

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

GEORGE T. SIMMONS,)	
)	
Appellant,)	Case No. 09C 338
)	
v.)	DECISION AND ORDER
)	AFFIRMING THE DECISION OF
DOUGLAS COUNTY BOARD OF)	THE DOUGLAS COUNTY BOARD OF
EQUALIZATION,)	EQUALIZATION
)	
Appellee.)	

The above-captioned case was called for a hearing on the merits of an appeal by George T. Simmons ("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 March 29, 2011, pursuant to an Order for Hearing and Notice of Hearing issued January 5, 2011 as amended by an Order dated January 5, 2011. Commissioner Warnes, Vice-Chairperson of the Commission, was the presiding hearing officer. Commissioner Wickersham, Chairperson of the Commission, was absent. Commissioner Warnes, as Vice-Chairperson acting in the absence of the Chairperson, designated Commissioners Warnes, Salmon, and Hotz as a panel of the Commission to hear the appeal. Commissioner Salmon was excused. Commissioner Hotz was present. The appeal was heard by a quorum of a panel of the Commission.

George T. Simmons was present at the hearing. No one appeared as legal counsel for the Taxpayer.

Thomas S. Barrett, a Deputy County Attorney for Douglas County, Nebraska, was present as legal counsel for the Douglas County Board of Equalization ("the County Board").

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

The Commission is required to state its final decision and order concerning an appeal, with findings of fact and conclusions of law, on the record or in writing. Neb. Rev. Stat. §77-5018 (Reissue 2009). The final decision and order of the Commission in this case is as follows.

I. ISSUES

The Taxpayer has asserted that actual value of the subject property as of January 1, 2009, is more 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, 2009.

II. FINDINGS OF FACT

The Commission finds and determines that:

1. The Taxpayer has a sufficient interest in the outcome of the above captioned appeal to maintain the appeal.
2. The parcel of real property to which this appeal pertains ("the Subject Property") is described in the table below.
3. Actual value of the subject property placed on the assessment roll as of January 1, 2009, ("the assessment date") by the Douglas County Assessor, value as proposed in a timely

protest, and actual value as determined by the County Board is shown in the following table:

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Description: CITY LOTS 8 BLOCK 150 N 58.8 FT BK 150 58.8 X 66 - EXCESS REDEVELOPMENT PROJ VALUE, Douglas County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$0.00	\$0.00	\$0.00
Improvement	\$994,900.00	\$994,900.00	\$994,900.00
Total	\$994,900.00	\$994,900.00	\$994,900.00

4. An appeal of the County Board's decision was filed with the Commission.
5. An Order for Hearing and Notice of Hearing issued on January 5, 2011, as amended by an Order issued on January 5, 2011, set a hearing of the appeal for March 29, 2011, at 9:00 a.m. CDT.
6. 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.
7. Actual value of the subject property as of the assessment date for the tax year 2009 is:

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Land value \$0.00
Improvement value \$994,900.00
Total value \$994,900.00.

III. APPLICABLE LAW

1. Subject matter jurisdiction of the Commission in this appeal is over all questions necessary to determine taxable value. Neb. Rev. Stat. §77-5016(7) (Reissue 2009).
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 2009).
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 2009).
4. “Actual value, market value, and fair market value mean exactly the same thing.”
Omaha Country Club v. Douglas County Board of Equalization, et al., 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).
5. Taxable value is the percentage of actual value subject to taxation as directed by section 77-201 of Nebraska Statutes and has the same meaning as assessed value. Neb. Rev. Stat. §77-131 (Reissue 2009).

6. All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation. Neb. Rev. Stat. §77-201(1) (Reissue 2009).
7. A presumption exists that the County Board has faithfully performed its duties and has acted on competent evidence. *City of York v. York County Bd. Of Equalization*, 266 Neb. 297, 64 N.W.2d 445 (2003).
8. The presumption in favor of the county board may be classified as a principle of procedure involving the burden of proof, namely, a taxpayer has the burden to prove that action by a board of equalization fixing or determining valuation of real estate for tax purposes is unauthorized by or contrary to constitutional or statutory provisions governing taxation. *Gordman Properties Company v. Board of Equalization of Hall County*, 225 Neb. 169, 403 N.W.2d 366 (1987).
9. The presumption disappears if there is competent evidence to the contrary. *Id.*
10. The order, decision, determination, or action appealed from shall be affirmed unless evidence is adduced establishing that the order, decision, determination, or action was unreasonable or arbitrary. Neb. Rev. Stat. §77-5016 (8) (Reissue 2009).
11. Proof that the order, decision, determination, or action appealed from was unreasonable or arbitrary must be made by clear and convincing evidence. See, e.g., *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb.App. 171, 645 N.W.2d 821 (2002).
12. "Clear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved." *Castellano v. Bitkower*, 216 Neb. 806, 812, 346 N.W.2d 249, 253 (1984).

13. A decision is "arbitrary" when it is made in disregard of the facts and circumstances and without some basis which could lead a reasonable person to the same conclusion. *Phelps Cty. Bd. of Equal. v. Graf*, 258 Neb 810, 606 N.W.2d 736 (2000).
14. A decision is unreasonable only if the evidence presented leaves no room for differences of opinion among reasonable minds. *Pittman v. Sarpy Cty. Bd. of Equal.*, 258 Neb 390, 603 N.W.2d 447 (1999).
15. "An owner who is familiar with his property and knows its worth is permitted to testify as to its value." *U. S. Ecology v. Boyd County Bd. Of Equalization*, 256 Neb. 7, 16, 588 N.W.2d 575, 581 (1999).
16. The County Board need not put on any evidence to support its valuation of the property at issue unless the taxpayer establishes the Board's valuation was unreasonable or arbitrary. *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).
17. A Taxpayer, who only produced evidence that was aimed at discrediting valuation methods utilized by the county assessor, failed to meet burden of proving that value of property was not fairly and proportionately equalized or that valuation placed upon property for tax purposes was unreasonable or arbitrary. *Beynon v. Board of Equalization of Lancaster County*, 213 Neb. 488, 329 N.W.2d 857 (1983).
18. A Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued. Cf. *Josten-Wilbert Vault Co. v. Board of Equalization for Buffalo County*, 179 Neb. 415, 138 N.W.2d 641 (1965) (determination of actual value).

IV. ANALYSIS

The subject property is a commercial parcel improved with three stories of 3,600 square feet each, for a total of 10,800 square feet of commercial space, built in 1890, but remodeled and further improved after a fire in 2005. (E2:2). The Taxpayer testified that one of the improvements made after the fire was the complete finishing of the 3,600 square foot basement. After this improvement, the total finished area of the subject property was 14,400 square feet (10,800 square feet + 3,600 square feet = 14,400 square feet). This improvement was in place prior to January 1, 2009.

The Taxpayer has asserted that actual value of the subject property as of January 1, 2009, is more than actual value as determined by the County Board.

The Taxpayer provided an appraisal which had an effective date of January 15, 2007. (E7). The Taxpayer testified that this appraisal was provided for purposes of obtaining financing and was accomplished prior to the improvements made by a tenant whose income stream was used for the Taxpayer's calculation of revenue using the income approach. The Commission gives little weight to the appraisal of the Taxpayer due to its effective date being approximately 23 months from the critical assessment date of January 1, 2009. In addition, the appraisal uses the sales comparison approach to value the subject property, but does not show adjustments made for differences between the alleged comparable parcels and the subject property. Also, the record files for the parcels alleged to be comparable were not provided. The Taxpayer agreed that the appraisal of his appraiser was of limited probative value for showing the actual value of the subject property for 2009 since it was completed before additional improvements were made

by the most recent tenant in accordance with terms of the lease in the amount of \$400,000.

(E8:1).

The Taxpayer provided testimony and written evidence of the basis for his determining actual value for 2009. (E4:1 & 2). He provides a rebuttal to the County Assessor's Cost Approach. (E4:1). The determination of actual value by the Taxpayer amounts to simply adding the purchase price he paid for the subject property and the cost for rebuilding after a fire destroyed the subject property shortly after its purchase. (E5:1). The Commission finds that this valuation method is not the cost approach referred to in Nebraska Statute §77-112 and it is not an accepted professional appraisal technique .

Under professionally accepted mass appraisal methodologies, the Cost Approach includes six steps:

“(1) Estimate the land (site) value as if vacant and available for development to its highest and best use. The site value analysis in an appraisal can appear as a separate section or as a subsection fo the cost approach. Typically site value analysis is a separate section when the property being appraised is vacant land or agricultural property with few improvements. The improvements must be valued in a consistent use with the land; (2) Estimate the total cost new of the improvements as of the appraisal date, including direct costs, indirect costs, and entrepreneurial profit or entrepreneurial incentive from market analysis; (3) Estimate the total amount of depreciation from all causes. This depreciation is broken down into three categories: physical deterioration, functional obsolescence, and external (economic) obsolescence; (4) Subtract the total dollar

amount of depreciation from the total cost new of the primary improvements to arrive at the depreciated cost of improvements; (5) Estimate the total cost new of any accessory improvements and site improvements. Then, estimate and deduct all depreciation from the total cost new of these improvements. The key to this step is estimating the value that these improvements add to the overall value of the property rather than their cost; (6) Add site value to the depreciated cost of the primary improvements, accessory improvements, and site improvements, to arrive at a value indication by the cost approach.” Garth E. Thimgan et. al., *Property Assessment Valuation*, 3rd Ed., (2010) at 230 (Garth E. Thimgan ed. 2010).

The purchase price paid for a property and the cost to improve it are but one of the factors that must be taken into account to determine actual value.

“It is true that the purchase price of property may be taken into consideration in determining the actual value thereof for assessment purposes, together with all other relevant elements pertaining to such issue; however, standing alone, it is not conclusive of the actual value of property for assessment purposes. Other matters relevant to the actual value thereof must be considered in connection with the sale price to determine actual value. Sale price is not synonymous with actual value or fair market value.” *Forney v. Box Butte County Bd. of Equalization*, 7 Neb.App. 417, 424, 582 N.W.2D 631, 637, (1998).

For the reasons stated above, the Commission gives little weight to that valuation approach used by the Taxpayer to rebut the County Assessor’s cost approach. However, the

Taxpayer's analysis of the actual value of the subject property using the purchase price, the improvements made after the fire and the additional improvements made under the most recent lease does have some probative value. The Commission notes with interest the history of improvements to the subject property which occurred subsequent to the purchase. This interest is further accentuated in light of the fact that there has not been an inspection of the subject property since the improvements have been made through no fault of either party. The Commission must look to other evidence provided in its determination of actual value.

The remaining basis for the Taxpayer's opinion of actual value of the subject property rests with his rebuttal of the County Assessor's income approach, shown in the Taxpayer's exhibit 4, page 2, and the inclusion of his explanation of the derivation of the capitalization rate shown in Exhibit 9. The Taxpayer testified and provided a written statement that it was his belief that the income method of appraisal to value property is, "[a]rguably the most meaningful method when determining the value of commercial property." (E4:2).

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.” Appraisal Institute, *The Dictionary of Real Estate Appraisal*, Fourth Edition (2002) at 143 (Mary Elizabeth Geraci ed., 2002).

The steps required for use of the income approach with direct capitalization may be summarized as:

“ (1) Research the income and expense data for the subject property and comparables; (2) Estimate the potential gross income of the property by adding the rental income and any other potential income; (3) Estimate the vacancy and collection loss; (4) Subtract vacancy and collection loss from total potential gross income to arrive at the effective gross income of the subject property; (5) Estimate the total operating expenses for the subject by adding fixed expenses, variable expenses, and a replacement allowance (where applicable); (6) Subtract the estimate of total operating expenses from the estimate of effective gross income to arrive at net operating income. (Deductions for capital items may also be necessary at various points in time through the projection period to calculate the cash flow used in discounted cash flow analysis.); (7) Apply one of the direct or yield capitalization techniques to this data to generate an estimate of value via the income capitalization approach.” The Appraisal Institute, *The Appraisal of Real Estate* 13th Edition (2008) at 466.

A variety of techniques may be used to quantify various components of any application of the approach. See, *id.* 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 year's estimated income. *Id.* at Ch. 22. A yield capitalization method requires an analysis of income and expected returns over multiple years. *Id.* at Ch. 23. Discounted cash flow analysis is a refinement of the yield capitalization method in which a reversionary value is added to the indicated value of the income stream. *Id.* at Ch. 24. 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.* That value is discounted to present value as of the valuation date and added to the value of the income stream. *Id.*

Under the Income Approach, the higher the capitalization rate, the lower the final indicated value. Thimgan et. al., *supra*, at 342-345.

When property is valued for ad valorem tax purposes, taxes should not be considered an expense item.” *Id.* at 356. The approved use of taxes is to include a factor for taxes in the capitalization rate. A “loaded” capitalization rate includes the effective tax rate. *Id.* at 371-373. The basis for that position is the interplay between tax rates, value, and resulting tax. Taxes to be paid are a function of both the rate and the value to which the rate is applied. If taxes are deducted for purposes of determining value; the tax rate is applied, the tax determined, and value is reduced. Once the reduced value is determined, the tax rate is again applied to reduced value to determine a new resulting tax. The process can produce a circularity in the calculations. For example, if value is lowered, then the deduction for taxes in the equation should be lowered, which would increase income and increase the calculated value, all other components of the calculation remaining constant. Use of a loaded capitalization rate avoids that circularity because

the loaded cap rate is indifferent to the items of income or expense producing the number into which it is divided.

The income approach is “most suitable for types of properties frequently purchased and held for the purpose of producing income, such as apartments. . . .” Robert J. Gloudemans, *Mass Appraisal of Real Property*, (1999) at 8.

Under professionally accepted mass appraisal methods, “the income and expenses that are proper and acceptable for income tax purposes are not the same as those that are appropriate for the income approach. Only the reasonable and typical expenses necessary to support and maintain the income-producing capacity of the property should be allowed.” Thimgan et. al., *supra*, at 318.

The Taxpayer provided evidence of the actual rental income from the subject property as shown in the lease agreement, Exhibit 8, but the actual revenue received is shown on Exhibit 10 and is for only a four month period. His income approach to value the subject property is shown on the worksheet, Exhibit 9, page 1. The Commission cannot speculate that the rental income for four months of the year will continue for an entire year. Thus, the direct capitalization method cannot be utilized.

The Taxpayer did not provide evidence of the actual expenses for the subject property or the market income, expenses, vacancy or losses for comparable properties. Only summary statements were provided of these important variables used to arrive at net operating income.

The Taxpayer used a capitalization rate of 8.5% derived by a determination from the income of the subject property and not from valuation and income of sales of comparable parcels. (E9:1).

The Commission finds that the Taxpayer's determination of actual value of the subject property using the income approach is not in accordance with professional appraisal standards and is to be given little weight.

The Commission finds that the Taxpayer neither rebutted the presumption in favor of the County Board's determination nor did he prove by clear and convincing evidence that the determination of the County Board was arbitrary or unreasonable.

Despite the Taxpayer's failure to rebut the presumption and prove that the County Board was arbitrary or unreasonable, the Commission has reviewed the evidence provided by the County Assessor. (E2:8). The appraiser for the County Assessor used the cost approach to value the subject property for 2009. An explanation of the appraiser's work using the cost approach is shown on Exhibit 2, page 7. The Commission's review of the "Cost Detail Worksheet" shows that the refinished basement has been included and valued. The Commission finds that the appraiser for the County Assessor has utilized professional mass appraisal techniques in valuing the subject property.

“§ 77-1511 creates a 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. 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 forward, 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. In an appeal ..., 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 Bd. of Equal.*, 261 Neb. 130 (2001) at 135 (citations omitted).

A taxpayer must introduce competent evidence of actual value of its property in order to successfully claim that a property is overvalued. *Lincoln Tel. and Tel. Co. v. County Bd. Of Equalization of York County*, 209 Neb. 465, 308 N. W. 2d 515 (1981).

The Commission finds that the Taxpayer has not provided competent evidence to rebut the presumption that the County Board faithfully performed its duties and had sufficient competent evidence to make its determination.

The Commission finds that the Taxpayer has not provided clear and convincing evidence that the County Board’s decision was arbitrary or unreasonable. The appeal of the Taxpayer is denied.

**V.
CONCLUSIONS OF LAW**

1. The Commission has subject matter jurisdiction in this appeal.
2. The Commission has jurisdiction over the parties to this appeal.

3. The Taxpayer has not produced competent evidence that the County Board failed to faithfully perform its official duties and to act on sufficient competent evidence to justify its actions.
4. The Taxpayer has not adduced sufficient, clear and convincing evidence that the decision of the County Board is unreasonable or arbitrary and the decision of the County Board should be affirmed.

**VI.
ORDER**

IT IS ORDERED THAT:

1. The decision of the County Board determining actual value of the subject property as of the assessment date, January 1, 2009, is affirmed.
2. Actual value, for the tax year 2009, of the subject property is:

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Land value	\$0
Improvement value	<u>\$994,900.00</u>
Total value	<u>\$994,900.00.</u>

3. This decision, if no appeal is timely filed, shall be certified to the Douglas County Treasurer, and the Douglas County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Reissue 2009).
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 2009.
7. This order is effective for purposes of appeal on March 30, 2011.

Signed and Sealed. March 30, 2011.

Robert W. Hotz, Commissioner

William C. Warnes, Commissioner

SEAL

APPEALS FROM DECISIONS OF THE COMMISSION MUST SATISFY THE REQUIREMENTS OF NEB. REV. STAT. §77-5019 (REISSUE 2009), OTHER PROVISIONS OF NEBRASKA STATUTES, AND COURT RULES.