

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

MIKE L. BACZWASKI,)	
)	
Appellant,)	Case No. 09R 086
)	
v.)	DECISION AND ORDER
)	REVERSING THE DECISION OF
BUFFALO COUNTY BOARD OF)	THE BUFFALO COUNTY BOARD OF
EQUALIZATION,)	EQUALIZATION
)	
Appellee.)	

The above-captioned case was called for a hearing on the merits of an appeal by Mike L. Baczwaski ("the Taxpayer") to the Tax Equalization and Review Commission ("the Commission"). The hearing was held in the Holiday Inn Express, 508 2nd Avenue South, Kearney, Nebraska, on July 16, 2010, pursuant to an Order for Hearing and Notice of Hearing issued May 6, 2010. Commissioner Wickersham, Chairperson of the Commission, was the presiding hearing officer. Commissioner Warnes was absent. Commissioner Wickersham, as Chairperson, designated Commissioners Wickersham, Salmon, and Hotz as a panel of the Commission to hear the appeal. Commissioner Salmon was excused. Commissioner Hotz was present. The appeal was heard by a quorum of a panel of the Commission.

Mike L. Baczwaski was present at the hearing. No one appeared as legal counsel for the Taxpayer.

Andrew W. Hoffmeister, a Deputy County Attorney for Buffalo County, Nebraska, was present as legal counsel for the Buffalo 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 Buffalo 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 2 Block 1 Bridle Acres Second Sub Pt NE¼ Section 24 Township 9 Range 17, Buffalo County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$29,275.00	Included in Total	\$29,275.00
Improvement	\$182,770.00	Included in Total	\$172,725.00
Total	\$212,045.00	\$194,180.00	\$202,000.00

4. An appeal of the County Board's decision was filed with the Commission.
5. An Order for Hearing and Notice of Hearing issued on May 6, 2010, set a hearing of the appeal for July 16, 2010, at 10:00 a.m. CDST.

6. 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.
7. Actual value of the subject property as of the assessment date for the tax year 2009 is:

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Land value	\$ 29,275.00
Improvement value	<u>\$182,770.00</u>
Total value	<u><u>\$212,045.00.</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) (Reissue 2009).
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 2009).
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 2009).

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 2009).
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) (Reissue 2009).
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) (Reissue 2009).
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).

IV. ANALYSIS

The subject property is an improved parcel in rural Buffalo County, Nebraska. Improvements on the subject property are a 1,748 square foot residence with a 1,734 square foot basement, 1,574 square feet of which is finished, an attached 996 square foot garage, and a 384 square foot detached garage.

The Taxpayer offered his opinion that taxable value of the subject property was \$194,100 for tax year 2009. As a basis for his opinion the Taxpayer testified that taxable value of the subject property for the year 2008 had increased at a greater rate than the increase in value for other parcels in Bridle Acres Subdivision and that no increase should be made for tax year 2009.

A review of the assessment history is necessary to place the assertions of the Taxpayer in perspective. The County Assessor is required to make his or her determination of taxable value by March 10 of each year and enter that determination on the assessment rolls. Neb. Rev. Stat. §§77-1301 and 77-1303 (Reissue 2009). Actual value as shown in the records of the County Assessor as of March 19, 2008 was \$218,355. (E2:1). The Taxpayer attributed the 2008 increase in value proposed by the County Assessor to the fact that he had purchased the subject property on April 4, 2008 for \$227,500. After hearing the Taxpayer's protest the County Board

determined that taxable value of the subject property for tax year 2008, was \$194,180. (E2:1). For tax year 2009, the County Assessor determined that actual value of the subject property was \$212,045. (E1:1). The Taxpayer protested. (E1:1). The County Board determined taxable value was \$202,000. (E1:1). The Taxpayer testified that he believed the County Board split the difference between value as determined by the County Assessor and his requested valuation as a basis for its decision. Value as determined by the County Assessor was \$212,045. (E1:1). Value as proposed by the Taxpayer was \$194,180. (E1:1). The difference between the two values is \$17,865 ($\$212,045 - \$194,180 = \$17,865$). Half of the difference between the two values is \$8,932.50 ($\$17,865 \div 2 = \$8,932.50$). Adding \$8,932.5 to value as proposed by the Taxpayer results in a value of \$203,112.50 ($\$194,180 + \$8,932.50 = \$203,112.50$). The basis for the County Board's determination of taxable value is unknown.

The County Assessor's determination of actual value was based on use of the cost approach. The cost approach is one of three valuation approaches specifically authorized for use by County Assessors. Neb. Rev. Stat. §77-112 (Reissue 2009). 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 contribution to value of the land component was determined based on sales of vacant lands using a scale that recognized that larger parcels sold for less per acre than smaller parcels.

Replacement cost new was determined based on cost data provided by Marshall & Swift. (E3:5).

Functional depreciation of 12% was attributed to the subject property. (E3:5). 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. The amount of functional depreciation was determined by an appraiser, employed by the County Assessor, after an inspection of the subject property.

Economic depreciation of 25% was attributed to the subject property. (E3:5). 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. Economic depreciation is determined each year by the County Assessor as an adjustment to estimates of value indicated by the cost approach. The amount of the adjustment for each neighborhood is determined based on an analysis of the assessment to sales ratios for sold parcels in that neighborhood. Once determined, the economic depreciation factor is applied to the improvements on each parcel in the neighborhood.

The County Assessor determined actual value of each parcel in Bridle Acres Second Subdivision for tax year 2009 using the process described above. The Taxpayer submitted Exhibit 4 containing the property record files for various parcels in Bridle Acres Second Subdivision for the tax year 2009.

The physical characteristics, attributes, amenities and actual value of the subject property as determined by the County Assessor and the parcels presented by the Taxpayer is summarized in the following tables.

Descriptor	Subject	Parcel 1	Parcel 2	Parcel 3
Exhibit	E4:8 & 9	E4:4-7	E4:10-11	E4:12-13
Location	6395 Windmill Rd	6180 Yellow Rose Lane	5245 Yellow Rose Lane	6150 Yellow Rose Lane
Lot Size	4.71 Ac	2.33 Ac	2.59 Ac	3.69 Ac
Condition	Good	Good	Good	Good
Quality	Good	Average +	Good	Average +
Yr Built	2003	2003	2005	2003
Exterior Walls	Siding Masonite	Siding Vinyl	Siding Vinyl	Siding Vinyl
Style	One Story	One Story 99% Two Story 1%	One Story	One Story 99% Two Story 1%

Above Ground	1,748 Sq Ft	1,624 Sq Ft	1,794 Sq Ft	1,668Sq Ft
Roof Cover	Comp Shingle	Comp Shingle	Comp Shingle	Comp Shingle
HVAC	Warm & Cooled	Warm & Cooled	Warm & Cooled	Warm & Cooled
Basement	1,734 Sq Ft	1,312 Sq Ft	1,728 Sq Ft	1,356 Sq Ft
Finished	1,574 Sq Ft	1,180 Sq Ft	1,500 Sq Ft	
Walkout		1		1
Bathrooms	3.5	3.5	4	3
Garage Type	Attached Detached	Built In Attached 1 Attached 2	Attached	Built In Attached 1 Attached 2
Garage Area	996 Sq Ft 384 Sq Ft	264 Sq Ft 120 Sq Ft 408 Sq Ft	1,054 Sq Ft	300 Sq Ft 120 Sq Ft 156 Sq Ft
Misc Imp	Wood Deck, Concrete Drive	Wood Deck, Patio, Concrete Drive	Concrete Drive	Wood Deck, Patio, Concrete Drive
Lot Value	\$29,275	\$23,325	\$17,980	\$26,725
Imp Value	\$182,770	\$164,715	\$191,855	\$125,805
Taxable Value	\$212,045	\$188,040	\$209,835	\$152,530

Descriptor	Subject	Parcel 4	Parcel 5	Parcel 6
Exhibit	E4:8 & 9	E4:14-15	E4:16-17	E4:18-19
Location	6395 Windmill Rd	6095 Yellow Rose Lane	6545 Windmill Rd	19445 63 RD Rd
Lot Size	4.71 Ac	5.09 Ac	4.25 Ac	2.06 Ac
Condition	Good	Good	Good	Good
Quality	Good	Average +	Good	Good
Yr Built	2003	2005	2005	2004

Exterior Walls	Siding Masonite	Siding Vinyl	Siding Masonite	94 %Siding Vinyl 6% Masonry Veneer
Style	One Story	One Story	One Story 74% Two Story 26%	One Story
Above Ground	1,748 Sq Ft	1,496 Sq Ft	1,996 Sq Ft	1,805 Sq Ft
Roof Cover	Comp Shingle	Comp Shingle	Comp Shingle	Comp Shingle
HVAC	Warm & Cooled	Warm & Cooled	Warm & Cooled	Warm & Cooled
Basement	1,734 Sq Ft	1,482 Sq Ft	1,492 Sq Ft	1,805 Sq Ft
Finished	1,574 Sq Ft	1,380 Sq Ft		
Walkout		1		1
Bathrooms	3.5	3	2	2
Garage Type	Attached Detached	Attached	Attached	Attached
Garage Area	996 Sq Ft 384 Sq Ft	600 Sq Ft	816 Sq Ft	1,019 Sq Ft
Misc Imp	Wood Deck, Concrete Drive	Wood Deck, Patio, Concrete Drive	Wood Deck, Concrete Drive	Wood Deck, Concrete Drive
Lot Value	\$29,275	\$30,225	\$28,125	\$18,120
Imp Value	\$182,770	\$134,910	\$149,650	\$162,505
Taxable Value	\$212,045	\$165,135	\$177,775	\$180,625

Descriptor	Subject	Parcel 7	Parcel 8
Exhibit	E4:8 & 9	E4:20-21	4:22-24
Location	6395 Windmill Rd	6445 Windmill Rd	19385 63 RD Rd
Lot Size	4.71 Ac	4.75 Ac	14.73 Ac
Condition	Good	Good	Good
Quality	Good	Good	Average +

Yr Built	2003	2002	2005
Exterior Walls	Siding Masonite	85% Siding Masonite 15% masonry Veneer	Siding Vinyl
Style	One Story	One Story	One Story
Above Ground	1,748 Sq Ft	1,512 Sq Ft	1,972 Sq Ft
Roof Cover	Comp Shingle	Comp Shingle	Comp Shingle
HVAC	Warm & Cooled	Warm & Cooled	Warm & Cooled
Basement	1,734 Sq Ft	1,512 Sq Ft	1,954 Sq Ft
Finished	1,574 Sq Ft	196 Rec 966 Part	1,466 Sq Ft
Walkout			1
Bathrooms	3.5	2	3.5
Garage Type	Attached Detached	Attached	Attached
Garage Area	996 Sq Ft 384 Sq Ft	751	768
Misc Imp	Wood Deck, Concrete Drive	Pole Bldg, 3,840 Sq Ft Concrete Drive	Wood Deck, Patio, Concrete Drive
Lot Value	\$29,275	\$24,970	\$67,905
Imp Value	\$182,770	\$118,775	\$175,070
Taxable Value	\$212,045	\$184,745	\$242,975

The assessment records do not show that assessment of the subject property was based on its sale and purchase in April of 2008, as contended by the Taxpayer. The assessment records do show that prior to County Board action actual value of the subject property was determined on a basis that conformed to the basis on which the actual value of other parcels in Bridle acres Second Subdivision was determined. Where the evidence shows the assessed value of property has been determined by a formula in substantial compliance with the law which has been

uniformly and impartially applied, such assessed value will not ordinarily be disturbed on appeal on evidence indicating a mere difference of opinion as to the valuation. *First Nat. Bank v. Otoe Cty.*, 233 Neb. 412, 445 N.W.2d 880 (1989); *Greenwood Ranch v. Morrill Cty. Bd. of Equal.*, 232 Neb. 114, 439 N.W.2d 760 (1989); *Dowd v. Board of Equalization of Boone County*, 240 Neb. 437, 482 N.W.2d 583 (1992).

After County Board action, the subject property was not valued on the same basis as other similarly situated parcels. Any method of valuation must, however uniform its application, indicate actual value. In this case, the formula is adjusted by use of an economic depreciation factor derived from a statistical analysis derived from sales for the sole purpose of obtaining a more accurate indication of actual value using the cost approach. There is no evidence that the determination of the County Board is related in any way to actual value of the subject property, and the Board's action resulted in a valuation of the subject property on a different basis than other similarly situated parcels. The County Board's determination was not related to a common standard, actual value, and is unreasonable or arbitrary.

Once it is determined that the decision of the County Board was unreasonable or arbitrary, the Commission must review the evidence and adopt the most reasonable estimate of actual value presented. *Garvey Elevators, Inc. v. Adams County Bd. of Equalization*, 261 Neb. 130, 621 N.W.2d 518 (2001).

The only evidence of actual value presented by the Taxpayer is his opinion that the prior year's value should be maintained. 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).

There is no evidence supporting the County Board's determination.

Actual value as determined by the County Assessor is supported by the record and is the most reasonable estimate of actual value before the Commission.

Taxable value of the subject property as determined by the County Board was not related to a common standard, actual value, and therefore did not equalize taxable value of the subject property with other similarly situated parcels. The methodology of the County Assessor is related to a common standard, actual value, and results in a taxable value that is equalized with similarly situated parcels.

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 \$ 29,275.00

Improvement value \$182,770.00

Total value \$212,045.00.

3. This decision, if no appeal is timely filed, shall be certified to the Buffalo County Treasurer, and the Buffalo County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Reissue 2009).
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 2009.
7. This order is effective for purposes of appeal on July 28, 2010.

Robert W. Hotz, 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