

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

WESTROADS MALL LLC,	)	
	)	
Appellant,	)	Case Nos 06C-105, 06C-106
	)	
v.	)	DECISION AND ORDER REVERSING
	)	THE DECISIONS OF THE DOUGLAS
DOUGLAS COUNTY BOARD OF	)	COUNTY BOARD OF EQUALIZATION
EQUALIZATION,	)	
	)	
Appellee.	)	

The above-captioned cases were called for a hearing on the merits of appeals by Westroads Mall LLC ("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 September 7, 2007, pursuant to an Order for Hearing and Notice of Hearing issued May 21, 2007. Commissioners Wickersham, Warnes, Salmon, and Hotz were present. Commissioner Wickersham presided at the hearing.

David J. Swinkle, Director of Tax Services for General Growth Property, Managing Member of the Taxpayer was present at the hearing. William E. Peters appeared as legal counsel for the Taxpayer.

Thomas S. Barrettt, a Deputy County Attorney for Douglas County, Nebraska, appeared 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 by Neb. Rev. Stat. §77-5018 (Cum. Supp. 2006) to state its final decision and order concerning an appeal, with findings of fact and conclusions of law, on

the record or in writing. The final decision and order of the Commission in the consolidated cases is as follows.

**I.  
ISSUES**

The Taxpayer has asserted that actual value of the subject property as of January 1, 2006, is less than actual value as determined by the County Board. The issues on appeal related to that assertion are:

Whether the decision of the County Board determining actual value of the subject property is unreasonable or arbitrary; and

The actual value of the subject property on January 1, 2006.

**II.  
FINDINGS OF FACT**

The Commission finds and determines that:

1. The Taxpayer has a sufficient interest in the outcome of the above captioned appeals to maintain them.
2. The parcels of real property to which the above captioned appeals pertain are described in the tables below and together comprise ("the subject property").
3. Actual value of each parcel of the subject property placed on the assessment roll as of January 1, 2006, ("the assessment date") by the Douglas County Assessor, value as proposed in timely protests, and actual value as determined by the County Board is shown in the following tables:

Case No. 06C-105

Description: Westroads Replat 2, Douglas County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$ 6,182,900.00	\$ In Total	\$ 6,182,900.00
Improvement	\$68,686,900.00	\$ In Total	\$68,686,900.00
Total	\$74,869,800.00	\$60,500,000.00	\$74,869,800.00

Case No. 06C-106

Description: Westroads Replat 5, Douglas County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$2,304,800.00	\$ In Total	\$2,304,800.00
Improvement	\$3,649,700.00	\$ In Total	\$3,649,700.00
Total	\$5,954,500.00	\$5,500,000.00	\$5,954,500.00

4. Appeals of the County Board's decisions were filed with the Commission.
5. The County Board was served with Notices in Lieu of Summons and duly answered those Notices.
6. The appeals were consolidated for hearing by order of the Commission.
7. An Order for Hearing and Notice of Hearing issued on May 21, 2007, set a hearing of the appeals for September 7, 2007, at 9:00 a.m. CDST.
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. Actual value of the subject property for the tax year 2006 is: \$66,061,369.00.

### III. APPLICABLE LAW

1. Subject matter jurisdiction of the Commission in each of the above captioned appeals is over issues raised during the county board of equalization proceedings on the appealed decision. *Arcadian Fertilizer, L.P. v. Sarpy County Bd. of Equalization*, 7 Neb.App. 655, 584 N.W.2d 353 (1998).
2. “Actual value is the most probable price expressed in terms of money that a property will bring if exposed for sale in the open market, or in an arm’s length transaction, between a willing buyer and a willing seller, both of whom are knowledgeable concerning all the uses to which the real property is adapted and for which the real property is capable of being used. In analyzing the uses and restrictions applicable to real property the analysis shall include a full description of the physical characteristics of the real property and an identification of the property rights valued.” Neb. Rev. Stat. §77-112 (Reissue 2003).
3. Actual value may be determined using professionally accepted mass appraisal methods, including, but not limited to, the (1) sales comparison approach using the guidelines in section 77-1371, (2) income approach, and (3) cost approach. Neb. Rev. Stat. §77-112 (Reissue 2003).
4. Use of all of the statutory factors for determination of actual value is not required. All that is required is use of the applicable factors. *First National Bank & Trust of Syracuse v. Otoe Cty.*, 233 Neb. 412, 445 N.W.2d 880 (1989).

5. “Actual value, market value, and fair market value mean exactly the same thing.”  
*Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 ( 2002).
6. Taxable value is the percentage of actual value subject to taxation as directed by section 77-201 of Nebraska Statutes and has the same meaning as assessed value. Neb. Rev. Stat. §77-131 (Reissue 2003).
7. All taxable real property, with the exception of qualified agricultural land and horticultural land, shall be valued at actual value for purposes of taxation. Neb. Rev. Stat. §77-201(1) (Cum. Supp. 2006).
8. A presumption exists that the County Board has faithfully performed its duties and has acted on competent evidence. *Omaha Country Club v. Douglas County Bd. of Equalization*, 11 Neb.App. 171, 645 N.W.2d 821 (2002).
9. The presumption that a county board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action remains until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence adduced on appeal to the contrary. *Omaha Country Club v. Douglas County Bd. of Equalization*, 11 Neb.App. 171, 645 N.W.2d 821 (2002).
10. 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).

11. The Commission can grant relief only if there is clear and convincing evidence that the action of the County Board was unreasonable or arbitrary. See, Neb. Rev. Stat. §77-5016 (8) (Cum. Supp. 2006), and e.g. *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb.App. 171, 645 N.W.2d 821 (2002).
12. "Clear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved." *Castellano v. Bitkower*, 216 Neb. 806, 812, 346 N.W.2d 249, 253 (1984).
13. A decision is "arbitrary" when it is made in disregard of the facts and circumstances and without some basis which could lead a reasonable person to the same conclusion. *Phelps Cty. Bd. of Equal. v. Graf*, 258 Neb 810, 606 N.W.2d 736 (2000).
14. A decision is unreasonable only if the evidence presented leaves no room for differences of opinion among reasonable minds. *Pittman v. Sarpy Cty. Bd. of Equal.*, 258 Neb 390, 603 N.W.2d 447 (1999).
15. A corporate officer or other representative of an entity, must be shown to be familiar with the property in question and have a knowledge of values generally in the vicinity to be qualified to offer an opinion of value. *Kohl's Dept. Stores v. Douglas County Bd. of Equal.*, 10 Neb.App. 809, 638 N.W.2d, 881 (2002).
16. The County Board need not put on any evidence to support its valuation of the property at issue unless the taxpayer establishes the Board's valuation was unreasonable or

arbitrary. *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 168, 580 N.W.2d 561, 566 (1998).

17. A Taxpayer, who only produced evidence that was aimed at discrediting valuation methods utilized by county assessor, failed to meet burden of proving that value of property was not fairly and proportionately equalized or that valuation placed upon property for tax purposes was unreasonable or arbitrary. *Beynon v. Board of Equalization of Lancaster County*, 213 Neb. 488, 329 N.W.2d 857 (1983).
18. Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued. *Lincoln Tel. and Tel. Co. v. County Bd. Of Equalization of York County*, 209 Neb. 465, 308 N.W.2d 515 (1981).

#### **IV. ANALYSIS**

The subject property is composed of two parcels. One parcel is improved with a shopping mall, the other with a parking garage operated in conjunction with the shopping mall. The parties stipulated that if the income approach was used for valuation of the parcels that the income and expense data submitted was for the joint operation of the shopping mall and the parking garage. The parties also stipulated that the parcels should be valued together if the income approach was used for valuation of the subject property.

The Taxpayer's representative testified that the garage was built to satisfy local parking space requirements for operation of the shopping mall. The evidence is that the sole use of the parking garage is to provide parking for patrons of the shopping mall. Actual value as

determined by the County Board for the shopping mall is derived from the use of two approaches; the income approach and the cost approach. (E1 and E9:8). Value for the shopping mall as indicated by the County's use of the cost approach is \$76,513,963.00. (E9:8). Value for the shopping mall as indicated by the County's use of the income approach is \$76,943,700.00. (E9:8). The reconciled value based on the use of the two approaches is \$74,869,800.00. (E9:8). An appraiser for the county testified that the reconciled value was lower than the value indicated by either the income approach or the cost approach because it was necessary to compensate for the presence of the parking garage. Actual value as determined by the County Board for the parking garage was based solely on use of the cost approach. (E2 and E15:5). The value as indicated by the cost approach was \$6,298,968.00. (E15:5). The reconciled value, which was adopted by the County Board was \$5,954,500.00. (E2 and E15:5). An appraiser testified that the reconciled value was lower than value as indicated by the cost approach because it was necessary to adjust for the use of the garage in conjunction with the shopping mall. It is clear that the adjustments made to reconcile values indicated by the income and cost approaches for the shopping mall and the garage were made recognizing the symbiotic relationship of the two parcels in the subject property. The purpose of the adjustments is explained; however, the amounts of the adjustments are not explained. The Commission concludes that while consideration of adjustments was clearly justified, the adjustments as adopted were arbitrary.

The Taxpayer presented evidence of actual value based on use of the income approach. The County presented evidence of actual value based on both the income approach and the cost approach. Either or both methods are approved methods with which to make a determination of

actual value. Neb. Rev. Stat. §77-112 (Reissue 2003). Use of the cost approach is “particularly important when a lack of market activity limits the usefulness of the sales comparison approach and when the properties to be appraised e.g., single family residences are not amenable to valuation by the income capitalization approach. Because cost and market value are more closely related when properties are new, the cost approach is important in estimating the market value of new or relatively new construction.” *The Appraisal of Real Estate*, Twelfth Edition, Appraisal Institute, pgs 353 and 354, (2001). The shopping mall portion of the subject property was built in 1968. (E14:6). The shopping mall was remodeled in 2003. (E14:6). Changes or addition to the shopping mall were made in 2000 (restaurant), 2002 (restaurant), and 2003 (department store). (E14:8, 10 and 12). Changes to the shopping mall in 2000 and 2002 for restaurant purposes were not deemed by the county to add value based on the cost approach. (E10:1). Those determinations are contrary to the findings on pages 5 and 7 of Exhibit 10. The department store added in 2003 was deemed by the county to have a replacement cost new, less depreciation of \$9,120,243. (E10:9). The contribution to value shown on the building value summary prepared by the county shows the “assessed value” of the department store to be \$6,260,100. (E10:1). Use of the cost approach requires the preparation of a value estimate for improvements and a value estimate made for the land. *Property Assessment Valuation*, 2<sup>nd</sup> Ed., International Association of Assessing Officers, 1996. The final estimate of value is the total of the two components. *Id.* As shown in Exhibit 10 at page 1, the estimate of value for shopping mall improvements using the cost approach was \$68,686,900. (E10:1). The estimate of value for the land component was \$6,182,900. (E10:1). The total of those two components for the shopping mall is \$74,869,800. The cost approach value adopted for the shopping mall was

\$76,513,963. (E9:8). No reconciliation of the difference was provided. Use of the cost approach to determine actual value for the shopping mall would be difficult in any circumstances. Here, application of the cost approach cannot be reconciled with generally accepted uses of the cost approach.

Evidence of actual value based on application of the income approach was presented by the Taxpayer and the County Board. (E3:1 and E9:6). The information presented by both parties is based on one year of operations. The Commission is mindful that one year of operations is not an appropriate basis on which to make a determination of value using the income approach. "Earning capacity and actual earnings are not the same thing. It is what the property, efficiently managed, should have earned that throws light on value." *Spencer Holiday House, Inc., v. Board of Equalization of Hall County*, 220 Neb. 607, 611, 371 N.W.2d 286, 288 (1985).

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. *The Dictionary of Real Estate Appraisal*, Fourth Edition, Appraisal Institute, p.143, (2002). The county used information concerning income and expenses (as shown in Exhibit 11) for its application of the income approach. That information was incorporated in to the income approach as shown in Exhibit 9 at page 6. The Taxpayer's use of the income approach is shown in Exhibit 3. There are material differences between uses of the income approach by the Taxpayer and the County. One material difference is the treatment of real property taxes. The County expensed real estate taxes. (E11:1 and E9:6). The Taxpayer did not expense real estate taxes. (E3:1). The County

used a capitalization rate that did not include a tax rate component. (E11:1 and E9:6). The Taxpayer used a capitalization rate that included a tax rate component. (E3:1). The second is the inclusion or exclusion of some other costs. The Taxpayer included expenses for leasing commissions, tenant improvements and replacement reserves. (E3:1). The County did not include those expenses in its calculations. (E11:1 and E9:6).

The Taxpayer did not deduct taxes as an expense and included a tax rate component in its capitalization rate. Property taxes can be considered as an expense item, but the preferred practice is to develop an effective tax rate and add that rate as a component of the capitalization rate. *Property Assessment Valuation*, 2<sup>nd</sup> Ed., International Association of Assessing Officers, 1996. The following lengthy quote provides a rationale for that recommendation.

“In considering the income and expenses of a property, a decision must be made on how to treat property taxes. When property is valued for ad valorem tax purposes, taxes should not be considered an expense item. Because any deduction from gross income directly affects the indicated property value through the income approach, only typical and reasonable expenses can be used. It might be questioned how a typical and reasonable figure for taxes can be found when taxes are usually based on the property value itself. Furthermore, taxes are assessed annually on the basis of the property value, the level of assessment, and the current tax rate or millage. What figures should be used if the property is new and must be assessed for the first time, if taxes have increased rapidly for the past few years, or if the property is not equitably assessed?

When the income approach is used to determine the property value for tax purposes, the practice of using property taxes as an expense item is based on a preconceived value and discredits the whole approach. Because taxes are often the largest single expense, this practice leaves the final conclusion subject to considerable error. The problem can be resolved by developing an effective tax rate and by including the rate in the capitalization rate for the property being appraised.” *Property Assessment Valuation*, 2<sup>nd</sup> Ed., International Association of Assessing Officers, 1996, pg 240.

An appraiser for the county testified that the County did not use an effective tax rate as a component of the capitalization rate if the parcel to be valued was subject to a triple net lease because any taxes paid by the owner were reimbursed by the tenant. Whatever the validity of

that position generally, its application to the subject property is not appropriate. The Taxpayer's representative testified that some leases of space in the shopping mall were not triple net leases. The Taxpayer's representative testified that a significant portion of the shopping mall designed for use by a major tenant was vacant for several years. The vacant area can be seen in Exhibit 8 as a blank area on the North side of the shopping mall. The real estate tax expense shown for the subject property is \$1,550,369. (E11:1). The indicated recovery of that expense is \$1,062,475. (E11:1). The rationale of the County for expensing real estate taxes rather than development of an effective tax rate for inclusion in a capitalization rate is not applicable to the subject property. The more appropriate method of accounting for taxes, for the reasons stated above, is use of an effective tax rate as a component of the capitalization rate. The Taxpayer and the County both adopted a base capitalization rate of 8%. The Taxpayer added an effective tax rate of 2.15%. The appropriate capitalization rate to be used to develop an estimate of value for the subject property using the income approach is 10.15%.

The remaining issue is the deduction of three expense items by the Taxpayer; leasing commission, tenant improvements, and replacement reserves. The Taxpayer's representative testified that the expenses were usual for shopping malls and that the amounts deducted were conformed to his expectations. The Taxpayer's representative also testified that the tenant improvements were items paid by the landlord to conform a space to the specific needs of a tenant and then recovered over the term of a lease. A deduction for tenant improvements is appropriate. See, *The Appraisal of Real Estate* 12<sup>th</sup> Edition, The Appraisal Institute, 2001, pp. 508-509. Likewise, deductions for leasing commissions is appropriate. See, *The Appraisal of Real Estate* 12<sup>th</sup> Edition, The Appraisal Institute, 2001, p. 515. And, finally, a deduction for

replacement reserves is appropriate. *See, The Appraisal of Real Estate* 12<sup>th</sup> Edition, The Appraisal Institute, 2001, p. 515.

Actual value as determined through use of the income approach as shown in Exhibit 3:1, \$66,061,369.00 is reasonable and that determination should be adopted by the Commission.

The parties have stipulated that if the income approach was used to value the subject property that the indicated value should be spread across both parcels of the subject property. The Commission is aware that section 77-1303 of Nebraska Statutes requires the county assessor to maintain an assessment roll on which the total value of each parcel must be stated with values attributed to the land and improvements. Division of the aggregate value as determined by the Commission for the subject property is left to the discretion of the county assessor.

**V.  
CONCLUSIONS OF LAW**

1. The Commission has subject matter jurisdiction in the above captioned appeals.
2. The Commission has jurisdiction over the parties to the above captioned appeals.
3. The Taxpayer has adduced sufficient, clear and convincing evidence that the decisions of the County Board are unreasonable or arbitrary and the decisions of the County Board should be vacated and reversed.

**VI.  
ORDER**

**IT IS ORDERED THAT:**

1. The decisions of the County Board determining taxable value of the subject property as of the assessment date, January 1, 2006, are vacated and reversed.
2. Actual value of the parcels of the subject property for the tax year 2006 is:  

Total value            \$66,061,369.00.
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. 2006).
4. Any request for relief, by any party, which is not specifically provided for by this order is denied.
5. Each party is to bear its own costs in this proceeding.
6. This decision shall only be applicable to tax year 2006.
7. This order is effective for purposes of appeal on October 2, 2007.

**Signed and Sealed.** October 2, 2007.

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Wm. R. Wickersham, Commissioner

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Nancy J. Salmon, Commissioner

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Robert W. Hotz, Commissioner

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William C. Warnes, Commissioner

**SEAL**

**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 (CUM. SUPP. 2006). IF A PETITION IS NOT TIMELY FILED, THIS ORDER BECOMES FINAL AND CANNOT BE CHANGED.**