presumption that a board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action. That presumption remains until there is competent evidence to the contrary

presented, and the presumption disappears when there is competent evidence on appeal to the contrary. From that point on, 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 upon the taxpayer on appeal from the action of the board.” *Garvey Elevators, Inc. v. Adams County Bd. of Equalization*, 261 Neb. 130, 136, 621 N.W.2d 518, 523, (2001).

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. The Court has also held that “In an appeal to the county board of equalization or to [the Tax Equalization and Review Commission] and from the [Commission] to this court, the burden of persuasion imposed on the complaining taxpayer is not met by showing a mere difference of opinion unless it is established by clear and convincing evidence that the valuation placed upon his property when compared to valuations placed on other similar property is grossly excessive and is the result of a systematic exercise of intentional will or failure of plain duty, and not mere errors of judgment.” *Garvey Elevators, Inc. v. Adams County Board of Equalization*, 261 Neb. 130, 136, 621 N.W.2d 518, 523, (2001).

14. "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).
15. "It is the function of the county board of equalization to determine the actual value of locally assessed property for tax purposes. In carrying out this function, the county board must give effect to the constitutional requirement that taxes be levied uniformly and proportionately upon all taxable property in the county. Individual discrepancies and inequalities within the county must be corrected and equalized by the county board of equalization." *AT & T Information Systems, Inc. v. State Bd. of Equalization and Assessment*, 237 Neb. 591, 595, 467 N.W.2d 55, 58, (1991).
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).
17. The appraisal of real estate is not an exact science. *Matter of Bock's Estate*, 198 Neb. 121, 124, 251 N.W.2d 872, 874, (1977).

#### IV. DISCUSSION

The subject property is improved with apartment buildings containing 115 apartments, garages containing 61 stalls, a swimming pool, paving, and a fence. (18:4 and 5). The improvements were constructed in 1967. (E18:3). The Taxpayer's representative testified that EQK Holdings Inc. had owned other apartments in Sarpy County but had sold them within the last five years and that he had managed the subject property at one time. The Taxpayer's

representative testified that the actual value of the subject property on the assessment date was \$2,700,000.00. The Taxpayer's representative testified that his opinion was based on the analysis of income and expenses for the subject property shown in Exhibit 7. That analysis in Exhibit 7 was in turn based on Exhibits 9, 11, and 13, showing actual income and expenses of the subject property for the years 2004, 2003, and 2002 respectively. The Taxpayer had also submitted a similar analysis to the County Board for consideration in conjunction with its protest. (E1:3). The formats of Exhibits 1 page 3, and 7 page 1 suggest use of the income approach to establish actual value of the subject property.

The Taxpayer is not bound by its presentation to the County Board but the basis for differences between the analysis in Exhibits 1 page 3 and 7 page 1 are unknown. Also unexplained is the manner in which Exhibits 9, 11, and 13 support Exhibit 7. The Commission was not able to make an analysis which verified the use of the information in Exhibits 9, 11, and 13 to produce the analysis in Exhibits 1 or 7.

Both the County and the Taxpayer used the income approach to obtain an indication of value. The income approach is "most suitable for types of properties frequently purchased and held for the purpose of producing income, such as apartments. . . ." *Mass Appraisal of Real Property*, International Association of Assessing Officers, 1999, p. 8.

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 years 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 representative challenged the County Board’s use of the direct capitalization method for use of the income approach on two basis. First that older apartment complexes have maintenance and other costs which are higher as a proportion of effective gross

income than the 35% used by the County. The Taxpayer's representative also testified that the 5% vacancy rate utilized by the County Board was too low. That older apartment complexes changed rents monthly in an effort to maintain physical occupancy rates of 90% or better and that effective occupancy rates were lower than 90%. Whether the County Board properly considered the effect of age on costs or income in its application of the income approach is unknown. It is the Taxpayer's burden to do more than raise doubts concerning application of the income approach by the County Board as one indicator of actual value. The Taxpayer must also provide clear and convincing evidence of actual value through application of one or more of the accepted valuation methods. The unsupported opinions of the Taxpayer's representative does not meet that requirement.

The County Board also utilized the cost approach. (E18:2). Use of the approach was not challenged by the Taxpayer. Actual value as determined by the County Board is higher than the value determined utilizing the income approach and lower than the value determined using the cost approach. (E18:2). The use of more than one approach is permitted and the resulting value may be reconciliation of the indicated values.

The Taxpayer has failed to show that the determination of the County Board was arbitrary or unreasonable.

**V.  
ORDER**

**IT IS THEREFORE ORDERED:**

1. That the decision of the County Board determining the actual or fair market value of the subject property as of the assessment date, January 1, 2005, as follows:

Land value	\$ 400,532.00
Improvement value	<u>\$3,685,468.00</u>
Total value	<u>\$4,086,000.00</u>

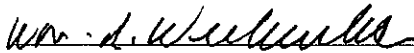
is affirmed.

2. That this decision, if no appeal is timely filed, shall be certified to the Sarpy County Treasurer, and the Sarpy County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Supp. 2005).
3. That any request for relief, by any party, which is not specifically provided for by this order is denied.
4. That each party is to bear its own costs in this matter.
5. That this decision shall only be applicable to tax year 2005.

6. This order is effective for purposes of appeal February 27, 2006.

**Signed and Sealed.** February 27, 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.**