

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

SFI LTD. PARTNERSHIP I, A)	
Nebraska Limited Partnership,)	
)	CASE NO. 04C-11
Appellant,)	
)	
vs.)	FINDINGS AND FINAL ORDER
)	AFFIRMING THE DECISION OF
LANCASTER COUNTY BOARD OF)	COUNTY BOARD OF EQUALIZATION
EQUALIZATION,)	
)	
Appellee.)	

SUMMARY

SFI Ltd. Partnership I ("the Partnership") owns the Tanglewood Apartment complex in the City of Lincoln, Lancaster County, Nebraska. The Partnership protested the Lancaster County Assessor's ("the Assessor's") proposed 2004 value for the subject property to the Lancaster County Board of Equalization ("the Board"). The Board denied the Partnership's 2004 valuation protest.

**I.
ISSUES**

The issues before the Commission are (1) whether the Board's decision to deny the Partnership's valuation protest was incorrect and either unreasonable or arbitrary; and (2) if so, whether the Board's determination of value was unreasonable.

II.
STATEMENT OF THE CASE

The Partnership owns a 23.69 acre tract of land legally described as Lots 1 & 2, Wyuka Subdivision, and Outlot "B," in the City of Lincoln, Lancaster County, Nebraska. (E8:9). The Partnership's appraisal shows that: The tract of land is improved with a 458-unit apartment complex made up of ten "garden apartment" buildings with 266 apartments built in 1992 with a gross building area of 240,471 square feet and seven additional "garden apartment" buildings with 192 apartments built in 1994 with a gross building area of 164,703 square feet; Amenities include a 7,684 square foot clubhouse containing a laundry facility, sauna and exercise room, two outdoor swimming pools, a lighted tennis court, and a hot tub; Site improvements include 176,000 square feet of asphalt parking area with 885 parking spaces, and 239 garages, for a total of 1,024 parking spaces ("the subject property"). (E2:1, 17 and 18).

Some differences exist between the description of the subject property by the Assessor and the Partnership's Appraiser. Because the income approach was primarily relied on, it is unnecessary to describe those difference as they relate to the size and description of the property. The Assessor does indicate that the complex has two more apartments than the Partnership's Appraiser but the difference may be attributable to apartment

units in the club house and does not materially affect the resulting calculations of value.

The Assessor determined that the subject property's actual or fair market value was \$15,000,000 as of the January 1, 2004, assessment date. (E1). The Partnership timely protested that determination and alleged that the subject property's actual or fair market value was \$13,873,000. (E8:8). The Board denied the protest. (E1).

The Partnership appealed the Board's decision on August 4, 2004. The Commission served a Notice in Lieu of Summons on the Board which the Board answered. The Commission issued a Second Amended Order for Hearing and Notice of Hearing setting the hearing on the merits of the appeal for the December 15, 2005.

The Commission called the case for a hearing on the merits of the appeal in the City of Lincoln, Lancaster County, Nebraska, on December 15, 2005. The Partnership appeared at the hearing through David Slosburg, Vice-President of Tanglewood, Inc., the General Partner of SFI Ltd. Partnership I. The Partnership also appeared through counsel, Jeffrey A. Silver, Esq.. The Board appeared through Michael E. Thew, Chief Deputy, Civil Division, Lancaster County Attorney's Office. Commissioners Hans, Lore, Reynolds and Wickersham heard the appeal. Commissioner Reynolds served as the presiding officer. Commissioner Reynolds did not participate in this decision.

The Partnership, through counsel, stated at the hearing before the Commission that equalization was not at issue. The Parties also stipulated and agreed at the hearing that the only issues the Commission need decide, are the appropriate Vacancy and Collection Loss ratio; the appropriate Expense Ratio; and whether personal property associated with rental of apartments should be deducted from the indicated value under the income capitalization approach and whether the Partnership has met its burden of proof.

The Board, at the close of the Partnership's case-in-chief, moved to dismiss the appeal. The motion was denied.

III. APPLICABLE LAW

The Partnership is required to demonstrate by clear and convincing evidence (1) that the Board's decision was incorrect and (2) that the Board's decision was unreasonable or arbitrary. Neb. Rev. Stat. §77-5016(7) (Supp. 2005). The "unreasonable or arbitrary" element requires clear and convincing evidence that the Board either (1) failed to faithfully perform its official duties; or (2) failed to act upon sufficient competent evidence in making its decision. The Partnership, once this initial burden has been satisfied, must then demonstrate by clear and convincing evidence that the Board's value was unreasonable.

See, Garvey Elevators v. Adams County Bd., 261 Neb. 130, 136, 621 N.W.2d 518, 523-524 (2001).

**IV.
FINDINGS OF FACT**

The Commission finds and determines that:

1. The Partnership stated on the record that the only issues before the Commission were the vacancy rate to be applied, expenses to be deducted, and deduction of the contributory value of personal property to determine actual or fair market value of the subject property as of January 1, 2004.
2. The Partnership's evidence of actual or fair market value as of January 1, 2004, is the opinion of an appraiser supported by an appraisal.
3. The Partnership's Appraiser's opinion of actual or fair market value for the subject property as of January 1, 2004, without consideration of a deduction for the Partnership's Appraiser's estimate of the contributory value of personal property is 2.4% less than the Board's determination of actual or fair market value for the subject property as of that date.

**V.
ANALYSIS**

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*, Twelfth Edition, The Appraisal Institute, 2001, pp. 493 - 494. A variety of techniques may be used to determine various components of the approach. *Supra*, at chs 20-24, (2001).

Both Parties adduced evidence of indicated value based on the income approach with direct capitalization. [E2:38 - 55 (Partnership's Appraisal); E8:45 (Assessor's information used by the Board); E4:86 - 114 (Board's Appraisal)]. Determination of critical factors under the income approach are shown below (all 'per unit' values have been converted to gross dollars for ease of reference):

	Assessor	Partnership's Appraiser	Board's Appraiser
Potential Gross Income	\$2,895,540	\$3,074,340	\$3,263,959
Vacancy & Collection Loss ¹	5% (\$144,477)	12.50% (\$384,293)	9.5% (310,076)
Other Income		\$182,817	
Effective Gross Income	\$2,750,763	\$2,872,865	\$2,953,883
Expense Ratio	29% (797,721)	43.09% (\$1,237,951) ²	32.50% (\$960,012)
Net Operating Income	\$1,953,042	\$1,634,913	\$1,993,871
Capitalization Rate	11.50%	11.30%	11.525%
Indicated Value	\$16,983,000	\$14,467,214	17,300,399
Less: Personal Property		(\$639,068)	
Indicated Value Income Approach ³	\$16,983,000	\$13,828,146 round \$13,830,000	\$17,300,399 called \$17,300,000

1 Note: The vacancy rate utilized by the Partnership's Appraiser was an actual effective vacancy rate of 11%. Vacancy rates used by the Assessor and the Board's appraiser were market rates.

2 Note: Dollar amounts are derived from exhibits, some rounding has occurred in the application of the indicated percentages.

3 Note: Final value as determined by the Assessor was \$15,000,000.00. (E8:45). Final Value as determined by the Partnership's Appraiser was \$14,000,000.00. (E2:3). Final value

as determined by the Board's Appraiser was \$18,000,000.00. (E4:118).

Potential gross income includes rental of apartments and may include other income such as garage rents and laundry income.

Vacancy and collection loss is defined as "an allowance for reductions from potential gross income attributable to vacancies, tenant turnover, and nonpayment of rent or other income. This line item consists of two components: physical vacancy as a loss in income [and] collection loss caused by concessions or default by tenants." *The Appraisal of Real Estate, supra*, at 512.

Vacancy and collection loss may be expressed as percentage of effective income. The vacancy and credit loss percentage used when estimating the fee simple interest in a property "should be the typical rate for the market." *Income Property Valuation*, Dearborn Financial Press, 1994, p. 116.

The Partnership's Appraiser used a 12.50% vacancy and collection loss ratio. (E2:48). The Taxpayer's Appraiser and the County Board's Appraiser used 1.5% as the collection loss component of the ratio. (E2:44; E4:107).

The Partnership's Appraisal Report indicates actual vacancy was 9.6%; that "This vacancy rate is generally consistent with other area survey results;" and that "results tend to indicate an average vacancy rate in the marketplace." (E2:43). The Appraisal Report cites to the "July, 2004, Lincoln Board of Realtors." (E2:43). The Board produced the 2004 *Multi-Family*

Rental Property Report published by the Realtors Association of Lincoln. (E17:10 - 18). The Partnership's Appraiser agreed that this document was the same document cited in his appraisal report. The Report establishes a 9.6% vacancy rate for the Average Vacancy Rate, for Area 2, the area where the property is located. (E17:15). This Report, however, is based on a survey dated April 1, 2004. (E17:11).

Uniform Standards of Professional Appraisal Practice ("USPAP") as produced by the Appraisal Standards Board include Statements on Appraisal Standards. *Uniform Standards of Professional Appraisal Practice and Advisory Opinions*, The Appraisal Foundation, lines 2933-4254, (2005). These Statements have "the full weight of a Standards Rule." *Supra*, lines 2936-2938. Statement No. 3 of the Statements provides:

"Retrospective appraisals (effective date of the appraisal prior to the date of the report) may be required for property tax matters . . . A retrospective appraisal is complicated by the fact that the appraiser already knows what occurred in the market after the effective date of the appraisal. Data subsequent to the effective date may be considered in developing a retrospective value as a confirmation of trends that would reasonably be considered by the buyer or seller as of that date. . . In absence of evidence in the market that data subsequent to the effective

date were consistent with and confirmed market expectations as of the effective date, the effective date should be used as the cut-off date for data considered by the appraiser.” *Supra*, lines 3071-3092.

The 2003 *Multi-Family Rental Property Report* states that the average vacancy rate for all units for Area 2 was 6.6%. (E17:6) This Report was based on a survey dated April 1, 2003. The average vacancy rate increased by almost 50% for Area 2 between April 1, 2003, and April 1, 2004. There is no clear and convincing evidence that such an increase was a confirmation of trends that would reasonably be considered by the buyer or seller as of January 1, 2004. The Partnership Appraiser’s reliance on data that was not collected until April 1, 2004, and reported sometime after that date did not conform to the criteria of *USPAP Statement 3 supra*.

The Partnership’s Appraiser did not use a market vacancy rate for his determination of a vacancy rate. He did however produce evidence of an actual 9.6% vacancy rate [which was rounded to 10% for the subject property. (E2:43)] That evidence is not clear and convincing evidence of the market vacancy rate as of January 1, 2004.

The Partnership’s Appraiser’s estimate of vacancy & collection loss ratio was determined by his analysis of an effective vacancy rate as opposed to the market vacancy rate.

(E2:43 and 44). The Partnership's Appraiser defined the effective vacancy rate as the difference between expected rents and actual rents. (E2:43 and 44). Methods of estimating a vacancy rate other than the physical rate are allowed and one of the allowed methods is a comparison of potential gross income against a subject property's actual collected income. *The Appraisal of Real Estate*, supra at p. 512. Any estimate of vacancy loss should reflect a typical investor's expectations for the subject property over the projected holding period. *Id.* The Partnership's Appraiser indicated that a portion of the variance between potential gross income and actual collected income was vacancies in two bedroom apartments. (E2:43 and 44). The Partnership's Appraiser further opined that potential tenants for two bedroom apartments were electing to own homes rather than rent because of low interest rates. *Id.* Difficulty renting two bedroom apartments seems to have arisen in the prior two years and has extended in to 2005. (E2:38). The holding period to be considered in an appraisal is a measure of how long investors would retain ownership of the subject property. *The Appraisal of Real Estate*. Supra, at p. 483, footnote 4. No expected holding period was identified by the Partnership's Appraiser but it appears that the Partnership has owned the subject property since its construction in 1992 and 1994. The Partnership has held the subject property for a long term holding period. There is no

evidence that investors anticipated interest rate levels for single family residential loans, experienced in 2002 through 2005 would extend through a long term holding period.

The ratio of total operating expense to effective gross income is the operating expense ratio (OER). The OER for the subject property as determined by the Partnership's Appraiser is approximately 43.09%. (Expenses of \$1,237,951 ÷ Effective Gross Income of \$2,872,865.) (E2:52). The Partnership's Appraiser based his estimate of operating expenses on an analysis of statements provided by the Partnership and a comparison with information from other apartment complexes. (E2:44 and 119-122). The Partnership's Appraiser testified that 2 of the properties whose expenses were analyzed on page 46 of Exhibit 2 for comparison had ownership in common with the subject property and a third was the subject property. The only other property was smaller than the subject, 270 units and by virtue of its smaller size had higher costs. A breakdown of components of the OER of the Partnership's Appraiser and the County Board's Appraiser as derived from page 28 of Exhibit 2 and page 114 of Exhibit 4 is as follows.

Expense Item	Gross Amount County Board Appraiser	Gross Amount Partnership Appraiser	% of Effective Gross Income County	% of Effective Gross Income Partnership
Insurance	\$103,386	\$91,600	3.50%	3.19%
Utilities	\$206,772	\$128,240	7.00%	4.46%
Maintenance	\$206,772	\$332,050	7.00%	11.55%
Management	\$206,722	\$136,461	7.00%	4.74%
Payroll		\$286,250		9.96%
Leasing/ Marketing (Advertising)	\$29,539	\$22,900	1.00%	.79%
Reserves	\$177,233	\$137,400	6.00%	4.78%
Administration/ Other		\$103,050		3.59%
Legal & Prof Fees	\$29,539		1.00%	
Total	\$960,012	\$1,237,951	32.5%	43.09%*

*.03% rounding error.

If "Administration/Other" as categorized by the Partnership's Appraiser is added to his estimate of "Management" the total is \$239,511. That amount is similar to the amount suggested by the Appraiser for the County. The major difference between the two cost estimates seems to be "Maintenance" and "Payroll". It is not clear in which category the County Board's Appraiser might have placed payroll costs. (E4:112-113). The Partnership's Appraiser estimated maintenance costs at the high end of an indicated range. (E2:45). Payroll was estimated by

the Partnership's Appraiser at a level exceeding the historical costs within the last three years for that category. (E2:45).

Historical expenses for the subject property can be considered when establishing costs. *The Appraisal of Real Estate*, Twelfth Edition, Appraisal Institute, 493, (2001). It is important however to validate those costs with typical expenses for comparable properties. *Id.* Credibility of the Partnership's Appraiser's cost determinations was affected by his failure to obtain market information from apartment complexes not controlled by the Partnership's general partner. An exhaustive analysis of costs or the credibility of the Partnership Appraiser's estimated costs is not necessary, however, for the Commission's decision.

The Partnership's Appraiser after finding net operating income divided that sum by a capitalization rate of 11.30%. (E2:52). The resulting indication of value was \$14,467,214 (E2:52). The Partnership's Appraiser after determining a preliminary value indication adopted an additional step. He subtracted his estimated contributory value of personal property associated with the subject property (\$639,068) from his estimate of capitalized value (\$14,467,214) for a resulting final rounded indication of value of \$13,830,000. (E2:52). The rationale of the Partnership's Appraiser for his deduction was simple, he argued that because all apartments included personal property such as stoves, refrigerators, and dishwashers, rents paid

included an increment for use of those items. In other words an apartment could be rented at a lower rate if it did not include appliances. The difference between the rental rates was not discoverable because large complexes all provided appliances. An estimate of the value of the personal property therefore had to be made and deducted from value indicated for the apartments with appliances.

The County Board, in support of a motion to dismiss, asserted that the Commission does not have jurisdiction to consider whether the value of personal property such as stoves, refrigerators, and dishwashers should be accounted for in the valuation of the subject property. Specifically the County Board claims that a deduction of \$639,068.00 as shown in Exhibit 2 at pages 32,37 and 52 should not be considered. The County Board directed the Commission to *Harrison Square Partnership v. Sarpy County*, 6 Neb. App. 454, 574 N.W.2d (1998), in support of its position.

Harrison Square, is the latest of a series of cases applying statutory provisions governing appeals from decisions of a County Board of Equalization. The language considered by the *Harrison Square* Court was in repealed section 77-1511 of Nebraska Statutes as follows "The Tax Equalization and Review Commission shall hear appeals and cross appeals taken under section 77-1510 as in equity and without a jury and determine anew all questions raised

before the county board of equalization which relate to the liability of the property to assessment, or the amount thereof." Neb. Rev. Stat. §77-1511, (Reissue 1996) repealed, 2001, Neb Laws LB 465, §12.

The language of section 77-1511 was, prior to creation of the Tax Equalization and Review Commission, applicable to appeals to the District Court. *See, Nebraska Telephone Co. v. Hall County*, 75 Neb. 405, 106 N.W. 471, (1906). In *Nebraska Telephone* a schedule furnished by the appellant had been used by the assessor to determine the property to be valued. Inclusion or exclusion of property from the schedule would have affected the total value determination of the assessor. The court determined that an appellant could not raise in the district court, questions concerning the accuracy of the schedule, when the issue raised before the county board had been the value of its property as determined by the assessor. *Id.* The Court cited the quoted statutory language and gave the following explanation for its determination. "This language clearly limits the inquiry in the district court to the questions raised before the board of equalization, and the reason for the limitation is obvious. If a taxpayer could present a question to the board which was without merit, and, after a determination of that question against him, could appeal to the district court and there present another and different question, a meritorious one, which required a different

ruling, he could always overturn the assessment, and thus escape taxation of his property altogether." *Supra* at 406-407,471.

The *Nebraska Telephone* Court's application of the statute has been cited in a variety of cases. In two cases concerning valuation of stock Courts have ruled that the accuracy of statements filed with the assessor by the appellant, could not be challenged for the first time on appeal even though information in the statements would have affected a value determination made by the county board. *See, First National Bank of Blue Hill v. Webster County*, 77 Neb. 813, 110 N.W. 535 (1906), *State Bank of Nebraska v. Seward County*, 95 Neb. 665, 146 N.W. 1046 (1914). In another case concerning the valuation of stock an attempt to raise taxability of the stock on appeal was denied. *See, Reichenbach Land & Loan Co. v. Butler County*, 105 Neb. 209, 179 N.W. 1015, (1920). Likewise raising the question of exemption of cattle from taxation for the first time on appeal is not permitted by the statute. *See, Reimers v. Merrick County*, 82 Neb. 639, 118 N.W. 113, (1908). In other applications of the statute the Court ruled that: a new statutory basis for exemption from taxation cannot be raised on appeal, *See, Nebraska State Bar Association v. Lancaster County Board of Equalization*, 237 Neb. 1, 465 N.W.2d 111 (1991); equalization may not be claimed on appeal if only actual value was disputed before the county board, *See, Gordman Properties Company v. Board of Equalization of Hall*

County, 225 Neb. 169, 403 N.W.2d 366, (1987); and discriminatory taxation of property for which an exemption is claimed could not be raised for the first time on appeal. See, *Ev. Lutheran Good Samaritan Society v. Buffalo County Board of Equalization*, 243 Neb. 351, 500 N.W.2d 520 (1993).

An appellant was successful in avoiding application of the rule when an injunction was sought to prohibit the collection of tax on an unlawful determination of value. See, *Brown v. Douglas County*, 98 Neb. 299, 152 N.W. 545, (1915). The Court noted that had the appellant filed an appeal from the valuation decision that the *Nebraska Telephone* Court's application of the statute would have resulted in no remedy. *Id.* The Court granted relief on the appellants' request for an injunction. *Id.*

The following facts are recited by the *Harrison Square* court concerning the hearing before the County Board. "There is no verbatim transcription of the hearing before the Board in the record on appeal, and this appeal proceeds on this basis. It appears from the evidence before the Commission that at the hearing before the Board conducted on July 10, 1996, the Board was advised by the county's appraiser that based on certain assumptions regarding the vacancy rate, the capitalization rate, and other variables, the Property should be valued at \$1,478,620. The Partnership presented as evidence to the Board an expense statement and pricing quotes for new equipment needed to replace

obsolete equipment." *Harrison Square Partnership v. Sarpy Board of Equalization*, 6 Neb. App. 454, 455, 574 N.W.2d 180, 182 (1998).

At the *Harrison Square* hearing before the Commission the Appellant disputed the capitalization rate applied by the appraiser. *Supra*, at 456,182. The Court noted that a representative of the Partnership had testified that no evidence concerning an appropriate capitalization rate had been presented to the County Board. *Supra*, at 460,574. The Tax Equalization and Review Commission granted relief based on testimony of the county's appraiser concerning the appropriate vacancy rate. *Supra*, at 460,184. The Commission's decision based on its use of a revised vacancy rate was affirmed. Facts of the case as stated by the Court did not show that the question of vacancy rate had been raised by the appellant before the county board. *Id.* The Appellant had also argued that the cap rate was not appropriate. The Commission based on evidence presented, determined that the County's cap rate was correct. The Court ruled that the cap rate proposed by the appellant could not be considered by the Commission because that question had not been raised before the County Board. *Id.* The Court cited the familiar statutory language of section 77-1511 in support of its ruling. *Id.*

Cases prior to *Harrison Square* may be read to prohibit the raising of a question on appeal which constituted a new theory of

the appeal i.e., taxability of property, correction of records, equalized value as opposed to actual value. The *Harrison Square* court seems to extend application of the statute to narrow questions of fact i.e., the appropriate capitalization rate. The *Harrison Square* Court cited *Wolgammott v. Abramson*, 253 Neb. 350, 570 N.W.2d 818, (1997) for that extension. *Wolgammott* concerned an appeal from a decision governed by the administrative procedures act with review being conducted de novo on the record. Review by the Commission is de novo of all questions raised. Neb. Rev. Stat. 77-5016(7) (Supp. 2005). Application of the repealed statute as exemplified in *Harrison Square* converts review by the Commission to a review of disputed facts, with new evidence, rather than a review of disputed issues or theories of the case with new evidence. Any distinction between the review required in appeals from administrative decisions "on the record" and the review required for appeals from County Boards "de novo of all questions raised" becomes almost meaningless despite clear differences in past applications of the statutory standards.

De novo review has been defined as review of "an appeal in which the appellate court uses the trial court's record but reviews the evidence and law without deference to the trial court's ruling." *Black's Law Dictionary, Seventh Addition*, West Group, 94 (1999). Nebraska courts have acted in accord with that definition. *See, Bauerle v. Bauerle*, 263 Neb. 881, 644 N.W.2d

128 (2002). A review under that definition does not allow new evidence on review because it confines review to the record. That definition was not applied by the *Harrison Square* Court nor has it been used by any other court applying the provisions of repealed section 77-1511 of Nebraska Statutes. Application of that definition would be inconsistent with other statutory provisions governing the Commission on the date of the appeal in this case. Neb. Rev. Stat. 77-5016 (Cum. Supp. 2004).

The statutory provision governing this appeal requires the Commission to determine de novo all questions raised in the proceeding upon which the order, decision, determination, or action appealed from is based. Neb. Rev. Stat. 77-5016(7) (Cum. Supp. 2004). The requirement that the Commission consider "de novo all questions raised" is identical to the repealed language applied by the *Harrison Square* Court.

Regardless of any misgivings concerning the basis for, or the effects of the *Harrison Square* decision the Commission is bound by it. The record of the Partnership's participation in proceedings before the county board in this case is limited to the property valuation protest, the transcript of a referee meeting, and materials submitted to the referee. (E8:2, 8, and 58-71). Other materials from the County Board proceeding are in evidence. (8:1, 3-7, 8-57, and 72). The additional materials respond to the questions presented by the Partnership or describe

the County Board's decision. The record of proceedings before the County Board does not show that the question of a deduction for the value of personal property included in the taxable value of the subject property was raised by the Partnership.

Personal property for purposes of taxation is defined as all property other than real property and franchises. Neb. Rev. Stat. §77-104 (Reissue 2003). Personal property is subject to tax on its net book value rather than actual value. Neb. Rev. Stat. 77-201(3) (Reissue 2003).

Real property for purposes of taxation includes all land, buildings, fixtures, and improvements. Neb. Rev. Stat. §77-103 (Reissue 2003). Fixtures has been defined by the Department of Property Assessment and Taxation to include any item of property that is: Annexed or physically attached to or incorporated into real property; Applied or adapted to the use or purpose of the real property to which it is attached, meaning that the real property cannot be used for its intended purpose without the item or the item cannot be used for its intended purpose without the real property; and Intended to be annexed to the real property. Intention to be annexed is to be inferred from the nature and extent of the annexation and adaptation, unless the owner of the item or the owner of the real property provides documentation that the intention is otherwise. 350 Neb. Admin. Code, ch 10, §001.01A (04/03). The three factor test stated in the regulation

is supported by decisions of the Nebraska Supreme Court. See, *Northern Natural Gas Company v. State Board of Equalization*, 232 Neb. 806, 443 N.W.2d 249, (1989). Real property other than agricultural and horticultural land is subject to tax on its actual value. *Neb. Rev. Stat.* 77-201(1) (Reissue 2003).

Improvements have been defined as any addition to real property, amounting to more than mere repairs, such as sidewalks, streets, sewers, or utilities. 350 *Neb. Admin. Code*, ch 10, §001.01C (04/03).

The Partnership's Appraiser testified that stoves, refrigerators, dishwashers, and ceiling fans were to various degrees plugged in, or attached to real property. The Partnership's Appraiser also testified that renters of apartments would require refrigerators, stoves, etc. for use of the apartment. The Partnership's Appraiser further testified that those items are typically transferred to a buyer on a sale of an apartment complex.

Exhibits 19 and 20 show that in 1994 the Lancaster County Assessor developed a one prong test to determine whether various items of property such as refrigerators, stoves, dishwashers, etc. associated with multi-family, duplexes, and apartment properties were real or personal property. The sole test employed by the Assessor was intent of the owner. (E19:1). Exhibit 21 was produced by the County to show that the

Partnership had acquiesced in its application of the law. The Commission is not bound by an interpretation of law by the parties. Without clear and convincing evidence of actual value it is not possible however to determine the adjustment to be made even if the Commission was not constrained in its consideration of the personal property deduction proposed by the Partnership's Appraiser.

The Partnership's Appraiser determined that the contributory value of personal property included with his income approach valuation of the subject property was 4.3% of the estimated replacement cost new for the project. (E2:31). The contributory value deducted is \$639,068. (E2:52) Replacement cost new less personal property was estimated by the Partnership's Appraiser to be \$21,589,566 ($\$22,620,066 - \$1,030,500 = \$21,589,566$). (E2:32) 4.3% of \$21,589,566 is \$928,351. Depreciated replacement cost of the project less the depreciated value of the personal property was estimated to be \$12,561,080. ($\$13,488,530 - \$927,450 = \$12,561,080$) (E2:32 and 33). 4.3% of \$12,561,080 is \$540,126.

The Partnership's Appraiser's estimate of contributory value for personal property is not supported by the data on page 33 of Exhibit 2. The data on page 33 of Exhibit 2 indicate that personal property would have a lower contribution to value than the Partnership's Appraiser's estimate. (Costs ($\$343,500 + \$687,000$) less Deprecation ($\$171,750 + \$274,800$) = \$583,450).

The contributory value of personal property deducted by the Partnership's Appraiser is not supported in his appraisal.

As noted the Partnership's Appraiser determined the contributory value of the personal property as an estimated percentage of replacement cost new. The approach relied on for the final value determination of the real property, was the income approach. The Partnership's Appraiser has shown that it is possible to derive a value based on the income approach for components of the subject property. The Partnership's Appraiser found, for example, the net operating income of land by capitalizing a value. (E2:30). A similar technique might have been successful if applied to determine net operating income attributable to the personal property with a subtraction of that amount from effective gross income for the subject property. If for example a 15% rate of return is assigned to the cost approach value of the personal property the resulting calculations produce an indicated value for the subject property of \$13,619,947 using the other assumptions of the Partnership's Appraiser as shown in Exhibit 2 page 52. ($\$639,068 \times .15 = \$95,860$) ($\$2,872,865 - \$95,860 = \$2,777,055$) ($\$2,777,055 - \$1,237,951 = \$1,539,054$) ($\$1,539,054 \div 11.3\% = \$13,619,947$). While the results in this example are similar, any uncertainty concerning the methodology would be eliminated if an estimate of contributory income was made and subtracted.

The second inquiry to be made is whether or not subtracting the value of personal property from the value indicated by capitalized net income results in a double deduction. A deduction for reserves of \$300/unit or \$137,400 was taken by the Partnership's Appraiser. (E2:48). Reserves or a replacement allowance may be used for the periodic replacement of items that must be replaced periodically during a buildings life. *The Appraisal of Real Estate*, Twelfth Edition, Appraisal Institute, 2001, 487. A replacement allowance may include replacement of stoves, refrigerators etc. *Supra*, 519, 524. If the reserve allowance includes the cost of replacing stoves, refrigerators, and dishwashers; two deductions affecting value would be taken for the same item. The first deduction taken would be for contributory value of personal property and the second was for a portion of the purchase of that property.

A further concern is consistency in methodology. One income item expressly included in the calculation of effective gross income for the subject property is laundry income. (E2:48). The amount of laundry income is determinable. (E2:120). Laundry income is derived from washers and dryers which would be classified as personal property. If income from one type of personal property is included in the calculation of value the rationale for excluding the income or the value of other personal property, unless it is significant, has not been shown. The

Commission does not choose to speculate concerning the contributory value of the personal property which is laundry equipment.

Separation of personal property from real property is not always required by the Uniform Standards of Appraisal Practice (USPAP). *Uniform Standards of Appraisal Practice and Advisory Opinions*, The Appraisal Foundation, Standards Rule 1-2(e)(iii), lines 563-564, (2005). Disclosure of personal property included in the valuation of real property is required. *Id.* Departure from that rule is not allowed. *Id.* lines 536 and 537. USPAP also advises that "An appraiser must analyze the effect on value of any personal property, trade fixtures, or intangible items that are not real property but are included in the appraisals". *Supra.* Standards Rule 1-4 (g) lines 667 and 668. Departure from that rule is allowed. *Id.* lines 626-627. A departure must be disclosed. *Id.* lines 402 and 403. The Partnership's Appraiser did not indicate that a departure from the rule was being made. The testimony of the Partnership's Appraiser was that he considered the rule binding and that personal property should always be subtracted to avoid overstatement of real property value. The comment to Standards Rule 1-4 (g) gives further guidance. "A separate appraisal developed in compliance with the standard pertinent to the type of property involved, is required when the value of a non-realty item or combination of such items

is significant to overall value.” *Id.* Comment lines 671-673. Comments are an integral part of USPAP and have the same weight as the component they address. *Supra*, Preamble lines 223 and 224. The Partnership’s Appraiser did not declare a departure from the comment nor was an appraisal of the personal property involved prepared in accordance with USPAP Standards 7 or 8 concerning the appraisal of personal property. Either the Partnership’s Appraiser chose to ignore the standards, even though he indicated that his appraisal was prepared in accordance with USPAP or he did not consider the value of the personal property involved to be significant to overall value. The Commission chooses to believe the latter. Given the difficulty of properly determining adjustments to value for personal property, the double deduction for both value and the cost of its creation and inconsistency in the treatment of laundry income the better practice would be to forego an adjustment unless the estimated value of the non-realty is significant in comparison to the value of the real property when as in this case they are firmly married in use and income streams. Because a separate appraisal was not prepared for valuation of personal property as required by USPAP, the Commission concludes the value of the associated personal property was not significant in comparison to the value of the real property.

The County Board did not deduct contributory value of personal property as part of its use of the income approach. If the Partnership's Appraiser's deduction for personal property is not considered, the difference between his value determination and the County Board's is \$360,932 ($\$15,000,000 - (14,000,000 + 639,068)$), a difference of 2.4%.

The Commission may not reverse the decision of the County Board unless, that decision is shown to be arbitrary or unreasonable. Arbitrary has been defined as a decision made in disregard of the facts and circumstances and without some basis which could lead a reasonable person to the same conclusion. *See, Phelps Cty. Bd. of Equal. v. Graf*, 258 Neb 810, 606 N.W.2d 736, (2000). Unreasonable has been defined as a decision for which the evidence presented leaves no room for differences of opinion among reasonable minds. *See, Pittman v. Sarpy Cty. Bd. of Equal.*, 258 Neb 390, 603 N.W.2d 447, (1999). The decision of the County Board was based on mass appraisal techniques used by the Assessor. Those techniques may not take into account the precise characteristics of each parcel even though properly applied mass appraisal techniques can and do take into account the readily observable and measurable differences between parcels. It is always possible to challenge a value determined through the use of mass appraisal techniques by pointing to the aspects of a parcel that distinguish it from all others. The

Courts long ago held that to provide stability in the assessment process that some imprecision would be allowed and that the mass appraisal values would be granted a presumption of validity. *See, Hastings Bldg. Co. v. Board of Equalization of Adams County*, 190 Neb. 63, 206 N.W.2d 338 (1973). To hold otherwise would have made every challenge to the assessor's value successful on a showing that a given parcel had characteristics different than those assumed by the mass appraisal model. The standard applied by Nebraska courts is reflected in USPAP. "It is implicit in mass appraisal that, even when properly specified and calibrated mass appraisal models are used, some individual value conclusions will not meet standards of reasonableness, consistency, and accuracy". *Uniform Standards of Appraisal Practice and Advisory Opinions*, The Appraisal Foundation, Standards Rule 6-6(b) Comment, lines 1841-1843, (2005).

One standard adopted by the Courts to assist a determination that a value adopted by a County Board was unreasonable or arbitrary was whether the evidence established that the value adopted by the County Board was grossly excessive when compared to the value supported by the evidence before the Court. *Hastings supra*. The Commission cannot determine that the difference between the value determined by the County Board and the value supported by the evidence before the Commission,

requires a conclusion that the County Board's decision was unreasonable or arbitrary.

**VI.
CONCLUSIONS OF LAW**

1. The Commission has jurisdiction over the Parties and over the subject matter of this appeal.
2. The Commission is required to affirm the decision of the Board unless evidence is adduced establishing that the Board's action was incorrect and either unreasonable or arbitrary. Neb. Rev. Stat. §77-5016(7) (Supp. 2005).
3. The Board is presumed to have faithfully performed its official duties. The Board is also presumed to have acted upon sufficient competent evidence to justify its decisions. These presumptions remain until the Partnership presents competent evidence to the contrary. If the presumption is extinguished the reasonableness of the Board's value becomes one of fact based upon all the evidence presented. The burden of showing such valuation to be unreasonable rests on the Partnership. *See, Garvey Elevators, Inc. v. Adams County Board of Equalization*, 261 Neb. 130, 136, 621 N.W.2d 518, 523 (2001).
4. "Actual value" is defined as the market value of real property in the ordinary course of trade, or 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 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. Neb. Rev. Stat. §77-112 (Reissue 2003).

5. 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).
6. 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. See, *Phelps Cty. Bd. of Equal. v. Graf*, 258 Neb 810, 606 N.W.2d 736, (2000).
7. A decision is "unreasonable" if the evidence presented leaves no room for differences of opinion among reasonable minds. See, *Pittman v. Sarpy Cty. Bd. of Equal.*, 258 Neb 390, 603 N.W.2d 447, (1999).
8. "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."

See, Castellano v. Bitkower, 216 Neb. 806, 812, 346 N.W.2d 249, 253 (1984).

9. The Partnership has failed to adduce clear and convincing evidence that the County Board's determination of taxable value for the subject property is unreasonable or arbitrary.
10. The Board's decision must be affirmed.

**VII.
ORDER**

IT IS THEREFORE ORDERED THAT:

1. The Lancaster County Board of Equalization's Order determining the subject property's 2004 taxable value is affirmed.
2. The Partnership's real property legally described as Lots 1 and 2, Wyuka Subdivision, and Outlot B, in the City of Lincoln, Lancaster County, Nebraska, more commonly known as the Tanglewood Apartments, taxable value for tax year 2004 is \$15,000,000.
3. Any request for relief by any Party not specifically granted by this Order is denied.
4. This decision, if no appeal is filed, shall be certified to the Lancaster County Treasurer, and the Lancaster County Assessor, pursuant to Neb. Rev. Stat. §77-5016(9) (Supp. 2005).
5. This decision shall only be applicable to tax year 2004.

6. Each Party is to bear its own costs in this matter.
7. This order is final for purposes of appeal on February 15, 2006

Signed and Sealed February 15, 2006

Robert L. Hans, Commissioner

Susan S. Lore, Commissioner

SEAL

Wm. R. Wickersham, Chair

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 APPEAL MUST BE FILED WITHIN THIRTY DAYS AFTER THE DATE OF THIS ORDER AND MUST SATISFY THE REQUIREMENTS OF STATE LAW IN NEBRASKA REVISED STATUTE §77-5019 (SUPP. 2005). IF A PETITION IS NOT TIMELY FILED, THIS ORDER BECOMES FINAL AND CANNOT BE CHANGED.