

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

G. L. SALES NO. 1, INC.,	)	
	)	
Appellant,	)	Case Nos 06C-479, 06C-480
	)	
v.	)	DECISION AND ORDER AFFIRMING
	)	THE DECISIONS OF THE LANCASTER
LANCASTER COUNTY BOARD OF	)	COUNTY BOARD OF EQUALIZATION
EQUALIZATION,	)	
	)	
Appellee.	)	

The above-captioned cases were called for a hearing on the merits of appeals by G. L. Sales No. 1, Inc. ("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 February 14, 2008, pursuant to an Order for Hearing and Notice of Hearing issued December 11, 2007. Commissioners Wickersham, Warnes, Salmon, and Hotz were present. Commissioner Wickersham presided at the hearing.

Thomas E. Shotkoski, President of the Taxpayer was present at the hearing. No one appeared as legal counsel for the Taxpayer.

Michael E. Thew, a Deputy County Attorney for Lancaster County, Nebraska, appeared as legal counsel for the Lancaster 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 the consolidated cases 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 appeals to maintain them.
2. The parcels of real property to which the above captioned appeals pertain are described in the tables below and together comprise ("the subject property").
3. Actual value of each parcel of the subject property placed on the assessment roll as of January 1, 2006, ("the assessment date") by the Lancaster County Assessor, value as proposed in timely protests, and actual value as determined by the County Board is shown in the following tables:

Case No. O6C-479

Description: Lots 17, 18, and 19, Block 4, Elizabeth Plaza, Lincoln, Lancaster County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$ 45,000.00	\$ 45,000.00	In Total
Improvement	\$290,300.00	\$189,375.00	\$In Total
Total	\$335,300.00	\$234,375.00	\$335,300.00

Case No. 06C-480

Description: Lots 17 and 18, Block 6, Elizabeth Plaza, Lincoln, Lancaster County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$45,000.00	\$45,000.00	In Total
Improvement	\$270,500.00	\$142,500.00	In Total
Total	\$315,500.00	\$187,500.00	\$294,000.00

4. Appeals of the County Board's decisions were filed with the Commission.
5. The County Board was served with Notices in Lieu of Summons and duly answered those Notices.
6. The appeals were consolidated for hearing by order of the Commission.
7. An Order for Hearing and Notice of Hearing issued on December 11, 2007, set a hearing of the appeals for February 14, 2008, at 9:00 a.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 hearing was held before a panel of the Commission. 442 Neb. Admin. Code, ch 4 §11.01 (10/07).
10. Actual value of each parcel for the tax year 2006 is:

Case No. 06C-479

Land value	\$ 45,000.00
Improvement value	<u>\$290,300.00</u>
Total value	<u>\$335,300.00</u>

Case No. 06C-480

Land value	\$ 45,000.00
Improvement value	<u>\$249,000.00</u>
Total value	<u>\$294,000.00.</u>

**III.  
APPLICABLE LAW**

1. Subject matter jurisdiction of the Commission in each of the above captioned appeals is over issues raised during the county board of equalization proceedings on the appealed decision. *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 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 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).
10. The Commission may not grant relief unless the action of the County Board was unreasonable or arbitrary. Neb. Rev. Stat. §77-5016 (8) (Cum. Supp. 2006),
11. Proof that the action of the County Board was unreasonable or arbitrary must be made by clear and convincing evidence. See, 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, 580 N.W.2d 561 (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. *See, Josten-Wilbert Vault Co. v. Board of Equalization*, 179 Neb. 415, 138 N.W.2d 641 (1965). See also in the context of equalization *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 two parcels of improved land. The improvements are two 6 unit apartment buildings and garages.

Both the Taxpayer's President and the County Board based their estimates of actual value for the subject property on use of the income approach. 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 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 and the County Board both relied on the direct capitalization method for the income approach.

The Taxpayer presented evidence of actual expenses for the years 2005, 2006 and 2007. 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*, 2<sup>nd</sup> 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*, 2<sup>nd</sup> 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, 2<sup>nd</sup> 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. (E19:6 and E19:10). When the income approach is used, 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. 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 Taxpayer’s calculation also included a deduction for amortization of a loan. (E1:9 O6C-479 and E1:11 06-480) . Consideration of mortgage debt service may be appropriate for valuation of an equity interest, but the deduction for mortgage debt service must be based on market terms. *The Appraisal of Real Estate* 12<sup>th</sup> Edition, The Appraisal Institute, (2001), pp. 522 and 543. Id. The evidence does not support a conclusion that the deduction for debt service taken by the Taxpayer is based on market as of January 1, 2006, the valuation date at issue in this proceeding. Equity value when derived for a parcel can be added to the mortgage amount to obtain an indication of value. *The Appraisal of Real Estate* 12<sup>th</sup> Edition, The Appraisal Institute, (2001), pp. 543. From the Taxpayer’s evidence the rate of return was the unknown in the calculations presented. For purposes of the Taxpayer’s calculation the value of the equity interest was assumed so that the value equation  $\text{Income} \div \text{Rate} = \text{Value}$  could be solved. The equation as presented by the Taxpayer was  $\text{Income} \div \text{Value} = \text{Rate}$ . That formulation begs the question of actual value to be assigned to the equity interest. In addition

the source of the loan amount is a number simply derived as 80% of another number the derivation of which is not in evidence.

The Taxpayer's President testified the income and expenses used in his calculations of value were actual income and expenses of the subject property for the years 2005, 2006, and 2007. The actual operating history of a subject property can be considered for appraisal purposes. *The Appraisal of Real Estate* 12<sup>th</sup> 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 for three years, one prior and two subsequent to the valuation date, was presented by the Taxpayer. The Taxpayer did not provided income and expense information for comparable parcels. A component of any valuation is an assessment of expectations. Converting expectations to reality after the fact does not reflect a true consideration of the unknown in terms of whether expectations are valid as of a given date. Income and expenses in subsequent years may be used to validate estimates of stabilized income for prior years but are not useable for production of an estimate of stabilized income. In this instance since income and expenses for the year 2005 alone were not sufficient to establish an estimate of stabilized income. The statement of expenses and income for the years for 2006 and 2007 are of limited use.

The Taxpayer has not shown by clear and convincing evidence that the decision of the County Board was unreasonable or arbitrary.

**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 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.

**VI.  
ORDER**

**IT IS ORDERED THAT:**

1. The decisions of the County Board determining taxable value of the subject property as of the assessment date, January 1, 2006, are affirmed.
2. Actual value of each parcel of the subject property for the tax year 2006 is:

Case No 06C-479

Land value	\$ 45,000.00
Improvement value	<u>\$290,300.00</u>
Total value	<u>\$335,300.00</u>

Case No. 06C-480

Land value	\$ 45,000.00
Improvement value	<u>\$249,000.00</u>
Total value	<u>\$294,000.00.</u>

3. This decision, if no appeal is timely filed, shall be certified to the Lancaster County Treasurer, and the Lancaster 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 February 21, 2008.

**Signed and Sealed.** February 21, 2008.

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Wm. R. Wickersham, Commissioner

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Nancy J. Salmon, Commissioner

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Robert W. Hotz, Commissioner

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William C. Warnes, Commissioner

**SEAL**

**APPEALS FROM DECISIONS OF THE COMMISSION MUST SATISFY THE REQUIREMENTS OF NEB. REV. STAT. §77-5019 (CUM. SUPP. 2006), OTHER PROVISIONS OF NEBRASKA STATUTES, AND COURT RULES.**