

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

JAMES W. FURMAN,)	
)	
Appellant,)	Case No. 09C 153
)	
v.)	DECISION AND ORDER
)	REVERSING THE DECISION OF
BOX BUTTE COUNTY BOARD OF)	THE BOX BUTTE COUNTY BOARD OF
EQUALIZATION,)	EQUALIZATION
)	
Appellee.)	

The above-captioned case was called for a hearing on the merits of an appeal by James W. Furman ("the Taxpayer") to the Tax Equalization and Review Commission ("the Commission"). The hearing was held in the Hampton Inn, 301 West Hwy 26, Scottsbluff, Nebraska, on December 1, 2009, pursuant to an Order for Hearing and Notice of Hearing issued September 30, 2009 as amended by an Order dated November 6, 2009. Commissioners Wickersham, Warnes and Salmon were present. Commissioner Wickersham was the presiding hearing officer.

James W. Furman was present at the hearing. A. James Moravek appeared as legal counsel for the Taxpayer.

Dennis D. King, Special County Attorney for Box Butte County, Nebraska, was present as legal counsel for the Box Butte County Board of Equalization ("the County Board").

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

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

**I.
ISSUES**

The Taxpayer has asserted that actual value of the subject property as of January 1, 2009, is less than actual value as determined by the County Board. The issues on appeal related to that assertion are:

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

The actual value of the subject property on January 1, 2009.

The Taxpayer has asserted that taxable value of the subject property as of January 1, 2009, is not equalized with the taxable value of other real property. The issues on appeal related to that assertion are:

Whether the decision of the County Board, determining the equalized taxable value of the subject property, is unreasonable or arbitrary;

Whether the equalized taxable value of the subject property was determined by the County Board in a manner and an amount that is uniform and proportionate as required by Nebraska's Constitution in Article VIII §1; and

The equalized taxable value of the subject property on January 1, 2009.

**II.
FINDINGS OF FACT**

The Commission finds and determines that:

1. The Taxpayer has a sufficient interest in the outcome of the above captioned appeal to maintain the appeal.

2. The parcel of real property to which this appeal pertains ("the Subject Property") is described in the table below.
3. Actual value of the subject property placed on the assessment roll as of January 1, 2009, ("the assessment date") by the Box Butte 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: Pt NE¼ SE¼ Section 30, Township 25, Range 47, Box Butte County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$5,407.00	\$5,407.00	\$5,407.00
Improvement	\$239,429.00	\$79,975.00	\$239,429.00
Total	\$244,836.00	\$85,382.00	\$244,836.00

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 30, 2009, as amended by an Order issued on November 6, 2009, set a hearing of the appeal for December 1, 2009, at MST.
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, with leave of the Commission, and in the presence of the Taxpayer, offered to confess judgement for part of the value claimed by deceasing taxable value in

the amount of \$14,508. Taxable value determined pursuant to the County Board's offer is \$230,328.00.

9. The Taxpayer refused the County Board's offer to confess.
10. Actual value of the subject property as of the assessment date for the tax year 2009 is:

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Land value \$ 5,407.00

Improvement value \$224,921.00

Total value \$230,328.00.

11. The Taxpayer has not obtained more relief than was offered to be confessed.

**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) (Cum. Supp. 2008).
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. 2008).
7. “Taxes shall be levied by valuation uniformly and proportionately upon all real property and franchises as defined by the Legislature except as otherwise provided in or permitted by this Constitution.” *Neb. Const.*, Art. VIII, §1.
8. Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value. *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).
9. The purpose of equalization of assessments is to bring the assessment of different parts of a taxing district to the same relative standard, so that no one of the parts may be compelled to pay a disproportionate part of the tax. *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991); *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).

10. Equalization to obtain proportionate valuation requires a comparison of the ratio of assessed to actual value for the subject property and comparable property. See *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).
11. Uniformity requires that whatever methods are used to determine actual or taxable value for various classifications of real property that the results be correlated to show uniformity. *Banner County v. State Board of Equalization*, 226 Neb. 236, 411 N.W.2d 35 (1987).
12. Taxpayers are entitled to have their property assessed uniformly and proportionately, even though the result may be that it is assessed at less than the actual value. *Equitable Life v. Lincoln County Bd. of Equal.*, 229 Neb. 60, 425 N.W.2d 320 (1988); *Fremont Plaza v. Dodge County Bd. of Equal.*, 225 Neb. 303, 405 N.W.2d 555 (1987).
13. The constitutional requirement of uniformity in taxation extends to both rate and valuation. *First Nat. Bank & Trust Co. v. County of Lancaster*, 177 Neb. 390, 128 N.W.2d 820 (1964).
14. In the evaluation of real property for tax purposes, where buildings and improvements are taxable as a part of the real estate, the critical issue is the actual value of the entire property, not the proportion of that value which is allocated to the land or to the buildings and improvements by the appraiser. *Bumgarner v. Valley County*, 208 Neb. 361, 303 N.W.2d 307 (1981).
15. If taxable values are to be equalized it is necessary for a Taxpayer to establish by clear and convincing evidence that valuation placed on his or her property when compared with valuations placed on similar property is grossly excessive and is the result of systematic

will or failure of a plain legal duty, and not mere error of judgement. There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity. *Newman v. County of Dawson*, 167 Neb. 666, 94 N.W.2d 47 (1959).

16. A presumption exists that the County Board has faithfully performed its duties and has acted on competent evidence. *City of York v. York County Bd. Of Equalization*, 266 Neb. 297, 64 N.W.2d 445 (2003).
17. The presumption in favor of the county board may be classified as a principle of procedure involving the burden of proof, namely, a taxpayer has the burden to prove that action by a board of equalization fixing or determining valuation of real estate for tax purposes is unauthorized by or contrary to constitutional or statutory provisions governing taxation. *Gordman Properties Company v. Board of Equalization of Hall County*, 225 Neb. 169, 403 N.W.2d 366 (1987).
18. The presumption disappears if there is competent evidence to the contrary. *Id.*
19. The order, decision, determination, or action appealed from shall be affirmed unless evidence is adduced establishing that the order, decision, determination, or action was unreasonable or arbitrary. Neb. Rev. Stat. §77-5016 (8) (Cum. Supp. 2006).
20. Proof that the order, decision, determination, or action appealed from was unreasonable or arbitrary must be made by clear and convincing evidence. See, e.g., *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb.App. 171, 645 N.W.2d 821 (2002).

21. "Clear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved."
Castellano v. Bitkower, 216 Neb. 806, 812, 346 N.W.2d 249, 253 (1984).
22. A decision is "arbitrary" when it is made in disregard of the facts and circumstances and without some basis which could lead a reasonable person to the same conclusion. *Phelps Cty. Bd. of Equal. v. Graf*, 258 Neb 810, 606 N.W.2d 736 (2000).
23. A decision is unreasonable only if the evidence presented leaves no room for differences of opinion among reasonable minds. *Pittman v. Sarpy Cty. Bd. of Equal.*, 258 Neb 390, 603 N.W.2d 447 (1999).
24. "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).
25. The County Board need not put on any evidence to support its valuation of the property at issue unless the taxpayer establishes the Board's valuation was unreasonable or arbitrary. *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).
26. A Taxpayer, who only produced evidence that was aimed at discrediting valuation methods utilized by the county assessor, failed to meet burden of proving that value of property was not fairly and proportionately equalized or that valuation placed upon property for tax purposes was unreasonable or arbitrary. *Beynon v. Board of Equalization of Lancaster County*, 213 Neb. 488, 329 N.W.2d 857 (1983).
27. A Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued. Cf. *Lincoln Tel. and*

Tel. Co. v. County Bd. Of Equalization of York County, 209 Neb. 465, 308 N.W.2d 515 (1981); *Arenson v. Cedar County*, 212 Neb. 62, 321 N.W.2d 427 (1982) (determination of equalized taxable value) *Josten-Wilbert Vault Co. v. Board of Equalization for Buffalo County*, 179 Neb. 415, 138 N.W.2d 641 (1965) (determination of actual value).

28. “The board may, with approval of the Tax Equalization and Review Commission, offer to confess judgment for part of the value claimed or part of the causes involved in the action. If (1) the appellant is present and refuses to accept such confession of judgment in full of the appellant's demands against the board in such action or the appellant fails to attend having had reasonable notice that the offer would be made, its terms, and the time of making it and (2) at hearing the appellant does not obtain more relief than was offered to be confessed, the appellant shall pay all the costs and fees the board incurred after making the offer. The offer shall not be deemed to be an admission of the cause of action or relief to which the appellant is entitled, and the offer shall not be given in evidence at the hearing.” Neb. Rev. Stat. §77-1510.01 (Cum. Supp. 2008).

IV. ANALYSIS

The subject property is an improved commercial parcel in Box Butte County, Nebraska. The parcel is used as the site of a veterinary clinic. The improvements on the parcel are those appropriate for that use. The subject property is near the City of Alliance but is not within that city’s municipal boundaries. The subject property, for purposes of valuation is deemed to be a rural parcel. All parcels with a commercial use and rural location were revalued for tax year 2009. Revaluation of the rural commercial parcels was performed by an appraiser under contract

to Box Butte County. The contract appraiser provided data to the County Assessor's office for entry in a computer program called Terra Scan. The Terra Scan program used the data to produce an estimate of value based on the cost approach. The output from the Terra Scan program is shown in Exhibit 3 at page 1.

The Taxpayer contends taxable value of the subject property is not equalized with the taxable value of a comparison parcel inside the municipal limits of Alliance Nebraska used as a veterinary clinic.

The purpose of equalization of assessments is to bring the assessment of different parts of a taxing district to the same relative standard, so that no one of the parts may be compelled to pay a disproportionate part of the tax. *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991); *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999). Taxable value of a parcel must be determined in a manner that is uniform and results in taxable values that are proportionate with taxable values for similar parcels. Equalization to obtain proportionate valuation requires a comparison of the ratio of assessed to actual value for the subject property and comparable property. See *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999). The Taxpayer has presented one parcel for comparison to the subject property. The comparison parcel differs from the subject property in location, size of the land component, age, condition size and quality of improvements. The taxable value of the comparison parcel for the tax year 2009 is shown in the Exhibit 4. There is no evidence that the actual value of the comparison parcel differs from its taxable value. The ratio of taxable value to actual value of the comparison parcel is 1. After adjustment as provided in this order the ratio of taxable value to actual value of

the subject property is also 1. It is not necessary to consider the Taxpayer's proportionality claim for equalization relief further.

Uniformity requires that the results of methods used to determine actual or taxable value for various classifications of real property must be correlated to show uniformity. *Banner County v. State Board of Equalization*, 226 Neb. 236, 411 N.W.2d 35 (1987). The necessary correlation in this case would be to actual value. See *id.*

Actual values for the subject property and the parcel offered for comparison were determined based on use of the cost approach. An examination of the use of the cost approach is necessary to determine if the results of its application to the subject property and the parcel offered for comparison may be correlated to the same standard, actual value.

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, 128 - 129

The first step in use of the cost approach is to determine the contribution to value of the land component. The contribution to value of the land component for each parcel was determined on a different basis. The contribution to actual value of the land component of the subject property was determined on a per acre basis. The contribution to actual value of land component of the parcel offered for comparison was determined on a per square foot basis. The subject parcel is located outside the municipal limits of the City of Alliance. The parcel offered for comparison is located on a busy street in a commercial section within the municipal limits of the City of Alliance. Differences in value attributable to location can be recognized in the valuation process. There is no evidence, that the different basis for estimating the contribution to value of the land component were not correlated to the same objective, actual value of the land if unimproved. The Taxpayer does not contend that the contribution to actual value of the land component of the subject property should be determined on a per square foot basis.

The second step in use of the cost approach is to determine the replacement cost new of improvements. Replacement cost new of the improvements on the subject property and the parcel offered for comparison was determined based on data supplied by Marshall & Swift. (E3:2 and E4:6). Data for the Marshall & Swift replacement cost new estimates changes periodically. Replacement cost new of the improvements on the subject property was determined based on cost tables provided for the year 2008. Replacement cost new of the improvements on the parcel offered for comparison was determined based on cost tables provided for the year 2005. The evidence is that use of the different tables, all other factors held constant, would produce different estimates of replacement cost new. Use of the cost tables dated near the year for which value is to be estimated is rationally related to determinations of

actual value for the target year. Replacement cost new is adjusted by depreciation to arrive at an estimate of the contribution to value. Evidence of the use of different cost tables that would produce different estimates of replacement cost new is not conclusive evidence that the results after deduction of depreciation are not uniformly correlated to the same standard, actual value. The Taxpayer does not contend that the replacement cost new of the improvements on the subject property should be based on the 2005 Marshall & Swift cost tables.

One element of the data entered in the Terra Scan program was incorrect. Correction of the data element resulted in a \$14,508 reduction in estimated contribution to value of the improvements on the subject property as determined using the Terra Scan program.

The next element to be considered in the application of the cost approach is an estimate of depreciation. Depreciation deductions may be taken for physical depreciation, functional utility or eternal obsolescence. “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, 154. One method of estimating of physical depreciation is the economic age-life method. “The economic age-life method is also known as the straight -line depreciation method and is a mechanical method of handling depreciation. . . In dealing with the economic age-life method, the following terms are important: *Effective Age*- Effective age is the number of years of age of the improvement as indicated by its condition. If an improvement has had better-than-average maintenance, its effective age may be

less than the actual age; if there has been inadequate maintenance, it may be greater. A fifty-year-old improvement may have an effective age of twenty-five years due to rehabilitation or modernization. *Remaining Economic Life* - Remaining economic life is the number of years from the date of appraisal to the date when the improvement becomes economically valueless. *Total Economic Life* - The total economic life is the estimated period over which it is anticipated that a property may be profitably used. This is the sum of the effective age and remaining economic life. Total economic life can never exceed, and is generally shorter than, the physical life of the property.” *Property Assessment Valuation, 2nd Ed.*, International Association of Assessing Officers, 1996, 160 - 161. “Effective age may or may not be the same as actual or chronological age, because maintenance, design, and location are factors that may increase or decrease the aging process. The remaining economic life of the improvement will, in most cases, be something less than the remaining physical life. Within the same improvement-use type, location will be an important consideration in the determination of economic life. For many uses, economic life in a large, fast growing, and relatively new city will be much shorter than economic life expectancy for the same property use in an older, smaller city.” *Property Assessment Valuation, 2nd Ed.*, International Association of Assessing Officers, 1996, 161. “In the economic age-life method, an estimate is made both of the effective age of the improvement and of its remaining economic life. The effective age and the remaining economic life together make up the life span of the improvement. The ratio of the effective age to the life span, times the cost new of the structure is a measure of the depreciation.” *Property Assessment Valuation, 2nd Ed.*, International Association of Assessing Officers, 1996, 161.

“Functional utility is the overall usefulness and desirability of a property; the ultimate criterion is whether the improvement efficiently satisfies the wants and needs of the market. Functional obsolescence is the loss of value in a property improvement due to changes in style, taste, technology, needs and demands. Functional obsolescence exists where a property suffers from poor or inappropriate architecture, lack of modern equipment, wasteful floor plans, inappropriate room sizes, inadequate heating or cooling capacity, and so on. It is the ability of a structure to perform adequately the function for which it is currently used.” *Property Assessment Valuation*, 2nd Ed., International Association of Assessing Officers, 1996, 154 - 155.

“External Obsolescence is loss in value as a result of an impairment in utility and desirability caused by factors external to the property (outside the property’s boundaries) and is generally deemed to be incurable.” *Property Assessment Valuation*, 2nd Ed., International Association of Assessing Officers, 1996, 155.

The Taxpayer’s equalization claim is based on the belief that the physical depreciation deductions attributed to improvements on the comparison parcel cannot be reconciled with the physical depreciation deductions attributed to the improvements on the subject property and that the resulting estimates of equal value are not equalized. There is no evidence that functional or economic depreciation has been attributed or should be attributed to improvements on either the subject property or the comparison parcel.

An Appraiser testifying on behalf of the Taxpayer (“Appraiser”) testified that physical depreciation tables could be derived from market data. Physical depreciation derived from market data is simply that physical depreciation deduction based on factors such as age, quality of construction, and condition, which will produce an estimate of the contribution to value for

improvements that when added to the contribution to value of land produces an estimate of value at or near the sale price of an improved parcel. An analysis of the physical depreciation deductions indicated by sales of improved parcels data is the basis for development of a market based physical depreciation table. The depreciation table is market specific. The table is then used to estimate physical depreciation deductions for improvements on sold and unsold parcels in the market for which the table was developed. Actual value determinations for the parcels are then related to the market in the area for which a table was developed.

The County Assessor testified that physical depreciation attributed to improvements on the comparison parcel was determined based on tables in the Terra Scan program. The County Assessor testified that there were no sales of veterinary clinics from which a market derived depreciation table could be developed and that the table used to determine physical depreciation to be attributed to the improvements on the subject property was determined based on the age-life method.

As noted above, age-life depreciation is a deduction which in formula form appears as:
$$\text{Effective Age} \div \text{Useful Life} \times \text{Replacement Cost New} = \text{Age Life Depreciation.}$$
 All of the improvements on the subject property were placed on the parcel in the year 1980. (E3:1). There is no evidence that effective ages or useful lives were determined by the County Assessor for the improvements on the subject property. The actual age of all the improvements shown in the assessment record for the subject property is 29 years (2009 - 1980 = 29). Physical depreciation attributed to the improvements on the subject property produced by the Terra Scan program varies. Physical depreciation amounts shown in the assessment records are 30%, 50%, 60% and 80% for various improvements on the subject property. (E3:1).

The Appraiser testified that she used a computer program supplied by Marshall & Swift to estimate replacement cost and age-life depreciation attributable to improvements on the subject property. The Marshall & Swift program used by the Appraiser, produced physical depreciation rates and amounts that differed from the rates and amounts determined by the Terra Scan program used by the County Assessor. One of the variables in the calculation of age-life depreciation is the useful life of an improvement. If the useful life of an improvement as determined by Marshall & Swift varied from the useful life of an improvement in the tables used by the Terra Scan program, different estimates of depreciation would be determined for improvements with the same age. Differences in the estimates of effective age would also produce differing results. The evidence does not provide an explanation for the differences between depreciation as determined by the Appraiser using the Marshall & Swift program and depreciation determined by the County Assessor using the Terra Scan program if based on the age-life method.

A notation on Exhibit 3 at page 8 indicates that for the tax year depreciation deductions for improvements on the subject property were determined based on market depreciation. In her 2009 Reports and Opinions for Box Butte County the Property Tax Administrator reported that market derived depreciation developed for the year 2009 was used for valuation of rural commercial parcels in tax year 2009. *2009 Reports and Opinions of the Property Tax Administrator for Box Butte County*, 34.

The County Assessor testified that physical depreciation attributed to improvements on the comparison parcel was determined based on a table in Terra Scan and that she did not know the basis on which that table was developed. Improvements on the comparison parcel were

placed on the property in the years 1950, 1976, 1977 and 1994. (E4:6). Physical depreciation attributed to improvements on the comparison parcel is either 73% or 74%. (E4:6). All of the improvements on the subject property were placed on that parcel in 1980. (E3:1). The rates of physical depreciation attributed to improvements on the subject property were 50% 30%, 80% and 60%. (E3:1). If the age life method is used, variations in depreciation between newer and older improvement are anticipated. In this case, a building constructed in 1950 was depreciated 73% and a building constructed in 1994 was also depreciated 73%. (E4:6). A building constructed in 1980 received 50% depreciation. (E3:1). The evidence does not support a conclusion that the physical depreciation deductions attributable to improvements on the subject property were based on the age-life method.

As noted, age-life depreciation may be affected by type of construction, quality, or condition and differences in those factors appear for each improvement on the subject property and the parcel offered for comparison. The County Assessor testified that a quality rating of 300 indicated a better quality building than one rated as a 200 quality. A better quality building would have a longer life than a lower quality building and therefore a lower annual rate of straight line depreciation. The County Assessor also testified that a building with a condition factor of 40 was in better condition than a building with a condition factor of 20 or 30. A well maintained building, one in better condition than another building, would have its useful life extended with a resulting lower rate of annual depreciation using the age-life method. The year built, quality and condition of the buildings on the comparison parcel are shown in the following table as extracted from Exhibit 4 at page 6.

Building	Year	Class	Quality	Condition	Physical Depreciation
Veterinary Hospital	1950	C	200	30	73%
Kennels	1977	C	200	20	73%
Office Bld	1994	D	300	40	73%
Veterinary Hospital	1994	D	300	40	73%

Improvements varying by year built, class quality, and condition all received 73% physical depreciation. The evidence does not support a conclusion that the physical depreciation deductions attributable to improvements on the comparison parcel were based on the age-life method.

A notation on Exhibit 4 at page 10 shows that depreciation deductions for improvements on the comparison parcel in 2005 were based on market derived depreciation. The contribution to value of the improvements on the comparison parcel has not changed for the tax years 2005 through 2009. (E4:7). In her *2009 Reports and Opinions for Box Butte County*, the Property Tax Administrator reported that market derived depreciation was used for valuation of rural commercial parcels in tax year 2009 based on a schedule developed in the year 2005. *2009 Reports and Opinions of the Property Tax Administrator for Box Butte County*, 34.

Notations on assessment records and the 2009 Reports and Opinions of the Property Tax Administrator show that the market was used to determine physical depreciation deductions for the subject property and the comparison parcel. Market depreciation as described by the Appraiser is based on sales. While there may not have been sales of veterinary clinics, sales of other commercial parcels could be used to develop a physical depreciation table. The evidence is that depreciation deductions shown for improvements on the subject property and the

comparison parcel are derived from the market. Physical depreciation as derived from the market are those deductions necessary to reduce replacement cost new to actual value in a market. The subject property is in a rural market area, the comparison parcel in a different market area. Differences in physical depreciation, as derived from the market, may not be uniform in amount. It is uniform in the method of its derivation and application if the result is correlated to actual value.

The Taxpayer stated that in his opinion taxable value of the subject property was \$133,069 when compared with the comparison parcel. The Taxpayer's opinion of value was based on application of depreciation factors applied to the comparison parcel to obtain equalized taxable value. For reasons noted above that opinion is not persuasive. The Taxpayer has not produced evidence that actual value of the comparison parcel or the subject property is different than values determined by the County Board. There is no evidence therefore, that physical depreciation was not determined in a manner which correlated the resulting values to a common standard, actual value.

The disparity in actual values of the subject property and the comparison parcel as shown in the assessment records calls for a better explanation than appears in the record before the Commission but that is not a basis for relief. The Taxpayer has to do more than raise doubts. See *Beynon v. Board of Equalization of Lancaster County*, 213 Neb. 488, 329 N.W.2d 857 (1983).

The County Assessor testified that there was an error in the data used by the Terra Scan program to calculate replacement cost new of the 3600 square foot building on the subject property. Correction of the error and recalculation of replacement cost new and

depreciation resulted in a decrease in the calculated contribution to value of that building. The decrease was \$14,508. The County Assessor's testimony is clear and convincing evidence that taxable value as determined by the County Board was unreasonable or arbitrary. The Taxpayer asserted that the subject property contains about 2 acres. The records of the county assessor show that the subject property contains 2.67 acres. The full extent of the subject property is 2.675 acres. (E10:4). A portion of the subject property, .175 acres, is used for county road purposes. (E10:4). The net taxable area of the subject property is 2.5 acres. The county assessors records show that 2 units at \$2,703.65 per unity for a total lot value of \$5407 were taxed. (E3:1). No evidence of the contribution to value of a 2.5 acre parcel has been provided. The Appraiser did not offer an opinion of value. The Taxpayer did not offer an opinion of actual value. The most reasonable evidence of actual value and taxable value for the subject property is the estimated value resulting from a correction to the data and recalculation using the cost approach with replacement cost new factors and depreciation determined by use of the Terra Scan program. Actual value of the subject property as of January 1, 2009, was \$230,328 and its equalized taxable value was \$230,328.

At the commencement of the hearing the County Board offered to confess judgement determining that taxable value of the subject property for tax year 2009 was \$230,328. The order of the Commission is that taxable value of the subject property for the tax year 2009, is \$230,328. If the County Board offers to confess judgement and at hearing the appellant does not obtain more relief than was offered to be confessed, the appellant shall pay all the costs and fees of the board incurred after making the offer. Neb. Rev. Stat. §77-1510.01 (Cum. Supp. 2008).

**V.
CONCLUSIONS OF LAW**

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

**VI.
ORDER**

IT IS ORDERED THAT:

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

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Land value \$ 5,407.00

Improvement value \$224,921.00

Total value \$230,328.00.

3. This decision, if no appeal is timely filed, shall be certified to the Box Butte County Treasurer, and the Box Butte 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. The Appellant shall pay all costs and fees of the Box Butte County Board incurred after making its offer of settlement at the hearing on the merits.
6. The County shall certify its costs, if any, incurred after its offer to confess made at the hearing on the merits, for payment by the Appellant, within 10 days of this order.
7. This decision shall only be applicable to tax year 2009.
8. This order is effective for purposes of appeal on February 10, 2010.

Signed and Sealed. February 10, 2010.

Nancy J. Salmon, Commissioner

William C. Warnes, Commissioner

SEAL

APPEALS FROM DECISIONS OF THE COMMISSION MUST SATISFY THE REQUIREMENTS OF NEB. REV. STAT. §77-5019 (REISSUE 2009), OTHER PROVISIONS OF NEBRASKA STATUTES, AND COURT RULES.

I concur in the result.

The analysis above considers two standards of review for review. One standard of review is stated as a presumption found in case law, the other is found as stated in statute. I do not believe consideration of two standards of review are required by statute or case law.

The Commission is an administrative agency of state government. See *Creighton St. Joseph Regional Hospital v. Nebraska Tax Equalization and Review Commission*, 260 Neb. 905, 620 N.W.2d 90 (2000). As an administrative agency of state government the Commission has only the powers and authority granted to it by statute. *Id.* The Commission is authorized by statute to review appeals from decisions of a county board of equalization, the Tax Commissioner, and the Department of Motor Vehicles. Neb. Rev. Stat. §77-5007 (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. Nuckolls Cty. Bd. Of Equal.*, 231 Neb. 653, 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