

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

SAVANNA SHORES DEVELOPMENT )	)	
LLC, )	)	
	)	Case Nos. 08R 276, 08R 277, 08R 278, 08R
Appellant, )	)	279, 08R 280, 08R 281, 08R 282, 08R 283,
	)	08R 284, 08R 285, 08R 286 & 08R 287
v. )	)	
	)	DECISION AND ORDER
SARPY COUNTY BOARD OF )	)	AFFIRMING THE DECISIONS OF
EQUALIZATION, )	)	THE SARPY COUNTY BOARD OF
	)	EQUALIZATION
Appellee.	)	

The above-captioned cases were called for a hearing on the merits of appeals by Savanna Shores Development LLC ("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 August 4, 2010, pursuant to an Order for Hearing and Notice of Hearing issued June 4, 2010. Commissioner Wickersham, Chairperson of the Commission, was the presiding hearing officer. Commissioner Warnes was absent. Commissioner Wickersham, as Chairperson, designated Commissioners Wickersham, Salmon, and Hotz as a panel of the Commission to hear the appeal. Commissioner Hotz was excused. Commissioner Salmon was present. The appeal was heard by a quorum of a panel of the Commission.

Tim W. Young, President of Boyer Young Dev. Managing Member of Savanna Shores Development LLC, was present at the hearing. No one appeared as legal counsel for the Taxpayer.

Nicole L. O'Keefe, a Deputy County Attorney for Sarpy County, Nebraska, was present as legal counsel for the Sarpy County Board of Equalization ("the County Board").

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

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

## **I. ISSUES**

The Taxpayer has asserted that actual value of the subject property as of January 1, 2008, 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, 2008.

## **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") described in the tables below.

3. Actual value of each parcel of the subject property placed on the assessment roll as of January 1, 2008, ("the assessment date") by the Sarpy 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. 08R 276

Description: Lot 9 2nd Addition Savanna Shores Subdivision, Sarpy County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$21,960.00	\$1,000.00	\$21,960.00
Total	\$21,960.00	\$1,000.00	\$21,960.00

Case No. 08R 277

Description: Lot 10 2nd Addition Savanna Shores Subdivision, Sarpy County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$21,960.00	\$1,000.00	\$21,960.00
Total	\$21,690.00	\$1,000.00	\$21,960.00

Case No. 08R 278

Description: Lot 141 Savanna Shores Subdivision, Sarpy County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$39,650.00	\$1,000.00	\$39,650.00
Total	\$39,650.00	\$1,000.00	\$39,650.00

Case No. 08R 279

Description: Lot 142 Savanna Shores Subdivision, Sarpy County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$39,650.00	\$1,000.00	\$39,650.00
Total	\$39,650.00	\$1,000.00	\$39,650.00

Case No. 08R 280

Description: Lot 143 Savanna Shores Subdivision, Sarpy County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$39,650.00	\$1,000.00	\$39,650.00
Total	\$39,650.00	\$1,000.00	\$39,650.00

Case No. 08R 281

Description: Lot 157 Savanna Shores Subdivision, Sarpy County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$36,600.00	\$1,000.00	\$36,600.00
Total	\$36,600.00	\$1,000.00	\$36,600.00

Case No. 08R 282

Description: Lot 158 Savanna Shores Subdivision, Sarpy County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$23,790.00	\$1,000.00	\$23,790.00
Total	\$23,790.00	\$1,000.00	\$23,790.00

Case No. 08R 283

Description: Lot 159 Savanna Shores Subdivision, Sarpy County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$23,790.00	\$1,000.00	\$23,790.00
Total	\$23,790.00	\$1,000.00	\$23,790.00

Case No. 08R 284

Description: Lot 182 Savanna Shores Subdivision, Sarpy County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$23,790.00	\$1,000.00	\$23,790.00
Total	\$23,790.00	\$1,000.00	\$23,790.00

Case No. 08R 285

Description: Lot 183 Savanna Shores Subdivision, Sarpy County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$23,790.00	\$1,000.00	\$23,790.00
Total	\$23,790.00	\$1,000.00	\$23,790.00

Case No. 08R 286

Description: Lot 184 Savanna Shores Subdivision, Sarpy County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$23,790.00	\$1,000.00	\$23,790.00
Total	\$23,790.00	\$1,000.00	\$23,790.00

Case No. 08R 283

Description: Lot 185 Savanna Shores Subdivision, Sarpy County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$25,620.00	\$1,000.00	\$25,620.00
Total	\$25,620.00	\$1,000.00	\$25,620.00

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 June 4, 2010, set a hearing of the appeals for August 4, 2010, at 11:00 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 2008 is:

Case No. 08R 276

Land value            \$21,960.00  
Total value            \$21,960.00

Case No. 08R 277

Land value            \$21,960.00  
Total value            \$21,960.00

Case No. 08R 278

Land value \$39,650.00

Total value \$39,650.00

Case No. 08R 279

Land value \$39,650.00

Total value \$39,650.00

Case No. 08R 280

Land value \$39,650.00

Total value \$39,650.00

Case No. 08R 281

Land value \$36,600.00

Total value \$36,600.00

Case No. 08R 282

Land value \$23,790.00

Total value \$23,790.00

Case No. 08R 283

Land value \$23,790.00

Total value \$23,790.00

Case No. 08R 284

Land value \$23,790.00

Total value \$23,790.00

Case No. 08R 285

Land value	\$23,790.00
Total value	<u>\$23,790.00</u>

Case No. 08R 286

Land value	\$23,790.00
Total value	<u>\$23,790.00</u>

Case No. 08R 287

Land value	\$25,620.00
Total value	<u>\$25,620.00.</u>

**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) (Reissue 2009).
2. “Actual value is the most probable price expressed in terms of money that a property will bring if exposed for sale in the open market, or in an arm’s length transaction, between a willing buyer and a willing seller, both of whom are knowledgeable concerning all the uses to which the real property is adapted and for which the real property is capable of being used. In analyzing the uses and restrictions applicable to real property the analysis shall include a full description of the physical characteristics of the real property and an identification of the property rights valued.” Neb. Rev. Stat. §77-112 (Reissue 2009).



3. Actual value may be determined using professionally accepted mass appraisal methods, including, but not limited to, the (1) sales comparison approach using the guidelines in section 77-1371, (2) income approach, and (3) cost approach. Neb. Rev. Stat. §77-112 (Reissue 2009).
4. “Actual value, market value, and fair market value mean exactly the same thing.”  
*Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).
5. Taxable value is the percentage of actual value subject to taxation as directed by section 77-201 of Nebraska Statutes and has the same meaning as assessed value. Neb. Rev. Stat. §77-131 (Reissue 2009).
6. All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation. Neb. Rev. Stat. §77-201(1) (Reissue 2009).
7. A presumption exists that the County Board has faithfully performed its duties and has acted on competent evidence. *City of York v. York County Bd. Of Equalization*, 266 Neb. 297, 64 N.W.2d 445 (2003).
8. The presumption in favor of the county board may be classified as a principle of procedure involving the burden of proof, namely, a taxpayer has the burden to prove that action by a board of equalization, fixing or determining valuation of real estate for tax purposes, is unauthorized by or contrary to constitutional or statutory provisions governing taxation. *Gordman Properties Company v. Board of Equalization of Hall County*, 225 Neb. 169, 403 N.W.2d 366 (1987).

9. The presumption disappears if there is competent evidence to the contrary. *Id.*
10. The order, decision, determination, or action appealed from shall be affirmed unless evidence is adduced establishing that the order, decision, determination, or action was unreasonable or arbitrary. Neb. Rev. Stat. §77-5016 (8) (Cum. Supp. 2008).
11. Proof that the order, decision, determination, or action appealed from was unreasonable or arbitrary must be made by clear and convincing evidence. See, e.g., *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb.App. 171, 645 N.W.2d 821 (2002).
12. "Clear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved." *Castellano v. Bitkower*, 216 Neb. 806, 812, 346 N.W.2d 249, 253 (1984).
13. A decision is "arbitrary" when it is made in disregard of the facts and circumstances and without some basis which could lead a reasonable person to the same conclusion. *Phelps Cty. Bd. of Equal. v. Graf*, 258 Neb 810, 606 N.W.2d 736 (2000).
14. A decision is unreasonable only if the evidence presented leaves no room for differences of opinion among reasonable minds. *Pittman v. Sarpy Cty. Bd. of Equal.*, 258 Neb 390, 603 N.W.2d 447 (1999).
15. A corporate officer or other representative of an entity, must be shown to be familiar with the property in question and have a knowledge of values generally in the vicinity to be qualified to offer an opinion of value. *Kohl's Dept. Stores v. Douglas County Bd. of Equal.*, 10 Neb.App. 809, 638 N.W.2d 881 (2002).

16. The County Board need not put on any evidence to support its valuation of the property at issue unless the taxpayer establishes the Board's valuation was unreasonable or arbitrary. *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).
17. A Taxpayer, who only produced evidence that was aimed at discrediting valuation methods utilized by the county assessor, failed to meet burden of proving that value of property was not fairly and proportionately equalized or that valuation placed upon property for tax purposes was unreasonable or arbitrary. *Beynon v. Board of Equalization of Lancaster County*, 213 Neb. 488, 329 N.W.2d 857 (1983).
18. A Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued. Cf. *Josten-Wilbert Vault Co. v. Board of Equalization for Buffalo County*, 179 Neb. 415, 138 N.W.2d 641 (1965).

#### **IV. ANALYSIS**

Each of the parcels comprising the subject property is an unimproved lot used for silt and water retention during the development phase of a single family residential subdivision. At some time in the future silt will be removed from each parcel, new dirt applied, and the parcels will be sold for residential use.

For tax year 2009 the taxable value of the parcels comprising the subject property and other lots owned by the Taxpayer in the subdivision was determined using a methodology described in Exhibit 79. Exhibit 79 describes the development of a discount factor and the

criteria for application of the discount factor to subdivision lots owned by a developer. A single discount factor is developed for each year and applied to all subdivisions. (E79:1). The assessor's discounted cash flow methodology values the lots held by the developer as inventory valued in terms of their worth as an income stream derived from sales in the assessment year and beyond. (E79:1). If a lot held by a developer is sold, the discounted valuation methodology is not used to value the lot in the year after its sale. (E79:1). If a lot is improved, the discounted valuation methodology is not applied. (E79:1). If the subdivision reaches a build out point, that is 95% of the lots have been sold by the developer, the discounted methodology is not applied in the subdivision. (E79:1).

Implementation of the assessor's discounted valuation methodology requires the development of an average build out period for subdivisions in the county and an overall capitalization rate as a discount factor. After those factors are determined the discount factor is determined by: "1. Multiplying the average annual cash flow from each subdivision by the capitalization/discount rate to determine the annual discounted cash flow. 2. Using the estimated revenues for each of the remaining years of the average countywide build out period; the annual discounted cash flow is totaled to arrive at the total annual discounted cash flow. 3. From the actual and projected actual cash flows, the undiscounted cash flow is calculate(sic) and totaled for the build out period. 4. The discount factor is determined by dividing the undiscounted cash flow into the discounted cash flow. This factor reflects the relationship of the cash flow of the typical subdivision considering the present worth of the cash flow over the build-out period and the cash flow without present worth discounting." (E79:3-4). The factor as

calculated for the year 2000 was .61. (E79:4). The factor as applied for the year 2009 was also .61.

Valuation discounts for lots held in a developers inventory have not been discussed by Nebraska Courts, however, a Kansas Court has provided the following succinct description of the developer's discount method as used for ad valorem tax purposes. "The developer's discount method of valuation which is also known as the subdivision approach or the development approach, consists of a discounted cash flow analysis which considers a projected absorption rate and the corresponding drop in income from the sale of lots. Inherent in this approach is the notion that, if the owner of multiple lots places them all on the market at once, there would not be enough buyers in the marketplace who would be willing to pay full market price for each lot. Such approach assumes that the seller would have to discount the price of the property to lure additional buyers into the market. The discount is calculated by utilizing an absorption factor, which is based upon the number of willing buyers in any given year. In the alternative, the developer's discount method could be defined as the price that the owner of multiple lots would accept for all of its lots when sold to one buyer; that buyer would presumably pay a discounted price for each individual lot because the buyer would take the absorption factor into account in determining how quickly, and for what price, he or she could in turn sell the lots to other buyers." 19 Kan.App.2d 643, 875 P.2d 297 (1994).

The developer's discount as applied to undeveloped land is a recognized valuation technique. See *The Appraisal of Real Estate* 13<sup>th</sup> Edition, The Appraisal Institute, 2008, 370 - 375. Use of the technique for valuation of lots after development has run afoul of statutory and constitutional provisions in various states.: valuation of each lot in a developed subdivision at its

full cash value approved, use of a developer's discount was rejected, *St. Leonard Shores v. Supervisor of Assessments of Calvert County*, 307 Md. 441, 514 A2d 1215 (1985); use of a developer's discount did not comply with statutes requiring separate valuation of each parcel placed on the assessment rolls, *First Interstate Bank or Oregon N.A. v. Department of Revenue*, 306 Or. 450, 760 P.2d 880 (1988); use of a developer's discount violated statutory scheme of valuing property for ad valorem tax purposes, *Hixon v. Lario Enterprises, Inc.*, 257 Kan. 377, 892 P.2d 507 (1995); wholesale discount would violate the constitutional requirement of uniformity of taxation, *Edward Rose Building Company v. Independence Township*, 436 Mich. 620, 462 N.W.2d 325 (1990); statute providing for discount if the property consists of four or more lots within one subdivision, and the lots are held under one ownership would be valued under a method recognizing the time period over which the lots must be sold to realize current market prices was unconstitutional violating the rules of uniformity of taxation for the same class of property and uniformity of assessment, levy and collection found in separate provisions of Oregon's Constitution, *Mathias v. Department of Revenue of the State of Oregon*, 312 Or. 50, 817 P.2d 272 (1991); application of absorption discount to developer's subdivision lots violated uniformity of taxation requirement, and absorption method was contrary to statutory scheme of ad valorem taxation, *Board of Equalization of Salt Lake County v. Utah State Tax Commissioner ex rel. Benchmark, Inc.*, 864 P.2d 882 (1993).

Nebraska law requires an assessor to prepare an assessment roll each year. Neb. Rev. Stat. §77-1303 (Reissue 2003). The assessment roll is to list each parcel, its owner, the number of acres or lots which comprise it and the value thereof and the improvements and the value thereof. *Id.* A parcel is defined as a contiguous tract of land determined by its boundaries under

the same ownership, and in the same tax district and section. Parcel also means an improvement on leased land. If all or several lots in the same block are owned by the same person and contained in the same district, they may be included in one parcel. Neb. Rev. Stat. §77-132 (Cum. Supp. 2008).

Courts have recognized that if valuation of a single lot as a parcel is required by law or regulation that requirement precludes grouping of the individual parcels together for valuation. The Court in *St. Leonard Shores* based on a directive of the State Department of Assessment and Taxation prohibiting consideration of bulk ownership found that each lot had to be valued separately. *St. Leonard Shores v. Supervisor of Assessments of Calvet County*, 307 Md. 441, 514 A2d 1215 (1985). The Court did not accept the argument of *St. Leonard Shores* that a buyer did not exist for all of the parcels it held. The Court stated: “Regardless of whether a buyer for each lot actually exists, the assessor is required to assess each lot as if a willing buyer exists.” *Id.* at 446, 1215. The Court in *First Interstate* relied on a statute that required preparation of an assessment roll listing each parcel of real property. *First Interstate Bank or Oregon N.A. v. Department of Revenue*, 306 Or. 450, 760 P.2d 880 (1988). The Court also noted that use of a developer’s discount does not result in a valuation of a parcel at its highest and best use, i.e. commercial or residential land, but as an investment. *Id.* The Court in *Hixon*, found that statutes which required the appraisal of each parcel of real property at its fair market value in money and the determination of fair market value using statutory factors did not allow use of the discount. *Hixon v. Lario Enterprises, Inc.*, 257 Kan. 377, 892 P.2d 507 (1995).

Nebraska law requires the assessment of residential real property at its actual value. Neb. Rev. Stat. §77-201(1) (Cum Supp. 2008). The Supreme Court of Michigan held in *Edward Rose*

*Building Company v. Independence Township*, 436 Mich. 620, 462 N.W.2d 325 (1990), that use of the developer's discount disregarded several factors essential to the computation of true cash value. The Court held that use of the developer's discount to value lots subdivided and available for single family residential development valued property at its investment value rather than its highest and best use as residential home sites. One factor in the use of the developer's discount is recognition of the cost of development. The use of the developer's discount after development, however, causes those costs to be counted twice. See *Rose Supra*, 332, 636. The Court in *Rose* also observed that the market for a single lot must take into account the availability of fungible lots. *Id.* Use of the developer's discount recognizes any weakness in the market twice. *Id.* The rationales discussed by the *Rose* Court all point to one conclusion and that is, use of a developer's discount after development of a parcel does not render a result that can be characterized as actual value.

By statute residential parcels shall be subject to taxation and shall be valued at actual value. Neb. Rev. Stat. §77-201 (Reissue 2009). Actual value, market value and fair market value mean exactly the same thing for taxation. *Richman Gordman v. Board of Equalization*, 214 Neb. 470, 334 N.W.2d 477 (1983). Taxable value and assessed value have the same meaning. Neb. Rev. Stat. §77-131 (Reissue 2009). The County Assessor's own policy statement if not explicitly at least implicitly recognizes the problem created by the methodology described in Exhibit 79. "Using standard appraisal techniques all lots in the various subdivisions will be appraised to market value with the discount factor being applied to obtain assessed value for each lot." (E79:4). Assessed value by law, must equal market value.



Whatever the implications of the assessor's use of the methodology to determine the taxable value of all of the undeveloped lots in the subdivision owned by the Taxpayer, the issue presented here is application of the methodology to parcels that had a restricted use, and remediation for sale would take place at some time in the future. Future sales of remediated parcels would be for full market value. No sale discount would be obtained from the Taxpayer by a buyer due to the history of the parcel.

The Taxpayer contends that the value of each lot should be discounted in the manner developed by the assessor and discounted further for the future cost of remediation estimated at \$25,000 per parcel. The cost of remediation for use as a silt collection pond can be compared to the effect on value of remediation for other environmental hazards that for a time prevent some or all uses of a parcel. Nebraska's Supreme Court has observed that two methods unencumbered value and value in use are generally accepted for the valuation of property requiring remediation for environmental hazards. *Garvey Elevators, Inc. v. Adams County Bd. of Equalization*, 261 Neb. 130, 621 N.W.2d 518 (2001). See also *Standard on the Valuation of Properties Affected by Environmental Contamination*, International Association of Assessing Officers (2001). One method is to determine actual value without regard to the hazard and deduct the cost of remediation. *Id.* If using that methodology the cost of remediation exceeds the estimate of value, the indicated value for the parcel is zero or a negative indicating that the seller would be required to pay another party to assume ownership of the parcel. The cost of remediation may be considered a liability to be paid at some future time. If a parcel is sold subject to a liability, the purchase price has two components, cash or current consideration paid and future payments to be made to discharge the liability. The sum of the value of the two components of consideration

paid is the sale price. Another method is to consider in use value. *Id.* The Commission also notes that the Taxpayer would not bear the cost of remediation for the subject property and a deduction for a liability that does not exist could not be considered for the subject property.

Value in use is applicable if the parcel has a current use that has value. *Id.* Valuation of that use as it represents the best estimate of actual value. The *Garvey* Court approved in use valuation as a methodology to determine actual value of a parcel with environmental hazards. *Id.* Valuation in use is applicable in this instance as well. The Taxpayer's contention that the cost of remediation should be deducted is rejected.

Residential property must be assessed based on its actual value. Neb. Rev. Stat. 77-201 (Supp 2007). Actual value is to be determined based on the highest and best use of the parcel. 350 Neb. Admin. Code, ch. 50, §.00204A (01/07). Highest and best use is the most reasonable and probable use of the property that will support the highest present value. 350 Neb. Admin. Code, ch. 10, §001.13 (3/09). It is the recognition of the contribution of that specific use to the community environment or community development goals in addition to wealth maximization of individual property owners. *Id.* "Highest and best use may be defined as follows: the reasonably probable and legal use of vacant land or an improved property that is physically possible, appropriately supported, and financially feasible and that results in the highest value." *The Appraisal of Real Estate*, 13<sup>th</sup> Edition, Appraisal Institute, 2008, 277. Both definitions require valuation of the use that will maximize value. The valuation of any parcel necessary requires consideration of its highest and best use.

The theoretical basis of the concept of highest and best use and the practical aspects of its application in the valuation of property have not been discussed in Nebraska law. The theoretical

basis for the concept of highest and best use and practical guides for its application in the valuation of property are well developed in professional literature.

“The theoretical focus of highest and best use analysis is on the potential uses of the land as though vacant.” *Id.* at 278. “In the analysis of highest and best use of land as though vacant, the appraiser seeks the answers to several questions: Should the land be developed or left vacant? If left vacant, when would future development be financially feasible? If developed, what kind of improvement should be built? In the analysis of the highest and best use of the property as improved, additional questions must be answered: Should the existing improvements on the property be maintained in their current state, should they be altered in some manner to make them more valuable, or should they be demolished to create a vacant site for a different use? If renovation or redevelopment is warranted, when should the new improvements be built?” *Id.* at 278.

“In general, if the value of a property as improved is greater than the value of the land as though vacant, the highest and best use is the use of the property as improved. However, a property’s existing use may represent an interim use, which begins with the land value for the new highest and best use and adds the contributory value of the current improvements until the new highest and best use can be achieved.” *Id.* at 278.

Four steps are implicit and are applied to develop adequate support for highest and best use opinion is the use being considered: 1. Legally permissible; 2. Physically permissible 3. Financially feasible; 4. Maximally productive *Id.* at 278-279. The highest and best use of land as though vacant is concluded after the four criteria have been applied and various alternative

uses have been eliminated. The remaining use that fulfills all four of the criteria is the highest and best use. *Id.* at 281.

The highest and best use of each parcel comprising the subject property is as the site for a single family residence. That use was restricted as of the assessment date until 80% of the lots in the subdivision have been sold and the effects of its current use as a silt pond are remediated. An approved methodology for the valuation of a parcel with a greater future value subject to remediation is the discounting of future income to a present worth. *Standard on the Valuation of Properties Affected by Environmental Contamination*, International Association of Assessing Officers, 2001, 16. The County Assessor's methodology assumes full development of the subdivision in 8 years. (E79:4). A future sale at full market value was discounted at a rate of 12.5%. (E79:4). The assumptions of the County Assessor allow a determination of value using the discounted future income from the parcel. The County Assessor's methodology as applied to a parcel from which the projected income, at its highest and best use, cannot be realized as of the assessment date is an accepted valuation technique. *Standard on the Valuation of Properties Affected by Environmental Contamination*, International Association of Assessing Officers, 2001, 16. The legal restraints on the sale of the parcels comprising the subject property are easily distinguishable from the fully permitted but uncertain sale of other parcels held by the Taxpayer in the subdivision. The Commission's decision is applicable only to those parcels of the subject property used as silt containment ponds as of the assessment date.

The County Board adopted values for the parcels comprising the subject property as determined by the County Assessor. After the County Board acted the County Assessor learned that the restrictions on a portions of the subject property, Lots 182, 183, & 184, might be lifted

during tax year 2008. (E103). The County Board's determinations were not unreasonable or arbitrary.

**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, 2008, are affirmed.
2. Actual value, for the tax year 2008, of each parcel described in an appeal as referenced by the Case No. is:

Case No. 08R 276

Land value \$21,960.00

Total value \$21,960.00

Case No. 08R 277

Land value \$21,960.00

Total value \$21,960.00

Case No. 08R 278

Land value \$39,650.00

Total value \$39,650.00

Case No. 08R 279

Land value \$39,650.00

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Case No. 08R 280

Land value \$39,650.00

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Case No. 08R 281

Land value \$36,600.00

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Case No. 08R 282

Land value \$23,790.00

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Case No. 08R 285

Land value \$23,790.00

Total value \$23,790.00

Case No. 08R 286

Land value \$23,790.00

Total value \$23,790.00

Case No. 08R 287

Land value \$25,620.00

Total value \$25,620.00.

3. This decision, if no appeal is timely filed, shall be certified to the Sarpy County Treasurer, and the Sarpy County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Reissue 2009).
4. Any request for relief, by any party, which is not specifically provided for by this order is denied.
5. Each party is to bear its own costs in this proceeding.
6. This decision shall only be applicable to tax year 2008.

7. This order is effective for purposes of appeal on August 11, 2010.

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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 (REISSUE 2009), OTHER PROVISIONS OF NEBRASKA STATUTES, AND COURT RULES.**

I concur in the result.

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

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

The Commission is authorized to review decision of a county board of equalization determining taxable values. Neb. Rev. Stat. §77-5007 (Supp. 2007). Review of county board of equalization decisions is not new in Nebraska law. As early as 1903 Nebraska Statutes provided



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

Many appeals of decisions made pursuant to section 77-1511 were decided without reference to the statutory standard of review applicable to the district courts review of a county board of equalization's decision. See, e.g., *Grainger Brothers Company v. County Board of Equalization of the County of Lancaster*, 180 Neb. 571, 144 N.W.2d 161 (1966). In *Hastings*

*Building Co., v. Board of Equalization of Adams County*, 190 Neb. 63, 206 N.W.2d 338 (1973), the Nebraska Supreme Court acknowledged that two standards of review existed for reviews by the district court; one statutory requiring a finding that the decision reviewed was unreasonable or arbitrary, and another judicial requiring a finding that a presumption that the county board of equalization faithfully performed its official duties and acted upon sufficient competent evidence was overcome. No attempt was made by the *Hastings* Court to reconcile the two standards of review that were applicable to the District Courts.

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

The possible results from application of the presumption as a standard of review and the statutory standard of review are: (1) the presumption is not overcome and the statutory standard is not overcome; (2) the presumption is overcome and the statutory standard is not overcome; (3) the presumption is not overcome and the statutory standard is overcome; (4) and finally the presumption is overcome and the statutory standard is overcome. The first possibility does not

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

Use of the presumption as a standard of review has been criticized. See G. Michael Fenner, *About Presumptions in Civil Cases*, 17 Creighton L. Rev. 307 (1984). In the view of that author, the presumption should be returned to its roots as a burden of proof. *Id.* Nebraska's Supreme Court acknowledged the difficulty of using two standards of review and classified the

presumption in favor of the county board of equalization as a principle of procedure involving the burden of proof, namely, a taxpayer has the burden to prove that action by a board of equalization fixing or determining valuation of real estate for tax purposes is unauthorized by or contrary to constitutional or statutory provisions governing taxation. See *Gordman Properties Company v. Board of Equalization of Hall County*, 225 Neb. 169, 403 N.W.2d 366 (1987). Use of the *Gordman* analysis allows consideration of both the presumption and the statutory standard of review without the difficulties inherent in the application of two standards of review. It is within that framework that I have analyzed the evidence.

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Wm. R. Wickersham, Commissioner