

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

UNION PLAZA APARTMENTS LTD,)	
)	
Appellant,)	Case No. 07C-153
)	
v.)	DECISION AND ORDER REVERSING
)	THE DECISION OF THE DOUGLAS
DOUGLAS COUNTY BOARD OF)	COUNTY BOARD OF EQUALIZATION
EQUALIZATION,)	
)	
Appellee.)	

The above-captioned case was called for a hearing on the merits of an appeal by Union Plaza Apartments LTD ("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 July 23, 2008, pursuant to an Order for Hearing and Notice of Hearing issued April 14, 2008. Commissioners Wickersham, Salmon, and Hotz were present. Commissioner Wickersham was the presiding hearing officer. Commissioner Warnes was excused from participation by the presiding hearing officer. The appeal was heard by a panel of three commissioners pursuant to 442 Neb. Admin. Code, ch. 4, §11 (10/07).

Philip L. Ullerich, General Partner of Union Plaza Apartments LTD, was present at the hearing without legal counsel.

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 (Cum. Supp. 2006). 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, 2007, 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, 2007.

**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, 2007, ("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:

Description: Lot 4 Block 171 and North 1 foot of vacated alley, Omaha, Douglas County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$87,800.00	\$Unknown	\$87,800.00
Improvement	\$2,250,200.00	\$Unknown	\$2,250,200.00
Total	\$2,338,000.00	\$Unknown	\$2,338,000.00

4. An appeal of the County Board's decision was filed with the Commission.
5. The County Board was served with a Notice in Lieu of Summons and duly answered that Notice.
6. An Order for Hearing and Notice of Hearing issued on April 14, 2008, set a hearing of the appeal for July 23, 2008, at 9:00 a.m. CDST.
7. 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.
8. Actual value of the subject property as of the assessment date for the tax year 2007 is:

Case No. 07C-153

Total value \$1,905,353.00.

**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) (Supp. 2007).
2. “Actual value is the most probable price expressed in terms of money that a property will bring if exposed for sale in the open market, or in an arm’s length transaction, between a

willing buyer and a willing seller, both of whom are knowledgeable concerning all the uses to which the real property is adapted and for which the real property is capable of being used. In analyzing the uses and restrictions applicable to real property the analysis shall include a full description of the physical characteristics of the real property and an identification of the property rights valued.” Neb. Rev. Stat. §77-112 (Reissue 2003).

3. Actual value may be determined using professionally accepted mass appraisal methods, including, but not limited to, the (1) sales comparison approach using the guidelines in section 77-1371, (2) income approach, and (3) cost approach. Neb. Rev. Stat. §77-112 (Reissue 2003).
4. “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 2003).
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) (Cum. Supp. 2006).
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. 2006).
11. Proof that the order, decision, determination, or action 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 county assessor, failed to meet burden of proving that value of property was not fairly and proportionately equalized or that valuation placed upon property for tax purposes was unreasonable or arbitrary. *Beynon v. Board of Equalization of Lancaster County*, 213 Neb. 488, 329 N.W.2d 857 (1983).
18. Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued. 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).

IV. ANALYSIS

The subject property is an improved commercial parcel. The improvement on the parcel is a seven floor building with a basement. (E3:4). The first floor is used in part for commercial

purposes. A part of the first floor is also used for a manager's office. Six floors have been converted to apartments.

The County Board introduced Exhibit 2. Exhibit 2 shows that an appraiser for the County Assessor estimated actual value of the subject property to be \$2,247,293.00 as of January 1, 2007. The County Board's determination of actual value as of January 1, 2007 was \$2,338,000.00. (E1:1).

Both the Taxpayer and the County Board have relied on the income approach to estimate actual value of the subject property as of January 1, 2007. 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; (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).

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.

An estimate of value using the income approach may also be obtained based on gross income and a gross income multiplier. *Supra* at 546-547. A gross income multiplier can be obtained by dividing the sale price of a comparable parcel by their potential gross incomes. *Supra* at 547. The gross income of the property for which value is to be estimated is then multiplied by the gross income multiplier. *Supra* at 546-547. Use of a gross rent multiplier was not examined in this appeal.

The income and expense components of the income approach may be derived in several ways. “The income and expenses that are proper and acceptable for income tax purposes are not the same as those that are appropriate for the income approach. Only the reasonable and typical expenses necessary to support and maintain the income-producing capacity of the property should be allowed.” *Property Assessment Valuation*, 2nd Ed., International Association of Assessing Officers, 1996, p. 204. That position has also been adopted by Nebraska Courts. See, *In re Assessment of OL & B Ry. Co.*, 213 Neb. 71, 75-76, 327 N.W.2d 108, 111 (1982) and *Spencer Holiday House, Inc., v. Board of Equalization of Hall County*, 220 Neb. 607, 371 N.W.2d 286 (1985). As will be seen below, the Commission, with one exception, has used market information to estimate income and expenses to derive an estimate of value based on use of the income approach. Effective gross income of the subject property based on the evidence is estimated as follows:

An appraiser for the County Assessor estimated annual apartment income to be \$428,176.00. That sum was found by attributing a rent of \$8.00 per square foot to 53,522 square

feet. (2:8). The Taxpayer produced a rent roll showing market rent for 43,450 square feet of apartments (48,750 total square feet of rental space less 5,300 commercial = 43,450) to be \$365,640 ($\$304,70.00 \times 12 = \$365,640$). The result is an estimated potential rent income of \$8.42 per square foot ($\$365,640 \div 43,450 = \8.42). The Taxpayer asserted that four parcels were comparable to the subject property: The Securities Building, Orpheum Tower, Kensington Tower, and The Conant. (E6:1). Information about the operation of those parcels can be found in Exhibit 9. Exhibit 9 is the product of responses to surveys submitted to the County Assessor's office by owners or operators of parcels. The Taxpayer's manager testified that he had submitted a survey. Exhibit 9 at pages 2 and 3 shows that all four parcels identified by the Taxpayer have apartments for rent at \$6.50 per square foot. The estimate of apartment rent per square foot shown in Exhibit 9 for the subject property is \$8.00 per square foot. (E9:2). The Taxpayer's rent roll shows market apartment rents of \$8.42 per square foot ($\$30,470 \times 12 \div (48,750 - 2300 - 3000) = \8.415)(E7:1). An appraiser for the County Assessor considered \$8.00 per square foot. (2:8). The Commission finds that \$8.00 per square foot is the appropriate rent per square foot of apartment space to be attributed to the subject property.

The Taxpayer's rent roll shows 43,450 square feet for apartment rental. Exhibit 2 as submitted by the County Board shows 53,522 square feet for apartment rental. (E2:8). Exhibit 2 page 8 also shows that additional income from apartments could only be generated from 49,775 square feet. It would seem that additional income from apartments would be generated from the same square footage that was rented for apartments. On page 4 of Exhibit 3 the County Board has produced sketches of the subject property. If the square footage of the six floors used for apartments is summed the total is 53,264 square feet. It is possible that the County Board's

calculation of income is based on gross square feet and the Taxpayer's rent roll is based on rentable square footage. The basis for the rent information in Exhibit 9 whether gross or rentable is unknown. The rent price adopted by the Commission is supported by the Taxpayer's estimate of market rents based on rentable space. The Commission determined that there are 43,450 square feet of space in the subject property available for rent as apartments. Potential gross apartment rents is \$347,600 ($\$8.00 \times 43,450 = \$347,600$).

Vacancy and collection losses associated with the apartment rentals must be estimated. An appraiser for the County Assessor estimated vacancy and collection loss at 7% of gross rents. (E2:8). Vacancy and collection losses for the four parcels identified by the Taxpayer as comparables as shown in Exhibit 9 is uniformly 7%. (E9:2 and 3). Vacancy and collection loss for the subject is shown as 8% in Exhibit 9. (E9:2). The Taxpayer furnished three years of financial information. (E8). Vacancy and collection losses for the year 2004 were significantly greater than those losses for the year 2005 or the year 2006. (E8:1). Actual vacancy and collection losses for the year 2005 and 2006 represented 9.3 % of gross rents ($\$28,760 + \$6,222 + \$31,207 + \$1,963 = \$68,152$ total collection and vacancy loss for 2 years $\div 2 = \$34,076 \div \$365,640$ potential gross rents = .093). The higher vacancy and collection losses reported by the Taxpayer and shown as experienced are unexplained. All of the parcels suggested as comparable by the Taxpayer reported 7% vacancy and collection losses and that estimate was adopted by the appraiser for the County Assessor. The Commission determines that a vacancy and collection loss estimated at 7% of gross rents is correct.

Other income attributable to the rental of apartments may be collected. Other income as collected for the subject property is shown in Exhibit 8. The average of the other income

collected over the three year period shown is \$13,184 ($\$14,655 + \$10,717 + \$14,179 = 39,551 \div 3 = \$13,184$). There is no other evidence of other income that might be estimated for the subject property.

The subject property contains space used for commercial purposes. The Taxpayer on its rent roll shows that space to be 5,300 square feet. (E7:2). Rents collected from that space average \$4.15 per square foot over a three year period ($\$24,000 + \$21,492 + \$20,570 = \$66,062 \div 3 \div 5,300 = \4.15). That is consistent with testimony of the Taxpayer's General Partner. Commercial rents per square foot in the parcels suggested as comparable by the Taxpayer: \$14.00, Securities Building; \$8, Orpheum Tower; and \$10.00, Kensington Tower. (E9:2). The Conant does not report commercial space. (E9:3). The subject property is shown as reporting \$10.00. (E9:2). An appraiser for the county assessor adopted a rate of \$10 per square foot (E9:2). A rate of \$8 per square foot exceeds the actual rents received and is the rate found at the Orpheum Tower. The Commission determines that a rate of \$8.00 per square foot of commercial space is appropriate.

The Taxpayer shows rentable commercial space to be 5,300 square feet ($2,300 + 3,300 = 5,300$). (E7:1). Three different numbers are shown in the report prepared by the appraiser for the County; 6,615 square feet, 5,954 square feet for additional income from commercial space and 6,876 on a sketch. (E2:9 and E3:4). The Commission determines that there are 5,300 square feet of commercial space available for rental in the subject property.

A portion of the first floor is used by a building manager. There is no evidence that the space generates income or that any income should be attributed to it.

Vacancy and collection losses attributable to the commercial space must be estimated.

The operating data submitted by the Taxpayer does not show any vacancy or collection loss attributable to the commercial space in the three years reported. (E8:1). Vacancy and collection losses attributable to commercial rentals reported for the parcels suggested as comparable by the Taxpayer are: 10%, Securities Building; 10%, Orpheum Tower; and 10%, Kensington Tower. (E9:2). The Conant did not report commercial rents. (E9:3). The subject reported a 10% rate. (E9:2). The Commission determined that the applicable rate vacancy and collection losses expected on commercial rentals is 10%.

Effective gross income for the subject property can then be determined as follows:

Potential Gross Income Apartment rent	\$347,600.00
Less Vacancy and Collection Loss 7%	(\$ 24,332.00)
Other Income	\$ 13,184.00
Commercial Rental	\$ 42,400.00
Less Vacancy and Collection Loss 10%	<u>(\$ 4,240.00)</u>
Effective Gross Income	<u>\$ 374,612.00</u>

The next component of the income approach is development of expenses. The Taxpayer has provided three year's of financial data. (E8:1). Rates for the calculation of vacancy and collection losses have been determined above. "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 approved use of taxes is to include a factor for taxes in the capitalization rate. A "loaded" capitalization rate includes the effective tax rate. *Property Assessment Valuation, 2nd Ed.*, International Association of Assessing Officers, 1996, p. 233. The amounts shown for vacancy and collection losses and real property taxes are not included in the amounts shown as operating expenses in Exhibit 8.

The three-year average of the adjusted operating expenses is \$182,339 ($\$179,583 + \$178,927 + \$188,508 = \$547,018 \div 3 = \$182,339$). The percentage of effective gross income represented by actual expenses is 48.6% ($\$182,339 \div \$374,612 = .486$). The Taxpayer's General Partner testified that it was not practical to separate expenses attributable to the commercial space from the apartment space. Expense ratios are reported in Exhibit 9 but apartment and commercial expense ratios are stated separately. It is necessary to derive a combined expense ratio from the information reported in Exhibit 9. The first step is to convert the expense percentages into dollars of expense. That is done by multiplying the effective gross income by the expense ratio. The derived expenses are then summed, the effective gross incomes are summed, and the total expenses are divided by the total effective gross income. The calculations for the parcels identified by the Taxpayer are as follows:

Security Building

$$((\$236,916 \times .44 = \$104,243.00) + (\$105,651 \times .08 = \$8,452)) (\$104,243 + \$8,452 = \$112,695$$

Total Expenses)

$$(\$236,916 + \$105,651 = \$342,567 \text{ Total Effective Gross Income})$$

$$(\$112,695 \div \$342,567 = .329 \text{ Expense Ratio})$$

Orpheum Tower

$$((\$896,171 \times .44 = \$394,315) + (\$42,005 \times .08 = \$3,360)) (\$394,315 + \$3,360 = \$397,675 \text{ Total$$

Expenses)

$$(\$896,171 + \$42,005 = \$938,176 \text{ Total Effective Gross Income})$$

$$(\$397,675 \div \$938,176 = .423 \text{ Expense Ratio})$$

Kensington Tower

$((\$338,544 \times .44 = \$148,959) + (\$34,200 \times .08 = \$2,736)) (\$148,959 + \$2,736 = \$151,695 \text{ Total Expenses})$

$(\$338,544 + \$34,200 = \$372,744 \text{ Total Effective Gross Income})$

$(\$151,695 \div \$372,744 = .406 \text{ Expense Ratio})$

The Conant did not report commercial rental income

An appraiser for the County Assessor determined that a 45% expense ratio was appropriate for the apartment expenses and a 30% expense ratio was appropriate for the commercial expenses.

(E2:8 and 9). Those determinations may be converted into a combined ratio of $(\$179,192 + \$17,861 = \$197,053 \text{ Total Expenses})(\$398,204 + \$59,535 = \$457,739 \text{ Total Effective Gross$

$\text{Income})(\$197,053 \div \$457,739 = .43)$. The ratios are: .486 actual; .329 Securities Building; .423

Orpheum Tower; .406 Kensington Tower; and, .43 appraiser. The Commission determines that a combined apartment and expense ratio of .41 is appropriate.

The loaded capitalization rate of 11.6 % as determined by the appraiser for the county assessor was not disputed.

The following are all of the elements necessary to estimate value of the subject property using the income approach. The items amounts and calculations are as follows.

Effective Gross Income	\$374,612
Expenses 41%	<u>(\$153,591)</u>
Net Operating Income	<u>\$221,021</u>

Net Operating Income $\$221,021 \div .116 \text{ Loaded Capitalization Rate} = \$1,905,353$. The

Commission concludes that actual value of the subject property was \$1,905,353 as of January 1, 2007.

Finally, The Taxpayer's General Partner testified in response to questions from the attorney for the County Board, that the Orpheum Tower had sold during the year 2007 for \$9,000,000.00. The Taxpayer's General Partner had previously asserted that the Orpheum Tower was a comparable parcel. The date of the sale in 2007 is unknown. A sale after the assessment date may be considered as evidence of actual value as of the assessment date. See, *H/K Company v. Board of Equalization of the County of Lancaster*, 175 Neb. 268, 121 N.W.2d 382 (1963). In addition a single sale may be considered evidence of actual value for another parcel. See, *Firethorn Investment, v. Lanacaster County Board of Equalization*, 261 Neb. 231, 622 N.W.2d 605 (2001). Circumstances surrounding the sale of the Orpheum Tower are not known so that it is impossible to determine from the evidence whether the sale was or was not an arm's length transaction. An assessment report prepared by an appraiser for the County Assessor's office dated April 25, 2008, and submitted as Exhibit 2 on behalf of the County Board does not disclose the sale. The lack of information concerning the circumstances of the sale requires that it be given no weight in the Commission's determination of actual value for the subject property.

**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 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 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 vacated and reversed.

**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, 2007, is vacated and reversed.
2. Actual value, for the tax year 2007, of the subject property is:

Case No. 07C-153

Total value \$1,905,353.00.

Actual value as determined by the Commission may be allocated by the County Assessor between land and Improvements as necessary for maintenance of the tax roll.

3. This decision, if no appeal is timely filed, shall be certified to the Douglas County Treasurer, and the Douglas County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Cum. Supp. 2006).
4. Any request for relief, by any party, which is not specifically provided for by this order is denied.
5. Each party is to bear its own costs in this proceeding.
6. This decision shall only be applicable to tax year 2007.

7. This order is effective for purposes of appeal on September 8, 2008.

Signed and Sealed. September 8, 2008.

Nancy J. Salmon, Commissioner

Robert W. Hotz, 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.

I concur 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 the 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. 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). 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. 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 requires a finding that the decision being reviewed was unreasonable or arbitrary. The basis for that determination is the evidence presented to the Commission in a new record. See, Neb. Rev. Stat. §77-5016 (Cum. Supp.

2006). Commission decisions are reviewed for error on the record. See, Neb. Rev. Stat. 77-5019(5) (Cum. Supp. 2006). The statutory basis for Commission review and the review of its decisions is analogous to district courts review of decisions made by administrative agencies. The basis for district court review of decisions made by administrative agencies is de novo on the record. *Tyson Fresh Meats v. State*, 270 Neb. 535, 704 N.W.2d 788 (2005). The decisions of the district court examining the administrative decision are reviewed for error on the record. *Thorson v. Nebraska Dept. of Health & Human Servs.*, 274 Neb. 322, 740 N.W.2d 27 (2007). The similarities are enough to suggest that the framework for review applied to district court decisions could be made applicable to decisions of the Commission.

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. 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 district court. *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 Nebraska Supreme 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 v. York County Bd of Equal.*, 266 Neb. 297, 664 N.W.2d 445 (2003). The burden of proof to overcome the presumption is competent evidence. *City of York*, Supra. 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. 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.* 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 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