

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

| | | |
|-----------------------------|---|------------------------------|
| UNION PLAZA APARTMENTS LTD, |) | |
| |) | |
| Appellant, |) | Case No 06C-163 |
| |) | |
| v. |) | DECISION AND ORDER REVERSING |
| |) | THE DECISION OF THE DOUGLAS |
| DOUGLAS COUNTY BOARD OF |) | COUNTY BOARD OF EQUALIZATION |
| EQUALIZATION, |) | |
| |) | |
| Appellee. |) | |

The above-captioned case was called for a hearing on the merits of an appeal by Union Plaza Apartments LTD ("the Taxpayer") 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 August 8, 2007, pursuant to an Order for Hearing and Notice of Hearing issued May 18, 2007. Commissioners Wickersham, Warnes, and Salmon were present. Commissioner Wickersham presided at the hearing.

Philip L. Ullerich, General Partner of the Taxpayer was present at the hearing. Howard L. Neuhaus appeared as legal counsel for the Taxpayer.

Thomas S. Barrett, a Deputy County Attorney for Douglas County, Nebraska, appeared as legal counsel for the Douglas County Board of Equalization ("the County Board").

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

The Commission is required by Neb. Rev. Stat. §77-5018 (Cum. Supp. 2006) 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.
ISSUES**

The Taxpayer has asserted that actual value of the subject property as of January 1, 2006, is less than actual value as determined by the County Board. The issues on appeal related to that assertion are:

Whether the decision of the County Board determining actual value of the subject property is unreasonable or arbitrary; and

The actual value of the subject property on January 1, 2006.

**II.
FINDINGS OF FACT**

The Commission finds and determines that:

1. The Taxpayer has a sufficient interest in the outcome of the above captioned appeal to maintain the appeal.
2. The parcel of real property to which this appeal pertains is described as Lot Four (4) in Block One Hundred Seventy-One (171) in the City of Omaha as surveyed and lithographed and he North one (1) foot of vacated alley adjoining said premises on the South, in in Douglas County, Nebraska, ("the subject property").
3. Actual value of the subject property placed on the assessment roll as of January 1, 2006, ("the assessment date") by the Douglas County Assessor, value as proposed in a timely protest, and actual value as determined by the County Board is shown in the following table:

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Description: Lot Four (4) in Block One Hundred Seventy-One (171) in the City of Omaha as surveyed and lithographed and he North one (1) foot of vacated alley adjoining said premises on the South, in,Douglas County, Nebraska.

| | Assessor Notice Value | Taxpayer Protest Value | Board Determined Value |
|-------------|-----------------------|------------------------|------------------------|
| Land | \$ 87,800.00 | \$In total | \$ 87,800.00 |
| Improvement | \$2,250,200.00 | \$In total | \$2,250,200.00 |
| Total | \$2,338,000.00 | \$1,100,000.00 | \$2,338,000.00 |

4. An appeal of the County Board's decision was filed with the Commission.
5. The County Board was served with a Notice in Lieu of Summons and duly answered that Notice.
6. An Order for Hearing and Notice of Hearing issued on May 18, 2007, set a hearing of the appeal for August 8, 2007, at 1:00 p.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. Actual value of the subject property as of the assessment date for the tax year 2006 is:

| | |
|-------------------|------------------------|
| Land value | \$ 87,800.00 |
| Improvement value | <u>\$2,171,131.00</u> |
| Total value | <u>\$2,258,931.00.</u> |

**III.
APPLICABLE LAW**

1. Subject matter jurisdiction of the Commission in this appeal is over 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. “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).
3. 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).
4. 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).

5. “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).
6. 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).
7. 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. 2006).
8. 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).
9. 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).
10. 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)

11. The Commission can grant relief only if there is clear and convincing evidence that the action of the County Board was unreasonable or arbitrary. See, Neb. Rev. Stat. §77-5016 (8) (Cum. Supp. 2006), and e.g. *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb.App. 171, 645 N.W.2d 821 (2002).
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).
15. A corporate officer or other representative of an entity, must be shown to be familiar with the property in question and have a knowledge of values generally in the vicinity to be qualified to offer an opinion of value. *Kohl's Dept. Stores v. Douglas County Bd. of Equal.*, 10 Neb.App. 809, 638 N.W.2d, 881 (2002).
16. The County Board need not put on any evidence to support its valuation of the property at issue unless the taxpayer establishes the Board's valuation was unreasonable or

arbitrary. *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 168, 580 N.W.2d 561, 566 (1998).

17. A Taxpayer, who only produced evidence that was aimed at discrediting valuation methods utilized by county assessor, failed to meet burden of proving that value of property was not fairly and proportionately equalized or that valuation placed upon property for tax purposes was unreasonable or arbitrary. *Beynon v. Board of Equalization of Lancaster County*, 213 Neb. 488, 329 N.W.2d 857 (1983).
18. Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued. *Lincoln Tel. and Tel. Co. v. County Bd. Of Equalization of York County*, 209 Neb. 465, 308 N.W.2d 515 (1981).

IV. ANALYSIS

The subject property is a mixed use parcel. The subject property includes two commercial bays on its first floor and sixty residential apartments on the other above ground floors. The improvements were constructed in 1910 and remodeled in 1986. (E7:2).

Both the Taxpayer's general partner and the County Board based their estimates of actual value for the subject property on use of the income approach. (E5 and E7). 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* 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.

It appears that both the Taxpayer and the County Board relied on the direct capitalization method for the income approach.

The Taxpayer's reliance on actual expenses of the subject property is not in accordance with generally accepted appraisal practice. "The 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*, 2nd Ed., International Association of Assessing Officers, 1996, p. 204. That position has also been adopted by Nebraska Courts. See, *In re Assessment of OL & B Ry. Co.*, 213 Neb. 71, 75-76, 327 N.W.2d 108, 111 (1982) and *Spencer Holiday House, Inc., v. Board of Equalization of Hall County*, 220 Neb. 607, 371 N.W.2d 286, (1985).

The calculation of expenses by the Taxpayer included payment of real estate taxes. "When property is valued for ad valorem tax purposes, taxes should not be considered an expense item." *Property Assessment Valuation*, 2nd Ed., International Association of Assessing Officers, 1996, p. 240. The approved use of taxes is to include a factor for taxes in the capitalization rate. A "loaded" capitalization rate includes the effective tax rate. *Property Assessment Valuation*, 2nd Ed., International Association of Assessing Officers, 1996, p. 233. The capitalization rate used by the County Board for its calculation of the income approach was a loaded capitalization rate. (E6:8). When the income approach is used, the higher the

capitalization rate, the lower the final indicated value. *Property Assessment Valuation, 2nd Ed.*, International Association of Assessing Officers, 1996, p. 232. Obviously deducting taxes also lowers value by reducing net income. The Taxpayer did not object to use of the County Board's loaded capitalization rate. The use of both a deduction for taxes and a loaded capitalization rate is not appropriate.

The Taxpayer's general partner testified the income and expenses shown in Exhibit 11 at page 6 represented, in part, actual income and expenses of the subject property for the years 2003, 2004, and 2005. The actual operating history of a subject property can be considered for appraisal purposes. *The Appraisal of Real Estate* 12th Edition, The Appraisal Institute, 2001, pp. 509 - 511. The analysis is, however, a multi-year analysis and is used as a basis for comparison only with comparable properties. *Id.* In this appeal information three years was presented by the Taxpayer. The Taxpayer did not provided income and expense information for comparable parcels.

The County Board had calculated potential gross income for the apartments based on 55,514 gross square feet. (E6:7). The floors on which apartments are located have a gross square footage of 53,264 sq ft (9044+ 8844 +8844+8844+8844+8844=53,264). (E7:3). The appraiser for Douglas County testified that it appeared that 2,250 sq ft on the first floor had been included in the apartment use area. The appraiser testified that it was an error to include 2,250 sq ft of the first floor in the calculation of apartment use area.

The appraiser's testimony is clear and convincing evidence that the decision of the County Board was unreasonable or arbitrary.

The Taxpayer's estimate of actual value is based on a valuation technique that is not generally accepted and is subject to adjustment for proper treatment of taxes, a reserve for replacement, and vacancy. The Commission cannot fill in the blanks in the Taxpayer's evidence.

It is possible to revise the estimate of value produced by the County Board with the appropriate change to the area deemed used for apartments. The living area as shown on page 7 of Exhibit 6 is reduced to 53,264 ($55,514 - 2,250 = 53,264$). The resulting calculations necessary to derive an estimate of value are as follows: $53,264 \times \$8 = \$426,112$ as potential gross income. $\$426,112 \times .93 = \$396,284$ as effective gross income (potential gross income - vacancy and collection loss of 7%). Effective gross income less 45% expenses equals net operating income of $\$217,956$ ($\$396,284 \times .55 = \$217,956$). Value attributable to the apartments is net operating income $\$217,956$ divided by the cap rate 11.6% or $\$1,878,931$ ($\$217,956 \div .116 = \$1,878,931$). The corrected value attributable to the residential use, $\$1,878,931$, plus the estimated value of the commercial use, $\$390,000$, equals total actual value of $\$2,258,931$ ($\$1,878,931 + \$380,000 = \$2,258,931$).

**V.
CONCLUSIONS OF LAW**

1. The Commission has subject matter jurisdiction in this appeal.
2. The Commission has jurisdiction over the parties to this appeal.

3. The Taxpayer has 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 vacated and reversed.

**VI.
ORDER**

IT IS ORDERED THAT:

1. The decision of the County Board determining taxable value of the subject property as of the assessment date, January 1, 2006, is vacated and reversed.
2. Actual value of the subject property for the tax year 2006 is:

| | |
|-------------------|-------------------------------|
| Land value | \$ 87,800.00 |
| Improvement value | <u>\$2,171,131.00</u> |
| Total value | <u><u>\$2,258,931.00.</u></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 (Cum. Supp. 2006).
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 2006.

7. This order is effective for purposes of appeal on August 13, 2007.

Signed and Sealed. August 13, 2007.

Wm. R. Wickersham, Commissioner

Nancy J. Salmon, 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 (CUM. SUPP. 2006). IF A PETITION IS NOT TIMELY FILED, THIS ORDER BECOMES FINAL AND CANNOT BE CHANGED.