

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

VANN PROPERTIES GENERAL PARTN., )		
	)	
Appellant,	)	Case No. 08C 160
	)	
v.	)	DECISION AND ORDER
	)	REVERSING THE DECISION OF
DOUGLAS COUNTY BOARD OF )	)	THE DOUGLAS COUNTY BOARD OF
EQUALIZATION,	)	EQUALIZATION
	)	
Appellee.	)	

The above-captioned case was called for a hearing on the merits of an appeal by Vann Properties General Partn. ("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 October 26, 2009, pursuant to an Order for Hearing and Notice of Hearing issued August 28, 2009. Commissioners Warnes, Salmon, and Hotz were present. Commissioner Warnes was the presiding hearing officer. Commissioner Wickersham was excused from participation by the presiding hearing officer.

R. Thomas Vann, Partner of Vann Properties General Partn., was present at the hearing. No one appeared as legal counsel for the Taxpayer.

Thomas S. Barrett, a Deputy County Attorney for Douglas County, Nebraska, was present 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 to state its final decision and order concerning an appeal, with findings of fact and conclusions of law, on the record or in writing. Neb. Rev. Stat. §77-

5018 (Cum. Supp. 2008). 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, 2008, 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, 2008.

The Taxpayer has asserted that taxable value of the subject property as of January 1, 2008, is not equalized with the taxable value of other real property. The issues on appeal related to that assertion are:

Whether the decision of the County Board, determining the equalized taxable value of the subject property, is unreasonable or arbitrary;

Whether the equalized taxable value of the subject property was determined by the County Board in a manner and an amount that is uniform and proportionate as required by Nebraska's Constitution in Article VIII §1; and

The equalized taxable value of the subject property on January 1, 2008.

**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 ("the Subject Property") is described in the table below.
3. Actual value of the subject property placed on the assessment roll as of January 1, 2008, ("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: OLD MILL PLAZA LOT 13 BLOCK 0 IRREG, Douglas County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$457,400.00	Included in Total	\$457,400.00
Improvement	\$2,729,900.00	Included in Total	\$2,729,900.00
Total	\$3,187,300.00	\$2,000,000.00	\$3,187,300.00

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 August 28, 2009, set a hearing of the appeal for October 26, 2009, 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 2008 is:

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Land value	\$457,400.00
Improvement value	<u>\$1,932,600.00</u>
Total value	<u><u>\$2,390,000.00.</u></u>

### **III. APPLICABLE LAW**

1. Subject matter jurisdiction of the Commission in this appeal is over all questions necessary to determine taxable value. Neb. Rev. Stat. §77-5016(7) (Cum. Supp. 2008).
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. “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).
5. 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).
6. 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. 2008).
7. “Taxes shall be levied by valuation uniformly and proportionately upon all real property and franchises as defined by the Legislature except as otherwise provided in or permitted by this Constitution.” *Neb. Const.*, Art. VIII, §1.
8. Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value. *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).
9. The purpose of equalization of assessments is to bring the assessment of different parts of a taxing district to the same relative standard, so that no one of the parts may be compelled to pay a disproportionate part of the tax. *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991); *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).

10. Equalization to obtain proportionate valuation requires a comparison of the ratio of assessed to actual value for the subject property and comparable property. See, *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).
11. Uniformity requires that whatever methods are used to determine actual or taxable value for various classifications of real property that the results be correlated to show uniformity. *Banner County v. State Board of Equalization*, 226 Neb. 236, 411 N.W.2d 35 (1987).
12. Taxpayers are entitled to have their property assessed uniformly and proportionately, even though the result may be that it is assessed at less than the actual value. *Equitable Life v. Lincoln County Bd. of Equal.*, 229 Neb. 60, 425 N.W.2d 320 (1988); *Fremont Plaza v. Dodge County Bd. of Equal.*, 225 Neb. 303, 405 N.W.2d 555 (1987).
13. The constitutional requirement of uniformity in taxation extends to both rate and valuation. *First Nat. Bank & Trust Co. v. County of Lancaster*, 177 Neb. 390, 128 N.W.2d 820 (1964).
14. In the evaluation of real property for tax purposes, where buildings and improvements are taxable as a part of the real estate, the critical issue is the actual value of the entire property, not the proportion of that value which is allocated to the land or to the buildings and improvements by the appraiser. *Bumgarner v. Valley County*, 208 Neb. 361, 303 N.W.2d 307 (1981).
15. If taxable values are to be equalized it is necessary for a Taxpayer to establish by clear and convincing evidence that valuation placed on his or her property when compared with valuations placed on similar property is grossly excessive and is the result of systematic

will or failure of a plain legal duty, and not mere error of judgement. There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity. *Newman v. County of Dawson*, 167 Neb. 666, 94 N.W.2d 47 (1959).

16. A presumption exists that the County Board has faithfully performed its duties and has acted on competent evidence. *City of York v. York County Bd. Of Equalization*, 266 Neb. 297, 64 N.W.2d 445 (2003).
17. 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).
18. The presumption disappears if there is competent evidence to the contrary. *Id.*
19. The order, decision, determination, or action appealed from shall be affirmed unless evidence is adduced establishing that the order, decision, determination, or action was unreasonable or arbitrary. Neb. Rev. Stat. §77-5016 (8) (Cum. Supp. 2006).
20. Proof that the order, decision, determination, or action appealed from 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).

21. "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).
22. 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).
23. 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).
24. 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).
25. 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).
26. A Taxpayer, who only produced evidence that was aimed at discrediting valuation methods utilized by the 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).



27. A Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued. Cf. *Lincoln Tel. and Tel. Co. v. County Bd. Of Equalization of York County*, 209 Neb. 465, 308 N.W.2d 515 (1981); *Arenson v. Cedar County*, 212 Neb. 62, 321 N.W.2d 427 (1982) (determination of equalized taxable value) *Josten-Wilbert Vault Co. v. Board of Equalization for Buffalo County*, 179 Neb. 415, 138 N.W.2d 641 (1965) (determination of actual value).

#### **IV. ANALYSIS**

The subject property is an improved commercial parcel with three one story commercial office buildings each with 12,000 gross square feet built in 1982. (E4:6). The buildings are all rated as average in quality.

The Taxpayer provided an appraisal as evidence of the 2008 actual value of the subject property. (E2). The appraiser for the Taxpayer testified that he had valued the subject property using the discounted cash flow method. This method is part of the yield capitalization approach to valuation which is one of the two basic methodologies of the income capitalization approach direct capitalization and yield capitalization. *The Appraisal of Real Estate*, 13<sup>th</sup> Edition, The Appraisal Institute, 2008, 465. The discounted cash flow method of valuation falls within the income approach to valuation which is authorized by Nebraska law to determine actual value. Nebraska Statute §77-112 (2003) recites that, “Actual value may be determined using professionally accepted mass appraisal methods, including, but not limited to, the (1) sales comparison approach, (2) income approach, and (3) cost approach.

The income approach is “most suitable for types of properties frequently purchased and held for the purpose of producing income, such as apartments, retail properties, and office buildings.” *Mass Appraisal of Real Property*, International Association of Assessing Officers, 1999, 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, 2002, 143.

The direct capitalization method produces an indication of value based on a single year’s estimated income. *The Appraisal of Real Estate*, 13<sup>th</sup> Edition, The Appraisal Institute, 2008, 499. “Direct capitalization is distinct from yield capitalization.” *Id.* at 500. A yield capitalization method requires an analysis of income and expected returns over multiple years. *Supra*, at 520. 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 522. 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 539.

“Yield capitalization considers a series of cash flows over time together with any reversion value or resale proceeds. Direct capitalization uses the relationship of one year’s income to conclude a value.” *Id.* at 500. The Taxpayer’s appraiser testified that he did not believe that the direct capitalization method was appropriate since the income history was available for the subject property.

The appraiser for the Taxpayer testified that there were special negative considerations associated with the subject property as of January 1, 2008. One of these negatives which influenced the subject property was that the subject property is located at the end of a circular median separated drive. A second negative factor is the location of the subject property in a “struggling” commercial rental area where the vacancy rate was greater than 20%. His testimony was that the occupancy of the subject property as of January 1, 2008 was only 42% (vacancy was 58%). Third, there was a negative impact as of January 1, 2008 caused by the construction of the Dodge Street overpass. In addition, the appraiser for the Taxpayer testified that there would be “lease up costs” to include leasing commissions and tenant improvement allowances.

A summary of the discounted cash flow analysis used by the Taxpayer’s appraiser is shown on Exhibit 2 page 55. This analysis included a 11% capitalization rate which was loaded, meaning the effective tax rate had been added to the capitalization rate of 9%. The evidence was that the County had used a capitalization rate of 9% also, but had chosen not to load it by adding the effective tax rate. (4:17). The appraiser for the County Assessor testified that mass appraisal techniques had been used to value the subject property for 2008. “In mass appraisal, it is usually preferable to treat property taxes as a component of the capitalization rate rather than

as an expense, so as to allow for variations in tax rates and eliminate the problem of estimating real estate taxes before the appraisal is complete.” *Mass Appraisal of Real Property*, Robert J. Gloudemans, International Association of Assessing Officers, 1999, 162. 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, 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. *Id.* The basis for that position is the interplay between tax rates, value, and resulting tax. Taxes to be paid are a function of both the rate and the value to which the rate is applied. If taxes are deducted for purposes of determining value; the tax rate is applied, the tax determined, and value is reduced. Once the reduced value is determined, the tax rate is again applied to the reduced value to determine a new resulting tax. The process can produce a circularity in the calculations. For example, if value is lowered, then the deduction for taxes in the equation should be lowered, which would increase income and increase the calculated value, all other components of the calculation remaining constant. Use of a loaded capitalization rate avoids that circularity because the loaded capitalization rate is indifferent to the items of income or expense producing the number into which it is divided. For the reasons stated use of a loaded capitalization rate will produce a more accurate estimate of actual value when the income approach is used to estimate actual value for ad valorem tax purposes.

The Taxpayer’s appraiser testified that his opinion of actual value for the subject property on January 1, 2008 using the discounted cash flow method was \$2, 380,000. (E2:44 to 55).

The Taxpayer's appraiser testified that he had also used a sales comparison approach to value the subject property and his opinion of actual value of the subject property using this method was \$2,400,000. (E2:35 to 43). The Commission notes that three of the four sales used for comparisons were located in the nearby vicinity to the subject property, and while similar to the subject property, they had been adjusted for differences to allow for them to be compared to the subject property. The reconciled opinion of valuation for the subject property, as testified to by the Taxpayer's appraiser, was \$2,390,000. (E2:36)

The County also used the income approach to value the subject property. (E4:17). The County's opinion of fair market value for 2008 was \$3,187,300. (E1:1 and E4:20). The appraiser for the Taxpayer testified that it was his opinion that the main difference between the two opinions of valuation for the subject property rested on the difference in estimate of rental income and the occupancy rate in year one. His further testimony was that the Taxpayer used actual income and expenses for the subject property over a period of several years. The Commission's review of the evidence provided by the Taxpayer shows that the appraisal of the appraiser for the Taxpayer provided multiple years of income and expenses (2005 to 2008) for the subject property which allowed the determination of a stabilized yearly income and expenses. (E2:65- 68 and E3:1-2).

The appraiser for the County Assessor testified that the County used market income and expenses derived from sales of comparable parcels, market data received from research, and answers to questionnaires sent to the landlords of comparable parcels. His testimony was that there was a higher vacancy rate in the immediate area surrounding the subject property than the 10% which he used. The County did not identify any deficiencies in the appraisal of the

appraiser for the Taxpayer except for the use of a higher vacancy rate and lower income (actual). The County did not provide any evidence of the market income or expenses for parcels which were comparable to the subject property, except for the testimony of the appraiser for the County Assessor.

In particular, for income the County used \$17 per square foot of leased area while the appraiser for the Taxpayer used \$14.59 per square foot. (E4:17 and E2:51). The vacancy used by the County was 10% and that used by the appraiser for the Taxpayer was 42%. (E4:17 and E2:53). The County's calculation of net operating income was \$286,856 (3 buildings each with net operating income of \$95,618.88). The appraiser for the Taxpayer's calculation of net operating income in the first year of the discounted cash flow analysis was \$73,121, a difference of \$213,735.

The Commission finds that the Taxpayer has rebutted the presumption that the County Board of Equalization faithfully performed its duties and had sufficient competent evidence on which to base its decision and the Taxpayer has shown by clear and convincing evidence that the decision of the County Board of Equalization was arbitrary or unreasonable in its determination; and that relief should be granted to the extent that the Commission finds that the actual value of the subject property for 2008 is \$2,390,000.

**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 produced competent evidence that the County Board failed to faithfully perform its official duties and to act on sufficient competent evidence to justify its actions.
4. 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 reversed.

**VI.  
ORDER**

**IT IS ORDERED THAT:**

1. The decision of the County Board determining actual value of the subject property as of the assessment date, January 1, 2008, is reversed.
2. Actual value, for the tax year 2008, of the subject property is:

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Land value	\$ 457,400.00
Improvement value	<u>\$1,932,600.00</u>
Total value	<u>\$2,390,000.00.</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 (Cum. Supp. 2008).
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 2008.
7. This order is effective for purposes of appeal on November 24, 2009.

Signed and Sealed. November 24, 2009.

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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. 2008), OTHER PROVISIONS OF NEBRASKA STATUTES, AND COURT RULES.**