

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

BARBARA J. GALUSHA,)	
)	
Appellant,)	Case No. 07R-939
)	
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 Barbara J. Galusha ("the Taxpayer") to the Tax Equalization and Review Commission ("the Commission"). The hearing was held in the Commission's Hearing Room on the sixth floor of the Nebraska State Office Building in the City of Lincoln, Lancaster County, Nebraska, on June 2, 2009, pursuant to an Order for Hearing and Notice of Hearing issued February 11, 2009 as amended by an Order dated April 2, 2009. Commissioners Wickersham and Hotz were present. Commissioner Wickersham was the presiding hearing officer. Commissioner Warnes was excused from participation by the presiding hearing officer. Commissioner Salmon was absent. The appeal was heard by a quorum of a panel of the Commission.

Barbara J. Galusha was present at the hearing. No one 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 (Cum. Supp. 2008). 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 ("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, 2007, ("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:

Description: Lot 1 Block 0 ODonnell Center, Omaha, Douglas County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$74,800.00	\$30,000.00	\$74,800.00
Improvement	\$165,300.00	\$171,074.00	\$165,300.00
Total	\$240,100.00	\$201,074.00	\$240,100.00

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 February 11, 2009, as amended by an Order issued on April 2, 2009, set a hearing of the appeal for June 2, 2009, at 11:00 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. Actual value of the subject property as of the assessment date for the tax year 2007 is:

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Land value \$ 74,800.00

Improvement value \$158,700.00

Total value \$233,500.00.

**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) (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 the county assessor, failed to meet the burden of proving that value of property was not fairly and proportionately equalized or that valuation placed upon property for tax purposes was unreasonable or arbitrary. *Beynon v. Board of Equalization of Lancaster County*, 213 Neb. 488, 329 N.W.2d 857 (1983).
18. A Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued. Cf. *Josten-Wilbert Vault Co. v. Board of Equalization for Buffalo County*, 179 Neb. 415, 138 N.W.2d 641 (1965).

IV. ANALYSIS

The subject property is an improved residential parcel. The 2,658 square foot residence with 645 square foot unfinished basement, and a 574 square foot attached garage was built in

1932. (E3:1) There are 2.67 acres in the parcel. (E3:2). The subject property was purchased by the Taxpayer in 1994. At the time of purchase the residence was being used as a retreat center. The Taxpayer had the commercial kitchen remodeled and redid the plumbing and electrical wiring. The Taxpayer has made all of the repairs or alterations necessary to bring the residence up to code.

The Taxpayer testified that the contribution to actual value of the residence was affected by its condition, specifically the need for a new roof and gutters, trimming of trees, and water damage to the ceiling and walls in two rooms. The Taxpayer submitted invoices for \$18,274 in roof repairs paid in December of 2007 and January of 2008, \$3,840 gutter repairs paid in May of 2008, and \$2,800 for tree trimming paid in November of 2007. (E6:3, 7 & 6). The Taxpayer asserted that various corrections to the inventory of characteristics for the residence should be made resulting in an indicated contribution to actual value of \$146,935. (E6:1). The Taxpayer further argued that the actual cost of repairs as stated above should then be deducted from the revised indicated contribution to actual value of the residence resulting in a net contribution of \$122,021. (E6:2). The Taxpayer then added \$74,800 as the contribution to actual value of the land for a total indicated actual value of \$196,821.

An appraiser employed by the County Assessor (“Appraiser”) testified that actual value of the subject property as determined by the County Board was derived from application of a computer program. The program can be referred to generically as a computer assisted mass appraisal (CAMA) program. The Appraiser testified that development of the database on which the program relies is a multi-step process. The first step is to inventory the physical characteristics and valuation factors of each parcel for which value is to be determined. Page 1

of Exhibit 3 is an example of an inventory. Page 4 of Exhibit 3 shows FIRE__METAL, GARAGE ATTACHED, CENTRAL H & A, BATHS, SF, and BASE 8'BLK UNFIN COND_GD, PORCH ENCL SCREEN as physical characteristics and Market Age, Constant, and NBHD as valuation factors, as items which affected value as determined in the model as applied to the subject property. The next step is to identify sold parcels and place the information concerning the sales in a database with the inventory information. The data for sold parcels is then analyzed to determine how selected physical characteristics or valuation factors found in the inventory affected sales prices. The analytical technique used is known as multiple regression analysis. See, *The Appraisal of Real Estate*, 12th Edition, Appraisal Institute (2001) pp. 684-685. After the database is analyzed and valuation factors are assigned to physical characteristics and valuation factors, the derived values are applied to the physical characteristics and valuation factors found in the inventory of a sold parcel. An example of the resulting calculation is shown in Exhibit 3 at page 4. The value indicated by the model is then compared to the sale price of each sold parcel. The resulting ratio is a sales assessment ratio. If the model indicates a value of \$80,000 and the parcel sold for \$100,000 the sales assessment ratio is .80 ($\$80,000 \div \$100,000 = .80$). A ratio of .80 indicates that the model under-assesses parcels. If the model indicates a value of \$120,000 and the parcel sold for \$100,000 the sales assessment ratio is 1.20 ($\$120,000 \div \$100,000 = 1.20$). A ratio of 1.2 indicates that the model over-assesses parcels. The sales assessment ratios for a neighborhood are evaluated to determine if, on a statistical basis, values indicated by the model meet standards for valuation. If adjustments to the values indicated by the model must be made to meet valuation standards, they are made by the addition of a constant amount or multiplication of the indicated contribution to value by a neighborhood factor or both.

After adjustments to the model have been made, the values established by the model are applied to unsold parcels to estimate their actual values. See, *Mass Appraisal of Real Property*, International Association of Assessing Officers, ch 4, (1999).

After an indication of value is developed using the model, that value is evaluated against the sales prices of similar parcels as found in the County Assessor's database. An example of the information used in that evaluation is shown in Exhibit 2 at page 5. The Residential Sales Comparables Inventory and Account Value Summary as shown in Exhibit 2 at page 5 does not demonstrate use of the sales comparison approach, it merely shows sales of similar parcels and allows the user to determine whether actual value as determined by the model is acceptable with those sales as references.

The model is obviously dependent on an accurate inventory of physical characteristics and valuation factors for sold and unsold parcels.

In this appeal, an inspection of the subject property by an appraiser employed by the County Assessor indicated the inventory of physical characteristics and valuation factors for the subject property was incorrect. Notes of the inspection show that the fireplace was changed from metal to masonry, a security system was added, above grade was reduced, basement was increased, and condition was changed to average. The appraiser reran the computer model based on the year 2009. The Appraiser testified that the 2009 value factors were identical to the 2007 factors. The resulting indication of value was \$233,500.

The Taxpayer contends that the cost of repairs should be deducted from the contribution to actual value as determined by the valuation model. Depreciation is the loss in value from any cause; the difference between the cost of an improvement on a valuation date and the market

value of the improvement on the same date. *Dictionary of Real Estate Appraisal, 3rd Ed., Appraisal Institute, 1998, pp. 79-80.* 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.* Physical depreciation may be estimated by analysis of the items in need of repair. Items in need of repair can be separated for purposes of analysis into those that are defined as curable and those that are defined as incurable. *Property Assessment Valuation, Supra, p. 395.* Curable physical depreciation is sometimes referred to as deferred maintenance. *Property Assessment Valuation, Supra, p. 398.* The tests to determine whether a physically deteriorated item is curable are: “First, if spending the money to ‘cure’ the item will result in a value increment equal to or greater than the expenditure, the item is normally considered curable. Second, if spending the money to cure the item will not result in a value increment equal to or greater than the expenditure *but will allow other existing items to maintain their value* then the item is normally considered curable.” *Property Assessment Valuation, Supra, p. 398.* In other words, if it is economical to repair the item of physical depreciation it is deemed curable. The items of physical depreciation that are not deemed curable are characterized as incurable. *Property Assessment Valuation, Supra, p. 399.* Incurable items of physical depreciation are further analyzed by differentiating between those that are short-lived and those that are long-lived. *Property Assessment Valuation, Supra, p. 395.* Short-lived items of physical depreciation are those that are not ready to be replaced on the valuation date but will

probably be replaced in the foreseeable future. *Property Assessment Valuation*, Supra, p. 399. Long-lived items of physical depreciation are those items not treated as curable or short-lived. *Property Assessment Valuation*, 2nd Ed., International Association of Assessing Officers, 1996, p. 399. A long-lived item for which physical depreciation is to be determined is not 100% physically deteriorated and does not need to be cured. *Id.* The analysis of depreciation as described above is a component of the cost approach when it is used to develop an estimate of value. *Property Assessment Valuation*, Supra, pp. 128 - 129. The Appraiser testified that when COND_GD was removed from the attributes of the subject property and a condition of average was entered that \$11,000 was deducted from value as indicated by the model. The Appraiser also testified that a dollar for dollar deduction should not be made for repairs because deductions for those costs were affected by market perception. Subtracting the cost to repair or cure various items described by the Taxpayer would necessarily be, at least in part, a duplication of a reduction in value attributable to use and time. The Taxpayer's dollar for dollar deduction for physical depreciation or repairs is not appropriate.

The County Board's decision was arbitrary or unreasonable because it was not based on accurate information about the subject property. The actual value as indicated by the model after correct information concerning the subject property is utilized is the most reasonable evidence of actual value before the Commission.

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, 2007, is vacated and reversed.
2. Actual value, for the tax year 2007, of the subject property is:

Case No. 07R-939

Land value \$ 74,800.00

Improvement value \$158,700.00

Total value \$233,500.00.

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 (Cum. Supp. 2008).
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 24, 2009.

Signed and Sealed. June 24, 2009.

Robert W. Hotz, Commissioner

SEAL

APPEALS FROM DECISIONS OF THE COMMISSION MUST SATISFY THE REQUIREMENTS OF NEB. REV. STAT. §77-5019 (CUM. SUPP. 2008), OTHER PROVISIONS OF NEBRASKA STATUTES, AND COURT RULES.

I concur in the result.

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

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

The Commission is authorized to review decisions 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 77-1511 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