

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

LAWRENCE D. HOFFMAN, TRUSTEE,)
HOFFMAN FAMILY FUNNEL TRUST,)

Appellant,)

v.)

DOUGLAS COUNTY BOARD OF)
EQUALIZATION,)

Appellee.)

Case No. 08C 156

DECISION AND ORDER
AFFIRMING THE DECISION OF
THE DOUGLAS COUNTY BOARD OF
EQUALIZATION

The above-captioned case was called for a hearing on the merits of an appeal by Lawrence D. Hoffman, Trustee, Hoffman Family Funnel Trust ("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 17, 2009, pursuant to an Order for Hearing and Notice of Hearing issued June 5, 2009 as amended by an Order dated June 5, 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.

Lawrence D. Hoffman, Trustee of the Hoffman Family Funnel Trust, 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.

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: KELLOGG PLACE LOT 13 BLOCK 0 S 36.5 FT N50.5 FT LT 12 & S 36.5 FT N 50.5 E 1/2 LT 13 & S 36 N 50 Ft W 1/2 Lt 13, Douglas County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$8,300.00	Included in Total	\$8,300.00
Improvement	\$332,600.00	Included in Total	\$332,600.00
Total	\$340,900.00	\$224,700.00	\$340,900.00

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 June 5, 2009, as amended by an Order issued on July 8, 2009, set a hearing of the appeal for August 17, 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 \$ 8,300.00

Improvement value \$332,600.00

Total value \$340,900.00.

**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. 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).
8. 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).
9. The presumption disappears if there is competent evidence to the contrary. *Id.*
10. 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).
11. 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).
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. "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).
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 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).
18. 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. *Josten-Wilbert Vault Co. v. Board of Equalization for Buffalo County*, 179 Neb. 415, 138 N.W.2d 641 (1965).

IV. ANALYSIS

The subject property is an improved commercial parcel. (E3:2) The multiple unit improvement consists of three floors with 8 apartments on the second and third floors and 4 bays, each of 600 square feet on the first floor. (E3:3) The Taxpayer testified that he leased out the first floor to three separate tenants with one tenant taking two bays of 600 square feet, or a total of 1,200 square feet.

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. Both the Taxpayer and the County Assessor valued the subject property using the income approach to valuation. The income approach to determine actual valuation is one of three professionally accepted appraisal methods and is authorized by Nebraska Statute §77-112 (2003) which states 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.

Proper application of the Income Approach requires an analysis of the “income-producing capabilities of a property, forecasting the periodic income and transforming the income expectations into a value estimate.” *Income Property Valuation*, Dearborn Financial Press, 1994, p. 143.

The income approach requires that the following steps be accomplished:

1. Estimate potential gross income from market data.
2. Estimate vacancy and collection loss and subtract it from gross income.
3. Add miscellaneous income to arrive at effective gross income.

4. Analyze and estimate operating expenses.
5. Subtract operating expenses from effective gross income to arrive at net operating income.
6. Select an appropriate capitalization method, technique, and rate.
7. Compute value by capitalizing the net operating income.

Property Assessment Valuation, 2nd Ed., International Association of Assessing Officers, 1996, p. 46.

“Investors, the typical owners of income-producing property, rely primarily on the income approach in making decisions to buy or sell.” *Property Assessment Valuation*, 2nd Ed., International Association of Assessing Officers, 1996, pp. 203.

The Commission notes that there is a deficiency with the evidence provided by the Taxpayer. First, the Taxpayer provided to the Commission only one year of actual income and expenses for the subject property and is unable to confirm a stabilized net operating income or expenses. (E2:3-7). The income approach to valuation requires a stabilization of the variable income and expense pattern. *Income Property Valuation*, Jeffrey D. Fisher and Robert S. Martin, Dearborn Financial Publishing, Inc., 1994, p. 170. It is then necessary to compare the stabilized income and expenses to the market rents and expenses. “Market rent is the rental income a property would probably command in the open market. It is indicated by the current rents that are either paid or asked for comparable space with the same division of expenses as of the date of the appraisal.” *The Appraisal of Real Estate*, 12th Edition, 2001, The Appraisal Institute, p. 476.

Under professionally accepted mass appraisal methods, “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.

Secondly, the Taxpayer did not provide evidence of market income/rent or expenses for comparable parcels.

Third, the Taxpayer testified that his rent rolls, Exhibit 2 pages 2 to 3, and the operating statement, Exhibit 2:5, included the financials for another 6 unit parcel which he termed the "408" located at 408 S. 24th St. (E2:2-3). His testimony was that the expenses shown on the operating statement were divided by a total of 18 units, which are comprised of 12 units for the subject property and 6 units from the "408" property, and this average, \$1,333.72, was multiplied by the 12 units of the subject property to determine his "direct costs." (E2:5) The Commission finds that this accounting method of calculating "direct expenses" is not a professionally accepted method of accounting for the direct expenses of the subject property since it includes the expenses of another parcel not part of the subject property.

The Taxpayer testified that he calculated the "shared costs" of the subject property by averaging a total of 250 units which he owned and managed. (E2:6-7). His testimony was that 6 parcels comprised the 250 units, the subject property being but one parcel and 12 units of the total. The "shared expenses" were calculated using this method at \$654/unit and when multiplied by 12 equals \$7,848. (E2:2) The Commission finds that this method of accounting for a portion of the expenses is not a professionally accepted method of accounting for expenses since it uses an average from parcels not part of the subject property. The calculation made by the Taxpayer using the above expenses is shown on Exhibit 2 page 2.

Fourth, the Commission finds that the Taxpayer did not provide competent evidence in support of his chosen capitalization rate of 9%; however, the Commission notes that it was similar to the capitalization rate used by the County. (E2:2 and E3:11-12). The capitalization rate used by the Taxpayer, 9% was not loaded, in other words it did not include the effective tax rate. A “loaded” capitalization rate includes the effective tax rate. *Property Assessment Valuation, 2nd Ed.*, International Association of Assessing Officers, 1996, p. 233. 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.

A Taxpayer who offers no evidence that the subject property is valued in excess of its actual value and who only produces evidence that is aimed at discrediting the valuation methods utilized by county assessor fails to meet his or her burden of proving that the value of the property was not fairly and proportionately equalized or that valuation placed upon the 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).

A taxpayer must introduce competent evidence of actual value of its property in order to successfully claim that a 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).

The Commission finds that the Taxpayer has not rebutted the presumption that the County Board of Equalization faithfully performed its duties and had sufficient competent evidence for its decision. Despite this fact, the Commission has reviewed all of the evidence presented and further finds that the Taxpayer has not shown by clear and convincing evidence that the County Board’s decision was either arbitrary or unreasonable nor has he shown by the reasonableness of

the evidence a new valuation or that the subject property was not equalized with the taxable value of other real property. The appeal of the Taxpayer is denied.

**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 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 not 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 affirmed.

**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 affirmed.
2. Actual value, for the tax year 2008, of the subject property is:

Case No. 08C 156

Land value	\$ 8,300.00
Improvement value	<u>\$332,600.00</u>
Total value	<u>\$340,900.00.</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 October 9, 2009.

Signed and Sealed. October 9, 2009.

Nancy J. Salmon, Commissioner

Robert W. Hotz, Commissioner

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.