

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

NEBCO, INC.,)	
)	
Appellant,)	Case Nos 06SV-001, 06SV-002
)	
v.)	DECISION AND ORDER AFFIRMING
)	THE DECISIONS OF THE DODGE
DODGE COUNTY BOARD OF)	COUNTY BOARD OF EQUALIZATION
EQUALIZATION,)	
)	
Appellee.)	

The above-captioned cases were called for a hearing on the merits of appeals by NEBCO, Inc. ("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 16, 2007, pursuant to an Order for Hearing and Notice of Hearing issued January 8, 2007.

Robert E. Miller, Vice President of the Taxpayer was present at the hearing. Shannon L. Doering appeared as legal counsel for the Taxpayer.

Stacey Hultquist, a Deputy County Attorney for Dodge County, Nebraska, appeared as legal counsel for the Dodge County Board of Equalization ("the County Board").

The Commission took statutory notice, received exhibits and heard testimony and entered its findings and order.

The findings and order of the Commission were appealed to the Nebraska Court of Appeals. The Court of Appeals ordered the Commission to reconsider the evidence obtained in the March 16, 2007, proceeding in accordance with the burden of proof and standard of review described in its order.

**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:

Was the decision of the County Board determining actual value of the subject property unreasonable or arbitrary?

What was actual value of the subject property on January 1, 2006?

The Taxpayer has asserted that taxable value of the subject property as of January 1, 2006, is not equalized with the taxable value of other real property. The issues on appeal related to that assertion are:

Was the decision of the County Board determining taxable value of the subject property unreasonable or arbitrary?

Was taxable value of the subject property determined by the County Board in a manner and an amount that is uniform and proportionate as required by Nebraska's Constitution in Article VIII §1?

What was the equalized taxable 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 described below are the ("subject property").
- 3. Actual value of each parcel of the subject property as stated in a notice of the County Board as of January 1, 2006, ("the assessment date"), value as proposed in timely protests, and actual value as finally determined by the County Board is shown in the following tables:

Case No. 06SV-001

Description: Tax Lots 57 & 58 Section 20, Township 17, Range 8, 132.66 acres, Dodge County, Nebraska.

	Board Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$1,385,000.00	\$597,900.00	\$950,000.00
Improvement	\$-0-	\$-0-	\$-0-
Total	\$1,385,000.00	\$597,900.00	\$950,000.00

Case No. 06SV-002

Description: Tax Lots 8, 29, 30, 32, 33, 34, & 54 Section 21, Township 17, Range 8, 225.71 acres, Dodge County, Nebraska.

	Board Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$2,365,000.00	\$338,565.00	\$1,390,000.00
Improvement	\$101,595.00	\$-0-	\$-0-
Total	\$2,466,595.00	\$338,565.00	\$1,390,000.00

- 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 January 8, 2007, set a hearing of the appeals for March 16, 2007, at 9:00 a.m..
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 each parcel for the tax year 2006 is:

Case No. 06SV-001

Land value \$ 950,000.00

Total value \$ 950,000.00

Case No. 06SV-002

Land value \$1,390,000.00

Total value \$1,390,000.00.

**III.
SCOPE OF REVIEW**

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).

**IV.
STANDARDS OF REVIEW AND BURDENS OF PROOF**

**A.
PRESUMPTION**

A presumption, derived from the statutory standard of review contained in section 77-5016(8) of Nebraska Statutes, arises on appeal that the decision, action, order, or determination

appealed from was made based on the faithful performance of official duties and was made upon sufficient competent evidence. *City of York v. York County Bd. of Equalization*, 266 Neb. 297, 664 N.W.2d 445 (2003). The presumption disappears if there is competent evidence to the contrary. *Id.* Competent evidence means evidence which tends to establish the fact in issue. *In re Application of Jantzen*, 245 Neb. 81, 511 N.W.2d 504 (1994). If the presumption disappears, from that point forward the reasonableness of the valuation becomes one of fact based on all of the evidence presented. *Garvey Elevators, Inc. v. Adams County Bd. of Equalization*, 261 Neb. 130, 641 N.W.2d 518 (2001). Once the presumption is overcome the Taxpayer has the burden to adduce evidence that the decision, action, order, or determination appealed from was unreasonable or arbitrary as prescribed by statute. *City of York v. York County Bd. of Equalization*, *supra*.

B.
UNREASONABLE OR ARBITRARY

The Commission may not grant relief unless it is shown that the order, decision, determination or action appealed from was unreasonable or arbitrary. Neb. Rev. Stat. §77-5016 (8) (Supp. 2007). 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). Clear and convincing evidence is that evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proven. *Castellano v. Bitkower*, 216 Neb. 806, 346 N.W.2d 249 (1984). 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). Proof of a mere difference of opinion is not sufficient to show that the County Board's decision was arbitrary or unreasonable. *Garvey Elevators, Inc. v. Adams County Bd. of Equalization*, 261 Neb. 130, 641 N.W.2d 518 (2001). And it is not enough to merely criticize the County Board's determination. See, *Beynon v. Board of Equalization of Lancaster County*, 213 Neb. 488, 329 N.W.2d 857 (1983). 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).

C.
TAXABLE VALUE

The Taxpayer has alleged that taxable value of the subject property as determined by the County Board is excessive. Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued. Cf. *Lincoln Tel. and Tel. Co. v. County Bd. Of Equalization of York County*, 209 Neb. 465, 308 N.W.2d 515 (1981); *Arenson v. Cedar County*, 212 Neb. 62, 321 N.W.2d 427 (1982) (determination of equalized values); and *Josten-Wilbert Vault Co. v. Board of Equalization for Buffalo County*, 179 Neb. 415, 138 N.W.2d 641 (1965) (determination of actual value).

D.
EQUALIZATION

The Taxpayer has alleged that taxable value of the subject property is not equalized with other similar real property. Proof that the valuation placed on the property when compared with the 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 judgement

is proof that the decision of the County Board was unreasonable or arbitrary. *Garvey Elevators, Inc. v. Adams County Bd. of Equalization*, 261 Neb. 130, 641 N.W.2d 518 (2001).

**V.
OTHER APPLICABLE LAW**

1. “Actual value of real property for purposes of taxation means the market value of real property in the ordinary course of trade. 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, 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).
2. “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).
3. 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).

4. 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).
5. “Taxes shall be levied by valuation uniformly and proportionately upon all real property and franchises as defined by the Legislature except as otherwise provided in or permitted by this Constitution.” *Neb. Const., Art. VIII, §1*
6. Equalization to obtain proportionate valuation requires a comparison of the ratio of assessed to actual value for the subject property and comparable property. *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).
7. Uniformity requires that whatever methods are used to determine actual or taxable value for various classifications of real property that the results be correlated to show uniformity. *Banner County v. State Board of Equalization*, 226 Neb. 236, 411 N.W.2d 35 (1987).
8. Taxpayers are entitled to have their property assessed uniformly and proportionately, even though the result may be that it is assessed at less than the actual value. *Equitable Life v. Lincoln County Bd. of Equal.*, 229 Neb. 60, 425 N.W.2d 320 (1988); *Fremont Plaza v. Dodge County Bd. of Equal.*, 225 Neb. 303, 405 N.W.2d 555 (1987).
9. The constitutional requirement of uniformity in taxation extends to both rate and valuation. *First Nat. Bank & Trust Co. v. County of Lancaster*, 177 Neb. 390, 128 N.W.2d 820 (1964).

10. The County Board of Equalization is required to fairly and impartially equalize the values of all items of real property in the county so that all real property is assessed uniformly and proportionately. Neb. Rev. Stat. 77-1501 (Cum. Supp. 2006).
11. 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).

VI. ANALYSIS

The parcels that comprise the subject property abut one of two lakes, Lake Leba or Leisure Lake. Both lakes were formed by the removal of sand and gravel and are near the Platte River in Dodge County. Tenants of the Taxpayer have placed cabins on the subject property. Cabins on the subject property are assessed to leaseholders as improvements on leased land.

Actual value for the parcels in the subject property was determined by the County Assessor and notice given to the Taxpayer. When given notice of those values the Taxpayer protested. (E1:2 and E2:2). On July 13, 2007, the County Board proposed actual values for the parcels comprising the subject property noting that one parcel was undervalued and that one was overvalued based on the assessor values. (E11:1 and E12:1). Authority for the County Board's action is found in section 77-1504 of Nebraska Statutes. The July 13, 2007, actual values as proposed by the County Board were protested by the Taxpayer. On August 30, 2007, the County Board granted relief based on those protests. The County Board's determinations

on August 30, 2007, of taxable value and equalized taxable value were appealed to the Commission and are the subject of these appeals.

Three issues were presented in the County Board proceedings: first, which lands and improvements in fact constitute the subject property; second, actual value of the subject property and third, the equalized taxable value of the subject property. It is clear from the evidence that even though cabins and other improvements exist on parts of the subject property that those improvements are not owned by the Taxpayer and are not subject to valuation in this proceeding. The Taxpayer and the County Board also agreed at the hearing before the Commission and at the time of the County Board's determination on August 30, 2007, that there were 51 developed lots or cabin sites and 10 undeveloped lots or cabin sites on the subject property. The Taxpayer's protests called into question both the taxable value of the subject property and its equalized taxable value for the tax year 2006. The Taxpayer attempted to show that actual values of the subject properties were lower than the determination of the County Board based on a prior year's taxable value, actual value of parcels asserted to be comparable and capitalization of rents. The Commission may utilize its experience, technical competence, and specialized knowledge in the evaluation of the evidence that is presented to it. Neb. Rev. Stat. 77-5016(5) (Supp 2007).

A.
TAXPAYER'S EVIDENCE OF ACTUAL VALUE

The Taxpayer's Vice-President testified that actual value of the subject property could be determined based on the capitalized rent of cabin sites. The Taxpayer's Vice-President testified that rents approximated \$2,000.00 per year for each developed cabin site and that an

appropriate capitalization rate was 10%. The actual value of each developed cabin site as determined by a division of the rent by the capitalization rate is \$20,000.00 ($\$2,000.00 \div 10 = \$20,000.00$). Potential cabin sites on both parcels were valued by the Taxpayer's Vice-President on the same basis as developed cabin sites. The Taxpayer and the County Board had reached an agreement that there were 34 developed cabin sites and 1 potential cabin site on the parcel described in Case No. 06SV-002. Actual value of that parcel as determined by the Taxpayer's Vice-President based on capitalized rent is \$700,000.00 ($35 \times \$20,000.00 = \$700,000.00$). The Taxpayer and the County Board agreed that the parcel described in Case No. 06SV-001 had 17 developed cabin sites and 9 undeveloped cabin sites. Actual value of that parcel as determined by the Taxpayer's Vice President based on capitalized rent is \$520,000.00 ($26 \times \$20,000.00 = \$520,000.00$). The Taxpayer's Vice-President testified that he validated these estimates of value for the parcels of the subject property with the taxable value for the prior tax year, 2005, and by comparison with parcels around two lakes in Cass County.

1.

Prior Year's Value

A prior year's taxable value is not evidence of actual value in a subsequent year. *DeVore v. Bd. Of Equal.*, 144 Neb. 351, 13 N.W.2d 451 (1944). *Affiliated Foods Coop v. Madison Co. Bd. Of Equal.*, 229 Neb. 605, 613, 428 N.W.2d 201, 206 (1988).

2.

Comparability of Cass County Lots or Cabin Sites

A determination that one parcel is comparable to another is dependent on the consideration of the characteristics of the parcels. See, *Property Assessment Valuation*, 2nd Ed., International Association of Assessing Officers, 1996, p. 76. The Taxpayer's Vice-President

presented evidence about the characteristics of lots or cabin sites in Cass County that he considered to be comparable to the lots or cabin sites on the subject property. Various factors such as lease terms, use, flooding potential, water quality, and utility services, can be examined to determine whether the lots or cabin sites in Cass County are comparable to the lots or cabin sites on the subject property.

The Taxpayer's Vice-President testified that cabin sites on the subject property were leased for 10 year terms and that cabin sites in Cass County were leased for a longer term. A difference in lease terms may affect actual value and assessment practices. A leased fee interest is the lessor's or landlord's interest. *The Appraisal of Real Estate*, The Appraisal Institute, Twelfth Edition, 2001, p. 81. "The valuation of a leased fee interest is best accomplished using the income capitalization approach. ... The benefits that accrue to an owner of a leased fee estate generally consist of income throughout the lease and the reversion at the end of the lease." *Id.* p. 81 and 82. A leasehold estate is the lessee's or tenant's estate. *Id.* p. 83. "A leasehold interest may have value if contract rent is less than market rent, creating a rental advantage for the tenant." *Id.* p. 83. An appraiser for the County testified that a long term lease may result in separate valuation of the leasehold interest and the leased fee interest. The Taxpayer's Vice-President testified that Cass County had proposed valuing the leasehold interest and the leased fee interest separately but did not know if that proposal had been implemented. The Taxpayer's Vice-President testified that improvements on the lots or cabin sites on the parcels in Cass County are better than those on the subject property and more of them were used year round. That testimony is ambiguous because the Taxpayer's Vice-President also testified that none of the lots or cabin sites on the subject property were used year

round. The evidence indicates that the difference in the lease terms affecting the use of the lot or cabin site by the tenant, potential rent, and valuation of the leasehold interest would be a material factor in valuation of the Cass County lots or cabin sites and less of a factor in the valuation of the lots or cabin sites on the subject property.

Lots or cabin sites are platted on one of the lakes in Cass County. The lots or cabin sites on the subject property are not platted.

The Taxpayer's Vice-President testified that the lots or cabin sites in Cass County were serviced by roads that were a little better than the roads servicing the subject property.

Lots or cabin sites at one of the lakes in Cass County are served by a central water and sewer system. Lots or cabin sites on the subject property obtain water from private sand point wells and use private septic tanks for sewage treatment.

The Taxpayer's Vice-President testified that the lots or cabin sites in Cass County were not subject to flooding. The subject property is subject to flooding.

The Taxpayer's Vice-President testified that Lake Leba, one of the lakes abutting portions of the subject property, had algae growth that on at least one occasion has required treatment. Algae problems at the lakes abutting the lots or cabin sites in Cass County are not nearly as severe as the algae problems experienced at Lake Leba.

The lots or cabin sites in Cass County do abut lakes formed by the removal of sand and gravel and are near the Platte River, as are the lots or cabin sites on the subject property.

Based on the factors for which evidence was presented including lease terms, platting, roads, utilities, flooding hazard and water quality, the Commission finds that the lots or cabin sites in Cass County are not comparable to the lots or cabin sites comprising the subject

property. Because the lots or cabin sites in Cass County are not comparable to the lots or cabin sites comprising the subject property evidence of the value whether actual or assessed value is not competent evidence of actual value of the subject property or that the determinations of the County Board were unreasonable or arbitrary.

3.

Assessed Value as Evidence of Actual Value

The Taxpayer's Vice-President contends that the actual or fair market value of the subject property should be determined based on the taxable or "assessed" value of other parcels located in another county. A Taxpayer wishing to use taxable "assessed" values to prove actual or fair market value must show that the approach used is a professionally approved mass or fee appraisal approach and demonstrate application of the approach.

A determination of actual value may be made for mass appraisal and assessment purposes by using approaches identified in Nebraska Statutes. Neb. Rev. Stat. §77-112 (Reissue 2003). The approaches identified are the sales comparison approach, the income approach, the cost approach and other professionally accepted mass appraisal methods. *Id.* Comparison of assessed values is not identified in the Nebraska Statutes as an accepted approach for a determination of actual value for purposes of mass appraisal. *Id.* Because the method is not identified in statute, proof of its professional acceptance as an accepted appraisal approach would have to be produced. *Id.* No evidence has been presented to the Commission that comparison of assessed values is a professionally accepted mass or fee appraisal approach.

The Taxpayer in this case asks the Commission to presume that the taxable "assessed" values of lots or cabin sites in Cass County are the actual values of those lots or cabin sites. A

presumption can arise that an assessor has properly determined taxable “assessed” value.

Woods v. Lincoln Gas and Electric Co., 74 Neb. 526, 527 (1905), *Brown v. Douglas County*, 98 Neb. 299, 303 (1915), *Gamboni v. County of Otoe*, 159 Neb. 417, 431, 67 N.W.2d 489, 499 (1954), *Ahern v. Board of Equalization*, 160 Neb. 709, 711, 71 N.W.2d 307, 309 (1955). A presumption can also arise that a County Board’s determination of taxable “assessed” value is correct. *Constructor's Inc. v. Cass Cty. Bd. of Equal.*, 258 Neb. 866, 606 N.W.2d 786 (2000). A presumption is not, however, evidence of correctness in and of itself, but may be classified as a principle of procedure involving the burden of proof. See, *Gordman Properties Company v. Board of Equalization of Hall County*, 225 Neb. 169, 403 N.W.2d 366 (1987).

The weight of authority is that assessed value is not in and of itself direct evidence of actual value. See, *Lienemann v. City of Omaha*, 191 Neb. 442. 215 N.W.2d 893 (1974). If the “taxable ‘assessed’ value comparison approach” was shown to be a professionally accepted approach for determination of actual value then further analysis would be required. Techniques for use of this approach would have to be developed. Techniques used in the sales comparison approach are instructive. In the sales comparison approach, a sale price is an indication of actual value for a sold property but must be adjusted to account for differences between properties to become an indicator of actual value for another property. *The Appraisal of Real Estate*, Twelfth Edition, Appraisal Institute, Chs 17, 18, 19 (2001). An analysis of differences and adjustments to the taxable “assessed” value of comparison properties would be necessary to obtain an indication of actual value for a subject property. See, *DeBruce Grain v. Otoe County Board of Equalization*, 7 Neb.App. 688, 584 N.W.2d 837 (1998). No adjustments or analysis of adjustments necessary to compensate for differences described above between the

subject property and the taxable “assessed” values of other parcels was presented. The evidence of taxable “assessed” value of the lots or cabin sites in Cass County is not competent evidence of the actual value of the lots or cabin sites comprising the subject property or that the County Board’s determinations were unreasonable or arbitrary.

4.

Actual Value as Derived from Rents and A Capitalization Rate

The Taxpayer’s Vice-President testified that he determined actual value for the subject property based on lease income and a capitalization rate. “The valuation of a leased fee interest is best accomplished using the income capitalization approach. ... The benefits that accrue to an owner of a leased fee estate generally consist of income throughout the lease and the reversion at the end of the lease.” *The Appraisal of Real Estate*, The Appraisal Institute, Twelfth Edition, 2001, p. 81 and 82. 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, p.143, (2002).

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. *Supra*, at 529. A yield capitalization method requires an analysis of income and expected returns over multiple years. *Supra*, at 549. Discounted cash flow analysis is a refinement of the yield capitalization method in which a reversionary value is added to the indicated value of the income stream. *Supra*, at 569. A reversionary value is added on the assumption that the asset producing an income stream still exists and has value at the end of the period. *Id.* That value is discounted to present value as of the valuation date and added to the value of the income stream. *Supra*, at ch 24.

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* 12th Edition, The Appraisal Institute, 2001, pp. 493 - 494. A variety of techniques may be used to quantify various components of any application of the approach. *Supra*, at chs 20-24, (2001).

The income component of the estimate of value presented by the Taxpayer's Vice-President was derived from actual rents paid on lots or cabin sites at the subject property. It is however earning capacity that is of greater importance. "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). There is evidence that there are other leased cabin sites in Dodge County. Use of rents paid at those sites to develop an estimate of value using the income approach would, as noted by the Supreme Court in *Spencer Holiday House*,

Inc, *Supra*, be more persuasive than actual rents at the subject property without any evidence of market rents.

No evidence of expenses that might be attributable to the subject property was presented. A failure to deduct expenses could result in an overstatement of income with a resulting overstatement of value when that income is divided by a capitalization rate. One “expense” item is certain, and that is taxes. Taxes are not however treated as a typical “expense” item when the income approach is used. “When property is valued for ad valorem tax purposes, taxes should not be considered an expense item.” *Property Assessment Valuation, 2nd Ed.*, International Association of Assessing Officers, 1996, p. 240. The preferred approach is to add the tax rate to a base rate resulting in a “loaded” capitalization rate. *Property Assessment Valuation, 2nd Ed.*, International Association of Assessing Officers, 1996, p. 233.

The Taxpayer’s Vice-President testified that a 10% capitalization rate was appropriate because when rents for the subject property were divided by that rate the result was a value equivalent to the taxable or assessed value of the Cass County lots or cabin sites. The “assessed” or taxable value of the lots or cabin sites in Cass County were used to validate a capitalization rate used in determining values for the subject properties. As the assessed value of the Cass County lots or cabin sites is not direct evidence of actual value they cannot be indirect evidence of actual value when used to justify a capitalization rate. Value determined using a capitalization rate is subject to two variables, the capitalization rate and the income into which it is divided. There is no evidence that rent at the lots or cabin sites in Cass County are the same as rents for the lots or cabin sites comprising the subject property. If rents for the lots or cabin sites in Cass County were \$3,000 as opposed to \$2,000 at the subject property the

capitalization rate necessary to arrive at the value indicated is 15% rather than 10%

$(\$3,000.00 \div \$20,000.00 = .15)$.

Capitalization rates can be estimated with various techniques; the techniques used depend on the quantity and quality of data available. When supported by appropriate market data, 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; yield capitalization techniques such as the general yield and change formula (R_o - Yield - change in income and value) and the Ellwood method. *The Appraisal of Real Estate 12th Edition*, The Appraisal Institute, 2001, pp. 530-531. The capitalization rate employed by the Taxpayer's Vice-President was not supported by analysis of market rates based on either gross income or net income and did not conform to generally accepted appraisal methodology.

The County Board's appraiser testified that the methodology proposed by the Taxpayer's Vice-President could be used to calculate the value of a leased fee. That testimony does not, however, indicate that 10% is the appropriate capitalization rate. Even if 10% was the correct capitalization rate for valuation of the leased fee the evidence is that the Taxpayer has not leased various lots or cabin sites and a valuation of the leased fee only would not be an appropriate valuation for those lots or cabin sites.

The Commission finds that the Taxpayer's estimate of value based on the use of rents for lots or cabin sites at the subject property and a capitalization rate is not competent evidence of actual value or that the determinations of the County Board were unreasonable or arbitrary.

The Commission determines that the estimate of actual value presented by the Taxpayer is not based on competent evidence of actual value. As a further note concerning the testimony of the Taxpayer's Vice-President the Nebraska Supreme Court has observed that "(a)s a general rule the valuation of property for tax purposes by the proper assessing officers should not be overturned by the testimony of one or more interested witnesses that the values fixed by such officers were excessive or discriminatory when compared with the values placed thereon by such witnesses. Otherwise no assessment could ever be sustained." *Helvey v. Dawson County Board of Equalization*, 242 Neb. 379, 387, 495 N.W.2d 261, 267 (1993).

The Taxpayer's evidence taken as a whole is directed solely to the issue of actual value of the subject property. Had actual value as proposed by the Taxpayer been proven it could have been considered as evidence that the County Board did not faithfully perform its duties and did not act on competent evidence or that the County Board's determinations were unreasonable or arbitrary. But actual value as proposed by the Taxpayer was not proven. We find that the Taxpayer's evidence standing alone is not competent evidence that the County Board failed to faithfully perform its duties and act on competent evidence, nor is it clear and convincing evidence that the County Board's determinations were unreasonable or arbitrary.

B.
THE COUNTY BOARD'S EVIDENCE

County Boards of equalization are required to fairly and impartially equalize the values of all items of real property in the county so that real property is assessed uniformly and proportionately. Neb. Rev. Stat. §77-1501 (2006 Cum. Supp.). Uniformity and proportionality are achieved if taxable value is determined based on a standard applicable to the subject

property and others. See, *Banner County v. State Board of Education*, 226 Neb. 236, 411 N.W.2d 35 (1987). In this appeal the standard common to the subject property and others is that it be taxed at its actual value. See, Neb. Rev. Stat. §77-201 (Supp. 2005). Actual value of real property for purposes of taxation means the market value of real property in the ordinary course of trade. Neb. Rev. Stat. §77-112 (Reissue 2003). 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 arms length transaction between a willing buyer and willing seller both of which are knowledgeable concerning all uses of which the real property is adapted or for which the real property is capable of being used. *Id.* To this end the statutes provide guidelines the county board of equalization may use to determine the actual value of real property. See, Neb. Rev. Stat. §77-112 (Reissue 2003).

Prior to a statutory change in 1989 actual value was to be determined with reference to specific factors. See, 1989 Neb. Laws LB 361 §3. Use of all of the factors was not required. See, *First National Bank & Trust v. Otoe County*, 233 Neb. 412, 445 N.W.2d 880 (1989). In 1989 however the legislature specified that “Actual value may be determined using professionally accepted mass appraisal techniques including but not limited to : (1) comparison with sales of property of known or recognized value, taking into account location, zoning and current functional use; (2) earning capacity of the property; and (3) Reproduction cost less depreciation.” 1989 Neb. Laws LB 361 §3. Use of the word “may” when used in a statute is given its permissive and discretionary meaning unless that meaning would manifestly defeat the statutory objective. See, *Robbins v. Neth*, 15 Neb. App. 67, 722 N.W.2d 76 (2006). The statutory provision describing the methods for determination of actual value in effect for

purposes of this appeal were as follows: “Actual value may be determined using professionally accepted mass appraisal methods, including but not limited to, the sales comparison approach using the guideline in section 1371, (2) income approach, and (3) cost approach.” Neb. Rev. Stat. §77-112 (Supp 2005). The statute provides for use of mass appraisal methods. A general discussion of mass appraisal methods and differences from fee appraisal methods may be found in *Property Appraisal and Assessment Administration*, IAAO 1990, *Property Assessment Valuation*, 2nd Edition IAAO 2002, and *Standards on Mass Appraisal of Real Property*, IAAO 2002. “Mass appraisal is the systematic appraisal of groups of properties as of a given date using standardized procedures and statistical testing. Single property appraisal or “fee appraisal in contrast, is the valuation of a particular property as of a given date.... the valuation steps in both approaches are similar but market analysis and quality control are handled differently.” *Property Assessment Valuation* 2nd Edition, IAAO. 2002, p. 285. Use of the word “may” as noted above indicates that the provision is permissive or discretionary in its application. For example the statutory provision would not prohibit a determination of actual value based on a fee appraisal of the subject property subject to all of the guidance provided in USPAP although a fee appraisal performed pursuant to USPAP is not a mass appraisal method.

County boards of equalization are authorized to appoint suitable persons to make recommendations on protests filed with the board. Neb. Rev. Stat. 77-1502.01 (Reissue 2003). The County Board made its determination of actual value based on the recommendation of an appraiser retained as a referee to advise it. See, Neb. Rev. Stat. §77-1502.01 (Reissue 2003). The County Board’s referee testified that he is a licensed certified general real property appraiser with more than 40 years of experience. The required experience and education of

certified general real property appraisers is found at Neb. Rev. Stat. §§ 76-2228 and 76-2230 through 76-2232 (Cum. Supp. 2006 and Supp 2007). The County Board's referee made two recommendations of value to the County Board. The first recommendation was made a part of the County Board's consideration of protests filed by the Taxpayer based on the County Assessor's valuation. The County Board's referee estimate of actual value as of July 21, 2006, was based on values of \$40,000.00 per improved lot or cabin site and \$20,000.00 per unimproved lot or cabin site. (E3:8). After a site inspection, that recommendation was adjusted as of August 28, 2006. The County Board referee's final recommendation, made in the form of a "Referee's Report" to the County Board was based on values of \$40,000.00 per leased lot or cabin site and \$30,000.00 per potential site for both parcels. (E15:2 and E16:2). The Commission notes that the cost of a sand pit well, \$1,500.00, and a septic system, \$7,500.00, as testified by the Taxpayer's Vice-President, nearly accounts for the \$9,000.00 difference in value determined by the County Board's referee for leased lots or cabins sites and those that are undeveloped and not leased. The County Board's referee testified that he arrived at his recommendation based on appraisals he had performed and additional knowledge of sales of both individual lots or cabin sites and entire lakes in Dodge County along the Platte River in the vicinity of Fremont. The County Board's referee testified generally that his recommendation was based on the market as derived from sales. The County Board's referee testified that he did not make a recommendation of actual value based on the income approach because he did not have sufficient information.

Each real estate appraiser credentialed in Nebraska is required to comply with the Uniform Standards of Appraisal Practice ("USPAP"). Neb. Rev. Stat. 76-2237 (Cum. Supp.

2007). A credentialed real estate appraiser appointed by a county board of equalization as a referee pursuant to section 77-1502.01 is, however, exempt from the requirements of the Real Property Appraiser Act while engaged as a referee. Neb. Rev. Stat. 77-2221(8) (Cum. Supp. 2006). The exemption allows the credentialed real estate appraiser to offer recommendations without compliance with the Uniform Standards of Professional Appraisal Practice (“USPAP”). That exemption does not exempt the appraiser from the requirements of USPAP for work performed for others. The County Board’s referee testified that he based his recommendations in part on appraisals he had performed. The appraisals were not submitted as evidence. USPAP requires that an appraisal be held in confidence by the appraiser unless released by the client. *Uniform Standards of Professional Appraisal Practice and Advisory Opinions*, The Appraisal Foundation, 2006 Edition, p. 8. The failure to produce the appraisals relied on for recommendations is understandable.

The reports provided by the County Board’s referee did not contain a recitation of the method used by the referee to arrive at his recommendation to the County Board. (E15, E16).

The County Board's referee did not present information concerning sales of individual lots or cabin sites or whole lakes, in spite of testifying that he used a “market comparison” approach when arriving at his recommendation of value. While it would be desirable to have additional information to support the recommendation of the County Board’s referee, the County Board could clearly consider its referee’s recommendation without supporting information. Neb. Rev. Stat. §77-1502.01 (Reissue 2003). The County Board referee’s reports were not shown to be inaccurate or in conflict with the requirements of a referee set forth in Neb. Rev. Stat. §77-1502.01 (Reissue 2003). The omission of information that may have

further supported the recommendation of the County Board's referee goes to the weight of the evidence. The County Board's reliance on the recommendation of the County Board's referee is not evidence that the County Board acted unreasonably or arbitrarily.

There is nothing in the statutes governing referees or the determination of actual value that requires a recommendation by a referee be based on a market comparison complete with a presentation and analysis of all of the information derived from the market for comparison and development of the recommendation. As a further note the statutes clearly provide for the use of mass appraisal methods making the use of all appraisal methodologies optional negating any claim that those methods are mandatory.

The evidence before the Commission consists of the recommendation of the County Board's referee as adopted by the County Board, and the testimony of the Taxpayer's Vice-President. While the Taxpayer's criticism of the County Board's reliance on the recommendation of its referee may be justified, it is not enough to merely criticize the County Board's determination. See, *Beynon v. Board of Equalization of Lancaster County*, 213 Neb. 488, 329 N.W.2d 857 (1983). The Taxpayer retains the burden to demonstrate that the valuation placed on the subject properties by the County Board were unreasonable or arbitrary. *City of York v. York County Bd. Of Equalization*, supra. As evidence that the County Board's decision was unreasonable or arbitrary the Taxpayer offered an opinion of value of it's Vice-President, an opinion of value which the Commission has already determined is unsupported by competent evidence of actual value.

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). The evidence before the Commission is, an opinion of value by a credentialed appraiser in support of the County Board determination and the opinion of value offered by the Taxpayer which is unsupported. There is no clear and convincing evidence that the decision of the County Board was arbitrary.

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). It is appropriate to note again that the determination of actual value made by the County Board was based on the recommendation of a licensed appraiser made in compliance with applicable statutes and the Taxpayer's estimate of value is not supported. The Taxpayer has not met its burden of showing by clear and convincing evidence that the determination of actual value made by the County Board could not be made by other reasonable persons based on the evidence. In fact there is no evidence that actual value is other than determined by the County Board. The decision of the County Board was not unreasonable. This finding is based upon a review of all of the evidence presented to determine the outcome of the Taxpayer's appeal.

C. EQUALIZATION

Although the Taxpayer in its protest asserted that the taxable value of the subject property was not equalized with other comparable and similar property within the county, no evidence was presented to the Commission concerning the actual value or the taxable value of any other parcels in Dodge County. The Commission is without any evidence in support of a claim that taxable value as determined by the County Board is not equalized with other

comparable or similar property within the County and need not consider the Taxpayer's equalization claim further.

**VII.
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 presumption that the County Board faithfully performed its duties and acted on sufficient competent evidence was not overcome by competent evidence.
4. The Taxpayer has not 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 affirmed.

**VIII.
ORDER**

IT IS THEREFORE ORDERED THAT:

1. The decisions of the County Board determining taxable value of the subject properties as of the assessment date, January 1, 2006, are affirmed.
2. Actual value of each parcel of the subject properties for the tax year 2006 is:

Case No. 06SV-001

Land value	\$ 950,000.00
Total value	<u>\$ 950,000.00</u>

Case No. 06SV-002

Land value	\$1,390,000.00
Total value	<u>\$1,390,000.00.</u>

3. This decision, if no appeal is timely filed, shall be certified to the Dodge County Treasurer, and the Assessment Manager for Dodge County, 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 May 16, 2008.

Signed and Sealed. May 16, 2008.

Nancy J. Salmon, Commissioner

William C. Warnes, Commissioner

SEAL

APPEALS FROM DECISIONS OF THE COMMISSION MUST SATISFY THE REQUIREMENTS OF NEB. REV. STAT. §77-5019 (CUM. SUPP. 2006), OTHER PROVISIONS OF NEBRASKA STATUTES, AND COURT RULES.

Commissioner Wickersham, concurring in the result.

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) (Supp. 2007).

Nebraska courts have held that the provisions of section 77-5016(8) of Nebraska Statutes create a presumption that the County Board has faithfully performed its official duties and has acted upon sufficient competent evidence to justify its actions. *City of York v. York County Board of Equalization*, 266 Neb. 297, 664 N.W.2d 445 (2003). The presumption cited in *York* has roots in the early jurisprudence of Nebraska. 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)). 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.*

In 1959 the legislature provided a statutory standard for review by the district courts of county board of equalization assessment decisions. Neb Laws 1959, LB 55 §3. The statutory standard of review required the district Court to affirm the decision of the county board 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 Nebraska Statutes. Neb. Rev. Stat. §77-1511 (Cum. Supp. 1959). Review of district court decisions made pursuant to section 77-1511 was de novo. *Future Motels, Inc. v. Custer County Board of Equalization*, 252 Neb. 565, 563 N.W.2d 785 (1997). The presumption functioned as a standard of review. See, e.g. *Gamboni v. County of Otoe*, 159 Neb. 417, 67 N.W.2d 492 (1954).

The Tax Equalization and Review Commission was created in 1995. Neb Laws 1995, LB 49 §153. Section 77-1511 of Nebraska Statutes was made applicable to review of county board of equalization assessment decisions by the Commission. *Id.* Review of commission decisions was prescribed by statute to be for error on the record. *Supra* §19. In 2001 section 77-1511 of Nebraska Statutes was repealed. Neb Laws 2001, 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 Nebraska Statutes. Commission decisions are reviewed for error on the record. Neb. Rev. Stat. 77-5019(5) (Cum. Supp. 2006)

Many appeals of district courts decisions made pursuant to section 77-1511 were decided without reference to the statutory standard of review applicable to the district courts. 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). As noted however review was de novo and the reviewing court was not bound by the standard of review imposed on the district court. The statutory standard of review applicable to the district courts was however considered in the review of a district court decision made pursuant to section 77-1511 in 1971. *Loskill v. Board of Equalization of Adams County*, 186 Neb. 707, 185 N.W.2d 852 (1971). In *Hastings Building Co., v. Board of Equalization of Adams County*, 190 Neb. 63, 206 N.W.2d 338 (1973), the court acknowledged that two standards of review existed for the district courts; one statutory, and the other judicial, stated as a presumption that the county board of equalization faithfully performed its official duties and acted upon sufficient competent evidence. No attempt was made by the *Hastings* Court to reconcile the two standards of review that were applicable to the district courts.

The possible results from application of the presumption and the statutory standard of review by the Commission 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. If the presumption is overcome the statutory standard remains. See, *City of York v. York County Bd of Equal.*, 266 Neb. 297, 664 N.W.2d 445 (2003). The second possibility does not therefore allow a grant of relief even though the presumption is overcome. The third possibility requires analysis. The presumption and the statutory standard of review are different legal standards, one remaining after the other has been met. See. *City of York Supra*. The burden of proof to overcome the presumption is competent evidence. *City of York Supra*. Clear and convincing evidence is required to show that the County Board'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 failed to perform its duties or act upon sufficient competent evidence is not always evidence that the County Board acted unreasonably or arbitrarily because the statutory standard of review remains even if the presumption is overcome. See, *City of York, Supra*. Clear and convincing evidence that a County Board'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 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. Each

analyses of the standards of review allowing a grant of relief requires a finding that the statutory standard has been met.

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.* The *Gordman* court acknowledged the difficulty of using two standards of review and classified the presumption in favor of the county board 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 possible conflict or difficulties inherent in the application of two standards of review. The *Gordman* analysis requires the Commission to consider all of the evidence produced in order to determine whether there is clear and convincing evidence that the decision, action, order, or determination being reviewed was unreasonable or arbitrary. It is within that framework that I have analyzed the evidence.

Wm. R. Wickersham, Commissioner

Commissioner Hotz, concurring in the result and dissenting in part.

Although I concur in the result of the Commission decision affirming the decision of the Dodge County Board of Equalization, I write separately to dissent from portions of the decision and to discuss concerns highlighted by this appeal.

This appeal is now being decided after a reverse and remand order by the Court of Appeals. The Court found error on the record and remanded for “entry of a decision in accordance with Nebraska law,” after concluding this Commission “imposed a weightier burden of proof on [the Appellant] than Nebraska law requires.” While I agree that on remand the Commission is now applying the correct burden of proof (competent evidence, rather than clear and convincing evidence) to the initial presumption that must be overcome by the Appellant, I dissent from that portion of the Commission’s decision that finds that the Appellant failed to rebut that presumption by sufficient competent evidence. I also dissent from that portion of the Commission decision that finds there was not clear and convincing evidence that the decision of the county board of equalization was arbitrary or unreasonable.

First, the statutes governing the Commission “create a presumption that the board has faithfully performed its official duties and has acted upon sufficient competent evidence to justify its actions.” *City of York v. York County Board of Equalization*, 266 Neb. 297, 664 N.W.2d 445 (2003). This presumption disappears if there is competent evidence to the contrary. *Gordman Properties Company v. Board of Equalization of Hall County*, 225 Neb. 169, 403 N.W.2d 366 (1987). Competent evidence is that evidence which “tends to establish the fact in issue,” that is “admissible and relevant on the point in issue,” and is “that which the very nature of the thing to

be proven requires.” *Shepherd v. City of Omaha*, 194 Neb. 813, 235 N.W.2d 873 (1975). As explained below, I would find there is sufficient competent evidence to rebut the presumption.

Second, proof that the action of the County Board was unreasonable or arbitrary must be made by clear and convincing evidence. *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb.App. 171, 645 N.W.2d 821 (2002). "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). An administrative agency's decision is "arbitrary" when it is made in disregard of the facts or circumstances and without some basis which would lead a reasonable person to the same conclusion. *Livingston v. Jefferson County Board of Equalization*, 10 Neb.App. 934, 640 N.W.2d 426 (2002). 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). I would also find there is clear and convincing evidence that the decision of the county board of equalization was arbitrary or unreasonable.

I do not disagree with the majority's findings regarding the evidence adduced by the Appellant, that "the Taxpayer's evidence standing alone is not competent evidence that the County Board failed to faithfully perform its duties and act on competent evidence, nor is it clear and convincing evidence that the County Boards's determinations were unreasonable or arbitrary." However, our review is not limited to "the Taxpayer's evidence standing alone." Instead, we are also to evaluate "competent evidence to the contrary presented;" our review being "one of fact based upon all the evidence presented." *Garvey Elevators, Inc. v. Adams County Bd. of Equalization*, 261 Neb.130, 641 N.W.2d 518 (2001) (emphasis added).

It is the statutory duty of the county board of equalization to determine the actual value of locally assessed property for tax purposes. *AT&T Info. Systems v. State Bd. of Equal.*, 237 Neb. 591, 467 N.W.2d 55 (1991). “Actual value of real property ... 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*. This section does not require use of all of the specified factors, but “requires use of applicable statutory factors, individually or in combination, to determine the actual value of real estate for tax purposes.” *Cabela’s, Inc. v. Cheyenne Cty. Bd. of Equal.*, 8 Neb.App. 582, 597 N.W.2d 623 (1998). When using the sales comparison approach, “comparable sales are recent sales of properties that are similar to the property being assessed in significant physical, functional, and location characteristics and in their contribution to value. When using comparable sales in determining actual value of an individual property under the sales comparison approach provided in section 77-112, the following guidelines shall be considered in determining what constitutes a comparable sale:...” *Neb. Rev. Stat. Section 77-1371* (emphasis added).

Under *Neb. Rev. Stat. § 77-1502.01*, the board of equalization may appoint a referee to conduct a protest hearing. Once such hearing has been conducted, the referee “shall transmit to the county board of equalization all papers relating to the case, together with his or her findings and recommendations in writing.” *Id.* After “considering all papers relating to the protest and the findings and recommendations of the referee,” the county board “may make the order recommended by the referee or any other order in the judgment of the board of equalization required by the findings of the referee, or may hear additional testimony, or may set aside such

findings and hear the protest anew.” *Id.* It should be noted that even though the county board may exercise its discretion under Section 77-1502.01 by appointing a referee, I find no statutory authority that such discretionary act relieves the board of its duties under Sections 77-112 and 77-1371 in its determination of actual value.

In this case, the county board appointed a referee, Mr. Blomendahl, to conduct the protest hearing and make recommendations to the Board. (T:64). After making initial recommendations, the county board asked the referee to review the properties again and submit a second recommendation (T:68). At about the same time, in a letter dated August 16, 2006, the Department of Property Assessment & Taxation, exercising its assessment duties for Dodge County under *Neb. Rev. Stat. § 77-1340*, revised its recommendations of value (to \$1,900,000 and \$1,205,000 respectively) (E13:1).

The referee submitted written reports of his subsequent review on August 28, 2006, also recommending revised values of \$1,390,000 and 950,000 respectively (E15 and E16). The County Board adopted the recommendations made by the referee (rather than the recommendations made by the Department of Property Assessment & Taxation) on August 30, 2006 (E17:1 and E18:1).

When questioned at the appeal hearing before this Commission, the referee stated the basis for his recommendation to the board was a “market opinion,” or “market comparison opinion.” (T:82). When asked what specific properties were used by the referee for purposes of comparison, the referee responded that he based his recommendation on “general knowledge.” (T83). He narrowed this response somewhat by responding affirmatively to a series of questions that the properties were in Dodge County, were in the vicinity of Fremont, and were along the

Platte River. (T:83). At no time in his testimony did he present any evidence that his recommendation was based upon a comparison to any particular property or to the actual sales information of any particular property.

It seems clear enough that when the county board utilizes the services of a referee to conduct a protest hearing its duties under Sections 77-112 and 77-1371 do not disappear. In this case, when the county board adopted the recommendation of the referee it effectively based its decision upon the approach to value utilized by the referee. Therefore, the board of equalization effectively used a sales comparison approach without regard to any actual sales for comparison to the subject property. To purport to conduct a sales comparison approach without using actual recent sales as the comparison to the subject property is problematic to say the least. To assess property based upon such a “market comparison opinion,” relying upon “general knowledge” rather than actual recent sales is clearly arbitrary or unreasonable. One would be hard-pressed to find a clearer example of arbitrariness in using a sales comparison approach than the approach utilized, which effectively compared the subject property to general information, and then opined value.

I am also concerned by references in the Commission decision to the referee’s obligations under USPAP (National Uniform Standards of Professional Appraisal Practice) regarding appraisal confidentiality. Such references in this context do nothing more than create a smoke screen. A referee who has appraised properties in the past may use the assessor’s sales data relating to those same properties without disclosing an iota of a confidential appraisal.

Thus, I would find the presumption in favor of the county board has been rebutted and there is clear and convincing evidence the board’s decision was arbitrary or unreasonable.

However, the reason for my concurrence in the result follows. In my mind the greatest difficulty in this appeal is that even though the board of equalization's decision was arbitrary or unreasonable, the evidence taken as a whole regarding actual value is incompetent. On this latter point I agree with the Commission decision. Generally, a taxpayer must introduce competent evidence of actual value in order to successfully claim that a property is overvalued. *Lincoln Tel. & Tel. Co. v. County Bd. Of Equal. of York County*, 209 Neb. 465, 308 N.W.2d 515 (1981). In this case, the Appellant did not adduce competent evidence of actual value.

Finally, it is clear the Commission has the statutory authority to either affirm or reverse the decision of the county board of equalization, but it does not have the authority to remand the case back to the board of equalization. Even if the majority agreed that there is sufficient competent evidence to rebut the presumption, and that there is clear and convincing evidence the decision of the board of equalization was arbitrary or unreasonable, the taxpayer would still not prevail on the issue of actual value. This is a serious concern. In this case, the more equitable result would be a remand to ascertain competent evidence regarding actual value. But, with no statutory authority for such a remand, I must concur with the Commission decision because there is lacking in the record competent evidence as to the value of the subject property.

Robert W. Hotz, Commissioner