BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

KEARNEY PLAZA HOMES, LP,	)	
	)	
Appellant,	)	Case Nos. 06C-265, 06C-266, 06C-267,
	)	06C-268, 06C-269, 06C-270, 06C-271,
v.	)	06C-272, 06C-273, 06C-274, 06C-275,
	)	06C-276, 06C-277, 06C-278, 06C-279,
BUFFALO COUNTY BOARD OF	)	06C-280
EQUALIZATION,	)	
	)	DECISION AND ORDER
Appellee.	)	AFFIRMING THE DECISIONS OF
	)	THE BUFFALO COUNTY BOARD OF
	)	EQUALIZATION
	)	

The above-captioned cases were called for a hearing on the merits of appeals by Kearney Plaza Homes, LP ("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 June 17, 2008, pursuant to an Order for Hearing and Notice of Hearing issued December 18, 2007. Commissioners Wickersham, Warnes, and Salmon were present. Commissioner Wickersham was the presiding hearing officer. Commissioner Hotz 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).

The requirement that a principal or full time employee, of Kearney Plaza Homes, LP, appear, was waived. Trent Sidders was present at the hearing as legal counsel for the Taxpayer.

Andrew W. Hoffmeister, a Deputy County Attorney for Buffalo County, was present on behalf of the Buffalo 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 the consolidated cases is as follows.

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:

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, 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:

Whether the decision of the County Board determining the equalized taxable value of the subject property is unreasonable or arbitrary;

Whether the equalized taxable value of the subject property was 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; and

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 to which the above captioned appeals pertain are ("the Subject Property") are described in the tables below.

3. Actual value of each parcel of the subject property placed on the assessment roll as of January 1, 2006, ("the assessment date") by the Buffalo County Assessor, value as proposed in timely protests, and actual value as determined by the County Board is shown in the following tables:

Case No. 06C-265

Description: Lot 8 Block 2, Kearney Plaza Third Subdivision, Kearney, Buffalo County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	$20,435.00	In Total	$20,435.00
Improvement	$62,070.00	In Total	$62,070.00
Total	$82,505.00	$52,370.00	$82,505.00

Case No. 06C-266

Description: Lot 9 Block 2, Kearney Plaza Third Subdivision, Kearney, Buffalo County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	$24,245.00	In Total	$24,245.00
Improvement	$62,020.00	$In Total	$62,020.00
Total	$86,265.00	$52,370.00	$86,265.00

Case No. 06C-267

Description: Lot 10 & N 20.21 feet of Lt 12 Block 2, Kearney Plaza Third Subdivision, Kearney, Buffalo County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	$20,600.00	In Total	$20,600.00
Improvement	$62,000.00	In Total	$62,000.00
Total	$82,600.00	$52,370.00	$82,600.00

Case No. 06C-268

Description: Lot 11 Block 2, Kearney Plaza Third Subdivision, Kearney, Buffalo County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	$21,525.00	In Total	$21,525.00
Improvement	$62,395.00	In Total	$62,395.00
Total	$83,920.00	$52,370.00	$83,920.00

Case No. 06C-269

Description: Lot 12 Block 2 Exc N 20.21 feet, Kearney Plaza Third Subdivision, Kearney, Buffalo County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	$16,195.00	In Total	$16,195.00
Improvement	$62,075.00	In Total	$62,075.00
Total	$78,270.00	$52,370.00	$78,270.00

Case No. 06C-270

Description: Lot 13 Block 2, Kearney Plaza Third Subdivision, Kearney, Buffalo County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	$19,460.00	In Total	$19,460.00
Improvement	$62,410.00	In Total	$62,410.00
Total	$81,870.00	$52,370.00	$81,870.00

Case No. 06C-271

Description: Lot 14 Block 2, Kearney Plaza Third Subdivision, Kearney, Buffalo County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	$19,575.00	In Total	$19,575.00
Improvement	$97,115.00	In Total	$97,115.00
Total	$116,690.00	$52,370.00	$116,690.00

Case No. 06C-272

Description: Lot 15 Block 2, Kearney Plaza Third Subdivision, Kearney, Buffalo County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	$19,800.00	In Total	$19,800.00
Improvement	$97,825.00	In Total	$97,825.00
Total	$117,625.00	$52,370.00	$117,625.00

Case No. 06C-273

Description: Lot 16 Block 2, Kearney Plaza Third Subdivision, Kearney, Buffalo County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	$19,800.00	In Total	$19,800.00
Improvement	$97,285.00	In Total	$97,285.00
Total	$117,085.00	$52,370.00	$117,085.00

Case No. 06C-274

Description: Lot 17 Block 2, Kearney Plaza Third Subdivision, Kearney, Buffalo County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	$19,800.00	In Total	$19,800.00
Improvement	$97,095.00	In Total	$97,095.00
Total	$116,895.00	$52,370.00	$116,895.00

Case No. 06C-275

Description: Lot 18 Block 2, Kearney Plaza Third Subdivision, Kearney, Buffalo County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	$22,375.00	In Total	$22,375.00
Improvement	$97,685.00	In Total	$97,685.00
Total	$120,060.00	$52,370.00	$120,060.00

Case No. 06C-276

Description: Lot 19 Block 2, Kearney Plaza Third Subdivision, Kearney, Buffalo County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	$29,250.00	In Total	$29,250.00
Improvement	$97,530.00	In Total	$97,530.00
Total	$126,780.00	$52,370.00	$126,780.00

Case No. 06C-277

Description: Lot 14 Block 3, Kearney Plaza Third Subdivision, Kearney, Buffalo County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	$24,400.00	In Total	$24,400.00
Improvement	$58,655.00	In Total	$58,655.00
Total	$83,055.00	$52,370.00	$83,055.00

Case No. 06C-278

Description: Lot 15 Block 3, Kearney Plaza Third Subdivision, Kearney, Buffalo County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	$22,810.00	In Total	$22,810.00
Improvement	$61,380.00	In Total	$97,380.00
Total	$84,190.00	$52,370.00	$84,190.00

Case No. 06C-279

Description: Lot 16 Block 3, Kearney Plaza Third Subdivision, Kearney, Buffalo County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	$21,300.00	In Total	$21,300.00
Improvement	$63,395.00	In Total	$63,395.00
Total	$84,695.00	$52,370.00	$84,695.00

Case No. 06C-280

Description: Lot 1 Block 1, Kearney Plaza Third Subdivision, Kearney, Buffalo County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	$42,290.00	In Total	$42,290.00
Improvement	$60,205.00	In Total	$60,205.00
Total	$102,495.00	$52,370.00	$102,495.00

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 December 18, 2007, as amended by an Order issued on March 17, 2008, set a hearing of the appeals for June 17, 2008, at 9:00 a.m. CDST.

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. 06C-265

Land value	$20,435.00
Improvement value	$62,020.00
Total value	$82,505.00

Case No. 06C-266

Land value	$ 24,245.00
Improvement value	$ 62,020.00
Total value	$ 86,265.00

Case No. 06C-267

Land value	$ 20,600.00
Improvement value	$ 62,000.00
Total value	$ 82,600.00

Case No. 06C-268

Land value	$ 21,525.00
Improvement value	$ 62,395.00
Total value	$ 83,920.00

Case No. 06C-269

Land value	$ 16,195.00
Improvement value	$ 62,075.00
Total value	$ 78,270.00

Case No. 06C-270

Land value	$ 19,460.00
Improvement value	$ 62,410.00
Total value	$ 81,870.00

Case No. 06C-271

Land value	$ 19,575.00
Improvement value	$ 97,115.00
Total value	$ 116,690.00

Case No. 06C-272

Land value	$ 19,800.00
Improvement value	$ 97,825.00
Total value	$ 117,625.00

Case No. 06C-273

Land value	$ 19,800.00
Improvement value	$ 97,285.00
Total value	$ 117,085.00

Case No. 06C-274

Land value	$ 19,800.00
Improvement value	$ 97,095.00
Total value	$ 116,895.00

Case No. 06C-275

Land value	$ 22,375.00
Improvement value	$ 97,685.00
Total value	$ 120,060.00

Case No. 06C-276

Land value	$ 29,250.00
Improvement value	$ 97,530.00
Total value	$ 126,780.00

Case No. 06C-277

Land value	$ 24,400.00
Improvement value	$ 58,655.00
Total value	$ 83,055.00

Case No. 06C-278

Land value	$ 22,810.00
Improvement value	$ 61,380.00
Total value	$ 84,190.00

Case No. 06C-279

Land value	$ 21,300.00
Improvement value	$ 63,395.00
Total value	$ 84,695.00

Case No. 06C-280

Land value	$ 42,290.00
Improvement value	$ 60,205.00
Total value	$ 102,495.00.

III.
APPLICABLE LAW

1. Subject matter jurisdiction of the Commission in each of the above captioned appeals 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. "(1)The county assessor shall perform an income-approach calculation for all rent-restricted housing projects constructed to allow an allocation of low-income housing tax credits under section 42 of the Internal Revenue Code and approved by the Nebraska Investment Finance Authority when considering the assessed valuation to place on the property for each assessment year. The income-approach calculation shall be consistent with any rules and regulations adopted and promulgated by the Property Tax Administrator and shall comply with professionally accepted mass appraisal techniques. Any low-income housing tax credits authorized under section 42 of the Internal Revenue Code that were granted to owners of the project shall not be considered income for purposes of the calculation but may be considered in determining the capitalization rate to be used when capitalizing the income stream. The county assessor, in determining the actual value of any specific property, may consider other methods of determining value that are consistent with professionally accepted mass appraisal methods described in

section 77-112.

(2) The owner of a rent-restricted housing project shall file a statement with the county assessor on or before October 1 of each year that details income and expense data for the prior year, a description of any land-use restrictions, and such other information as the county assessor may require." Neb. Rev. Stat. §77-1333 (Cum. supp. 2006)

6. 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).

7. 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).

8. "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.

9. 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).

10. 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).

11. 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).

12. 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).

13. In the evaluation of real property for tax purposes, where buildings and improvements are taxable as a part of the real estate, the critical issue is the actual value of the entire property, not the proportion of that value which is allocated to the land or to the buildings and improvements by the appraiser. *Bumgarner v. Valley County*, 208 Neb. 361, 303 N.W.2d 307 (1981).

14. If taxable values are to be equalized it is necessary for a Taxpayer to establish by clear and convincing evidence that valuation placed on his or her property when compared with valuations placed on similar property is grossly excessive and is the result of systematic will or failure of a plain legal duty, and not mere error of judgement. There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity. *Newman v. County of Dawson,* 167 Neb. 666, 94 N.W.2d 47 (1959).

15. 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).

16. 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).

17. The presumption disappears if there is competent evidence to the contrary. Id.

18. 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).

19. 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).

20. "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).

21. 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).

22. 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).

23. 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).

24. 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).

25. A Taxpayer, who only produced evidence that was aimed at discrediting valuation methods utilized by the county assessor, failed to meet burden of proving that value of property was not fairly and proportionately equalized or that valuation placed upon property for tax purposes was unreasonable or arbitrary. *Beynon v. Board of Equalization of Lancaster County*, 213 Neb. 488, 329 N.W.2d 857 (1983).

26. A Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued. Cf. *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 consists of sixteen improved residential parcels. All of the residences are approximately the same size and have three bedrooms, with two baths and an

attached 2 car garage. Construction of the residences on the parcels described in Case Nos. 06C-271 through 276 was completed in the year 2005. Residences on all of the other parcels that are part of the subject property were 65% complete as of January 1, 2006, and were finished during the year 2006.

The owner of the subject property has chosen to participate in a federally-sponsored program for the development of low-income housing. The program is authorized by Section 42 of the Internal Revenue Code of 1986 as the Federal Low-Income Housing Tax Credit Program. ("LIHTC"). LIHTC is administered by state agencies. The agency responsible for administration of the LIHTC in Nebraska is the Nebraska Investment Finance Authority ("NIFA"). 350 Neb. Admin. Code, ch. 51,§002.01)(A)(1) (05/07/05). There are benefits and burdens associated with LIHTC participation.

One benefit of LIHTC participation is a federal income tax credit. An LIHTC participant, if in compliance with various requirements, receives an annual credit to be used against federal income tax liability ("LIHTC credit") for a ten-year period. I.R.C. §42 (f)(1). LIHTC credits awarded to a project are based on the costs of the project development, the number of qualified low-income housing units included in the project, and other factors. See, *Valuation and Market Studies for Affordable Housing*, Richard E. Polton, Appraisal Institute (2002) pp. 32 & 33. The annual amount of LIHTC credits available for award is limited on a state by state basis. I.R.C. §42 (h)(3). Credits are awarded to projects approved by NIFA. Because projects seeking approval would earn more credits than are available, awards of LIHTC credits by NIFA are made on a competitive basis.

The entity owning a project is usually a limited partnership or a limited liability company. See, *Valuation and Market Studies for Affordable Housing,* supra, p. 20. Once an agreement for reservation of credits or a final award of credits is made, an interest in the owner entity is sold to an investor. See, *Valuation and Market Studies for Affordable Housing,* supra, p. 34. The sale is not the sale of an interest in real estate owned by the entity nor is it a sale of tax credits. The sale of an interest in the entity will, if expectations are met, allow the benefits of credits against income tax obligations to accrue to the buyer. The value paid for the purchased interest in the owner entity is determined by the investor based on the scheduled payment of the LIHTC credits over a ten year credit period and a desired rate of return. See, *Valuation and Market Studies for Affordable Housing,* supra, p. 75.

For example, total LIHTC credits to be made available over a ten year period might be $3,000,000.00. The value of those LIHTC credits to an investor is not $3,000,000.00 because they will be made available over time. Value is discounted at some rate to arrive at a present value for the delayed availability. The present value of the credit amount available in any year is simply that current amount which, with compounded interest, will equal the credit to be made available. See, *Valuation and Market Studies for Affordable Housing*, supra, pp. 720-722. The discount rate will vary as the rates on investments vary. For example, if it is assumed that the LIHTC credits, as reserved, are made available in annual installments of $300,000 for ten years, the present value of those payments at a discount rate of 2% is $2,694,775.50.

Proceeds from the sale of an interest in the owner entity are used to fund development of the project. Proceeds from the sale may represent 50 to 60 percent of the cost of development. See, 350 Neb. Admin. Code, ch. 51 §004.04 (05/07/05). Other estimates are higher with

proceeds being over 70% of the cost of development. See, *Valuation and Market Studies for Affordable Housing*, supra, p. 36.

The burdens associated with LIHTC participation are numerous. The burdens relate to tenant qualification, rents that may be charged, and management of the project. The owner of an LIHTC project must elect and qualify the project under either the "20-50" test or the "40-60 test." I.R.C. §42 (g)(1). Under the "20-50" test the project qualifies if 20% or more of the units are both rent-restricted and occupied by individuals whose income is 50% or less of the area median gross income. Under the "40-60" test, the project qualifies if 40% or more of the units are both rent-restricted and occupied by individuals with income of 60% or less of area median gross income.

No credit may be allowed unless there is an extended low-income housing commitment in effect. I.R.C. 42 (h)(6)(A). An extended low-income housing commitment is an agreement specifying the portion of each building that will be used for low-income housing, allowing enforcement of the rent qualifications in state courts, and allowing disposition only if the entire building is disposed of. I.R.C. 42 (h)(6)(B). The low-income housing agreement is recorded as a restrictive covenant against the real estate and is binding on the successors of the owner. I.R.C. 42 (h)(6)(B).

The maximum amount of rent that may be charged for a low-income unit in an LIHTC project is based on the gross median income adjusted for the assumed household size for a particular type of unit. See, *Valuation and Market Studies for Affordable Housing*, Richard E. Polton, Appraisal Institute (2002) p. 39. The applicable gross median income is determined by an agency of the federal government. *Id*. The gross rents chargeable are then calculated with

reference to the income limitations elected by the owner. *Id*. The maximum allowable rent is then reduced by a utility allowance. *Id*. The net allowable rent may be higher or lower than market rents. See, *Id.* at p. 41. When analyzing a low-income housing project three rents should be considered: Market rent, restricted rent, and actual or contract rents. Id. See also, 350 Neb. Admin. Code, ch. 51 §004.06 (05/07/05).

Another burden of LIHTC participation is a requirement that the owner maintain the units of a LIHTC project so that they are suitable for occupancy, taking into account local health, safety, and building codes (or other habitability standards) or the uniform physical condition standards for public housing established by HUD. 26 CFR §1.42-5 (d)(2)(I) & (ii). The HUD physical standards do not preempt local health, safety, and building codes. 26 CFR §1.42-5 (d)(2)(ii). The creation and retention of various records is required. 26 CFR §1.42-5 (b). Reviews and inspections are another component of the compliance regime. 26 CFR §1.42-5 (b)(2).

Restrictions on rent and other conditions are imposed for an initial compliance period of 15 years. I.R.C. §42 (i)(1). Compliance with the restrictions is important because LIHTC credits are subject to recapture if compliance is not maintained. I.R.C. §42 (j). The restrictions on use may continue in effect during the period of an extended low-income housing commitment.

Sale of an LIHTC project subject to restrictions is not prohibited during the term of the low-income housing commitment. I.R.C. §42 (d)(7)(A). If an LIHTC project is sold, subject to restrictions, and credits are unused, then they are allocated between the parties. I.R.C. §42 (f)(4). If credits have been fully used then no allocation of credit is necessary. Special provisions

govern a potential sale of a project for one year at the end of the compliance period. I.R.C. §42 (h)(6)(E) & (I). Interests in the entity owning an LIHTC project are freely transferable.

Nebraska law requires taxation of the subject property based on its actual value. Neb. Rev. Stat. §77-201(1) (Cum. Supp. 2006). "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). "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). 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).

Nebraska Statutes contain a specific provision concerning the valuation for taxation of rent-restricted housing projects qualifying for LIHTC credits. The statute in effect for assessment of the subject property was as follows:

> "(1) The county assessor shall perform an income-approach calculation for all rent-restricted housing projects constructed to allow an allocation of low-income housing tax credits under section 42 of the Internal Revenue Code and approved by the Nebraska Investment Finance Authority when considering the assessed valuation to place on the

property for each assessment year. The income-approach calculation shall be consistent with any rules and regulations adopted and promulgated by the Property Tax Administrator and shall comply with professionally accepted mass appraisal techniques. Any low-income housing tax credits authorized under section 42 of the Internal Revenue Code that were granted to owners of the project shall not be considered income for purposes of the calculation but may be considered in determining the capitalization rate to be used when capitalizing the income stream. The county assessor, in determining the actual value of any specific property, may consider other methods of determining value that are consistent with professionally accepted mass appraisal methods described in section 77-112.

(2) The owner of a rent-restricted housing project shall file a statement with the county assessor on or before October 1 of each year that details income and expense data for the prior year, a description of any land-use restrictions, and such other information as the county assessor may require." Neb. Rev. Stat. §77-1333 (Cum. Supp. 2006).

The Property Tax Administrator has promulgated rules and regulations as a guide to appraisers and assessors of the Department of Property Assessment and County Assessors and their appraisers in the appraisal of multi-family housing subject to income and/or rent restrictions imposed by federal/state/local programs (affordable housing). 350 Neb. Admin. Code ch. 51, §001.01 (05/07/05). Those rules were in effect for tax year 2006.

The rules and regulations of the Property Tax Administrator describe the interest to be appraised as "the fee simple interests in multi-family housing property. These rights include the real estate and all rights and privileges associated with the ownership therein. The value to be

determined in the appraisal is the actual or market value of the property as set forth in Section 77-112 R.R.S. 2003." 350 Neb. Admin. Code ch. 51, §001.02 (05/07/05). "Value is created by the anticipation of benefits to be derived in the future." *The Appraisal of Real Estate*, 12th Edition, Appraisal Institute (2001) p. 35.

A benefit derived from ownership of real estate with a LIHTC unit is the LIHTC credits. As discussed above, the value of the LIHTC credits is determined in a market composed of investors and entities with LIHTC eligible projects. Because payment of the credits is tied to a unit, a qualified sale of a building during the credit period allows the new owner to receive the unearned credits. I.R.C. §42 (f)(4). An owner selling a building would want to receive the value of that benefit and a buyer would be willing to pay for that benefit. For example, in the event of a foreclosure sale, the benefit of the LIHTC credits is considered a component of the value of the real estate being sold. See, *Valuation and Market Studies for Affordable Housing*, Richard E. Polton, Appraisal Institute, (2002) p. 101.

The question of whether the benefit derived from the tax credits should be considered when real estate is valued for purposes of ad valorem taxation has had a variety of answers in the Courts. Some Courts have held that LIHTC credits constitute an intangible, and are therefore not taxable as a part of the real estate. *Cottonwood Affordable Housing v. Yavapai County*, 205 Ariz. 427, 72 P.3d 357 (2003), *Maryville Properties L.P. v. Nelson,* 83 S.W.3d 608 (2002), and *Cascade Court Limited Partnership v. Noble*, 105 Wash.App. 563, 20 P.3d 997 (2001). Several Courts have expressly held that LIHTC credits are not intangible property. *Pine Point Housing, L.P. v. Lowndes County Bd of Tax Assessors*, 254 Ga.App. 197, 561 S.E.2d 860 (2002), *Town Square Limited Partnership v. Clay County Board of Equalization*, 704 N.W.2d 896 (2005), and

Rainbow Apartments v. Illinois Property Tax Appeal Bd., 326 Ill.App.3d 1105, 762 N.E.2d 534 (2001). Courts have held that the value of LIHTC credits must be included in a determination of taxable value of real estate with a variety of rationales: *Parkside Townhomes Associates v. Board of Assessment Appeals of York County*, 711 A.2d 607 (1998), (Effect of tax credits part of economic reality and must be considered); *In re Ottawa Housing Assoc., L.P.* 27 Kan. App.2d 1008, 10 P.3d 777 (2000), (Fair market value is affected by investment tools. Low income housing contracts are investment tools and have to be considered); *Hometowne Associates, L.P. v. Maley*, 839 N.E.2d 269 (2005), (Tax credits are considered in a calculation of an obsolescence adjustment); *Huron Ridge LP v. Ypsilanti Township*, 275 Mich.App. 23, 737 N.W.2d 187 (2007), (Fair market value of IRC §42 housing is not merely influenced by, but primarily driven by tax credits. Value of property would be artificially depressed if the value of tax credits is not included); *Brandon Bay Limited Partnership v. Payette County*, 142 Idaho 681, 132 P.3d 438 (2006), (Tax credits were rights and privileges belonging to real estate and properly considered in valuation of property); *Spring Hill, L.P. v. Tennessee State Board of Equalization*, 2003 WL 23099679 (Tenn.Ct.App), (See Tennessee Court of Appeals Rules 11 and 12), (Consideration of the value-decreasing factor of restricted rents along with the value increasing factor of Tax Credits provides a full and accurate picture of the property's worth); *Pine Pointe Housing, L.P. v. Lowndes County Board of Tax Assessors*, 254 Ga.App. 197, 561 S.E.2d 860 (2002) (Tax credits go hand in hand with restrictive covenants that require the property to charge below-market rent. If viewed in isolation the rental restrictions would artificially depress the value of the property for tax valuation purposes.); *Pedcor Investments v. State Board of Tax*

Commissioners, 715 N.E.2d 432 (1999), (Tax credits create economic benefit and cannot be ignored in a determination of economic obsolescence).

The definition of real property found in Nebraska Statutes includes “all privileges.” Neb. Rev. Stat. §77-103 (Reissue 2003). Privileges pertaining to real property have been defined by the Property Tax Administrator as the right to sell, lease, use, give away, or enter, and the right to refuse to do any of these. 350 Neb. Admin Code, ch. 10 §001.01F (05/05). A long-term lease, for example, is considered a privilege in Nebraska. See, *Omaha Country Club v. Douglas County Board of Equalization,* 11 Neb.App. 171, 645 N.W.2d 821 (2002). In *Omaha Country Club,* the Court determined that “the actual or fair market value of the real property can only be ascertained by first determining the fee simple value, including the value of the leasehold estate, the leased fee estate, and any other severed estate.” Id, at 182, 831. The Court went on to find that “the actual value of real property for tax purposes shall be the value a willing buyer would be willing to pay for the fee simple interest.” Id. LIHTC credits are transferable and a part of the economic reality of parcels subject to the agreements which make their use possible. *Town Square Limited Partnership v. Clay County Board of Equalization*, 704 N.W.2d 896 (2005). The rationale described by the *Town Square* Court for inclusion of value of LIHTC credits in the valuation of real property is persuasive and consistent with Nebraska law.

Section 77-1333 of Nebraska Statutes requires exclusion of LIHTC credits from income if the income approach is used to develop an estimate of actual value. The statute clearly prohibits addition of the annual credit amount to the rents and other income of a parcel. The Statute does not, however, prohibit consideration of the value that might be attributable to the LIHTC credits in any other context or other valuation approaches. Section 77-1333 recognizes,

for example, that the existence of LIHTC credits could be a factor in the development of a capitalization rate. Determining the contribution to value represented by the benefit of the LIHTC credits does not violate the terms of the statute. The rationale described by the *Town Square* Court for inclusion of value of LIHTC credits in the valuation of real property is persuasive and consistent with Nebraska law.

Another benefit derived from ownership of an LIHTC project is current income. Value may be attributed to the current income benefit. The value of the benefit to be derived from current income can be determined by capitalizing income. "The income capitalization approach to value consists of methods, techniques, and mathematical procedures that an appraiser uses to analyze a property's capacity to generate benefits (i.e., usually the monetary benefits of income and reversion) and convert these benefits into an indication of present value." *The Appraisal of Real Estate*, 12th Edition, Appraisal Institute (2001) p. 471.

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). 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. *The Appraisal of Real Estate*, supra, chs 20-24, (2001).

The Property Tax Administrator in rules and regulations gave the following guidance for use of the income approach in the valuation of affordable housing. "The appropriate income approach for use in appraisal is to determine the potential gross income attributable to the property using economic or typical rent for the type of property in the county, community, or neighborhood. Allowances for vacancies and collections relative to the type of property being appraised are deducted from the estimate of potential gross income. Typically, allowable expenses are deducted from the estimate of potential gross income to give an indication of the net operating income attributable to ownership of the property. Expenses peculiar to affordable housing should not be over-looked. In many cases, owners of such housing are required to keep detailed records in order to meet state and federal compliance reporting requirements. To the net income from the rental of the property is added net income from other operations. Typically the 'other net income' includes income from laundry, vending machines, and rental of garages. This net operating income is capitalized or divided by a rate which reflects the returns to ownership of the type of property common to the area." 350 Neb. Admin. Code, ch. 51, §005.04A (05/07/05).

The restrictions imposed by participation in the LIHTC program may mean lower effective gross income and higher costs than those which would be expected in the operation of an unrestricted property. Recognition of the impact of restrictions does not however require use

of actual operating results of a project in the income approach. See, *Valuation and Market Studies for Affordable Housing*, Richard E. Polton, Appraisal Institute, (2002) pp. 94-97. Reliance on actual income or expenses of the subject property is not in accordance with generally accepted appraisal practice. "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). The owner of a rent-restricted housing project is required to file a statement with the county assessor on or before October 1 of each year that details income and expense data for the prior year. Neb. Rev. Stat. §77-1333 (Sum. Supp. 2006). If provided, the data would be a basis for developing estimates of income and expenses for rent-restricted housing projects.

A capitalization rate must be developed for use in the income approach. A capitalization rate may be determined based on analysis of sales of comparable properties, effective gross income multipliers and net income ratios, and consideration of mortgage and equity components in the band of investment technique. *The Appraisal of Real Estate*, 12th Edition, Appraisal Institute (2001) p. 35. Section 77-1333 of Nebraska Statutes specifically provides for consideration of LIHTC credits as a component of a capitalization rate used for development of an estimate of actual value based on the income approach. Other factors such as market area

characteristics, overall risk levels, quality and durability of income, expenses, site and area characteristics, physical characteristics locational characteristics and program structure may be considered to reduce or lessen risk and therefore reduce or increase the appropriate capitalization rate. *Valuation and Market Studies for Affordable Housing*, Richard E. Polton, Appraisal Institute, (2002) p. 105.

The portion of the rules and regulations of the Property Tax Administrator providing guidance for tax year 2006 to appraisers and assessors of the Department of Property Assessment and Taxation and County Assessors and their appraisers for development of a capitalization rate when using the income approach for the valuation of affordable housing parcels is set out in full:

> "005.04E The income capitalization method should not be applied in a manner that unfairly ignores the market for similar properties in the area. Rental rates, productivity, and restrictions imposed upon the use of the real property must be considered to determine actual value.
>
> 005.04E(1) The capitalization rate is the theoretical risk rate of interest applied by valuators in calculating the present value of future returns. The capitalization rate for affordable housing may be developed from time to time through the band-of-investment technique.
>
> 005.04E(2) The band-of-investment technique may be used to develop a composite rate from the market.
>
> 005.04E(3) From the market composite rate the equity yield rate for the equity investor may be estimated recognizing the ratio of loan to value for the subject property.
>
> 005.04E(4) This method has the advantages of;
>
> 005.04e(4)a. The composite rate will always be the same regardless of the mortgage and equity ratios;
>
> 005.04E(4)b. Any mortgage position should always be superior to that of the equity rate because it is fixed by contract and burden of management is the responsibility of the equity owner; and,
>
> 005.04E(4)c. The risk of equity investment increases as its ratio to value declines thus prospective yield should increase accordingly.
>
> 005.04F One of the following methods may be selected to estimate an income approach valuation for the property.
>
> 005.04F(1) Direct capitalization of net operating income utilizing a capitalization rate developed in consideration of the value of any low-income housing tax credits relating to the property;

005.04F(2) Capitalization by a modified band of investment technique." 350 Neb. Admin. Code, ch. 51, §005.04E (05/07/05).

The band of investment technique for determining a capitalization rate is a generally recognized appraisal methodology. *The Appraisal of Real Estate*, supra, p. 534. The band of investment method is defined as "a technique in which the capitalization rates attributable to components of a capital investment are weighted and combined to derive a weighted-average rate attributable to the total investment." *The Appraisal of Real Estate*, supra, p. 535. The components of the formula for derivation of a capitalization rate using the band of investment techniques and their definitions follow.

"Mortgage capitalization rate (R_M): The capitalization rate for debt; the ratio of the annual debt service to the principal amount of the mortgage loan. A mortgage capitalization rate may be calculated based on the initial mortgage amount or the outstanding mortgage amount. Also known as *annual constant*. (R_M=debt service/mortgage principal).

Equity capitalization rate (R_E): An income rate that reflects the relationship between a single year's equity dividend and the initial equity investment; used to convert equity dividend into an equity value indication; also called the *cash on cash rate, cash flow rate*, or *equity dividend rate*. (R_E=equity dividend/equity invested).

Equity yield rate (Y_E): A rate of return on equity capital as distinguished from the rate of return on debt capital (the interest rate); the equity investor's internal rate of return. The equity yield rate considers the effect of debt financing on the cash flow to the equity investor.

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

Equity ratio (E): The ratio between the equity investment on a property and its total price; the fraction of the investment that is unencumbered by debt." *The Appraisal of Real Estate*, supra, p. 535.

"Equity dividend (I_E) is the portion of net operating income that remains after debt service is paid." *The Appraisal of Real Estate*, supra, p. 484.

The formula for calculation of the capitalization rate using the band of investment technique is $(M \times R_M) + (E \times R_E) = \text{Rate}$.

A market rate project may have a loan-to-value ratio of 75% and an equity ratio of 25%. *Valuation and Market Studies for Affordable Housing*, supra, p. 35. An affordable housing project may have a loan to value ratio of 25% and an equity ratio of 75%. Id. Capitalization rates developed based on a constant mortgage capitalization rate and a constant equity yield rate show the divergent results from application of the band of investment rate formula for market as opposed to affordable housing projects.

Market

$(.75\ M \times .08\ R_M) + (.25\ E \times .06\ Y_E) = .075$

Affordable Housing

$(.25\ M \times .08\ R_M) + (.75\ E \times .06\ Y_E) = .065.$

The effect of the lower capitalization rate applied to a given net operating income would be a higher estimate of value. Section 77-1333 of Nebraska Statutes states that the benefit of the LIHTC credits may be recognized in the development of a capitalization rate. The band of investment technique as illustrated does that by recognizing the low loan-to-value ratio after receipt of the proceeds from the transfer of an interest in the owner entity passing through the tax

credits to an investor. If there is no equity dividend expected from current income of an affordable housing project or if it does not have equity the results from application of the band of investment formula would show a greater divergence between the derived capitalizations rates for market projects and affordable housing projects.

Use of real estate in an LIHTC project is not restricted in perpetuity. The benefits of owning income-producing real estate include proceeds from the disposition of the property at termination of the investment. *The Appraisal of Real Estate*, supra, p.483. The minimum restriction period is 15 years. I.R.C. §42 (i)(1). A longer period may be agreed to. At the end of the restriction period the property reverts to an unrestricted use with a potentially higher current earning capacity. A potentially higher earning capacity would support a higher value. Anticipation of that higher value, based on a reversion to an unrestricted status, is a benefit and may be valued. "Reversionary benefits are usually estimated as anticipated dollar amounts or as relative changes in value over the presumed holding period." *The Appraisal of Real Estate*, supra, p. 485. The value of the reversionary benefit can be calculated as the difference between the value of the current income benefit as restricted, and the value of the current income benefit if unrestricted, capitalized at an appropriate rate until termination of the restrictions. See, *The Appraisal of Real Estate*, supra, at p. 91. One commentator suggests that the reversion value should only be calculated at or near the end of the restriction's term. See, *Valuation and Market Studies for Affordable Housing*, Richard E. Polton, Appraisal Institute (2002) p. 91. It is apparent, however, that a value existed for the reversionary benefit from the commencement of the restriction's term. While the value of that benefit may become greater near the end of the term, it has value throughout the term and should be recognized. The Supreme Court of the

State of Washington expressly held on analogous facts, property subject to a long term lease, that if market rent exceeds contract rent the leasehold bonus (the difference between market rents and contract rents) should be capitalized and the value of the property should be determined by adding the present value of the leasehold bonus to capitalized value of the contract rent. See, *Folsom v. County of Spokane*, 111 Wash.2d 256, 759 P.2d 1196 (1988). Here, "contract income," as affected by the agreement between the owner and NIFA, may be less than "market income." The principle described in *Folsom* seems clearly applicable.

The owner of the subject property has also chosen to participate in the "Crown program". (E18:15). Participation in the Crown program obligates the owner to provide educational supportive, and educational services. (E18:15). The owner is also required to divert $50.00 of rent paid each month to a special account for the benefit of the tenant, should the tenant elect to purchase the rented unit. The cost of the extra services and diversion of rent to a special account decrease the net income available to the owner. Participation in the Crown program provides the owner and general partner with rights of first refusal for a one year period after the end of the compliance period. (E18: 16 & 17). A qualified tenant may purchase a unit for an amount determined in accordance with section 42 (i) (7) of the Internal Revenue Code. (E16). In the event a unit is not purchased by the owner or a qualified tenant the unit may be purchased by "the Authority" for an amount determined in accordance with section 42 (h) (6) (F) of the Internal revenue Code. (E16).

Estimates of value based on use of the income approach with restricted rents and expenses unique to LIHTC projects are incomplete without consideration of the contribution to actual value of LIHTC credits and the reversionary interest and may understate actual value. The

Commission finds that actual value of an LIHTC project may be determined as the sum of the contributions to value of the LIHTC credit benefit, the current income benefit, and the reversionary benefit. In addition to use of the income approach for determinations of actual value, actual value of an LIHTC project may be determined by use of the cost approach or the sales comparison approach. Neb. Rev. Stat. 77-1333 (Cum. Supp. 2006).

An appraiser for the Taxpayer testified that his opinion of actual value of the subject property as of January 1, 2006, was $385,000.00. Exhibit 19 describes the basis for the opinion offered by the appraiser for the Taxpayer. The appraiser for the Taxpayer assumed that the subject property was in the same condition on January 1, 2006, as it was on his inspection in March of 2008. (E19:8). An appraiser employed by the County Assessor inspected the subject property in November of 2005 and again in January of 2006. The January 1, 2006, inspection indicated that the parcels described in Case Nos. 06C-271 through 276 were complete as of the inspection date. (E26:4, E27:4, E28:4 E29:4 E30:4, and E31:4). The improvements on all other parcels were found to be 65% complete. (E20:4, E21:4, E22:4, E23:4, E24:4, E25:4, E32:4, E33:4, and E3:4). An assumption that the subject property was in the same condition as of January 1, 2006, as it was in March of 2008, is not supported by the evidence.

The appraiser for the Taxpayer assumed that income and expenses determined as of January 1, 2006, were the same as income and expenses as of March 2008. (E19: 8). Most of the improvements on the subject property were constructed in the year 2005. As noted, a portion of the subject property was not competed until sometime in 2006. The first year of operation for the full project was the year 2007. An appraiser should develop an estimate of the typical operating expenses on an annual cash basis. See, *The Appraisal of Real Estate*, 12th Edition,

Appraisal Institute (2001) p. 513. The evidence does not support an assumption that income and expenses in a start up year with less than a full project are the same as the income and expenses 2 years later.

The appraiser for the Taxpayer advised that "Low Income Housing Projects are considered to be marketable on a national and regional market and therefore sales and rents from other locations have been reviewed and considered in support of the value conclusion in this report." (E19:8). That view was supplemented by the following "The subject property is located in an area of established multi-family and residential improvements. Important City Streets in the vicinity of the subject provide good traffic patterns and the location of other related improvements provide excellent locational identity. Multi-family and duplex improvements in the area are experiencing good occupancy and low vacancy rates. These factors indicate a good community market. The property is being used to its highest and best use. There are no similar improvements for sale that are competitive to the subject. The current occupancy and the surrounding environment, make this property a reasonable alternative and marketability is projected to be good. A review of comparable sales indicated a marketing time between 4 months and 6 months." (E19:27). Even though the appraiser believed comparable sales existed, he advised that the sales comparison approach was not applicable. (E19:16). The appraiser for the Taxpayer also advised that in developing a capitalization rate that "The appraiser has investigated comparable sales and competing properties for rates and has extracted rates from comparable sales when possible." (E19:30). The comparable sales used for development of a capitalization rate are shown in Exhibit 19 at pages 46 through 55. Despite the presence of comparable sales that could be used to develop a capitalization rate the appraiser for the

Taxpayer did not develop an indication of value based on the sales comparison or market approach. (E17:56).

The appraiser for the Taxpayer based his opinion of actual value on an application of the income approach detailed in pages 30 through 33 of Exhibit 19.

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 Apprisal*, Fourth Edition, Appraisal Institute (2002) p.143. The steps required for use of the income approach with direct capitalization may be summarized as (1) estimate potential gross income; (2) deduct estimated vacancy and collection loss to determine effective gross income; (3) deduct estimated expenses to determine net operating income; (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.. *The Appraisal of Real Estate,* supra, at chs 20-24.

Three major methods are used to develop an indication of value using the income approach: direct capitalization; yield capitalization; and a discounted cash flow analysis. *The Appraisal of Real Estate,* supra. The direct capitalization method produces an indication of value

based on a single year's estimated income. *The Appraisal of Real Estate,* 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. *The Appraisal of Real Estate,* 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. *The Appraisal of Real Estate,* supra. That value is discounted to present value as of the valuation date and added to the value of the income stream. *The Appraisal of Real Estate,* 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. *The Appraisal of Real Estate,* supra, at 546-547. A gross income multiplier can be obtained by dividing the sale price each comparable parcel by its potential gross incomes. *The Appraisal of Real Estate,* supra, at 547. The gross income of the property for which value is to be estimated is then multiplied by the gross income multiplier derived from the sales of comparable parcels. *The Appraisal of Real Estate,* supra, at 546-547.

The actual operating history of a subject property can be considered for appraisal purposes. *The Appraisal of Real Estate* 12th Edition, The Appraisal Institute (2001) pp. 509 - 511. An analysis using the actual operating expenses of a parcel requires a multi-year analysis that is then used as a basis for comparison only with comparable properties. *Id*. As of the assessment date the subject property did not have an operating history. The year 2006, was the first full year of operation for most of the subject property.

Potential gross income for the subject property was developed by an appraiser for the Taxpayer based on the rents for March 2008. (E19:31). Rents as of January 1, 2006 or for any

earlier period are unknown. Maximum allowable rents allowed for the subject property before deduction of a utility allowance during the year 2005 and 2006 are set out in Exhibits 51 and 52. A three bedroom unit could be rented to a person at the 60% income level for $892 per month less the utility allowance after March 2006. (E52). A three bedroom unit could be rented to a person at the 60% income level for $869 per month less the utility allowance after February 11, 2006. (E52). Overall rents in the subject property can reach 58.53% of the applicable median income. (E18:3). The appraiser for the Taxpayer estimated market rent at $1,000 per month. (E19:31). The appraiser for the Taxpayer also determined that LIHTC restricted rents were $698 per month. (E19:31). A witness for the Taxpayer testified that the maximum allowable rent was $749. The difference between allocable rents and actual rents is $51 ($749-$698=$51). The difference may be the $50 set aside required for participation in the Crown program.

Expenses as shown on page 32 of Exhibit 19 include a deduction for real estate taxes. 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 appropriate 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*, supra, at p. 233. The basis for that position is the interplay between tax rates, value, and resulting tax when a valuation estimate is developed using the income approach. The income approach at its simplest can be described as a formula in which income (I) is divided by a capitalization rate (R) to derive an estimate of value (V) or (I÷R=V). Income equals the sum of income less expenses. As the formula is applied if an expense is increased income is reduced, and the indication of value is reduced. The inverse is true for the reduction of an expense. The

reduction of an expense produces an increase in income and results in an increase in the value indication. Taxes to be paid are a function of both the rate and the value to which the rate is applied. If taxes are deducted for purposes of determining value; the tax rate is applied to a stated value, the tax is determined, and a deduction is taken. If, for example, value is reduced the resulting tax deduction should be reduced, producing in turn a higher indication of value when the formula is rerun. Because the objective in an ad valorem tax proceeding is to determine the value to which the tax rate is to be applied, the formula calls for use of an unknown that will be found only with the use of the unknown itself. Use of a loaded capitalization rate avoids the circularity produced by an expense deduction for taxes because the loaded capitalization rate is indifferent to the items of income or expense the sum of which it is divided into.

Statutory provisions for determination of actual value, the levy, and payment of the resulting tax are also an important consideration. Actual or taxable value is determined as of January 1 of each year. Neb. Rev. Stat. §77-1301 (Cum. Supp. 2006). Levies on taxable value are determined by October 15 of each year. Neb. Rev. Stat. §77-1601 (Reissue 2003). The resulting amount of tax is then determined and a notice sent to a taxpayer. Neb. Rev. Stat. §77-1701 (Reissue 2003). The tax is due and payable on December 31 of each year. Neb. Rev. Stat. §77-203 (Reissue 2003). Payment of the tax due may be made in two installments, the first due on May 1 or April 1, and the second due on September 1 or August 1 of the year following its levy. Neb. Rev. Stat. §77-204 (Reissue 2003). If taxes are paid in the year after levy, and considered an expense item in the year paid, the taxes paid may not be those which are attributable to the year in which other expenses or income being annualized were determined. In short, one expense item, real property taxes, will be a year off the time frame for all other items if

the taxes are paid immediately prior to the delinquency dates. Use of a loaded cap rate makes consideration of an adjustment to financial information unnecessary. For the reasons stated the use of a loaded capitalization rate will produce a more accurate estimate of actual value when the income approach is used to estimate actual value for ad valorem tax purposes.

The rules and regulations of the Property Tax Administrator contain the following provision regarding the items to be included in expenses: "Projected annual operating expenses associated with the affordable residential rental property, excluding non-cash items such as depreciation and amortization, but including property taxes and those actual costs expected to be incurred and paid as required by federal, state or local regulations, provision, and restrictions as applicable to the assessment year." 350 Neb. Admin. Code, ch. 51, §005.04C(3) (05/07/05). The rule calls for an estimate of the real property tax for the assessment year. The amount of tax could not be known until both the value subject to tax and the levy had been determined. Perhaps mathematically the interplay noted above between tax and the a value determined after deduction of the tax can be resolved, but there is no evidence in this case that a resolution was attempted.

The appraiser for the Taxpayer may have capitalized management and maintenance expense. "Because the subject consists of single family residences, on site management and maintenance is slightly more difficult and a slightly higher than typical overall rate would be indicated." (E19:45). Deductions for the described expenses were taken. (E19:32). Obviously deduction of an expense and then capitalizing the same expense is not appropriate. The Commission has not found any authority for the capitalization of management or maintenance expenses.

An appraiser employed by the County Assessor testified that in his opinion actual value of the subject property as of January 1, 2006, was $1,565,000.00. Actual value as determined by an appraiser employed by the County Assessor equaled the sum of the determinations of actual value made by the County Board. Exhibit 36 describes the basis for the opinion offered by the appraiser employed by the County Assessor. The cost approach, and the sales comparison approach were developed and correlated to develop and support an opinion of actual value.

The County Assessor is required to perform an income approach calculation for an LIHTC project. Neb. Rev. Stat. §77-1333 (Cum. Supp. 2006). The County Assessor is required to make a determination of actual value as of January 1, 2007, by March 19 of each year. Neb. Rev. Stat. §77-1303 (Cum. Supp. 2006). The provisions of section 77-1333 can be best understood with reference to that obligation of the County Assessor. An estimate of actual value based on use of the income approach was not developed by the County Assessor for the tax year 2006 by March 19. (E36: 42 through 74). The appraiser employed by the County Assessor in his appraisal prepared after the County Assessor's determination, and after the County Board's determination, advised that in his opinion the "Income approach is not valid and was not developed. No income was provided by the owner and most single family dwellings sell for use not income." (E36:74). The requirement that an estimate of value using the income approach be prepared by a County Assessor does not extend to appraisals prepared apart from the County Assessor's determination of actual value by March 19. Development of the income approach was not required in support of the opinion of value offered by the appraiser employed by the County Assessor at the Commission hearing.

The cost approach was developed by an appraiser employed by the County Assessor. The cost approach includes six steps: "(1) Estimate the land (site) value as if vacant and available for development to its highest and best use; (2) Estimate the total cost new of the improvements as of the appraisal date, including direct costs, indirect costs, and entrepreneurial profit from market analysis; (3) Estimate the total amount of accrued depreciation attributable to physical deterioration, functional obsolescence, and external (economic) obsolescence; (5) Subtract the total amount of accrued depreciation from the total cost new of the primary improvements to arrive at the depreciated cost of improvements; (5) Estimate the total cost new of any accessory improvements and site improvements, then estimate and deduct all accrued depreciation from the total cost new of these improvements; (6) Add site value to the depreciated cost of the primary improvements, accessory improvements, and site improvements, to arrive at a value indication by the cost approach." *Property Assessment Valuation,* 2nd Ed., International Association of Assessing Officers (1996) pp. 128 - 129.

An appraiser employed by the County Assessor determined that the contribution to value of the land component was $2.23 per square foot for each parcel of the subject property. (E36:30). The contribution to value of the land component (Land Value) for the parcels comprising the subject property are shown in Exhibit 36 at pages 42, 44, 46, 48, 50, 52, 54, 56, 58, 60, 62, 64, 66, 68, 70, and 72. On each of those pages the amount indicated as the Land Value equals the amount shown as the contribution to value for land as determined by the County Board.

The contributions to value of the improvements (Replacement Cost New Less Depreciation) for the parcels comprising the subject property are shown in Exhibit 36 at pages

42, 44, 46, 48, 50, 52, 54, 56, 58, 60, 62, 64, 66, 68, 70, and 72. On each of those pages the amount indicated as the Replacement Cost New Less Depreciation for improvements equals the amount shown as the contribution to value for improvements as determined by the County Board. A review of the cost approach data shows that for each unfinished residence 35% functional depreciation was deducted. (E36:42, 44, 46, 48, 50, 52, 54, 56, 58, 60, 62, 64, 66, 68, 70, and 72).

A review also shows that 12% Economic Depreciation was taken on each unit. (E36:42, 44, 46, 48, 50, 52, 54, 56, 58, 60, 62, 64, 66, 68, 70, and 72). An appraiser for the Taxpayer testified that the cost approach could be used to determine actual value of LIHTC projects but economic depreciation would have to be considered to account for the restrictions. There is no evidence that 12% economic depreciation is not an appropriate rate. The aggregate cost to acquire and construct improvements on the subject property in 2005 and 2006 as determined as of December 2006 was $3,966,816. (E18:2). Total actual value as determined by the County Board as of January 1, 2006, was $1,565,000. The determinations of value adopted by the County Board largely conform to the indications of value developed by an appraiser employed by the County Assessor using the cost approach.

The sales comparison approach was developed by an appraiser employed by the County Assessor in each appraisal submitted by the County Board. In the sales comparison approach an opinion of value is developed by analyzing similar properties and comparing those properties with the subject property. *The Appraisal of Real Estate*, 12th Edition, Appraisal Institute (2001) pg. 418. "Comparable properties" share similar quality, architectural attractiveness (style), age, size, amenities, functional utility, and physical condition. *Property Assessment Valuation*, 2nd

Ed., International Association of Assessing Officers, 1996, p. 98. When using "comparables" to determine value, similarities and differences between the subject property and the comparables must be recognized. Id. An opinion of value based on use of the sales comparison approach requires use of a systematic procedure:

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

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

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

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

5. Reconcile the various value indications produced from the analysis of comparables into a single value indication or a range of values." *The Appraisal of Real Estate* 12th Edition, The Appraisal Institute (2001) p. 422.

An appraiser employed by the County Assessor identified six sold parcels for comparison with the parcels of the subject property. (E36:78). None of the six parcels are identified as being part of a low income housing project. Various adjustments were made and the rational for the

adjustments described. (E36:78, 79, and 80). As adjusted, the range of values for homes with 1,217 square feet was $112, 800 to $132,475. (E36:78). As adjusted the range of values for homes with 1,224 square feet was $112,800 to $133,035. (E36:79). The range of values as determined by the County Board for the parcels with completed improvements was $116,690 to $126,780. (E36:20). An appraiser employed by the County Assessor concluded that the sales of the parcels as adjusted supported the 2006 value determinations by the County Board. (E36:81).

A total of $3,519,810 in tax credits payable over 10 years were reserved for the subject property (10 x $351,981= $3,519,810) in 2005. (E17:2). The value of those credits as of January 1, 2006, is unknown.

The analysis performed by the appraiser for the Taxpayer indicates that there may be a substantial difference between the value indicated by the income approach for a restricted parcel as opposed to a market parcel. There is no evidence of the value the reversionary interest had as of January 1, 2007, based on the expectation that the LIHTC restrictions will expire in the event of a tenant or authority purchase at the end of 15 years.

There are obvious difficulties with the appraisals. The determinations of actual value made by the County Board are based on use of the cost approach. The cost approach may be used to determine the value of LIHTC parcels. Neb. Rev. Stat. §77-1333 (Supp. 2006).

The opinion of value adopted by the appraiser for the Taxpayer does not consider the contribution to value of the tax credits or the expectation that restrictions on the subject property will expire. The estimate of value derived from current income as developed by the appraiser for the Taxpayer relies on assumptions that are not supportable and an incorrect application of income approach techniques. The opinion of the appraiser for the Taxpayer and the appraisal

which supports that opinion, are not clear and convincing evidence that the decisions of the County Board were unreasonable or arbitrary.

The opinions of value adopted by the appraiser employed by the County Assessor may be criticized for reasons stated above. The opinions of actual value adopted by the appraiser for the County Assessor are not clear and convincing evidence that the decisions of the County Board were unreasonable or arbitrary.

The Taxpayer asserted that actual values of the parcels contained in the subject property were not equalized with other parcels. No evidence was presented to the Commission concerning the actual value or the taxable value of any other parcels in Buffalo County. The Commission is without any evidence in support of a claim that taxable values as determined by the County Board are not equalized with other comparable or similar property within the County and need not consider the Taxpayer's equalization claim further.

V.
CONCLUSIONS OF LAW

1. The Commission has subject matter jurisdiction in this appeal.
2. The Commission has jurisdiction over the parties to this appeal.
3. The Taxpayer has not produced competent evidence that the County Board failed to faithfully perform its official duties and to act on sufficient competent evidence to justify its actions.
4. The Taxpayer has not adduced sufficient, clear and convincing evidence that the decisions of the County Board are unreasonable or arbitrary and the decisions of the County Board should be affirmed.

VI.
ORDER

IT IS ORDERED THAT:

1. The decisions of the County Board determining actual values of the parcels comprising subject property as of the assessment date, January 1, 2006, are affirmed.

2. Actual value, for the tax year 2006, of each parcel described in an appeal as referenced by the Case No. is:

Case No. 06C-265

Land value	$20,435.00
Improvement value	$62,070.00
Total value	$82,505.00

Case No. 06C-266

Land value	$ 24,245.00
Improvement value	$ 62,020.00
Total value	$ 86,265.00

Case No. 06C-267

Land value	$ 20,600.00
Improvement value	$ 62,000.00
Total value	$ 82,600.00

Case No. 06C-268

Land value	$ 21,525.00
Improvement value	$ 62,395.00
Total value	$ 83,920.00

Case No. 06C-269

Land value	$ 16,195.00
Improvement value	$ 62,075.00
Total value	$ 78,270.00

Case No. 06C-270

Land value	$ 19,460.00
Improvement value	$ 62,410.00
Total value	$ 81,870.00

Case No. 06C-271

Land value	$ 19,575.00
Improvement value	$ 97,115.00
Total value	$ 116,690.00

Case No. 06C-272

Land value	$ 19,800.00
Improvement value	$ 97,825.00
Total value	$ 117,625.00

Case No. 06C-273

Land value	$ 19,800.00
Improvement value	$ 97,285.00
Total value	$ 117,085.00

Case No. 06C-274

Land value	$ 19,800.00
Improvement value	$ 97,095.00
Total value	$ 116,895.00

Case No. 06C-275

Land value	$ 22,375.00
Improvement value	$ 97,685.00
Total value	$ 120,060.00

Case No. 06C-276

Land value	$ 29,250.00
Improvement value	$ 97,530.00
Total value	$ 126,780.00

Case No. 06C-277

Land value	$ 24,400.00
Improvement value	$ 58,655.00
Total value	$ 83,055.00

Case No. 06C-278

Land value	$ 22,810.00
Improvement value	$ 61,380.00
Total value	$ 84,190.00

Case No. 06C-279

Land value	$ 21,300.00
Improvement value	$ 63,395.00
Total value	$ 84,695.00

Case No. 06C-280

Land value	$ 42,290.00
Improvement value	$ 60,205.00
Total value	$ 102,495.00.

3. This decision, if no appeal is timely filed, shall be certified to the Buffalo County Treasurer, and the Buffalo 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 2006.
7. This order is effective for purposes of appeal on June 2, 2008.

Signed and Sealed. June 2, 2008.

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William C. Warnes, Commissioner

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Nancy J. Salmon, 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.

I do not believe consideration of two standards of review is required by statute or case law.

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

The Commission is authorized to review decision of a County Board of Equalization determining taxable values. Neb. Rev. Stat. §77-5007 (Supp. 2007). Review of County Board of Equalization decisions is not new in Nebraska law. As early as 1903 Nebraska Statutes provided for review of County Board assessment decisions by the district courts. Laws 1903, c. 73 §124. The statute providing for review did not state a standard for that review. Id. A standard of review stated as a presumption was adopted by Nebraska's Supreme Court. See, *State v. Savage*, 65 Neb. 714, 91 N.W. 716 (1902) (citing *Dixon Co. v. Halstead*, 23 Neb. 697, 37 N.W. 621

(1888) and *State v. County Board of Dodge Co.* 20 Neb. 595, 31 N.W. 117 (1887). The presumption was that the County Board had faithfully performed its official duties and had acted upon sufficient competent evidence to justify its actions. See, Id. In 1959 the legislature provided a statutory standard for review by the district courts of county board of equalization, assessment decisions. 1959 Neb Laws, LB 55, §3. The statutory standard of review required the District Court to affirm the decision of the county board of equalization unless the decision was arbitrary or unreasonable or the value as established was too low. Id. The statutory standard of review was codified in section 77-1511 of the Nebraska Statutes. Neb. Rev. Stat. §77-1511 (Cum. Supp. 1959). After adoption of the statutory standard of review Nebraska Courts have held that the provisions of section 77-5011 of the Nebraska Statutes created a presumption that the County Board has faithfully performed its official duties and has acted upon sufficient competent evidence to justify its actions. See, e.g. *Ideal Basic Indus. V. Nucholls Cty. Bd. Of Equal*., 231 Neb. 297, 437 N.W.2d 501 (1989). The presumption stated by the Court was the presumption that had been found before the statute was enacted.

Many appeals of decisions made pursuant to section 77-1511 were decided without reference to the statutory standard of review applicable to the district courts review of a county board of equalization's decision. See, e.g. *Grainger Brothers Company v. County Board of Equalization of the County of Lancaster*, 180 Neb. 571, 144 N.W.2d 161 (1966). In *Hastings Building Co., v. Board of Equalization of Adams County*, 190 Neb. 63, 206 N.W.2d 338 (1973), the Nebraska Supreme Court acknowledged that two standards of review existed for reviews by the district court; one statutory requiring a finding that the decision reviewed was unreasonable or arbitrary, and another judicial requiring a finding that a presumption that the county board of

equalization faithfully performed its official duties and acted upon sufficient competent evidence was overcome. No attempt was made by the *Hastings* Court to reconcile the two standards of review that were applicable to the District Courts.

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

The possible results from application of the presumption as a standard of review and the statutory standard of review are: (1) the presumption is not overcome and the statutory standard is not overcome; (2) the presumption is overcome and the statutory standard is not overcome; (3) the presumption is not overcome and the statutory standard is overcome; (4) and finally the presumption is overcome and the statutory standard is overcome. The first possibility does not allow a grant of relief, neither standard of review has been met. The second possibility does not therefore allow a grant of relief even though the presumption is overcome because the statutory standard remains. See, *City of York v. York County Bd of Equal.*, 266 Neb. 297, 664 N.W.2d 445 (2003). The third possibility requires analysis. The presumption and the statutory standard of

review are different legal standards, and the statutory standard remains after the presumption has been overcome. See. Id. The burden of proof to overcome the presumption is competent evidence. Id. Clear and convincing evidence is required to show that a county board of equalization's decision was unreasonable or arbitrary. See, e.g. *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb.App. 171, 645 N.W.2d 821 (2002). Competent evidence that the county board of equalization failed to perform its duties or act upon sufficient competent evidence is not always evidence that the county board of equalization acted unreasonably or arbitrarily because the statutory standard of review remains even if the presumption is overcome. *City of York,* supra. Clear and convincing evidence that a county board of equalization's determination, action, order, or decision was unreasonable or arbitrary, as those terms have been defined, may however overcome the presumption that the county board of equalization faithfully discharged its duties and acted on sufficient competent evidence. In any event the statutory standard has been met and relief may be granted. Both standards of review are met in the fourth possibility and relief may be granted.

Use of the presumption as a standard of review has been criticized. See, G. Michael Fenner, About Presumptions in Civil Cases, 17 Creighton L. Rev. 307 (1984). In the view of that author the presumption should be returned to its roots as a burden of proof. Id. Nebraska's Supreme Court acknowledged the difficulty of using two standards of review and classified the presumption in favor of the county board of equalization as a principle of procedure involving the burden of proof, namely, a taxpayer has the burden to prove that action by a board of equalization fixing or determining valuation of real estate for tax purposes is unauthorized by or contrary to constitutional or statutory provisions governing taxation. *See, Gordman Properties*

Company v. Board of Equalization of Hall County, 225 Neb. 169, 403 N.W.2d 366 (1987). Use of the *Gordman* analysis allows consideration of both the presumption and the statutory standard of review without the difficulties inherent in the application of two standards of review. It is within that framework that I have analyzed the evidence.

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Wm R. Wickersham, Commissioner