

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

AMY N. RAMOS, SCOTTS BLUFF)
COUNTY ASSESSOR,)
)
Appellant,)
)
v.)
)
SCOTTS BLUFF COUNTY BOARD OF)
EQUALIZATION)
)
and)
)
ALYSSA L. FRANK,)
)
Appellees.)

Case No. 09C 017

DECISION AND ORDER
REVERSING THE DECISION OF
THE SCOTTS BLUFF COUNTY BOARD
OF EQUALIZATION

The above-captioned case was called for a hearing on the merits of an appeal by Amy N. Ramos Scotts Bluff County Assessor ("County Assessor") to the Tax Equalization and Review Commission ("the Commission"). The hearing was held in the Scottsbluff Hampton Inn, 301 W Hwy 26, Scottsbluff, Nebraska, on June 7, 2010, pursuant to an Order for Hearing and Notice of Hearing issued March 9, 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.

Amy N. Ramos Scotts Bluff County Assessor, was present at the hearing. Kent A. Hadenfeldt appeared as legal counsel for the County Assessor.

Richard A. Douglas, Special County Attorney for Scotts Bluff County, Nebraska, was present as legal counsel for the Scotts Bluff County Board of Equalization ("the County Board").

Alyssa L. Frank ("Taxpayer") was present at the hearing. No one appeared as legal counsel for the Taxpayer.

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

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

I. ISSUES

The County Assessor has asserted that actual value of the subject property as of January 1, 2009, is greater than actual value as determined by the County Board. The issues on appeal related to that assertion are:

Whether the decision of the County Board determining actual value of the subject property is unreasonable or arbitrary; and

The actual value of the subject property on January 1, 2009.

II. FINDINGS OF FACT

The Commission finds and determines that:

1. The County Assessor may maintain the appeal.
2. The parcel of real property to which this appeal pertains ("the Subject Property") is described in the table below.
3. Actual value of the subject property placed on the assessment roll as of January 1, 2009, ("the assessment date") by the Scotts Bluff County Assessor, value as proposed in a

timely protest, and actual value as determined by the County Board is shown in the following table:

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Description: Block 1 ALF Subdivision, Scottsbluff, Scotts Bluff County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$61,880.00	\$61,880.00	\$61,880.00
Improvement	\$612,483.00	\$218,421.00	\$226,831.00
Total	\$674,363.00	\$280,301.00	\$288,711.00

4. An appeal of the County Board's decision was filed with the Commission.
5. An Order for Hearing and Notice of Hearing issued on March 9, 2010, set a hearing of the appeal for June 7, 2010, at 1:00 p.m. MDST.
6. An Affidavit of Service which appears in the records of the Commission establishes that a copy of the Order for Hearing and Notice of Hearing was served on all parties.
7. Actual value of the subject property as of the assessment date for the tax year 2009 is:

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Land value \$ 61,880.00

Improvement value \$477,229.00

Total value \$539,109.00.

**III.
APPLICABLE LAW**

1. Subject matter jurisdiction of the Commission in this appeal is over all questions necessary to determine taxable value. Neb. Rev. Stat. §77-5016(7) (Reissue 2009).

2. “Actual value is the most probable price expressed in terms of money that a property will bring if exposed for sale in the open market, or in an arm’s length transaction, between a willing buyer and a willing seller, both of whom are knowledgeable concerning all the uses to which the real property is adapted and for which the real property is capable of being used. In analyzing the uses and restrictions applicable to real property the analysis shall include a full description of the physical characteristics of the real property and an identification of the property rights valued.” Neb. Rev. Stat. §77-112 (Reissue 2009).
3. Actual value may be determined using professionally accepted mass appraisal methods, including, but not limited to, the (1) sales comparison approach using the guidelines in section 77-1371, (2) income approach, and (3) cost approach. Neb. Rev. Stat. §77-112 (Reissue 2009).
4. “Actual value, market value, and fair market value mean exactly the same thing.”
Omaha Country Club v. Douglas County Board of Equalization, et al., 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).
5. Taxable value is the percentage of actual value subject to taxation as directed by section 77-201 of Nebraska Statutes and has the same meaning as assessed value. Neb. Rev. Stat. §77-131 (Reissue 2009).
6. All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation. Neb. Rev. Stat. §77-201(1) (Reissue 2009).

7. A presumption exists that the County Board has faithfully performed its duties and has acted on competent evidence. *City of York v. York County Bd. Of Equalization*, 266 Neb. 297, 64 N.W.2d 445 (2003).
8. The presumption in favor of the county board may be classified as a principle of procedure involving the burden of proof, namely, an appellant has the burden to prove that action by a board of equalization fixing or determining valuation of real estate for tax purposes is unauthorized by or contrary to constitutional or statutory provisions governing taxation. *Gordman Properties Company v. Board of Equalization of Hall County*, 225 Neb. 169, 403 N.W.2d 366 (1987).
9. The presumption disappears if there is competent evidence to the contrary. *Id.*
10. The order, decision, determination, or action appealed from shall be affirmed unless evidence is adduced establishing that the order, decision, determination, or action was unreasonable or arbitrary. Neb. Rev. Stat. §77-5016 (8) (Cum. Supp. 2006).
11. Proof that the order, decision, determination, or action 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. “An owner who is familiar with his property and knows its worth is permitted to testify as to its value.” *U. S. Ecology v. Boyd County Bd. Of Equalization*, 256 Neb. 7, 16, 588 N.W.2d 575, 581, (1999).
16. The County Board need not put on any evidence to support its valuation of the property at issue unless the appellant 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. An appellant, who only produced evidence that was aimed at discrediting valuation methods utilized by the County Board, 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. An appellant must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued. Cf. *Josten-Wilbert Vault Co. v. Board of Equalization for Buffalo County*, 179 Neb. 415, 138 N.W.2d 641 (1965).

IV. ANALYSIS

The subject property is an improved parcel. The improvements on the parcel are three square foot metal on steel frame buildings and 19,140 square feet of concrete paving. (E3:22 &

23). The buildings are used for storage and contain 138 storage units. 23 of the storage units have heating and cooling. One of the buildings contains an office.

For tax year 2009, initial value of the subject property was established by the County Assessor using the cost approach. The County Assessor's value was protested. The County Board's determination of actual value was based on a 3% increase over the prior year's taxable value. Each change of value or indeed even no change in value can be expressed as a percentage of the prior year's value. It is not, therefore, the percentage of change over the prior year's value that is significant. It is the rationale or basis for a decision that is pertinent.

It is the burden of the Appellant to show that the decision of the County Board was unreasonable or arbitrary. Neb. Rev. Stat. §77-5016 (8) (Reissue 2009). All evidence presented to the Commission is considered to make that determination.

A County Board is required to prepare and file a report of its consideration of each protest. Neb. Rev. Stat. §77-1502 (Reissue 2009). Each report of a County Board's consideration of a protest must include a statement describing the basis on which the board's decision was made. Neb. Rev. Stat. §77-1502 (Reissue 2009). In this case the report of the County Board is in evidence before the Commission as Exhibit 1. No rationale or basis for the County Board's 3% increase in value over the prior year's taxable value is stated in the County Board's report of its decision. (E1). No rationale or basis for the County Board's 3% increase was presented in the hearing before the Commission. The decision of the County Board is unreasonable or arbitrary.

Once it is determined that the decision of County Board was unreasonable or arbitrary, the Commission must review the evidence and adopt the most reasonable estimate of actual value

presented. *Garvey Elevators, Inc. v. Adams County Bd. of Equalization*, 261 Neb. 130, 621 N.W.2d 518 (2001).

The a witness for the Taxpayer testified that the improvements on the subject property could be constructed new at a cost of \$2,000 per unit for the unheated and cooled storage unites and a cost of \$3,000 per unit for those with heating and cooling. Replacement of the storage units based on that testimony would cost \$299,000 $((115 \times \$2,000 = \$230,000) + (23 \times \$3,000 = \$69,000) = \$299,000)$. The Taxpayer's witness testified variously that the stated costs included the cement pad under each unit and that it did not. The stated cost does not include the cost of land on which the units are sited or the cost of preparing the land for construction. The stated cost does not include paving or other site improvements appropriate for use of the storage units once built. Storage units were constructed on the subject property in 2002 and 2005. (E3:26). Depreciation would reduce any contribution to value stated as replacement cost new for the building on the subject property. The Taxpayer's witness did not offer an opinion of actual value for the subject property as of the assessment date and his testimony is an insufficient basis on which to make a determination of actual value.

Exhibit 3 at pages 34, 35 & 36 contains material submitted by the Taxpayer to the County Board. The chart on page 34 displays percentage changes in values. As noted above percentage changes in values are not in themselves relevant. The explanation on page 33 of Exhibit 3 points out that percentage changes based on an incorrect base is meaningless. Pages 35 and 36 of Exhibit 3 rely on calculations of value per square foot to show that the subject property was over assessed at the value determined by the County Assessor. A Taxpayer wishing to use taxable "assessed" values to prove actual or fair market value must show that the approach used is a

professionally approved mass or fee appraisal approach and demonstrate application of the approach.

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

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

The weight of authority is that assessed value is not in and of itself direct evidence of actual value. See, *Lienemann v. City of Omaha*, 191 Neb. 442, 215 N.W.2d 893 (1974). If however, the “taxable ‘assessed’ value comparison approach” was shown to be a professionally accepted approach for determination of actual value, and that the taxable “assessed value of the proposed comparables was equal to actual value, further analysis would be required. Techniques for use of the approach would have to be developed.

Techniques used in the sales comparison approach are instructive. In the sales comparison approach, a sale price is an indication of actual value for a sold property but must be adjusted to account for differences between properties to become an indicator of actual value for another property. *The Appraisal of Real Estate* 13th Edition, The Appraisal Institute, 2008, Ch 13. An analysis of differences and adjustments to the taxable “assessed” value of comparison properties would be necessary to obtain an indication of actual value for a subject property. See, *DeBruce Grain v. Otoe County Board of Equalization*, 7 Neb.App. 688, 584 N.W.2d 837, (1998). No adjustments or analysis of adjustments necessary to compensate for differences between the subject property and the taxable “assessed” values of other parcels was presented.

County assessors are authorized by statute to use the cost approach to estimate value. Neb. Rev. Stat. §77-112 (Reissue 2009). The County Assessor determined actual value of the subject property using the cost approach. 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 estimate of value using the cost approach considers direct costs, indirect costs and an entrepreneurial profit or incentive. *The Appraisal of Real Estate* 13th Edition, The Appraisal Institute, 2008, p. 378. Direct costs include expenditures for labor and materials. *The Appraisal of Real Estate* 13th Edition, The Appraisal Institute, 2008, p. 387. Indirect costs include administrative costs, professional fees, financing costs, financing costs and the interest paid on construction loans, taxes and the builder’s or developer’s all risk insurance during marketing, sales, and lease up costs. *The Appraisal of Real Estate* 13th Edition, The Appraisal Institute, 2008, p. 387. Entrepreneurial incentive represents the amount an entrepreneur expects to receive for his or her contribution to a project and risk. *The Appraisal of Real Estate* 13th Edition, The Appraisal Institute, 2008, p. 389. Entrepreneurial profit is a market derived figure that represents the difference between costs to construct and market value after completion. *The Appraisal of Real Estate* 13th Edition, The Appraisal Institute, 2008, p 389.

Costs and depreciation as determined by the County Assessor, were obtained from Marshall and Swift, a nationally recognized reference source. Costs and depreciation as obtained from Marshall and Swift were used by the County Assessor to determine actual value of all mini

storage units in Scotts Bluff County for the tax year 2009. At the hearing the County Assessor determined that the number of heated and cooled storage units was overstated in her assessment records, that various improvements had been removed and that the square feet of concrete paving outside the bases of the storage units was overstated. The County Assessor corrected her assessment records and revised her estimate of value based on the cost approach as follows:

Contribution to value made by the heated and cooled units was decreased by \$37,321 recognizing that only 23 units were heated and cooled; contributions to value net of depreciation attributed to a chain link fence, two gates and parking bumpers were removed; and the contribution to value made by concrete paving net of depreciation was reduced based on a determination that only 19,140 feet of paving lay outside the bases of the storage units. The deductions attributable to the fence gates and paving in gross were \$104,988 ($\$7,758 + \$441 + 329 + \$96,460 = \$104,988$). The gross reduction was reduced by the 7% depreciation factor applied to all improvements resulting a net reduction in value of \$97,639 ($(\$104,988 \times .07 = \$7,349)$ $(\$104,988 - \$7,349 = \$97,639)$). The County Assessor also reduced the contributions to value made by improvements in the amount of \$284 attributable to parking bumpers. The contribution to actual value made by the land component was determined by an analysis of sales of vacant land. The County Assessor opinion of actual value based on use of the cost approach was \$593,109. The County Assessor's opinion of value was derived as follows: Replacement cost new less depreciation pre hearing \$612,483. (E3:25). Replacement cost new less depreciation was reduced in the amounts of \$37,321, \$97,631 and \$284. The redetermined replacement cost new less depreciation of improvements was \$477,239 ($\$612,483 - \$37,321 - \$97,639 - \$284 = \$477,239$) The contribution to value of the land component was added for a final estimate of value of \$539,695 ($\$477,239 +$

\$61,880 = \$539,119). The County Assessor stated that her estimate of actual value based on the cost approach was \$539,109. The difference cannot be reconciled. The record is sufficient to support the opinion of the County Assessor. There is no evidence that the County Assessor did not properly apply the cost and depreciation factors available to her at the hearing or that the contribution to value made by the land component is incorrect.

County assessors are authorized by statute to use the income approach to estimate value. Neb. Rev. Stat. §77-112 (Reissue 2009). The County Assessor determined actual value of the subject property using the income approach. (E3:46-49). 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; and (4) divide net operating income by an estimated capitalization rate to yield indicated value. *The Appraisal of Real Estate* 13th Edition, The Appraisal Institute, 2008, pp. 466. A variety of techniques may be used to quantify various components of any application of the approach. *Id.*, at chs 20-24.

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

The County Assessor obtained information from operators of mini storage units pertaining to income and expenses and was able to make an estimate of net operating income from that information for the subject property. The final component of the income approach is the capitalization rate. Capitalization rates may be estimated with various techniques. Accepted techniques include: derivation from comparable sales; derivation from effective gross income multipliers and net income ratios; band of investment - mortgage and equity components; band of investment - land and building components; the debt coverage formula, and yield capitalization rates such as the general yield and change formula and the Ellwood method. *The Appraisal of Real Estate* 13th Edition, The Appraisal Institute, 2008, pp. 501. The capitalization rate used by the County Assessor was obtained from realtyrates.com. (E3:30). The County Assessor stated that she verified use of the capitalization rate selected with local appraisers. The capitalization rate used by the County Assessor was not, however, verified with an analysis of local markets by the County Assessor. The basis for other appraiser's endorsement of the rate is unknown. Even if a capitalization rate cannot be obtained from sales, a capitalization rate may be indicated by the band of investment technique.

The expense analysis contained in Exhibit 3 at pages 46-49 does not exclude 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 is divided by a capitalization rate to derive an estimate of value ($I \div R = V$). 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 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. The process produces a circularity in the calculations. 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 important considerations. Actual or taxable value is determined as of January 1 of each year. Neb. Rev. Stat. §77-1301 (Reissue 2009). Levies on taxable value are determined by October 15 of each year. Neb. Rev. Stat. §77-1601 (Reissue 2009). 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 2009). 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 2009). 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 of 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 weight to be given evidence is reserved to the Commission. *Neb. Rev. Stat. §77-5016(5)* (Reissue 2009). No opinion of actual value was given on behalf of the Taxpayer. Unsupported evidence of the cost to replace the storage units without consideration of other improvements, the cost of land and depreciation cannot be given weight that overcomes an estimate of value determined by a County Assessor, based on uniform application of a formula in accordance with the law. See, *First Nat. Bank v. Otoe Cty.*, 233 Neb. 412, 445 N.W.2d 880

(1989). *Greenwood Ranch v. Morrill Cty. Bd. of Equal.*, 232 Neb. 114, 439 N.W.2d 760 (1989).

Dowd v. Board of Equalization of Boone County, 240 Neb. 437, 482 N.W.2d 583 (1992).

The determination of actual value made by the County Board is simply a 3% increase over the prior years valuation. The prior year's assessment is not relevant to the subsequent year's valuation. *DeVore v. Bd. Of Equal.*, 144 Neb. 351, 13 N.W.2d 451 (1944). *Affiliated Foods Coop v. Madison Co. Bd. Of Equal.*, 229 Neb. 605, 428 N.W.2d 201 (1988). If a prior year's assessment is not relevant, then it follows that a percentage increase from that assessment, without explanation, is not a relevant consideration when valuation for a subsequent year is being considered. There is no evidence supporting the County Board's determination of actual value.

The income approach as developed by the County Assessor used a capitalization rate that was not derived from the market for the subject property and did not properly account for real property taxes.

The most reasonable estimate of actual value of the subject property, in the evidence before the Commission is that determined by the County Assessor using the cost approach.

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 County Assessor has produced competent evidence that the County Board failed to faithfully perform its official duties and to act on sufficient competent evidence to justify its actions.

4. The County Assessor has adduced sufficient, clear and convincing evidence that the decision of the County Board is unreasonable or arbitrary and the decision of the County Board should be vacated and reversed.

**VI.
ORDER**

IT IS ORDERED THAT:

1. The decision of the County Board determining actual value of the subject property as of the assessment date, January 1, 2009, is vacated and reversed.
2. Actual value, for the tax year 2009, of the subject property is:

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Land value	\$ 61,880.00
Improvement value	<u>\$477,229.00</u>
Total value	<u>\$539,109.00.</u>

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

7. This order is effective for purposes of appeal on June 30, 2010.

Signed and Sealed. June 30, 2010.

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

Wm R. Wickersham, Commissioner