

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

JOHN L. WOLZEN,	)	
	)	
Appellant,	)	Case No. 07R-318
	)	
v.	)	DECISION AND ORDER
	)	REVERSING THE DECISION OF
CUSTER COUNTY BOARD OF	)	THE CUSTER COUNTY BOARD OF
EQUALIZATION,	)	EQUALIZATION
	)	
Appellee.	)	

The above-captioned case was called for a hearing on the merits of an appeal by John L. Wolzen ("the Taxpayer") to the Tax Equalization and Review Commission ("the Commission"). The hearing was held in the Holiday Inn Express, 508 2nd Ave. Kearney, Nebraska, on November 5, 2008, pursuant to an Order for Hearing and Notice of Hearing issued September 5, 2008. Commissioners Wickersham, Warnes and Salmon were present. Commissioner Warnes was the presiding hearing officer. Commissioner Hotz was excused by the presiding hearing officer. A panel of three commissioners was created pursuant to 442 Neb. Admin. Code, ch. 4, §011 (10/07).

John L. Wolzen was present at the hearing. No one appeared as legal counsel for the Taxpayer.

Glenn A. Clark, Deputy County Attorney for Custer County, Nebraska, was present as legal counsel for the Custer 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 ("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 Custer 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: ROBERT HUNTERS 2ND ADD: BLOCK 2 LOTS 12-13, Custer County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$2,955.00	\$2,955.00	\$2,955.00
Improvement	\$136,495.00	\$75,000.00	\$136,495.00
Total	\$139,450.00	\$77,955.00	\$139,450.00

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 September 5, 2008, set a hearing of the appeal for November 5, 2008, at 8:00 a.m. CST.
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	\$ 2,955.00
Improvement value	<u>\$70,418.00</u>
Total value	<u><u>\$73,373.00.</u></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 the county assessor, failed to meet burden of proving that value of property was not fairly and proportionately equalized or that valuation placed upon property for tax purposes was unreasonable or arbitrary. *Beynon v. Board of Equalization of Lancaster County*, 213 Neb. 488, 329 N.W.2d 857 (1983).
18. A Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued. Cf. *Josten-Wilbert Vault Co. v. Board of Equalization for Buffalo County*, 179 Neb. 415, 138 N.W.2d 641 (1965).

#### **IV. ANALYSIS**

The subject property is a residential parcel improved with a single story house of 1,664 square feet. (E2:1) Construction on the house was begun in 2004. (E2:1). The testimony of the Taxpayer was that he was the builder of the house, except for the plumbing and installation of heating and air conditioning.

The first issue presented by the Taxpayer to the Commission was that the construction of the house located on the subject property was not completed as of January 1, 2007. He testified that he did not begin to move into the house until between August and October 2007.

The County Assessor used the cost approach to value the subject property. This approach to valuation is one of the approved methods. See, Neb Rev Stat 77-112. The cost approach assumes a completed improvement, and adjustments would need to be made to discount for only partially completed improvements.

The County Assessor provided a list of “components of construction” and the percentage completion for the subject property as of January 1, 2007. (E:7) The County Assessor testified that it was her opinion that the construction of the house was 89% completed on January 1, 2007. (E:7). Those components of construction which were not complete were:

6.00% - Built-in cabinets, interior doors, trim

3.00% - Floor coverings

2.00% - Painting and Decorating

Total 11.00% construction of the house not complete

The County Assessor took 8% reduction in assessed value for depreciation of the improvements on the subject property in making her initial assessment, but that upon listening to the testimony of the Taxpayer at this appeal hearing she testified that she would use 11% depreciation to recognize and account for the stage of construction of the subject property on January 1, 2007.

The County Assessor testified that she had not inspected the subject property.

The Taxpayer, using Exhibit 7, testified to a list of the percentage of “components of construction” which had not been completed as of January 1, 2007. His testimony was that the following list of components of construction, and their percentage difference from Exhibit 7 had not been completed as of January 1, 2007.

Drywall not installed - 1.6%

Built-in Cabinets, Interior Doors, Trim - 13%

Plumbing Fixtures - 5%

Built in Appliances - 3%

Light Fixtures/Finish Hardware - 2%

Painting and Decorating - 4%

For a total of 28.6% of the construction of the house not complete

The Taxpayer supported his testimony with photographs. (E1:5 and 6).

The Commission gives greater weight to the testimony and evidence of the Taxpayer as to how much of the subject property was completed as of January 1, 2007, and finds that only 71.4% of the subject property was completed on that date. The basis for this finding is the extensive testimony provided by the Taxpayer of each item that had not yet been installed as of January 1, 2007, and the Testimony of the County Assessor that she had not inspected the subject property in making her assessment of value for 2007.

The second issue presented by the Taxpayer is that both the attached garage and the solid wall porch/”shop” were assessed with the subject property, they are located on different lots. (E:5). The parties acknowledged and agreed that these improvements should be valued on a different parcel. The value of these improvements are itemized on E5:2 as \$15,526 for the garage and \$31,535 for the solid wall porch/”shop”.

A third issue presented was that the subject property had a basement as of January 1, 2007, but it was not included in the assessed value. (E5:2). The Commission is without the necessary information and costing schedules to determine the valuation of the basement.

The Commission finds that the valuation of the subject property is \$73,373 for 2007. This valuation is calculated using the County Assessor's basic cost structure of \$101,304 ( 1,664 square feet x \$60.88/square foot) and reducing it by \$2,679 which is the cost for the heating and cooling which had not been installed which results in a valuation of \$98,625. (E5:2). The valuation for 2007 of \$73,373 is calculated by taking 71.4% of the cost figure of \$98,625 and further increasing it by the value of the land, \$2,955. (E5:1 and E5:2).

The Commission gives great weight to its finding as to the extent of completion of the subject property as of January 1, 2007, and the erroneous addition of the garage and solid wall porch/"shop" to the subject property when it should be assigned to another parcel. The Commission finds that relief should be granted to the Taxpayer and the 2007 valuation of the subject property is \$73,373.

**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:

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Land value \$ 2,955.00

Improvement value \$70,418.00

Total value \$73,373.00.

- 3. This decision, if no appeal is timely filed, shall be certified to the Custer County Treasurer, and the Custer 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 March 11, 2009.
- Signed and Sealed. March 11, 2009.

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Nancy J. Salmon, Commissioner

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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.

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 decision of a County Board of Equalization determining taxable values. Neb. Rev. Stat. §77-5007 (Supp. 2007). Review of County Board of Equalization decisions is not new in Nebraska law. As early as 1903 Nebraska Statutes provided for review of County Board assessment decisions by the district courts. Laws 1903, c. 73 §124. The statute providing for review did not state a standard for that review. *Id.* A standard of review stated as a presumption was adopted by Nebraska's Supreme Court. See, *State v. Savage*, 65 Neb. 714, 91 N.W. 716 (1902) (citing *Dixon Co. v. Halstead*, 23 Neb. 697, 37 N.W. 621 (1888) and *State v. County Board of Dodge Co.* 20 Neb. 595, 31 N.W. 117 (1887)). The presumption was that the County Board had faithfully performed its official duties and had acted upon sufficient competent evidence to justify its actions. See, *Id.* In 1959 the legislature provided a statutory standard for review by the district courts of county board of equalization, assessment decisions. 1959 Neb Laws, LB 55, §3. The statutory standard of review required the District Court to affirm the decision of the county board of equalization unless the decision was arbitrary or unreasonable or the value as established was too low. *Id.* The statutory standard of review was codified in section 77-1511 of the Nebraska Statutes. Neb. Rev. Stat. §77-1511 (Cum. Supp. 1959). After adoption of the statutory standard of review Nebraska Courts have held that the provisions of section 77-5011 of the Nebraska Statutes created a presumption that the County Board has faithfully performed its official duties and has acted upon sufficient competent evidence to justify its actions. See, e.g. *Ideal Basic Indus. V. Nucholls Cty. Bd. Of*

*Equal.*, 231 Neb. 297, 437 N.W.2d 501 (1989). The presumption stated by the Court was the presumption that had been found before the statute was enacted.

Many appeals of decisions made pursuant to section 77-1511 were decided without reference to the statutory standard of review applicable to the district courts review of a county board of equalization's decision. See, e.g. *Grainger Brothers Company v. County Board of Equalization of the County of Lancaster*, 180 Neb. 571, 144 N.W.2d 161 (1966). In *Hastings Building Co., v. Board of Equalization of Adams County*, 190 Neb. 63, 206 N.W.2d 338 (1973), the Nebraska Supreme Court acknowledged that two standards of review existed for reviews by the district court; one statutory requiring a finding that the decision reviewed was unreasonable or arbitrary, and another judicial requiring a finding that a presumption that the county board of equalization faithfully performed its official duties and acted upon sufficient competent evidence was overcome. No attempt was made by the *Hastings* Court to reconcile the two standards of review that were applicable to the District Courts.

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

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

the presumption is not overcome and the statutory standard is overcome; (4) and finally the presumption is overcome and the statutory standard is overcome. The first possibility does not allow a grant of relief, neither standard of review has been met. The second possibility does not therefore allow a grant of relief even though the presumption is overcome because the statutory standard remains. See, *City of York v. York County Bd of Equal.*, 266 Neb. 297, 664 N.W.2d 445 (2003). The third possibility requires analysis. The presumption and the statutory standard of review are different legal standards, and the statutory standard remains after the presumption has been overcome. See. *Id.* The burden of proof to overcome the presumption is competent evidence. *Id.* Clear and convincing evidence is required to show that a county board of equalization's decision was unreasonable or arbitrary. See, e.g. *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb.App. 171, 645 N.W.2d 821 (2002). Competent evidence that the county board of equalization failed to perform its duties or act upon sufficient competent evidence is not always evidence that the county board of equalization acted unreasonably or arbitrarily because the statutory standard of review remains even if the presumption is overcome. *City of York*, supra. Clear and convincing evidence that a county board of equalization's determination, action, order, or decision was unreasonable or arbitrary, as those terms have been defined, may however overcome the presumption that the county board of equalization faithfully discharged its duties and acted on sufficient competent evidence. In any event the statutory standard has been met and relief may be granted. Both standards of review are met in the fourth possibility and relief may be granted.

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

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

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Wm R. Wickersham, Commissioner