

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

JAMES C. CREIGH,)	
)	
Appellant,)	Case No. 07R-839
)	
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 James C. Creigh ("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 March 17, 2009, pursuant to an Order for Hearing and Notice of Hearing issued January 8, 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. A panel of three commissioners was created pursuant to 442 Neb. Admin. Code, ch. 4, §011 (10/07). Commissioner Salmon was absent. The appeal was heard by a quorum of a panel of the Commission.

James C. Creigh 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, heard testimony and received stipulations of the parties.

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 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: Lot 50 Block 0 Bryn Mawr, Omaha, Douglas County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$33,300.00	In Total	\$33,300.00
Improvement	\$366,500.00	In Total	\$366,500.00
Total	\$399,800.00	\$342,345.00	\$399,800.00

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 January 8, 2009, set a hearing of the appeal for March 17, 2009, 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. The County Board stipulated that the residence has 3,592 square feet of residential area.
9. Actual value of the subject property as of the assessment date for the tax year 2007 is:

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Land value \$ 33,300.00

Improvement value \$355,755.00

Total value \$389,055.00.

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 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 residence on the parcel contains 3,592 square feet of residential area, a 1,791 square foot basement with 1,076 square feet of finish, and a built-in 867 square foot garage. (E3:1).

The Taxpayer asserted that actual value of the subject property should be determined based on its taxable value for the year 2006. The prior year's assessment is not relevant to the subsequent year's valuation. *DeVore v. Bd. Of Equal.*, 144 Neb. 351, 13 N.W.2d 451 (1944), *Affiliated Foods Coop v. Madison Co. Bd. Of Equal.*, 229 Neb. 605, 428 N.W.2d 201 (1988).

The Taxpayer submitted an analysis of the sales of four parcels. (E71). The physical characteristics of the subject property with factors affecting its valuation are shown in the following table with the same information for each of the sold parcels identified by the Taxpayer.

Descriptor	Subject	Parcel 1	Parcel 2	Parcel 3	Parcel 4
Exhibit	E3:1&2	E7:2-10	E7:11-19	E7:20-28	E&:29-37
Location	1529 N129 Av	13033 Franklin St	13018 Charles St	1711 N 129 Av	12805 Franklin St
Lot Size	11,102	11,390	13,640	18,512	16,250
Condition	Good	Good	Good	Good	Good
Quality	Very Good	Very Good	Very Good	Very Good	Very Good
Yr Built	1989	1987	1989	1989	1997
Exterior Walls	Frame Siding	Frame Siding	Frame Siding	Frame Siding	Frame Siding
Style	2 Story	2 Story	2 Story	2 Story	2 Story
Area Above Ground	3,592	3,381	3,785	3,610	3,477
Roof Type	Hip/Gable	Hip/Gable	Hip/Gable	Hip/Gable	Hip/Gable

Descriptor	Subject	Parcel 1	Parcel 2	Parcel 3	Parcel 4
Roof Cover	Wood Shake	Wood Shake	Wood Shake	Wood shake	Wood Shake
HVAC	Central Air	Central Air	Central Air	Central Air	Central Air
Basement	1,791	1,694	1,825	1,864	1,740
Finished	1,079	833	912	1,500	870
Walkout	1				
Bedrooms	4	4	5	5	4
Bathrooms	3	2.5	3.5	5	4
Garage Type	Built In	Built In	Built In	Attached	Built In
Garage Area	867	774	801	894	760
Misc Imp	Masonry Fireplace, Wood Deck, Security System, Central Vacuum, Sprinkler System, Brick Veneer	Metal Fireplace, Wood Deck, Security System	Masonry Fireplace Security System	Masonry Fireplace, Wood Deck	Metal Fireplace, Wood Deck, Security System
Lot Value	\$33,306	\$34,200	\$40,900	\$55,500	\$48,800
Imp Value	\$366,541	\$317,700	\$351,500	\$341,000	\$339,700
Taxable Value	\$3,998,471	\$352,900	\$392,400	\$396,500	\$388,500
Sale Date		6/14/05	10/10/06	7/7/05	7/22/05
Sale Price		\$315,000	\$398,500	\$398,000	\$386,000

1. Exhibit 3 page 2. Exhibit 1 page 1 shows land \$33,300 and Improvement \$399,800. Exhibit 3 page 4 shows land \$33,306 and Improvements \$366,253.

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. When using comparables to determine value, similarities and differences between the subject property and the comparables must be recognized. *Property Assessment Valuation*, 2nd Ed., 1996, p.103.

Parcels 2 and 3 are the most similar to the subject property based on condition, quality, style, year built, area above ground, basement size and finish, and size of garage. The subject property has a walkout entrance to the basement, a feature not found in any of the four parcels. Parcels 2 and 3 sold for \$398,500 and \$398,000 respectively. Actual value of the subject property as determined by the County Board is \$399,806. The sold parcels submitted by the Taxpayer for analysis do not indicate that actual value as determined by the County Board is unreasonable or arbitrary.

It is clear from an examination of Exhibit 7 that actual value of the subject property and the sold parcels was determined on the basis of calculations which considered the value contributed by various physical characteristics of the improvements and factors which affected value. Actual value as determined by the County Board was based on an assumption that square footage or residential are of the residence was 3,772. (E3:5). The SF (square feet) of residential area in the residence is in fact 3,592 as stipulated by the County Board. The County Board stipulated that the Central H&A should also be adjusted to 3,592. The County Board also stipulated that recalculation with those changes would present a correct estimate of value for the subject property. The following table shows the resulting calculations.

Valuation Factor or Physical Characteristic	Number of Units of a Physical Characteristic or a Valuation Factor to be Applied	Value Change per unit of Physical Characteristic or Valuation Factor	Affect on Value of Units of a Physical Characteristic or Valuation Factor	Number of Units of a Physical Characteristic or Application of a Valuation Factor as adjusted	Affect on Value of Units of a Physical Characteristic or a Valuation Factor as Adjusted
Fire_Masonry	1	3,375.00	3,375.00	1	3,375.00
Central H&A	3,772	6.75	25,461.00	3,592	24,246.00
Base Fin	895	27.00	24,165.00	895	24,165.00
Garage Built In	867	27.00	23,409.00	867	23,409.00
Baths	4	6,750.00	27,000.00	4	27,000.00
SF	3,772	54.00	203,688.00	3,592	193,968.00
Base Walkout	1	6,750.00	6,750.00	1	6,750.00
Porch Wood Deck	514	10.80	5,551.20	514	5,551.20
Cond_Good	1	13,500.00	13,500.00	1	13,500.00
Base 8'Blk Unfin	1,791	16.20	29,014.20	1,791	29,014.20
Market Age	18	(300.00)	(5,400.00)	18	(5,400.00)
Constant	1	25,000.00	25,000.00	1	25,000.00
Sub Total			381,513.40		370,578.40
Nbhd		.96	366,253	.96	355,755
Total Imp			\$366,253		\$355,755
Land			\$33,300		\$33,300
Total Value			\$399,553		\$389,055

Actual value as determined by the County Board was unreasonable or arbitrary because it was not based on correct information regarding the physical characteristics of the subject

property. After adjustment, the estimate of value developed is consistent with the true physical characteristics of the subject property and with the methodology used to develop estimates of value for the other parcels shown in Exhibit 7.

The Taxpayer presented an analysis indicating that selected parcels in the neighborhood of the subject property were over assessed based on the model applied above. Whatever the merits of the Taxpayer's contentions with regard to the parcels shown in Exhibit 8 the evidence in this appeal is that the model produced an estimate of value that is lower than the sales prices of parcels having elements of similarity with the subject property. The analysis in Exhibit 8 is not clear and convincing evidence that the decision of the County Board was arbitrary or unreasonable independent of the failure to properly consider the physical characteristics 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 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-839

Land value \$ 33,300.00

Improvement value \$355,755.00

Total value \$389,055.00.

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. 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 24, 2009.

Signed and Sealed. March 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. 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 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