

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

WOW LIFE INSURANCE SOCIETY,)	
)	
Appellant,)	Case No. 09C 171
)	
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 WOW Life Insurance Society ("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 January 14, 2010, pursuant to an Order for Hearing and Notice of Hearing issued October 28, 2009. Commissioners Wickersham, Warnes, Salmon and Hotz were present. Commissioner Wickersham, Chairperson of the Commission, was the presiding hearing officer.

Dean Holdsworth, Director of Montage Underwriting of WOW Life Insurance Society, was present at the hearing. Steven D. Davidson 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 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, 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: Lots 5, 6, 7, & 8 Block 116 City Lots, Omaha, Douglas County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$1,000,000.00	\$1,000,000.00	\$1,970,000.00
Improvement	\$43,400,000.00	\$25,000,000.00	\$38,030,000.00
Total	\$44,400,000.00	\$26,000,000.00	\$40,000,000.00

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 October 28, 2009, set a hearing of the appeal for January 14, 2010, at 9:00 a.m. CST.
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 \$ 1,970,000.00

Improvement value \$38,030,000.00

Total value \$40,000,000.00.

**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) (Cum. Supp. 2008).
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. 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, 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).

IV. ANALYSIS

The subject property is a 30 story office tower in downtown Omaha. The building was constructed in 1968 and has been a landmark on the Omaha skyline since construction. Only one other building in Omaha is more than 30 stories tall. The County Board determined that actual

value of the subject property as of January 1, 2009 was \$40,000,000.00. An appraiser retained by the County Assessor (“County Assessor Appraiser”) opined that actual value of the subject property as of January 1, 2009, was \$40,000,000. An appraiser retained by the Taxpayer (“Taxpayer’s Appraiser”) opined that actual value of the subject property as of January 1, 2009, was \$26,000,000. The determination of value made by the County Board was based on use of the income approach to valuation. The income approach to valuation was likewise relied on by the appraisers retained by the parties.

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, 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; and (4) divide net operating income by an estimated capitalization rate to yield indicated value. *The Appraisal of Real Estate* 13th Edition, The Appraisal Institute, 2008, 466. A variety of techniques may be used to quantify various components of any application of the approach. *Id.* at chs 20-24.

Two major methods are used to develop an indication of value using the income approach: direct capitalization and yield capitalization. *Id.* at 465. The direct capitalization method produces an indication of value based on a single year's estimated income. *Id.* at 465. A yield capitalization method requires an analysis of income and expected returns over multiple years. *Id.* at 465. Discounted cash flow analysis is a refinement of the yield capitalization method in which cash flows and an eventual sale price are discounted at a rate to indicate a present value. *Id.* at 540. The County Board and the appraisers used the direct capitalization method.

It is the Taxpayer's burden to show that the decision of the County Board was unreasonable or arbitrary. Neb. Rev. Stat. §77-5016(8) (Reissue 2009). The opinion of the Taxpayer's Appraiser is that actual value of the subject property as of January 1, 2009 was \$26,000,000. If the opinion of the Taxpayer's Appraiser is persuasive it is evidence that the decision of the County Board determining actual value at \$40,000,000 was unreasonable or arbitrary. The opinion of the Taxpayer's Appraiser was based on assumptions, judgements, and conclusions set out in an appraisal received as Exhibit 5. It is necessary to examine those assumptions, judgements and conclusions to determine whether the opinion of the Taxpayer's Appraiser is persuasive.

The initial step in application of the income approach is to estimate potential gross income. The Taxpayer's Appraiser concluded that market rents for the subject property with the exception of bank space on the first 3 floors were \$17.00 per square foot, which is "near the high end of the range of effective market rents." (E5:114). Effective market rents for office space were described as being between \$10 and \$25 per square foot for office space. (E5:114). The

Taxpayer's Appraiser's opinion was that office space in the subject property should rent for \$13.37 to \$25 per square foot. (E5:114). Actual office space rents in the subject property range from \$17.18 to \$19.00 per square foot on full service terms. (E5:114). The rental rate selected by the Taxpayer's Appraiser for office space is not "near the high end" of any range of rents presented.

A portion of the subject property, the first 3 floors, is subject to a long term lease to a single tenant for use as a bank. The lease originated with construction of the subject property. The leased space has been adapted to the use of the tenant. The actual lease rate for the year 2009, was \$11.25 per square foot. The bank space has unusual features, is not easily adapted to a different use, and there is no evidence of lease rates for comparable space.

A vacancy and collection loss rate of 15% was used by the Taxpayer's Appraiser and the County Assessor's Appraiser in their applications of the income approach. (E5:117 and E3:149).

The Taxpayer's Appraiser found that other income should be attributed to the subject property from garage spaces, space for antennas on the roof, and storage space. (E5:114 & 117). The Taxpayer's property manager testified that 260 garage spaces are rented to tenants. The Taxpayer's Appraiser reported that 25 garage spaces are used by the Taxpayer's employees. (E5:114). There seem to be 285 garage spaces. (E5:114). Spaces are rented to the public at \$100 per space per month. (E5:114). 285 spaces rented at \$100 per space per month would generate \$342,000 ($285 \times \$100 \times 12 = \$342,000$). The Taxpayer's Appraiser estimated that income at \$310,000. 260 spaces at \$100 per space per month would generate \$312,000 ($260 \times \$100 \times 12 = \$312,000$). The calculations of the Taxpayer's Appraiser appear to be based on actual rents rather than market rents. It is potential income from a parcel that is important to its

valuation. *In re Assessment of OL & B Ry. Co.*, 213 Neb. 71, 327 N.W.2d 108 (1982); *Spencer Holiday House, Inc., v. Board of Equalization of Hall County*, 220 Neb. 607, 371 N.W.2d 286 (1985). The estimate by the Taxpayer's Appraiser of income from the garage spaces is not supported by the evidence.

The Taxpayer's Appraiser estimated income from storage space at \$67,476. (E:114). That estimate was based on rental rates of \$6 to \$7 per square foot per month. (E5:114). The volume of storage space is unknown. Floor plans indicate that storage space is on the 29th and 30th floors. (E5:79 & 80). Those floors, like the floors below them, contain 11,500 square feet of space outside the elevator and stairwell core. If all of that space were available, the total storage space would be 23,000 square feet. The floor plans show that some of the space outside the elevator and stairwell core is to be used for special purposes and is not available for storage. (E5:79 and 80). If a rate of \$7 per square foot per month is attributed to storage space, the estimate of storage space for rent is 9,639 square feet based on the estimates of the Taxpayer's Appraiser ($\$67,476 \div \$7 = 9,639$). If a rate of \$6 per square foot is attributed to storage space the estimate of storage space for rent is 11,246 square feet based on the estimates of the Taxpayer's Appraiser ($\$67,476 \div \$6 = 11,246$). The floor plans indicate more storage space. The calculation of storage space income by the Taxpayer's Appraiser is not supported in Exhibit 7.

Expenses as estimated by the Taxpayer's Appraiser are calculated on several bases: as a % of EGI, management fees and administrative fees; per square foot of gross building space, insurance, utilities, repairs and maintenance and reserves for replacement; and per square foot of rentable space, leasing commissions and redecorating fees. Use of the differing bases for calculating expenses is explained and is an acceptable appraisal practice.

The actual operating history of a subject property can be considered for appraisal purposes. *The Appraisal of Real Estate* 13th Edition, The Appraisal Institute, 2008, 481 - 483. An analysis using the actual operating expenses of a parcel requires a multi-year analysis that is then used as a basis for comparison only, with comparable properties. *Id.* Three years of operating statements are available for analysis. (E3:174 - 186). An expense considered by the Taxpayer's Appraiser is a reserve for replacement. A reserve for replacements is appropriate to provide for the periodic replacement of building components that wear out more rapidly than the building and must be replaced during the building's economic life. *The Appraisal of Real Estate* 13th Edition, The Appraisal Institute, 2008, 491. A review of the items in the actual expense accounts described in the special approval category indicates some which could be considered as items for which costs should be recognized through a reserve for replacements, some might be considered tenant improvements such as remodeling, and some might simply be management decisions, such as the removal of the escalator to the fourth floor. Gross actual expenses for the subject property, without consideration of special approvals, were \$2,347,822 for the year 2006, \$2,454,532 for the year 2007, and \$2,570,048 for the year 2008. (E3:174 - 186). Expenses as estimated by the Taxpayer's Appraiser without consideration of an expense for a reserve for replacements was \$2,704,332 ($\$2,915,482 - \$211,150 = \$2,704,332$). (E5:117). General operating expenses as estimated by the Taxpayer's Appraiser exceed the highest amount of actual operating expense by \$134,284, or 5.23% ($\$2,704,332 - \$2,570,048 = \$134,284 \div \$2,570,048 = .05225$).

The Taxpayer's Appraiser deducted \$211,150 as the expense of a reserve for replacements. (E5:117). The cost of items designated special approval was \$1,108,448.36 in

2006, \$472,756.05 in 2007, and \$542,897.91 in 2008. (E3:175, 179, & 185). The actual cost of special approvals exceeds the reserve for replacements estimated by the Taxpayer's Appraiser and may reflect management decisions that are not typical of the market.

The final component of the income approach is the capitalization rate. Capitalization rates may be estimated with various techniques. Accepted techniques include: derivation from comparable sales; derivation from effective gross income multipliers and net income ratios; band of investment - mortgage and equity components; band of investment - land and building components; the debt coverage formula, and yield capitalization rates such as the general yield and change formula and the Ellwood method. *The Appraisal of Real Estate* 13th Edition, The Appraisal Institute, 2008, 501. The Taxpayer's Appraiser considered derivation from comparable sales, the band of investment - mortgage and equity components, and a national survey of rates. (E5:119).

The rates derived from sales ranged from 9.56% to 15%. (E5:118). Those sales were numbers 5, 6, 7, and 9, described in the comparable sales section of the appraisal report at pages 93, 95, 96, and 98 of Exhibit 5. Most of those properties were considered lower investment grade properties with above market vacancy. (E5:119). One or more of the sales may also have been influenced by tax considerations. (E5:118). The Taxpayer's Appraiser did not rely on the capitalization rate shown by the sales. (E5:119).

Information concerning capitalization rates from two national surveys were considered by the Taxpayer's Appraiser. (E5:118). Results from the Realty Rates.com were reported for the 2nd and 4th quarters of 2008. (E5:118). Results from the Korpacz Real Estate Investor Survey were reported for urban office properties and national CBD office investors. (E5:118). Different

ranges and averages of capitalization rates were reported. Korpacz reported an average national CBD investor yield of 8.52% in the fourth quarter of 2008. (E5:118). The Taxpayer's Appraiser noted that, "The yield rates in the upper part of the Korpacz range tend to be more descriptive of the local market, similar to the Korpacz's capitalization rates." (E5:118). The significance of the note may be that a 8.5% capitalization rate was adopted by the Taxpayer's Appraiser. (E5:119).

The most weight was given to the capitalization rate developed using the band of investment - mortgage and equity components technique. (E5:119). The components of the formula for derivation of a capitalization rate using the band of investment techniques and their definitions follow.

Mortgage capitalization rate (R_M): The ratio of the annual debt service to the principal amount of the mortgage loan. *The Appraisal of Real Estate* 13th Edition, The Appraisal Institute, 2008, 505.

Equity capitalization rate (R_E): The ratio of annual equity dividend to the amount of equity investment. *Id.*

Equity yield rate (Y_E): An internal rate of return on equity capital. *Id.* at 506.

Loan-to-value ratio (M): The ratio between a mortgage loan and the value of the property pledged as security, usually expressed as a percentage. *Id.* at 506.

Equity ratio (E): The ratio between the down payment paid on a property and its total price; the fraction of the investment that is unencumbered by debt. *Id.* at 506.

The formula for calculation of the capitalization rate using the band of investment technique is $(M \times R_M) + (E \times R_E) = R_O$. *Id.* at 506. In plain terms it is a weighted average of two rates; the mortgage rate for debt, and the rate of return expected on owner equity. Mortgage rates

are discoverable by surveying lenders. *Id.* at 506. The equity yield rate may be harder to discover because it is dependent on market data. *Id.* at 506.

The formula described in Exhibit 5 is different than the formula described above. The formula in Exhibit 5 assumes a 10 year holding period and appears to develop a capitalization rate based on that time frame. Three aspects of the calculation are notable: first there is no discussion or justification for the 10 year holding period; second over the ten year period no appreciation in value is estimated (E5:118); and third a holding period is not part of the accepted formulation of a capitalization rate based on the band of investment - mortgage equity method described above. A holding period, and consideration of a sinking fund factor, are parts of analysis to estimate value based on yield capitalization methods that require estimates of income and expenses over a period of time. See *The Appraisal of Real Estate* 13th Edition, The Appraisal Institute, Ch 23, 2008.

“A reversionary benefit is the lump sum benefit an investor receives upon termination of an investment or at an intermediate analysis period during the term of an investment (especially for appraisals).” *The Appraisal of Real Estate 13th Edition*, The Appraisal Institute, 2008, 458. 2008.

“Reversionary benefits are usually estimated as an anticipated dollar amount or as relative changes in value over the presumed projection period.” *Id.* “Reversionary benefits may or may not require separate measurement, depending on the purpose of the analysis and the method of capitalization employed.” *Id.* “The notion that an investor anticipates a complete recovery of invested capital - plus a payment for the use of capital - prevails in the real estate market just as it does in other markets. The term return of capital refers to the recovery of invested capital. The

term return on capital refers to the additional amount received as compensation for use of the investor's capital until it is recaptured. " *The Appraisal of Real Estate* 13th Edition, The Appraisal Institute, 2208, 461. "Investment capital may be recaptured through annual income, or it may be recaptured all or in part through disposition of the property at the termination of the investment. It may also be recaptured through a combination of both. If the property value does not change between the time the initial investment is made and the time the property is sold, the investor can recapture all of the initial capital invested at property resale at the end of the holding period. Thus, when initial value is equivalent to resale value, the annual income can all be attributed to the return on capital. If the income has remained level (or constant), the indicated income rate (i.e., the overall capitalization rate) will be equal to the return on capital." See *The Appraisal of Real Estate* 13th Edition, The Appraisal Institute, 2008, 461-462. It follows that investors looking for a return would accept a given return in current income or appreciation. If yield is expected from appreciation the current income yield could be reduced so that the total of appreciation and current income yield equaled the desired rate. Estimates of expenses and income for only one year are presented as required for an estimate of value using direct capitalization methods. When only one year of income is being considered appreciation may not be a factor. The Taxpayer's Appraiser shows no appreciation in his formula. (E5:118). The Taxpayer's Appraiser does, however, estimate the percentage of the loan paid at the end of 10 year holding period. (E5:118). While considering only one year of income, the Taxpayer's Appraiser has analyzed a 10 year period as one means of estimating a capitalization rate. The Taxpayer's Appraiser has mixed long term investment considerations appropriate for a

discounted cash flow analysis estimate of value with the simpler capitalization of one year's income analysis.

A sinking fund factor is the compound interest factor that represents the level of payment percentage required to be periodically invested and compounded at a specific rate in order to grow to an amount equal to \$1 over a specific period of time. *Income Property Valuation*, Fisher and Martin, 1994, 580. Once again, a factor that is used when the analysis considers several years becomes a component of a calculation fundamentally based on one year.

Multiplying the loan rate, the percentage of the loan balance paid by the end of the holding period, and the sinking fund factor produces a factor of .0099. (E5:119). The .0099 factor is then used in the formula developed by the Taxpayer's Appraiser to reduce what appears to be the band of investment - mortgage equity capitalization rate ($.058 + .0278 - .0099 = .0759$). (E5:119).

The calculation of a capitalization rate as shown in the appraisal report mixes methodologies in a manner not described in any appraisal reference works available to the Commission.

Justification for the equity yield rate is a selection near the top of the survey range in a manner consistent with selection of capitalization rates from the same survey. The survey does indicate that capitalization rates range from 4 to 9% but there is no indication that the highest capitalization rate is applicable to the local market. The differential between the loan rate and equity yield rate is 2.5% ($9.25 - 6.75 = 2.5$). (E5:118). The indication is that investors have a much higher estimate of risk than the lenders. The development of the capitalization rate by the

Taxpayer's Appraiser relying on the band of investment - mortgage equity method is not persuasive.

The only other bases for selection of a capitalization rate presented in the appraisal are national surveys. (E5:118). Although the surveys are described, a rate selection was not made based on the surveys. There is no described basis for the capitalization rate selected by the Taxpayer's Appraiser.

For reasons stated above the estimate of value developed by the Taxpayer's Appraiser based on the income approach is not clear and convincing evidence that the decision of the County Board was arbitrary or unreasonable.

The Taxpayer's Appraiser also developed an opinion of value based on the sales comparison approach. (E5:85-103). In the sales comparison approach an opinion of value is developed by analyzing closed sales, listings, or pending sales of properties that are similar to the subject property. *The Appraisal of Real Estate*, 13th Edition, Appraisal Institute, 2008, 297. An opinion of value based on use of the sales comparison approach requires use of a systematic procedure:

“1. Research the competitive market for information on sales transactions, listings, and offers to purchase or sell involving properties that are similar to the subject property in terms of characteristics such as property type, date of sale, size, physical condition, location, and land use restraints. ...

2. Verify the information by confirming that the data obtained is factually accurate and that the transactions reflect arm's-length market considerations. ...

3. Select relevant units of comparison (e.g., price per acre, price per square foot, price per front foot) and develop a comparative analysis for each unit. ...

4. Look for differences between the comparable sale properties and the subject property using the elements of comparison. Then adjust the price of each sale to reflect how it differs from the subject property or eliminate that property as a comparable. This step typically involves using the most comparable sale properties and then adjusting for any remaining differences.

5. Reconcile the various value indications produced from the analysis of comparables into a single value indication or a range of values.” *The Appraisal of Real Estate* 13th Edition, The Appraisal Institute, 2008, 301-302.

Nine sales were analyzed. (E5:100 & 101). The Taxpayer’s Appraiser deemed some of the sales unusable for derivation of a capitalization rate because the sales were influenced by tax considerations. (E5:118). The sales for which capitalization rates were included in the data were sales 5, 6, 7, and 9. (E5:93, 95, 96, and 98). The sales which the Taxpayer’s Appraiser deemed affected by tax considerations were not identified. Sale 5 was relied on by the Taxpayer’s Appraiser and is in the group that may have been influenced. Most of those properties for which capitalization rates were available were considered lower investment grade properties with above market vacancy. (E5:119). The Taxpayer’s Appraiser acknowledged that the sales required significant adjustments. (E5:103). The Taxpayer’s Appraiser also acknowledged that sales with fewer adjustments were more reliable indicators of value. (E5:103). The Taxpayer’s Appraiser used sales 1 and 5 to set a range from which to derive a value per square foot that could be attributed to the subject property. (E5:103). Sale 5 required the least adjustments. (E5:100 & 101). Sale 5 may have been influenced by tax considerations and may have been considered a

lower investment grade property with above market vacancy at the time of its sale. Sale 4 required 38% net adjustments. (E5:100). The estimate of value obtained by the Taxpayer's Appraiser based on the sales comparison approach is not clear and convincing evidence that the decision of the County Board was arbitrary or unreasonable.

For reasons noted above the opinion of the Taxpayer's Appraiser is not clear and convincing evidence that the decision of the County Board was unreasonable or arbitrary.

The opinion of value offered by the County Assessor's appraiser is the value adopted by the County Board.

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:

Case No. 09C 171

Land value \$ 1,970,000.00

Improvement value \$38,030,000.00

Total value \$40,000,000.00.

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 (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 July 28, 2010.

Nancy J. Salmon, Commissioner

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.

I concur in the result.

The analysis above considers two standards of review for review. One standard of review is stated as a presumption found in case law, the other is found as stated in statute. I do not believe consideration of two standards of review are required by statute or case law.

The Commission is an administrative agency of state government. See *Creighton St. Joseph Regional Hospital v. Nebraska Tax Equalization and Review Commission*, 260 Neb. 905, 620 N.W.2d 90 (2000). As an administrative agency of state government the Commission has only the powers and authority granted to it by statute. *Id.* The Commission is authorized by statute to review appeals from decisions of a county board of equalization, the Tax Commissioner, and the Department of Motor Vehicles. Neb. Rev. Stat. §77-5007 (Supp. 2007). In general, the Commission may only grant relief on appeal if it is shown that the order, decision, determination, or action appealed from was unreasonable or arbitrary. Neb. Rev. Stat. §77-5016(8) (Cum. Supp. 2008).

The Commission is authorized to review decision of a county board of equalization determining taxable values. Neb. Rev. Stat. §77-5007 (Supp. 2007). Review of county board of equalization decisions is not new in Nebraska law. As early as 1903 Nebraska Statutes provided for review of County Board assessment decisions by the district courts. Laws 1903, c. 73 §124. The statute providing for review did not state a standard for that review. *Id.* A standard of review stated as a presumption was adopted by Nebraska's Supreme Court. See *State v. Savage*, 65 Neb. 714, 91 N.W. 716 (1902) (citing *Dixon Co. v. Halstead*, 23 Neb. 697, 37 N.W. 621 (1888) and *State v. County Board of Dodge Co.* 20 Neb. 595, 31 N.W. 117 (1887)). The presumption was that the County Board had faithfully performed its official duties and had acted upon sufficient competent evidence to justify its actions. See *id.* In 1959, the legislature provided a statutory standard for review by the district courts of county board of equalization, assessment decisions. 1959 Neb Laws, LB 55, §3. The statutory standard of review required the District Court to affirm the decision of the county board of equalization unless the decision was arbitrary or unreasonable or the value as established was too low. *Id.* The statutory standard of review was codified in section 77-1511 of the Nebraska Statutes. Neb. Rev. Stat. §77-1511 (Cum. Supp. 1959). After adoption of the statutory standard of review Nebraska Courts have held that the provisions of section 77-5011 of the Nebraska Statutes created a presumption that the County Board has faithfully performed its official duties and has acted upon sufficient competent evidence to justify its actions. See, e.g., *Ideal Basic Indus. V. Nuckolls Cty. Bd. Of Equal.*, 231 Neb. 653, 437 N.W.2d 501 (1989). The presumption stated by the Court was the presumption that had been found before the statute was enacted.

Many appeals of decisions made pursuant to section 77-1511 were decided without reference to the statutory standard of review applicable to the district courts review of a county board of equalization's decision. See, e.g., *Grainger Brothers Company v. County Board of Equalization of the County of Lancaster*, 180 Neb. 571, 144 N.W.2d 161 (1966). In *Hastings Building Co., v. Board of Equalization of Adams County*, 190 Neb. 63, 206 N.W.2d 338 (1973), the Nebraska Supreme Court acknowledged that two standards of review existed for reviews by the district court; one statutory requiring a finding that the decision reviewed was unreasonable or arbitrary, and another judicial requiring a finding that a presumption that the county board of equalization faithfully performed its official duties and acted upon sufficient competent evidence was overcome. No attempt was made by the *Hastings* Court to reconcile the two standards of review that were applicable to the District Courts.

The Tax Equalization and Review Commission was created in 1995. 1995 Neb. Laws, LB 490 §153. Section 77-1511 of the Nebraska Statutes was made applicable to review of county board of equalization assessment decisions by the Commission. *Id.* In 2001 section 77-1511 of Nebraska Statutes was repealed. 2001 Neb. Laws, LB 465, §12. After repeal of section 77-1511 the standard for review to be applied by the Commission in most appeals was stated in section 77-5016 of the Nebraska Statutes. Section 77-5016(8) requires a finding that the decision being reviewed was unreasonable or arbitrary. *Brenner v. Banner County Board of Equalization*, 276 Neb. 275, 753 N.W.2d 802 (2008). The Supreme Court has stated that the presumption which arose from section 77-1511 is applicable to the decisions of the Commission. *Garvey Elevators, Inc. V. Adams County Bd. of Equalization*, 261 Neb. 130, 621 N.W.2d 518 (2001).

The possible results from application of the presumption as a standard of review and the statutory standard of review are: (1) the presumption is not overcome and the statutory standard is not overcome; (2) the presumption is overcome and the statutory standard is not overcome; (3) the presumption is not overcome and the statutory standard is overcome; (4) and finally the presumption is overcome and the statutory standard is overcome. The first possibility does not allow a grant of relief, neither standard of review has been met. The second possibility does not therefore allow a grant of relief even though the presumption is overcome because the statutory standard remains. See *City of York v. York County Bd of Equal.*, 266 Neb. 297, 664 N.W.2d 445 (2003). The third possibility requires analysis. The presumption and the statutory standard of review are different legal standards, and the statutory standard remains after the presumption has been overcome. See *id.* The burden of proof to overcome the presumption is competent evidence. *Id.* Clear and convincing evidence is required to show that a county board of equalization's decision was unreasonable or arbitrary. See, e.g., *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb.App. 171, 645 N.W.2d 821 (2002). Competent evidence that the county board of equalization failed to perform its duties or act upon sufficient competent evidence is not always evidence that the county board of equalization acted unreasonably or arbitrarily because the statutory standard of review remains even if the presumption is overcome. *City of York*, *supra*. Clear and convincing evidence that a county board of equalization's determination, action, order, or decision was unreasonable or arbitrary, as those terms have been defined, may however overcome the presumption that the county board of equalization faithfully discharged its duties and acted on sufficient competent evidence. In any event the statutory

standard has been met and relief may be granted. Both standards of review are met in the fourth possibility and relief may be granted.

Use of the presumption as a standard of review has been criticized. See G. Michael Fenner, *About Presumptions in Civil Cases*, 17 Creighton L. Rev. 307 (1984). In the view of that author, the presumption should be returned to its roots as a burden of proof. *Id.* Nebraska's Supreme Court acknowledged the difficulty of using two standards of review and classified the presumption in favor of the county board of equalization 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. See *Gordman Properties Company v. Board of Equalization of Hall County*, 225 Neb. 169, 403 N.W.2d 366 (1987). Use of the *Gordman* analysis allows consideration of both the presumption and the statutory standard of review without the difficulties inherent in the application of two standards of review. It is within that framework that I have analyzed the evidence.

Wm. R. Wickersham, Commissioner