

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

SFI LTD. PARTNERSHIP II, A	)	
Nebraska Limited Liability	)	
Partnership,	)	CASE NO. 04C-12
	)	
Appellant,	)	
	)	FINDINGS AND FINAL ORDER
vs.	)	AFFIRMING DECISION OF THE
	)	COUNTY BOARD OF EQUALIZATION
SARPY COUNTY BOARD OF	)	
EQUALIZATION,	)	
	)	
Appellee.	)	

Filed March 11, 2005

Appearances:

For the Appellant: Jeffrey A. Silver, Esq.  
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For the Appellee: Tamra L. W. Madsen, Esq.  
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Before: Commissioners Hans, Lore, Reynolds, and Wickersham.

**I.  
STATEMENT OF THE CASE**

SFI Limited II, a Nebraska Limited Liability Partnership ("the Taxpayer"), owns a 7.127 acre tract of land legally described as Lot 3, Willow Brook Addition, City of LaVista, Sarpy County, Nebraska. (E2:12; E2:18; E3:1). The tract of land is improved with a 120-unit apartment complex with 50 garage units, a pool, and an office/clubhouse, all built in 1972. (E2:12). The apartment complex has approximately 119,160 square feet of

gross building area (E2:62), and 94,890 square feet of rentable area. (E2:64).

The Sarpy County Assessor ("the Assessor") determined that the subject property's actual or fair market value was \$3,000,000 as of the January 1, 2004, assessment date. (E1). The Taxpayer timely protested that determination and alleged that the subject property's assessed value exceeded actual or fair market value and further the assessed value was not equalized with comparable properties. The Taxpayer therefore requested that the assessed value be fixed at \$1,428,000. (E17). The Sarpy County Board of Equalization ("the Board") denied the protest. (E1).

The Taxpayer appealed the Board's decision on August 4, 2004. The Commission served a Notice in Lieu of Summons on the Board on August 6, 2004, which the Board answered on September 1, 2004. The Commission issued an Amended Order for Hearing and Amended Notice of Hearing to each of the Parties on January 5, 2005. An Affidavit of Service in the Commission's records establishes that a copy of the Order and Notice was served on each of the Parties.

The Commission called the case for a hearing on the merits of the appeal in the City of Lincoln, Lancaster County, Nebraska, on March 4, 2005. The Taxpayer appeared at the hearing through D. David Slosburg, Vice-President of the Taxpayer's General Partner. (E17). Mr. Slosburg was accompanied by counsel,

Jeffrey A. Silver, Esq., Attorney at Law. The Board appeared through Tamra L. W. Madsen, Esq., Deputy Sarpy County Attorney. Commissioners Hans, Lore, Reynolds and Wickersham heard the appeal. Commissioner Wickersham served as the presiding officer.

## **II. ISSUES**

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

## **III. APPLICABLE LAW**

The Taxpayer 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) (Cum. Supp. 2004)). 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 Taxpayer, once this initial burden has been satisfied, must then demonstrate by clear and convincing evidence that the Board's value was unreasonable. *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 Taxpayer adduced no evidence of a lack of equalization, and abandoned this cause of action.
2. The Vice-President of the Taxpayer's General Partner testified that in his opinion the subject property's actual or fair market value was \$1,428,000. (E17). The record does not support this opinion evidence.
3. The Taxpayer's Appraisal Report placed the greatest weight on the Income Approach. The Income Approach contained in the Taxpayer's Appraisal Report fails to comply with professionally accepted mass appraisal methodologies, and is not credible.

**V.  
ANALYSIS**

**A.  
VALUATION**

The Taxpayer adduced evidence of actual or fair market value through opinion testimony from the Vice-President of the Taxpayer's General Partner. An owner or officer of an owner may

testify to the worth of his or her property if the owner is familiar with the property and knows the worth. A corporate officer or president is not, as such, qualified to testify as to value of corporate property. In order to qualify, he or she must be shown to be familiar with the property and have a knowledge of values generally in the vicinity. *Kohl's Dept. Stores v. Douglas County Bd. of Equal.*, 10 Neb.App. 809, 813 - 814, 638 N.W.2d 877, 881 (2002) (Citations omitted). The Vice-President of the Taxpayer's General Partner with members of his family owns through various entities more than 10,000 apartment units located throughout the midwestern United States. He is therefore qualified to give an opinion of value. The Taxpayer's burden of persuasion, however, 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. *US Ecology, Inc. v. Boyd County Bd of Equalization*, 256 Neb. 7, 15, 588 N.W.2d 575, 581 (1999). There is no such evidence in the record.

The Taxpayer also adduced opinion evidence from a Certified General Appraiser licensed by the State of Nebraska. The Taxpayer's Appraiser, in an appraisal apparently for purposes of

obtaining a commercial loan for the subject property in 2001, determined that the subject property's actual or fair market value was \$3,010,000. (E15:3). The Taxpayer's Appraiser, in an appraisal for purposes of challenging assessed value 26-months later, determined that the subject property's actual or fair market value had dropped to \$1,990,000. (E2:3).

The Taxpayer's Appraiser's first appraisal yielded indicated values of \$3,440,000 under the Cost Approach; \$3,120,000 under the Sales Comparison Approach, and \$3,010,000 under this Income Capitalization Approach. (E15:181). These results follow generally accepted appraisal principles which hold that each approach to value will, if done properly, yield similar results. The Taxpayer's 2004 appraisal yielded indicated values of \$3,710,000 under the Cost Approach; \$2,280,000 under the Sales Comparison Approach, and \$1,990,000 under the Income Capitalization Approach. (E2:185). The Taxpayer's Appraiser attributes the widely varying results to a "soft" real estate market.

The record, however, offers a different explanation. The Taxpayer's Appraiser's 2001 Appraisal Report was admitted only for purposes of impeachment. (E15). The Taxpayer's Appraiser's opinion of actual or fair market value of the subject property's land component increased from \$620,000 in October, 2001, to \$778,000 on January 1, 2004. (E15:119; E2:112). The Taxpayer

Appraiser's opinion of costs in his "feasibility study" increased from \$3,443,388 in 2001 to \$3,709,285 in 2004. (E15:103; E2:93). The Taxpayer's Appraiser's opinion of value under Cost Approach also increased from \$3,440,000 in 2001 to \$3,710,000 in 2004. (E15:122; E2:117).

The Taxpayer's Appraiser's indicated value under the Sales Comparison Approach, however, dropped from \$3,120,000 in 2001 to \$2,280,000 in 2004. (E15:153; E2:136). The Taxpayer's Appraiser's indicated value under the Income Capitalization Approach also dropped from \$3,010,000 in 2001 to \$2,048,271 in 2004. (E15:191; E2:184). The Taxpayer's Appraiser placed the greatest weight on the Income Approach for tax year 2004. The Parties' difference of in opinions of value is limited to factors used under the Income Approach. (E2:184; E6).

The Taxpayer's Appraiser's 2004 indicated value under the Income Approach agrees with the Board's determination of appropriate Management Fee (5%) and Reserves for Replacement (5%). (E2:184; E6). The Board, however, determined that a 35% expense ratio was adequate for remaining necessary operating expenses. (E6). The Taxpayer's Appraiser determined that a 54.23% expense ratio was required for necessary operating expenses. (E2:184).

The Taxpayer's Appraiser stated that the amounts shown on Exhibit 2, page 184, were "historical expense ratios for the

subject property supported by the market." The Taxpayer's expert offered as evidence supporting his expense ratios income and expense data from five "comparable" properties. (E2:173). There is no way of determining whether these properties are truly comparable to the subject properties, since the information regarding ownership is confidential. This "market support" for the Taxpayer's expert's expense ratios, however, does not support his determination of an expense ratio of 54.23% excluding managements fees and reserves for replacement. The "comparable" properties cited by the Taxpayer's expert have expense ratios which range from a low of 45.50% to a high of 54.69%. (E2:173). These expense ratios, however, include both management fees and "structural maintenance." (E2:173). It is also significant that two of the five properties shown are owned in one form or another by the Taxpayer's General Partner. Nothing in the record explains why expense ratios of 35.50% to 44.69% (the "market support" expense ratios less 5% for management fees and less 5% for reserves for replacement) support an expense ratio of 54.23% for the subject property. The low end of this range supports the Board's determination of a 35% expense ratio excluding management fees and reserves for replacement. This "market support," even at the high end, however, does not support the Taxpayer's Appraiser's determination of a 54.23% expense ratio for remaining items.

The Taxpayer's expert, however, alleges that the "soft" real estate market is affecting the subject property's value. The Taxpayer's Appraiser points to his Sales Comparison Approach in support of his argument. The Taxpayer's expert, however, developed his 2004 Sales Comparison Approach without reference to certain sales he relied on in 2001, and excluding sales within Sarpy County which were more recent in time, some of which were within 10 miles of the subject property. Appraisers licensed by the State of Nebraska are governed in their professional activities by the *Uniform Standards of Professional Appraisal Practice* ("USAP"). *USPAP* provides that:

"When a sales comparison approach is applicable, an appraiser must analyze such comparable sales data as are available to indicate a value conclusion."

*USPAP*, The Appraisal Foundation, 2005, p. 19. The Taxpayer's Appraiser's selective use of sales appears to contradict this requirement.

## **B. OTHER ISSUES**

The Taxpayer argues that rent concessions necessary to increase occupancy rates adversely impact actual or fair market value. The Vice-President of the Taxpayer's General Partner therefore prepared a "Direct Capitalization Pro Forma" as evidence of value. (E2:171). This pro forma deducts the present

value of the "rent concessions" (\$59,089) from the final indicated value of \$2,048,071. (E2:184). This procedure violates professionally accepted appraisal methodologies.

"When real estate markets are oversupplied, landlords may give tenants concessions such as free rent for a specified period of time or extra tenant improvements. In shopping center leases, retail store tenants are sometimes given rent credit for interior store improvements. All rent concessions result from market conditions and the relative negotiating strengths of the landlord and the tenant. It is not unusual for free rent concessions to be given outside of the lease term so that the concessions do not appear on the written lease contract. In these situations appraisers must still consider lease concessions when calculating the effective rent being paid."

*The Appraisal of Real Estate*, 12<sup>th</sup> Ed., Appraisal Institute, 2001, p. 505. The resulting value, \$1,990,000, is not clear and convincing evidence of value.

This particular "Direct Capitalization Pro Forma" presents other difficulties as well. A "pro forma" is defined as:

"A financial balance sheet or income statement for a business prepared by an accountant; in appraisal, a statement used to project gross income, operating

expenses, and net operating income for a future period based on specified expectations; also called *pro forma statement*. In preparing a pro forma statement, appraisers may use reconstructed operating statements and other market-driven comparable income and expense data.”

*The Dictionary of Real Estate Appraisal*, 4<sup>th</sup> Ed., the Appraisal Institute, 2002, pp. 221 - 222. The Vice-President of Taxpayer’s General Partner testified that this pro forma is based on prospective income as of January 1, 2004, historic expenses for 2003, and that the expenses will change, since the Taxpayer’s former practice of paying for tenants heating bills changed effective January 1, 2004. The Taxpayer failed to adduce any evidence of the corrections necessary to bring this Direct Capitalization Pro Forma into compliance with professionally accepted appraisal methodologies. This document is not clear and convincing evidence of actual or fair market value as of the assessment date.

The Taxpayer has the duty to adduce clear and convincing evidence that the Board’s decision was incorrect, and either unreasonable or arbitrary, and that the Board’s value was unreasonable. *Garvey Elevator, supra*. The Taxpayer has failed to meet any these burdens. The Board’s decision must accordingly be affirmed.

**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) (Cum. Supp. 2004).
3. The Board is presumed to have faithfully performed its official duties in determining the actual or fair market value of the property. The Board is also presumed to have acted upon sufficient competent evidence to justify its decision. These presumptions remain until the Taxpayer 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 Taxpayer. *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. The Taxpayer has failed to adduce clear and convincing evidence that the Board's decision was incorrect and either unreasonable or arbitrary. The Board's decision must accordingly be affirmed.

**VII.  
ORDER**

**IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:**

1. The Sarpy County Board of Equalization's Order setting the assessed value of the subject property for tax year 2004 is affirmed.
2. The Taxpayer's real property legally described as Lot 3, Willow Brook Addition, City of LaVista, Sarpy County, Nebraska, more commonly known as the Inwood Apartments, shall be valued in the amount of \$3,000,000 for tax year 2004 as determined by the Board.
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 Sarpy County Treasurer, and the Sarpy County Assessor, pursuant to Neb. Rev. Stat. §77-5016(7) (Cum. Supp. 2004).

5. This decision shall only be applicable to tax year 2004.
6. Each Party is to bear its own costs in this matter.

**IT IS SO ORDERED.**

Dated this 11<sup>th</sup> day of March, 2005.

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*Robert L. Hans, Commissioner*

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*Susan S. Lore, Commissioner*

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*Mark P. Reynolds, Vice-Chair*

**SEAL**

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*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 (REISSUE 2003). IF A PETITION IS NOT TIMELY FILED, THIS ORDER BECOMES FINAL AND CANNOT BE CHANGED.**

**PLEASE NOTE:** You will only be notified of a change in assessed value for your property for tax year 2005 if the 2005 assessed value for your property differs from the 2004 assessed value as determined by your Assessor or County Board of Equalization. The Commission's decision for 2004 has no impact on this determination. You should contact your Assessor's Office after March 19, 2005, to determine your 2005 assessed value. If you are unsatisfied with that value, you must file a protest before July 1, 2005. If you fail to file a protest, there can be no change to Assessor's determination of the 2005 assessed value for your property.