

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

| | | |
|-----------------------------|---|-------------------------------|
| PLATTSMOUTH PLACE APTS. LP, |) | |
| |) | |
| Appellant, |) | CASE NO. 05C-036 |
| |) | |
| vs. |) | FINDINGS AND ORDER |
| |) | AFFIRMING THE DECISION OF THE |
| CASS COUNTY BOARD OF |) | CASS COUNTY BOARD OF |
| EQUALIZATION, |) | EQUALIZATION |
| |) | |
| Appellee. |) | |

The above-captioned case was called for a hearing on the merits of an appeal by Plattsmouth Place Apts. LP, 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 17, 2006, pursuant to a Notice and Order for Hearing issued November 30, 2005. Commissioners Wickersham, Warnes, and Hans were present. Commissioner Wickersham presided at the hearing.

Charles R. Clatterbuck, General Partner of Plattsmouth Apts. LP, appeared at the hearing on behalf of Plattsmouth Place Apts. LP ("the Taxpayer") without counsel.

The Cass County Board of Equalization ("the County Board") appeared through counsel, Nathan B. Cox, Esq., County Attorney for Cass County, Nebraska.

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

The Commission is required by Neb. Rev. Stat. §77-5018 (Supp. 2005) to state its final decision and order concerning an appeal, with findings of fact and conclusions of law, on the record or in writing. The final decision and order of the Commission in this case is as follows.

I. STANDARD OF REVIEW

The Taxpayer, in order to prevail, is required to demonstrate that the decision of the County Board was incorrect and arbitrary or unreasonable. Neb. Rev. Stat. §77-5016(8)(Supp. 2005). The presumption created by the statute can be overcome if the Taxpayer shows by clear and convincing evidence that the County Board either failed to faithfully perform its official duties or that the County Board failed to act upon sufficient competent evidence in making its decision. *Garvey Elevators, Inc. v. Adams County Bd. of Equalization*, 261 Neb. 130, 136, 621 N.W.2d 518, 523-524 (2001). It is the Taxpayer's burden to overcome the presumption with clear and convincing evidence of more than a difference of opinion. *Garvey Elevators, Inc v. Adams County Bd. of Equalization* , 261 Neb. 130, 136, 621 N.W.2d 518, 523-524 (2001). The Taxpayer, once this initial burden has been satisfied, must then demonstrate by clear and convincing evidence that the value as determined by the County Board was unreasonable. *Garvey Elevators, Inc. v. Adams County Bd. of Equalization*, 261 Neb. 130, 136, 621 N.W.2d 518, 523-524 (2001).

II. FINDINGS

The Commission finds and determines that:

1. The Taxpayer is the owner of record of certain real property described in the appeal as Curtis Heights Lot 1, NW1/4SE1/4, Section 24, Township 12N, Range 13 E, 6th PM Cass County, Nebraska ("the subject property").

2. The actual or fair market value of the subject property, placed on the assessment roll as of January 1, 2005, (“the assessment date”) by the Cass County Assessor was:

| | |
|-------------------|-----------------------------|
| Land value | \$ 62,181.00 |
| Improvement value | \$847,469.00 |
| Total value | <u>\$909,650.00.</u> (E1:1) |

3. The Taxpayer timely protested that value to the County Board. The Taxpayer proposed the following value for the subject property:

| | |
|-------------------|----------------------------|
| Land value | \$ 62,181.00 |
| Improvement value | \$766,682.00 |
| Total value | <u>\$828,863.00</u> (E1:3) |

4. The County Board denied the protest. (E1:1).

5. The Taxpayer timely filed an appeal of the County Board’s decision to the Commission.

6. The County Board was served with a Notice in Lieu of Summons, and duly answered that Notice.

7. An Order for Hearing and Notice of Hearing issued on November 30, 2005, set a hearing of the Taxpayer's appeal for February 17, 2006, 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 Taxpayer has not adduced sufficient, clear and convincing evidence to overcome the statutory burden of proof in favor of the County Board.

10. Based on the entire record before it, the Commission finds and determines that the actual or fair market value of the subject property for tax year 2005 is:

| | |
|-------------------|----------------------|
| Land value | \$ 62,181.00 |
| Improvement value | \$847,469.00 |
| Total value | <u>\$909,650.00.</u> |

11. The value of the subject property as of the assessment date determined by the County Board is supported by the evidence.
12. The decision of the County Board was correct and neither arbitrary or unreasonable.
13. The decision of the County Board should be affirmed.

III.

CONCLUSIONS OF LAW

1. Subject matter jurisdiction of the Commission is over all issues raised during the county board of equalization proceedings. *Arcadian Fertilizer, L.P. v. Sarpy County Bd. of Equalization*, 7 Neb.App. 655, 584 N.W.2d 353, (1998)
2. The Commission has jurisdiction over the parties and the subject matter of this appeal.
3. The Commission, while making a decision, may not consider testimony, records, documents or other evidence which is not a part of the hearing record except those identified in the Commission's rules and regulations or Section 77-5016 (3). Neb. Rev. Stat. §77-5016 (3) (Supp 2005).
4. 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. 2004)

5. “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).
6. Actual value of real property for purposes of taxation means the market value of real property in the ordinary course of trade. Neb. Rev. Stat. §77-112 (Reissue 2003).
7. “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).
8. 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).
9. 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).
10. The Taxpayer must adduce evidence establishing that the action of the County Board was incorrect and unreasonable or arbitrary. Neb. Rev. Stat. §77-5016 (7) (Supp. 2005). The Nebraska Supreme Court, in considering similar language, has held that “There is a

presumption that a board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action. That presumption remains until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence on appeal to the contrary. From that point on, the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon all the evidence presented. The burden of showing such valuation to be unreasonable rests upon the taxpayer on appeal from the action of the board.” *Garvey Elevators, Inc. v. Adams County Bd. of Equalization*, 261 Neb. 130, 136, 621 N.W.2d 518, 523, (2001).

11. 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).
12. 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).
13. The Court has also held that “In an appeal to the county board of equalization or to [the Tax Equalization and Review Commission] and from the [Commission] to this court, the burden of persuasion imposed on the complaining taxpayer is not met by showing a mere difference of opinion unless it is established by clear and convincing evidence that the valuation placed upon his property when compared to valuations placed on other similar property is grossly excessive and is the result of a systematic exercise of intentional will

- or failure of plain duty, and not mere errors of judgment.” *Garvey Elevators, Inc. v. Adams County Board of Equalization*, 261 Neb. 130, 136, 621 N.W.2d 518, 523, (2001).
14. "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).
15. “It is the function of the county board of equalization to determine the actual value of locally assessed property for tax purposes. In carrying out this function, the county board must give effect to the constitutional requirement that taxes be levied uniformly and proportionately upon all taxable property in the county. Individual discrepancies and inequalities within the county must be corrected and equalized by the county board of equalization.” *AT & T Information Systems, Inc. v. State Bd. of Equalization and Assessment*, 237 Neb. 591, 595, 467 N.W.2d 55, 58, (1991).
16. “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).
17. The appraisal of real estate is not an exact science. *Matter of Bock’s Estate*, 198 Neb. 121, 124, 251 N.W.2d 872, 874, (1977).

IV. DISCUSSION

The Subject property is an improved commercial parcel. The improvement is an apartment building with 36 apartments. (E12:2). The apartments are known as Highland Place Apartments and are managed by Property Source. (E1:9). The Cass County Assessor relied on

the income approach to determine actual value of the subject property as of the assessment date. (E12:2 and 3). The County Board adopted the determination of the County Assessor. (E1:1). The Taxpayer likewise sought to determine value using the income approach, (E1:3-7). The income approach is a recognized professionally accepted mass appraisal method. Neb. Rev. Stat. §77-112 (Reissue 2003). The income approach is also a recognized method for making a determination of value for fee appraisals. *The Appraisal of Real Estate*, 12th Edition, The Appraisal Institute, 2001, pp. 493-494.

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, p. 143. The steps required for use of the income approach with direct capitalization may be summarized as (1) estimate potential gross income; (2) deduct estimated vacancy and collection loss to determine effective gross income; (3) deduct estimated expenses to determine net operating income; (4) divide net operating income by an estimated capitalization rate to yield indicated value. *The Appraisal of Real Estate*, 12th Edition, The Appraisal Institute, 2001, pp. 493-494. A variety of techniques may be used to quantify various components of any application of the approach, *Supra*, at chs. 20-24.

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 years 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 capitlaization 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.* The value is discounted to present value as of the valuation date and added to the value of the income stream. *Supra*, at ch. 24. In this appeal the Taxpayer seeks to use the yield capitalization method. (E1:4).

The Taxpayer contends that the County Assessor unreasonably and arbitrarily increased rents of two bedroom apartments from \$445 to \$450 per month, decreased the vacancy percentage from 10% to 7.5% and estimated miscellaneous income at \$3,600.00, when actual miscellaneous income was \$2,318.00 (Case file, Appeal Form). The County Assessor's capitalization rate was not challenged nor were expenses attributed to the apartment rentals as determined by the County Assessor.

The Taxpayer based his estimate of miscellaneous income contribution to actual laundry income for the year 2004 of \$2,318.74. (E1:5). The property manager for the Taxpayer testified that the laundry income is variable. The 2005 profit and loss statement for the subject property shows actual laundry income of \$2,954.33. (E5:1). Both the 2004 and 2005 profit and loss statements show other items of miscellaneous income. The Taxpayer's property manager

testified that some items of miscellaneous income were offset by expenses. An example is application of fee income. In the income approach net operating income is divided by a capitalization rate. Net operating income is determined by subtracting estimated operating expenses from effective gross income. If effective gross income is understated net operating income will be understated and the result will be lower than appropriate indication of value. If an income item is offset by an expense as for example an application fee both the income and the expense would have to be removed to keep calculation of the effect of exclusion of either neutral in a final indication of value. The amount of miscellaneous income attributed to the subject property by the County Assessor was \$3,600.00. The profit and loss statements of the Taxpayer for years 2004 and 2005 both show miscellaneous income in excess of \$3,600.00. (E1:5 and E5:1). Approved procedures for use of the income approach require that a comprehensive study be made of historical income and expenses for the subject property. *The Appraisal of Real Estate*, 12th Edition, The Appraisal Institute, 2001, p. 493. That study is to be combined with an analysis of typical income and expense levels for comparable properties. *Id.* The Taxpayer has failed to analyze all miscellaneous income for the subject property and has failed to present any evidence that the miscellaneous income shown for the subject property is typical.

The Taxpayer asserts that the vacancy loss attributed to the subject property should be 10% of potential gross income. (E1:4). A vacancy and collection loss of 7.5% of potential gross income was utilized by the County Assessor. (E12:1). "Vacancy and collection loss is an allowance for reductions in potential gross income attributable to vacancies, tenant turnover, and nonpayment of rent or other income". *The Appraisal of Real Estate*, 12th Edition, The Appraisal Institute, 2001, p. 512. The Taxpayer presented a rent roll for the subject property as of June

2005. (E1:6-8). No other rent rolls for the subject property was produced. Evidence concerning vacancies for 5 months during the year 2005 was produced. (E1:11). No evidence of typical or market vacancies was produced. A determination of the appropriate allowance for vacancy and collection loss requires that the market be surveyed and results compared with experience at the subject property or that potential gross income at market rates be compared against the subject property's actual collected income. *The Appraisal of Real Estate*, 12th Edition, The Appraisal Institute, 2001, p. 512. The Taxpayer has not produced and it is its burden to do so.

The final component of the income approach challenged by the Taxpayer was the calculation of rents as an element of potential gross income. The Taxpayer suggested that rentals should be calculated at a rate of \$445 per month for the 34 two bedroom apartments and at \$395 per month for 2 one bedroom apartments. (E1:4). The County Assessor had determined rental income based on 34 two bedroom apartments at \$450 per month and 2 one bedroom apartments at \$395 per month. The difference in rent income and an element of potential gross income is \$2,040.00 ($(\$450 \times 12 \times 34) - (\$445 \times 12 \times 34) = \$2,040$). If capitalized at the agreed capitalization rate, (.11) as shown in Exhibit 12 at page 2, that difference would indicate a reduction of value in the amount of \$18,545 ($\$2,040 \div .11 = \$18,545.45$). The Taxpayer's representative and the Taxpayer's property manager testified that the actual rents charged were lower. Both testified that actual rents charged for the two bedroom apartments were \$399 per month and that those rates were in effect for the subject property as of December 2003. The rent roll produced shows that various factors affect the base rent and the average rental rates as of June 2005 for the subject property were \$421. (E16:8). One of the factors effecting rents are charges for pets. (E19). "The valuation of fee simple interests in income producing real estate is

based on market rent the property is capable of producing”. *The Appraisal of Real Estate*, 12th Edition, The Appraisal Institute, 2001, p. 500. The Taxpayer has produced evidence that rents for 2 bedroom apartments at Nottingham Apartments were \$400 per month and \$475 per month at Parkview. (E1:17). The Taxpayers property manager testified that those are the only apartments comparable to the subject property in the community of Plattsmouth where the subject property is located. Exhibit 1 page 17 does not disclose adjustments for pets or other factors that might affect rents at the comparables. No evidence was presented to established that Parkview and Nottingham are comparable in amenities or size of units. The Taxpayer has not produced clear and convincing evidence that market rents for the subject property are \$445 per month for two bedroom apartments or any other number.

The Taxpayer has produced two estimates of value using the income approach, one for the County Board and one for the Commission. (E1:4, E2:1-2, and E3:1). The two estimates were derived as follows:

| Component | County Board | Commission |
|---|-------------------|-------------------|
| Rental Potential Gross Income | | |
| 46 units x 421 | | |
| 34/2 bedroom @ \$445, 2/1 bedroom @ \$395 | \$181,872 | \$193,994 |
| Laundry Income | <u>\$ 2,318</u> | <u>\$ 2,954</u> |
| Total Potential Gross Income | \$184,190 | \$193,994 |
| Vacancy 10% | <u>\$(18,419)</u> | <u>\$(19,300)</u> |
| Effective Income | \$165,771 | \$164,595 |
| Expenses 45% | \$(74,596) | \$(78,567) |
| NOI | \$ 91,175 | \$ 95,028 |
| Cap Rate | .11 | .11 |
| Capitalized Value | \$828,863 | \$872,981 |

The Taxpayer's representative testified that the rents proposed to the Commission were those utilized by the Assessor for tax year 2004. The Taxpayer called the County Assessor as a witness. The County Assessor testified that under her supervision a rent survey was conducted for a reappraisal of apartments in Plattsmouth for the tax year 2005. The Assessor did not know the area surveyed, the number of survey's sent, or the number of survey's returned. The County Assessor testified that she had valued the subject property for tax year 2005. The County Assessor testified that she had valued the subject property for tax year 2005. The County Assessor knew little about the facts at issue. While the testimony of the County Assessor does not support the determination of the Board the Taxpayer must do more than create doubts concerning the value determined by the Board a Taxpayer must also show the relief to be

granted. The Taxpayer has failed to show relief to be granted and has failed to show that relief should be granted.

**V.
ORDER**

IT IS THEREFORE ORDERED THAT:

1. The decision of the County Board determining the actual or fair market value of the subject property as of the assessment date, January 1, 2005, as follows:

| | |
|-------------------|---------------------|
| Land value | \$ 62,181.00 |
| Improvement value | <u>\$847,469.00</u> |
| Total value | <u>\$909,650.00</u> |

is affirmed.

2. This decision, if no appeal is timely filed, shall be certified to the Cass County Treasurer, and the Cass County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Supp. 2005).
3. Any request for relief, by any party, which is not specifically provided for by this order is denied.
4. Each party is to bear its own costs in this matter.
5. This decision shall only be applicable to tax year 2005.

6. This order is effective for purposes of appeal March 22, 2006.

Signed and Sealed. March 22, 2006.

Wm. R. Wickersham, Commissioner

SEAL

William C. Warnes, Commissioner

ANY PARTY SEEKING REVIEW OF THIS ORDER MAY DO SO BY FILING A PETITION WITH THE APPROPRIATE DOCKET FEES IN THE NEBRASKA COURT OF APPEALS. THE PETITION MUST BE FILED WITHIN THIRTY DAYS AFTER THE DATE OF THIS ORDER AND MUST SATISFY THE REQUIREMENTS OF STATE LAW CONTAINED IN NEB. REV. STAT. §77-5019 (SUPP. 2005). IF A PETITION IS NOT TIMELY FILED, THIS ORDER BECOMES FINAL AND CANNOT BE CHANGED.

Commissioner Hans, dissenting.

Robert L. Hans, Commissioner