

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

COLE MT OMAHA,)	
)	
Appellant,)	Case No. 09C 526
)	
v.)	DECISION AND ORDER
)	REVERSING THE DECISION OF
DOUGLAS COUNTY BOARD OF)	THE DOUGLAS COUNTY BOARD OF
EQUALIZATION,)	EQUALIZATION
)	
Appellee.)	

The above-captioned case was called for a hearing on the merits of an appeal by Cole MT Omaha ("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 September 15, 2010, pursuant to an Order for Hearing and Notice of Hearing issued April 8, 2010 as amended by an Order dated June 2, 2010. Commissioners Wickersham, Warnes, Salmon, and Hotz were present. Commissioner Wickersham, was the presiding hearing officer.

Mark Sellman, Senior Vice President of Cole REIT Advisors II LLC, Managing member of Cole MT Omaha, was present at the hearing. Steven D. Davidson appeared as legal counsel for the Taxpayer.

Thomas S. Barrett, a Deputy County Attorney for Douglas County, Nebraska, was present as legal counsel for the Douglas County Board of Equalization ("the County Board").

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

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

**I.
ISSUES**

The Taxpayer has asserted that actual value of the subject property as of January 1, 2009, 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, 2009.

The Taxpayer has asserted that taxable value of the subject property as of January 1, 2009, 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, 2009.

**II.
FINDINGS OF FACT**

The Commission finds and determines that:

1. The Taxpayer has a sufficient interest in the outcome of the above captioned appeal to maintain the appeal.
2. The parcel of real property to which this appeal pertains ("the Subject Property") is described in the table below.
3. Actual value of the subject property placed on the assessment roll as of January 1, 2009, ("the assessment date") by the Douglas County Assessor, value as proposed in a timely protest, and actual value as determined by the County Board is shown in the following table:

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Description: Lots 1, 2, 3, and - Ex Ir SWSTRLY 32.73 Ft -Lt 4, One Pacific Place, Omaha, Douglas County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$3,696,500.00	\$3,500,000.00	\$3,696,500.00
Improvement	\$29,645,100.00	\$17,800,000.00	\$29,645,100.00
Total	\$33,341,600.00	\$21,300,000.00	\$33,341,600.00

4. An appeal of the County Board's decision was filed with the Commission.
5. The County Board was served with a Notice in Lieu of Summons and duly answered that Notice.
6. An Order for Hearing and Notice of Hearing issued on April 8, 2010, as amended by an Order issued on June 2, 2010, set a hearing of the appeal for September 15, 2010, at 9:00 a.m. CDST.
7. An Affidavit of Service, which appears in the records of the Commission, establishes that a copy of the Order for Hearing and Notice of Hearing was served on all parties.

8. Equalized taxable value of the subject property as of the assessment date for the tax year 2008 is:

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Total value \$18,369,733.00.

**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. “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.
8. Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value. *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).
9. The purpose of equalization of assessments is to bring the assessment of different parts of a taxing district to the same relative standard, so that no one of the parts may be compelled to pay a disproportionate part of the tax. *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991); *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623, (1999).

10. Equalization to obtain proportionate valuation requires a comparison of the ratio of assessed to actual value for the subject property and comparable property. See, *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).
11. 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).
12. 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).
13. 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).
14. 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).
15. 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).

16. 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).
17. 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).
18. The presumption disappears if there is competent evidence to the contrary. *Id.*
19. 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).
20. 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).

21. "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).
22. 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).
23. 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).
24. 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).
25. 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).
26. 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).

27. 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 taxable value); *Josten-Wilbert Vault Co. v. Board of Equalization for Buffalo County*, 179 Neb. 415, 138 N.W.2d 641 (1965) (determination of actual value).

IV. ANALYSIS

The subject property is an improved parcel in Omaha, Douglas County, Nebraska. There are three buildings on the subject property with a parking lot and other improvements that together allow the subject property to be used as a retail shopping mall. Two buildings, one containing 87,000 gross square feet, and the other containing 11,151 gross square feet, are rented for shops, a restaurant, mall offices, and mechanical rooms. The shops are for the most part described as “high end” national chain stores. One 296 square foot building is used as a Scooters coffee shop. The Taxpayer acquired the subject property in February of 2007 for \$36,000,000.00. The subject property was reappraised in 2007, by the Douglas County Assessor's office for tax year 2008. Taxable value for the year 2008 was determined by the Douglas County Assessor to be \$33,641,600.00. Taxable value for the year 2009 as determined by the County Assesor was \$33,641,600. That determination was protested to the County Board. The County Board affirmed taxable value as determined by the County Assessor. The Taxpayer

asserts that actual value is less than taxable value as determined by the County Board and that taxable value of the subject property is not equalized with other similar parcels.

An appraiser appearing on behalf of the Taxpayer offered his opinion that actual value of the subject property as of January 1, 2009 was \$20,700,000. Because the Commission determines that the equalized taxable value of the subject property is lower than the opinion of actual value given by the Taxpayer's appraiser, that opinion will not be considered further.

In support of its contention that taxable value of the subject property was not equalized with other similar parcels, the Taxpayer produced property record files showing the methods and facts used to determine the taxable value of other shopping malls and the testimony of witnesses. A review of Exhibits 15 through 73 shows that the Douglas County Assessor classified shopping malls as neighborhood shopping centers, community shopping centers, or regional shopping centers. The subject property is classified as a community shopping center. (E2:2). Other parcels classified as community shopping centers are described in Exhibit 48, known as Rockbrook Village, and Exhibits 53, 54, 55, 56, and 57, collectively known as Village Point.

A shopping center may be defined as "a group of commercial establishments planned, developed, owned, and managed as a unit related in location, size, and type of shops to the trade area it serves, it provides onsite parking relating to the types and sizes of its stores.." *Shopping Center Appraisal and Analysis*, Appraisal Institute, Second Edition 2009 p. 1. Shopping centers have the following characteristics:

- “1. Coordinated architectural treatments, concepts, or themes for the building or buildings providing space for tenants that are selected and managed as a unit for the benefit of all the tenants. A shopping center is not a miscellaneous or unplanned assemblage of separate or common-wall structures.

2. A unified site, suited to the type of center called for by the market. The site may permit the expansion of buildings and the addition of new buildings, uses, or parking structures if the trade area and other growth factors are likely to demand them.
3. An easily accessible location within the trade area with efficient entrances and exists for vehicular traffic as well as convenient and pleasurable access for transit passengers, where appropriate, and pedestrians from surrounding developments.
4. Sufficient onsite parking to meet demand generated by retail users. Parking should be arranged to enhance pedestrian traffic flow to the maximum advantage for retail shopping and to provide acceptable walking distances from parked cars to center entrances and to all individual stores.
5. Service facilities (screened from customers) for the delivery of merchandise.
6. Site improvements, such as landscaping, lighting, and signage, that create a desirable, attractive, and safe shopping environment.
7. A tenant mix and grouping that provide synergistic merchandising among stores and the widest possible range and depth of merchandise appropriate for the trade area and type of center.
8. Comfortable surroundings for shopping and related activities that create a strong sense of identity and place.” *Id* at p. 2.

Shopping centers may be described in terms of the size of the center, the anchor tenant, types of products sold in the center, site size, distance and travel time users will travel to reach it, and customer base. *Id* at p. 3. The economics of shopping centers requires consideration of the local economic area to identify trends and make projections concerning the major economic variables that affect the local economy, as related to the supply and demand for particular types of retail goods and services in the geographic area served by the shopping center from a specific site. *Id* at p. 49. Major economic variables affecting shopping centers are employment in the area analyzed as in several ways related to population, households, etc., and total population in the area as well as its composition and as households, families, and its characteristics such as

incomes, purchasing power, age, and potential growth. *Id* at p. 51-60. Despite the complexity of shopping centers and the factors that affect their value the cost, approach, sales comparison approach and income approach may be used to develop estimates of value. *Id* at, p. 171-195.

The income approach is considered particularly applicable to the valuation of shopping centers. *Id* at p 192. Taxable values of Rockbrook Village, the various components of Village Point, and the subject property were determined using the income approach. (E48:25-34 , E53:11, E54:12, E55:10, E56:9, and E13:12,13 &14).

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.

An estimate of value using the income approach may also be obtained based on gross income and a gross income multiplier. *Id* at 516-517. A gross income multiplier can be obtained by dividing the sale price of each comparable parcel by its potential gross income and analyzing the results. *Id* at 516. 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. *Id* at 516-517.

Taxable value of the subject property and the two other community shopping centers was determined using direct capitalization of a single year's income. The pertinent data for each parcel and the resulting values are shown in the following tables.

	Subject Bldg 1	Subject Bldg 2	Subject Bldg 3
Exhibit	13:7 & 12	13:8 & 13	13:9 & 14
Gross Area Sq Ft	87,000	11,151	296
Rented Area Sq Ft	87,000	11,151	296
Rent Rate/Sq Ft	\$30	\$30	\$45
V & C Loss	10%	5%	10%
Add Income	-0-	-0-	-0-

	Subject Bldg 1	Subject Bldg 2	Subject Bldg 3
Expense %	10%	8%	10%
Cap Rate	7.25%	7.25%	7.25%
Indicated Value	\$29,160,000	4,032,800	148,800.00
Value/Gross Sq Ft	\$335.17	\$361.65	\$502.70

	Rockbrook Bldg 1	Rockbrook Bldg 2	Rockbrook Bldg 3	Rockbrook Bldg 4	Rockbrook Bldg 5
Exhibit	48:3 & 25	48:4 & 26	48:5 & 27	48:6 & 28	48:7 & 29
Gross Area Sq Ft	28,640	16,000	16,000	16,760	8,000
Rented Area Sq Ft	28,640	16,000	16,000	16,760	8,000
Rent Rate/Sq Ft	\$10	\$10	\$10	\$10	\$10
V & C Loss	10%	10%	10%	10%	10%
Add Income	-0-	-0-	-0-	-0-	-0-
Expense %	15%	15%	15%	15%	15%
Cap Rate	9%	9%	9%	9%	9%
Indicated Value	\$2,434,400	\$1,360,000	\$1,360,000	\$1,424,600	\$680,000
Value/Gross Sq Ft	\$85	\$85	\$85	\$85	\$85

	Rockbrook Bldg 6	Rockbrook Bldg 7	Rockbrook Bldg 8	Rockbrook Bldg	Rockbrook Bldg 10
Exhibit	48:8 & 30	48:9 & 31	48:10 & 32	48:11 & 33	48:12 & 34
Gross Area Sq Ft	12,000	30,914	20,825	3,644	14,841
Rented Area Sq Ft	12,000	30,914	20,825	3,644	14,841
Rent Rate/Sq Ft	\$10	\$10	\$10	\$10	\$10
V & C Loss	10%	10%	10%	10%	10%
Add Income	-0-	-0-	-0-	-0-	-0-
Expense %	15%	15%	15%	15%	15%

	Rockbrook Bldg 6	Rockbrook Bldg 7	Rockbrook Bldg 8	Rockbrook Bldg	Rockbrook Bldg 10
Cap Rate	9%	9%	9%	9%	9%
Indicated Value	\$1,020,000	\$2,627,700	\$1,770,100	\$309,700	\$1,261,500
Value/Gross Sq Ft	\$85	\$85	\$85	\$84.99	\$85

	Village Pointe Lot 4 Bldgs 1 & 2	Village Pointe Lot 5 Bldgs 1, 2, & 3	Village Pointe Lot 1 Bldgs 1 & 2	Village Pointe Lot 2 Bldg 1
Exhibit	53:2, 3 & 11	54:2, 3, 4, & 12	55:2,3 & 10	56:2 & 9
Gross Area Sq Ft	43,869 19,745 ¹	31,960 6,293 14,599 ³	48,510 39,000 ⁵	42,472
Rented Area Sq Ft	60,057	48,952	77,339	38,703
Rent Rate/Sq Ft	\$17.82	\$23.01	\$23.51	\$26.00
V & C Loss	10%	10%	10%	10%
Add Income	-0-	-0-	-0-	-0-
Expense %	11.15%	11.85%	10.65%	11.05%
Cap Rate	9%	9%	9%	9%
Indicated Value	\$9,508,900	\$9,929,100	\$16,246,000	\$8,950,800
Value/Gross Sq Ft	\$149.48 ²	\$187.87 ⁴	\$185.65 ⁶	\$210.75 ⁷

1. Total Gross Sq Ft 63,614
2. \$149.48 ($\$9,508,900 \div 63,614 = \149.48)
3. Total Gross Sq Ft 52,852
4. \$187.87 ($\$9,929,100 \div 52,852 = \187.87)
5. Total Gross Sq Ft 87,510
6. \$185.65 ($\$16,246,000 \div 87,510 = \185.65)
7. \$210.75 ($\$8,950,800 \div 42,472 = \210.75)

As noted above, taxable values of the subject property and the other two community shopping centers were determined by the Douglas County Assessor's office using the income approach. Rents that can be charged are affected by the demographics of the area served by the

shopping center and the types of tenants in the center. See, *Shopping Center Appraisal and Analysis* supra. In some respects the two are intertwined. A shopping area with high incomes could be expected to support specialty stores with higher priced goods. Tenants with specialty or higher priced goods will attract higher income individuals. The evidence is that the types of tenants in the subject property and Lots 1 & 5 of Village Pointe are very similar, that is high end national chains or high end local retailers with one or more restaurants.

The subject property essentially has two single story free standing buildings with open air parking between them. (E10:120) The design of Lots 1 & 5 in Village Pointe is similar. (E9:3). The income, ages, and other demographic factors of the population around a shopping center are factors in the estimation of the dollar amount of sales at the center which in turn affects rents a tenant might pay. The demographics of the area around the subject property are similar to the demographics around Village Pointe. Because the rent and risk components of the income approach that would affect valuation are comparable for both the subject property and Lots 1 & 5 of Village Pointe, similarity in the income, vacancy, and collection loss and capitalization components of the income approach is expected. However, comparison of the elements of the income approach as set out in the tables above show substantial disparities.

Rents at the subject property are estimated at \$30 per square foot on gross square footage. Rents at Lot 5 of Village Pointe are estimated at \$23.01 on rental square feet or 92.6% of gross square footage ($48,952 \div 52,852 = .926$). Rents at Lot 1 of Village Pointe are estimated at \$23.51 on rental square feet or 88.3% of gross square footage ($77,339 \div 87,510 = .883$).

The vacancy and collection loss for building 2 on the subject property is estimated at 5%, whereas the vacancy and collection loss for all other buildings at the subject property and lots 1 & 5 of Village Pointe is 10%.

The capitalization rate used for all buildings at the subject property is 7.25%. The Capitalization rate used for all buildings at Village Pointe is 9%.

The evidence is that all leases at the subject property and Lots 1 & 5 at Village Pointe provide for reimbursement by tenants to the owner of expenses for insurance, taxes, repairs, common area maintenance, and other expenses. A cost actually born by the owner of the subject property and Lots 1 & 5 of Village Pointe is management. The expense ratio estimated for buildings 1 and 3 at the subject property is 10%. The expense ratio for building 2 at the subject property is estimated at 8%. The expense ratio estimated for Lot 5 at Village Pointe is 11.85% and for Lot 1 at Village Pointe is 10.65%.

The effect of each difference in the components of the income approach between the subject property and Lots 1 and 5 at Village Pointe is to increase the estimated value for the subject property derived from use of the approach. Higher estimated rents increase income. The application of a given rent to gross area rather than rentable area increases income. A lower vacancy rate reduces a deduction and increases income. A lower expense ratio lowers a deduction and increases income. Use of a lower capitalization rate increases the value estimate at any given level of income. The effects as described are demonstrated by the comparison of values per gross square foot derived from the values obtained by the County Assessor from use of the income approach in the manner described. Values per gross square foot of building 1 of the subject property are \$335.17 per gross square foot, and at building 2 \$361.65 per gross square

foot. The values per gross square foot of buildings on Lots 5 and 1 of Village Pointe are \$187.87 and \$185.65 respectively. The value per gross square foot of building 2 on the subject property is nearly double the value per gross square foot of the building on Lot 1 of Village Pointe.

Actual value of the subject property as estimated by the County Assessor and adopted by the County Board is near the purchase price of the subject property, \$36,000,000, in February of 2007, however, it is apparent that value as adopted by the County Board is not the equalized taxable value of the subject property. The disparities shown in application of the income approach as discussed above support a conclusion that value as estimated for the subject property by the County Assessor and adopted by the County Board is grossly excessive when compared to the valuation of similar parcels, and is the result of systematic will or failure of a plain legal duty, and not mere error of judgement. The Taxpayer is entitled to relief.

The Taxpayer is entitled to have the contribution to value of buildings 1 & 2 on the subject property equalized with the contribution to value of the buildings on Lot 1 of Village Pointe. Building 3 on the subject property is smaller than any building found at Village Pointe. There is no evidence that its contribution to value is not equalized with other buildings in shopping centers. Equalized taxable value of the subject property is the total gross square feet of buildings 1 and 2 multiplied by the value per gross square foot of the buildings on Lot 1 of Village Pointe plus the contributory value of building 3 at total of \$18,369,733 ($87,000 + 11,151 = 98,151 \times \$185.65 = \$18,221,733 + \$148,000 = \$18,369,733$).

**V.
CONCLUSIONS OF LAW**

1. The Commission has subject matter jurisdiction in this appeal.
2. The Commission has jurisdiction over the parties to this appeal.
3. The Taxpayer has produced competent evidence that the County Board failed to faithfully perform its official duties and to act on sufficient competent evidence to justify its actions.
4. The Taxpayer has adduced sufficient, clear and convincing evidence that the decision of the County Board is unreasonable or arbitrary and the decision of the County Board should be vacated and reversed.

**VI.
ORDER**

IT IS ORDERED THAT:

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

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Total value	<u>\$18,369,733.00.</u>
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3. For the purpose of complying with the requirements of section 77-1303 of Nebraska Statutes the County Assessor may make such allocation of the the total value of the subject property between lot and improvements as deemed appropriate.

3. This decision, if no appeal is timely filed, shall be certified to the Douglas County Treasurer, and the Douglas County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (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 November 24, 2010.
- Signed and Sealed. November 24, 2010.

Nancy J. Salmon, Commissioner

Robert W. Hotz, Commissioner

William C. Warnes, 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 (Reissue 2009). 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) (Reissue 2009).

The Commission is authorized to review decision of a County Board of Equalization determining taxable values. Neb. Rev. Stat. §77-5007 (Reissue 2009). 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.

Wm. R. Wickersham, Commissioner