

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

ROBERT N. MAYO,)	
)	
Appellant,)	Case No. 07R-037
)	
v.)	DECISION AND ORDER AFFIRMING
)	THE DECISION OF THE KIMBALL
KIMBALL COUNTY BOARD OF)	COUNTY BOARD OF EQUALIZATION
EQUALIZATION,)	
)	
Appellee.)	

The above-captioned case was called for a hearing on the merits of an appeal by Robert N. Mayo ("the Taxpayer") to the Tax Equalization and Review Commission ("the Commission"). The hearing was held in the Hampton Inn, 301 W Hwy 26, Scottsbluff, Nebraska, on May 22, 2008, pursuant to an Order for Hearing and Notice of Hearing issued February 15, 2008. Commissioners Wickersham, Warnes, and Hotz were present. Commissioner Salmon was excused from participation by the presiding hearing officer. The appeal was heard by a panel of three commissioners pursuant to 442 Neb. Admin. Code, ch. 4, §11 (10/07). Commissioner Wickersham was the presiding hearing officer.

Robert N. Mayo was present at the hearing without legal counsel.

David L. Wilson, County Attorney for Kimball County, Nebraska, was present as legal counsel for the Kimball County Board of Equalization ("the County Board").

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

The Commission is required to state its final decision and order concerning an appeal, with findings of fact and conclusions of law, on the record or in writing. Neb. Rev. Stat. §77-5018 (Cum. Supp. 2006). The final decision and order of the Commission in this case is as follows.

**I.
ISSUES**

The Taxpayer has asserted that actual value of the subject property as of January 1, 2007, is less than actual value as determined by the County Board. The issues on appeal related to that assertion are:

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

The actual value of the subject property on January 1, 2007.

**II.
FINDINGS OF FACT**

The Commission finds and determines that:

1. The Taxpayer has a sufficient interest in the outcome of the above captioned appeal to maintain the appeal.
2. The parcel of real property to which this appeal pertains is described as Lots 1 & 2 Block 1, Huff's First Addition, Kimball, Kimball County, Nebraska, ("the subject property").
3. Actual value of the subject property placed on the assessment roll as of January 1, 2007, ("the assessment date") by the Kimball 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 Block 1, Huff's First Addition, Kimball, Kimball County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$18,030.00	\$9,000.00	\$18,030.00
Improvement	\$184,835.00	\$165,000.00	\$182,370.00
Total	\$202,865.00	\$174,000.00	\$200,400.00

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. The Taxpayer was served with a Notice in Lieu of Summons and duly answered that Notice.
7. An Order for Hearing and Notice of Hearing issued on February 15, 2008, set a hearing of the appeal for May 22, 2008, at 12:00 p.m. MDST.
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 the subject property as of the assessment date for the tax year 2007 is:

Land value	\$ 18,030.00
Improvement value	<u>\$182,370.000</u>
Total value	<u>\$200,400.00.</u>

**III.
APPLICABLE LAW**

1. Subject matter jurisdiction of the Commission in this appeal is over all questions necessary to determine taxable value. Neb. Rev. Stat. 77-5016 (7) (Supp. 2007).

2. “Actual value is the most probable price expressed in terms of money that a property will bring if exposed for sale in the open market, or in an arm’s length transaction, between a willing buyer and a willing seller, both of whom are knowledgeable concerning all the uses to which the real property is adapted and for which the real property is capable of being used. In analyzing the uses and restrictions applicable to real property the analysis shall include a full description of the physical characteristics of the real property and an identification of the property rights valued.” Neb. Rev. Stat. §77-112 (Reissue 2003).
3. Actual value may be determined using professionally accepted mass appraisal methods, including, but not limited to, the (1) sales comparison approach using the guidelines in section 77-1371, (2) income approach, and (3) cost approach. Neb. Rev. Stat. §77-112 (Reissue 2003).
4. “Actual value, market value, and fair market value mean exactly the same thing.”
Omaha Country Club v. Douglas County Board of Equalization, et al., 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).
5. Taxable value is the percentage of actual value subject to taxation as directed by section 77-201 of Nebraska Statutes and has the same meaning as assessed value. Neb. Rev. Stat. §77-131 (Reissue 2003).
6. All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation. Neb. Rev. Stat. §77-201(1) (Cum. Supp. 2006).

7. A presumption exists that the County Board has faithfully performed its duties and has acted on competent evidence. *City of York v. York County Bd. Of Equalization*, 266 Neb. 297, 64 N.W.2d 445 (2003).
8. The presumption in favor of the county board may be classified as a principle of procedure involving the burden of proof, namely, a taxpayer has the burden to prove that action by a board of equalization fixing or determining valuation of real estate for tax purposes is unauthorized by or contrary to constitutional or statutory provisions governing taxation. *Gordman Properties Company v. Board of Equalization of Hall County*, 225 Neb. 169, 403 N.W.2d 366 (1987).
9. The presumption disappears if there is competent evidence to the contrary. *Id.*
10. The order, decision, determination, or action appealed from shall be affirmed unless evidence is adduced establishing that the order, decision, determination, or action was unreasonable or arbitrary. Neb. Rev. Stat. §77-5016 (8) (Cum. Supp. 2006).
11. Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence. See, e.g. *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb.App. 171, 645 N.W.2d 821 (2002).
12. "Clear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved." *Castellano v. Bitkower*, 216 Neb. 806, 812, 346 N.W.2d 249, 253 (1984).
13. A decision is "arbitrary" when it is made in disregard of the facts and circumstances and without some basis which could lead a reasonable person to the same conclusion. *Phelps Cty. Bd. of Equal. v. Graf*, 258 Neb 810, 606 N.W.2d 736 (2000).

14. A decision is unreasonable only if the evidence presented leaves no room for differences of opinion among reasonable minds. *Pittman v. Sarpy Cty. Bd. of Equal.*, 258 Neb 390, 603 N.W.2d 447 (1999).
15. “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 taxpayer establishes the Board's valuation was unreasonable or arbitrary. *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).
17. A Taxpayer, who only produced evidence that was aimed at discrediting valuation methods utilized by county assessor, failed to meet burden of proving that value of property was not fairly and proportionately equalized or that valuation placed upon property for tax purposes was unreasonable or arbitrary. *Beynon v. Board of Equalization of Lancaster County*, 213 Neb. 488, 329 N.W.2d 857 (1983).
18. Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued. Cf. *Lincoln Tel. and Tel. Co. v. County Bd. Of Equalization of York County*, 209 Neb. 465, 308 N.W.2d 515 (1981); *Arenson v. Cedar County*, 212 Neb. 62, 321 N.W.2d 427 (1982) (determination of equalized values); and *Josten-Wilbert Vault Co. v. Board of Equalization for Buffalo County*, 179 Neb. 415, 138 N.W.2d 641 (1965) (determination of actual value).

IV. ANALYSIS

The subject property is an improved residential parcel. The improvements are a 2,722 square foot residence with an attached 576 square foot garage, 1,066 square feet of partition finished basement and several small sheds. (E11:11).

A form 521 filed at the time of purchase indicates that the Taxpayer purchased the subject property in 2005 for \$195,000.00. (E12:1).

The Taxpayer had advised the County Assessor in 2006 that payment for personal property was included in the purchase. (E13). The Taxpayer also testified that the purchase of personal property was included in the purchase price shown on the form 521. A property list that the Taxpayer did not consider part of the real estate which had been prepared during negotiations was received in evidence as Exhibit 10 page 5. The values placed on the list were known only to the Taxpayer at the time of closing. Several items on the list such as the two sheds (items 18 and 19) are improvements to the real estate. One item, a leather sofa, was the subject of a separate transaction with the Taxpayer's wife. Items such as light fixtures and carpeting are generally considered fixtures and a part of the real estate. The County Assessor testified that she would consider the built in dishwasher to be a fixture. The Taxpayer testified that part of the rationale for purchase of the subject property was the inclusion of personal property so that he and his wife could move in quickly without waiting to purchase items for use and enjoyment of the premises. One of the contentions of the Taxpayer is that taxable value of the subject property should be determined by its 2005 purchase price, that price being the \$195,000.00 paid less the amount paid for personal property.

It is true that the purchase price of property may be taken into consideration in determining the actual value thereof for assessment purposes, together with all other relevant elements pertaining to such issue; however, standing alone, it is not conclusive of the actual value of property for assessment purposes. Other matters relevant to the actual value thereof must be considered in connection with the sale price to determine actual value. Sale price is not synonymous with actual value or fair market value. *Forney v. Box Butte County Bd. of Equalization*, 7 Neb.App. 417, 582 N.W.2d 631 (1998). If however, the evidence discloses the circumstances surrounding the sale and shows that it was an arm's length transaction between a seller who was not under compulsion to sell and a buyer who was not compelled to buy, it should receive strong consideration.” *Potts v. Board of Equalization of Hamilton County*, 213 Neb. 37, 48, 328 N.W.2d 175, 328 (1982).

There is evidence that the sale and purchase of the subject property was not an arm's length transaction because the seller may have been motivated by pressing financial needs. The Taxpayer testified that his allocation of value to the personal property was made without any knowledge of the seller or anyone else. The list of personal property prepared by the Taxpayer contains items that could properly be considered real property. The evidence presented is an insufficient basis for a determination that actual value of the subject property for the tax year 2007 could be determined by reference to a 2005 purchase price with a deduction.

For tax year 2007, actual value of the subject property was determined by the County Board based on the cost approach. (E1:1 and 11:11 & 12). Use of 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.

Only physical depreciation was deducted from the replacement cost new calculated for the subject property. (E11:11). “Physical deterioration is the loss in value due to wear and tear in service and the disintegration of an improvement from the forces of nature. All man made objects begin a slow process of deterioration as soon as they are created. . . Among the most common causes of physical deterioration are wear and tear through use, breakage, negligent care, infestation of termites, dry rot, moisture, and the elements. *Property Assessment Valuation*, 2nd Ed., International Association of Assessing Officers, 1996, pp. 154.

The Taxpayer asserted that the contribution to actual value of the land component was not properly determined. The Taxpayer showed that the contribution to actual value for the land component of two larger neighboring parcels was less than the contribution to value calculated for the two lots in the subject property. The County Assessor testified that the neighboring parcels were subject to a flooding hazard and there were considered to make lessor contribution

to value than the lots contained in the subject property. The Taxpayer presented evidence of the sale of three unimproved lots. (E7). The County Assessor testified that the unimproved lots were not comparable to the lots which are the land component of the subject property if it had been unimproved because they were not on paved streets and had less desirable locations. When considering the land component of real property, “comparable” properties are those that share similar use (residential, commercial industrial, or agricultural), physical characteristics (size, shape, and topography), and location. *Property Assessment Valuation*, 2nd Ed., International Association of Assessing Officers, 1996, p. 70 - 76. Based on the evidence presented the Commission cannot conclude that the vacant lots described in Exhibit 7 are comparable to the lots of the subject property.

The Taxpayer also contended generally that actual value of the subject property could not be determined based on its estimated replacement cost. Use of the cost approach is one of the mass appraisal techniques specifically recognized in Nebraska Statutes. Neb. Rev. Stat. §77-112 (Reissue 2003). Further the analysis does not stop at the calculation of a replacement cost since depreciation is deducted. In this appeal the County Assessor testified that the amount of physical depreciation taken was derived from an analysis of the market as related to the age of the subject property. Use of the cost approach in the manner described for the subject property conforms to generally accepted mass appraisal techniques and is an acceptable method for estimating actual value of the subject property.

The Taxpayer also asserted that various elements or factors to be considered if the cost approach was used were not correct as applied to the subject property. The Taxpayer testified that construction of the residence was not "masonry." The Taxpayer testified that the residence

had a frame construction with a brick or stone veneer. The Marshall and Swift Residential Cost Manual was used to estimate replacement cost. "Masonry construction" is described in that manual as concrete block, brick or stone veneer on block load bearing walls. *Marshall & Swift Residential Cost Handbook, Marshall & Swift/ Boeckh, LLC, (6/2005), p. 7.* Wood-frame construction utilizes lightweight lumber or metal studs for its structural system. *Id.* The County Assessor testified that her understanding was that a residence or brick veneer was considered to be masonry construction. In general the cost per square foot to construct a masonry residence exceeds the cost per square foot to construct a stud framed residence. See *Supra* p VG-13. The Taxpayer testified that the term "CmBrick" as shown in Exhibit 11 at page 11 was not appropriate because the brick or stone veneer was not "commercial brick." The County Assessor testified that the abbreviation "CmBrick" meant common brick" The term "common brick" is used in the Marshall & Swift Residential Cost Handbook associated with masonry construction and cost factors are supplied for that type of construction. *Id.* Residences with stud framed construction have cost factors for Brick Veneer and Stone Veneer associated with that type of construction. *Id.* The cost factor used by the County board for a "masonry" residence with a "CmBrick" wall is lower than the cost factor shown in the Marshall & Swift manual for a stud frame residence of its size with a brick veneer. *Id.* The County Assessor testified that cost tables were provided by a computer service. The Commission is unable to determine what adjustment might be made to replacement cost new to reflect a stud framed residence with a brick veneer. The Taxpayer testified that the word "shingle" was ambiguous in Exhibit 11 at page 11, that the term as used could refer to shake shingles for example and that the roof on the residence was in fact composition shingles. The County Assessor testified that the term "shingle" as used in

Marshall and Swift meant “composition shingles.” Various roof covers are noted as a basis for adjustment to the cost per square foot of residences. See, *Id.* A roof cover that is “composition shingle” requires a reduction in cost. *Id.* A reduction in cost is associated with use of the term “shingle” in the calculation of cost of construction made by the County Board. (E11:11).

The Taxpayer must produce evidence of actual value as of the assessment date even if the criticisms of the use of the cost approach are considered well taken. See, *Beynon v. Board of Equalization of Lancaster County*, 213 Neb. 488, 329 N.W.2d 857 (1983). As noted above the Taxpayers reliance on the amount paid on purchase in 2005 is misplaced.

The Taxpayer also asserted taxable value of the subject property was not equalized with the taxable value of neighboring parcels. The parcels the Taxpayer presented as comparable parcels are described in Exhibits 5 & 6. The County Assessor testified that those parcels should not be considered as comparable to the subject property due to differences in age, size and other characteristics of the lots and improvements. “Comparable properties” share similar quality, architectural attractiveness (style), age, size, amenities, functional utility, and physical condition. *Property Assessment Valuation*, 2nd Ed., International Association of Assessing Officers, 1996, p. 98. The following table shows various characteristics of the subject property and the parcels offered as comparables.

Descriptor	Subject	Comp 1	Comp 2
Exhibit	E:4	E:5	E:6
Location	712 S Howard	802 S. Elm	210 W 9 th
Condition	very good		
Quality	very good		
Yr Built	1954		
Ext Wall 1	Cm Brick		
Base Area	2,722	2,056	1,834.00
Total Area	2,722	1,628	1,834.00
Style	1 story	1 story	1 story
Roof	shingle		
Heating/cooling	Wrm Cool		
Basement	1,066	1,628	1,800
Part Finish	1,066		
Walkout			
Bedrooms	3		
Plumbing fixtures	12		
Garage Type	Attached	Detached	Attached
Garage Area	576	576	576
Misc Imp	4 tool sheds and 5 porches	porch	2 porches
Fireplaces	3 1 story		

The Commission, based on the evidence presented, determines that the parcels described in Exhibits 5 and 6 are not comparable to the subject property.

Equalization to obtain proportionate valuation requires a comparison of the ratio of assessed to actual value for the subject property and comparable property. *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623, (1999). When a parcel is improved it is unnecessary to consider the contribution to value of each component to achieve equalization. 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). 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). A Taxpayer, who only produced evidence that was aimed at discrediting valuation methods utilized by county assessor, failed to meet burden of proving that value of property was not fairly and proportionately equalized or that valuation placed upon property for tax purposes was unreasonable or arbitrary. *Beynon v. Board of Equalization of Lancaster County*, 213 Neb. 488, 329 N.W.2d 857 (1983). Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued. Cf. *Lincoln Tel. and Tel. Co. v. County Bd. Of Equalization of York County*, 209 Neb. 465, 308

N.W.2d 515 (1981); *Arenson v. Cedar County*, 212 Neb. 62, 321 N.W.2d 427 (1982)

(determination of equalized values).

The only evidence of value for the parcels offered as comparable assessed value was the assessed or taxable value of each parcel. 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 Taxpayer in this case asks the Commission 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*, Twelfth Edition, Appraisal Institute, Chs 17, 18, 19, (2001). 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.

There is no evidence on which to make a comparison of the ratio of taxable to actual value for the subject property or the parcels offered as comparables. The Taxpayer has not proven a basis for relief on his equalization claim.

The Taxpayer has not demonstrated by clear and convincing evidence that the decision of the County Board was unreasonable or arbitrary. The evidence does not show that the County

Board failed to faithfully perform its duties or act on sufficient competent evidence to justify its action as it determined the actual value of the subject property.

**V.
CONCLUSIONS OF LAW**

1. The Commission has subject matter jurisdiction in this appeal.
2. The Commission has jurisdiction over the parties to this appeal.
3. The Taxpayer has 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 decision of the County Board is unreasonable or arbitrary and the decision of the County Board should be affirmed.

**VI.
ORDER**

IT IS ORDERED THAT:

1. The decision of the County Board determining actual value of the subject property as of the assessment date, January 1, 2007, is affirmed.
2. Actual value, for the tax year 2007, of the subject property is:

Land value	\$ 18,030.00
Improvement value	<u>\$182,370.00</u>
Total value	<u>\$200,400.00.</u>

3. This decision, if no appeal is timely filed, shall be certified to the Kimball County Treasurer, and the Kimball County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Cum. Supp. 2006).
4. Any request for relief, by any party, which is not specifically provided for by this order is denied.
5. Each party is to bear its own costs in this proceeding.
6. This decision shall only be applicable to tax year 2007.
7. This order is effective for purposes of appeal on June 19, 2008.

Signed and Sealed. June 19, 2008.

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 (CUM. SUPP. 2006), OTHER PROVISIONS OF NEBRASKA STATUTES, AND COURT RULES.

I concur in the result.

The Commission is an administrative agency of state government. See, *Creighton St. Joseph Regional Hospital v. Nebraska Tax Equalization and Review Commission*, 260 Neb. 905, 620 N.W.2d 90 (2000). As an administrative agency of state government the Commission has only the powers and authority granted to it by statute. Id. The Commission is authorized by statute to review appeals from decisions of a county board of equalization, the Tax Commissioner, and the Department of Motor Vehicles. Neb. Rev. Stat. §77-5007 (Supp. 2007).

In general the Commission may only grant relief on appeal if it is shown that the order, decision, determination, or action appealed from was unreasonable or arbitrary. Neb. Rev. Stat. §77-5016(8) (Supp. 2007).

Nebraska courts have held that the provisions of section 77-5016(8) of the Nebraska Statutes create a presumption that the County Board has faithfully performed its official duties and has acted upon sufficient competent evidence to justify its actions. *City of York v. York County Board of Equalization*, 266 Neb. 297, 664 N.W.2d 445 (2003). The presumption cited in *York* has roots in the early jurisprudence of Nebraska. See, *State v. Savage*, 65 Neb. 714, 91 N.W. 716 (1902) (citing *Dixon Co. v. Halstead*, 23 Neb. 697, 37 N.W. 621 (1888) and *State v. County Board of Dodge Co.* 20 Neb. 595, 31 N.W. 117 (1887)). As early as 1903 Nebraska Statutes provided for review of County Board assessment decisions by the district courts. Laws 1903, c. 73 §124. The statute providing for review did not state a standard for that review. *Id.*

In 1959 the legislature provided a statutory standard for review by the district courts of county board of equalization, assessment decisions. 1959 Neb Laws, LB 55, §3. The statutory standard of review required the district Court to affirm the decision of the county board of equalization unless the decision was arbitrary or unreasonable or the value as established was too low. *Id.* The statutory standard of review was codified in section 77-1511 of the Nebraska Statutes. Neb. Rev. Stat. §77-1511 (Cum. Supp. 1959). Review of district court decisions made pursuant to section 77-1511 was de novo. *Future Motels, Inc. v. Custer County Board of Equalization*, 252 Neb. 565, 563 N.W.2d 785 (1997). The presumption functioned as a standard of review. See, e.g. *Gamboni v. County of Otoe*, 159 Neb. 417, 67 N.W.2d 492 (1954).

The Tax Equalization and Review Commission was created in 1995. 1995 Neb. Laws, LB 490 §153. Section 77-1511 of the Nebraska Statutes was made applicable to review of county board of equalization assessment decisions by the Commission. *Id.* In 2001 section 77-1511 of Nebraska Statutes was repealed. 2001 Neb. Laws, LB 465, §12. After repeal of section 77-1511 the standard for review to be applied by the Commission in most appeals was stated in section 77-5016 of the Nebraska Statutes. Section 77-5016 requires a finding that the decision being reviewed was unreasonable or arbitrary. The basis for that determination is the evidence presented to the Commission in a new record. See, Neb. Rev. Stat. §77-5016 (Cum. Supp. 2006). Commission decisions are reviewed for error on the record. See, Neb. Rev. Stat. 77-5019(5) (Cum. Supp. 2006). The statutory basis for Commission review and the review of its decisions is analogous to district courts review of decisions made by administrative agencies. The basis for district court review of decisions made by administrative agencies is de novo on the record. *Tyson Fresh Meats v. State*, 270 Neb. 535, 704 N.W.2d 788 (2005). The decisions of the district court examining the administrative decision are reviewed for error on the record. *Thorson v. Nebraska Dept. of Health & Human Servs.*, 274 Neb. 322, 740 N.W.2d 27 (2007). The similarities are enough to suggest that the framework for review applied to district court decisions could be made applicable to decisions of the Commission.

Many appeals of decisions made pursuant to section 77-1511 were decided without reference to the statutory standard of review applicable to the district courts. See, e.g. *Grainger Brothers Company v. County Board of Equalization of the County of Lancaster*, 180 Neb. 571, 144 N.W.2d 161 (1966). As noted however review was de novo and the reviewing court was not bound by the standard of review imposed on district court. *Loskill v. Board of Equalization of*

Adams County, 186 Neb. 707, 185 N.W.2d 852 (1971). In *Hastings Building Co., v. Board of Equalization of Adams County*, 190 Neb. 63, 206 N.W.2d 338 (1973), the Nebraska Supreme Court acknowledged that two standards of review existed for the district courts; one statutory, and the other judicial stated as a presumption that the county board of equalization faithfully performed its official duties and acted upon sufficient competent evidence. No attempt was made by the *Hastings* Court to reconcile the two standards of review that were applicable to the district courts.

The possible results from application of the presumption and the statutory standard of review by the Commission are: (1) the presumption is not overcome and the statutory standard is not overcome; (2) the presumption is overcome and the statutory standard is not overcome; (3) the presumption is not overcome and the statutory standard is overcome; (4) and finally the presumption is overcome and the statutory standard is overcome. The first possibility does not allow a grant of relief, neither standard of review has been met. If the presumption is overcome the statutory standard remains. See, *City of York v. York County Bd of Equal.*, 266 Neb. 297, 664 N.W.2d 445 (2003). The second possibility does not therefore allow a grant of relief even though the presumption is overcome. The third possibility requires analysis. The presumption and the statutory standard of review are different legal standards, one remaining after the other has been met. See. *City of York v. York County Bd of Equal.*, 266 Neb. 297, 664 N.W.2d 445 (2003). The burden of proof to overcome the presumption is competent evidence. *City of York*, *Supra*. Clear and convincing evidence is required to show that a county board of equalization's decision was unreasonable or arbitrary. See, e.g. *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb.App. 171, 645 N.W.2d 821 (2002). Competent evidence that the county board of

equalization failed to perform its duties or act upon sufficient competent evidence is not always evidence that the county board of equalization acted unreasonably or arbitrarily because the statutory standard of review remains even if the presumption is overcome. *City of York, Supra*. Clear and convincing evidence that a county board of equalization's determination, action, order, or decision was unreasonable or arbitrary, as those terms have been defined, may however overcome the presumption that the county board of equalization faithfully discharged its duties and acted on sufficient competent evidence. In any event the statutory standard has been met and relief may be granted. Both standards of review are met in the fourth possibility and relief may be granted. Each analyses of the standards of review allowing a grant of relief requires a finding that the statutory standard has been met.

Use of the presumption as a standard of review has been criticized. See, G. Michael Fenner, *About Presumptions in Civil Cases*, 17 *Creighton L. Rev.* 307 (1984). In the view of that author the presumption should be returned to its roots as a burden of proof. *Id.* Nebraska's Supreme Court acknowledged the difficulty of using two standards of review and classified the presumption in favor of the county board of equalization as a principle of procedure involving the burden of proof, namely, a taxpayer has the burden to prove that action by a board of equalization fixing or determining valuation of real estate for tax purposes is unauthorized by or contrary to constitutional or statutory provisions governing taxation. See, *Gordman Properties Company v. Board of Equalization of Hall County*, 225 Neb. 169, 403 N.W.2d 366 (1987). Use of the *Gordman* analysis allows consideration of both the presumption and the statutory standard of review without the possible conflict or difficulties inherent in the application of two standards of review. The *Gordman* analysis requires the Commission to consider all of the evidence

produced in order to determine whether there is clear and convincing evidence that the decision, action, order, or determination being reviewed was unreasonable or arbitrary. It is within that framework that I have analyzed the evidence.

Wm R. Wickersham, Commissioner