

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

DON L. SHORT II, TRUSTEE, DON L.)
SHORT II REVOCABLE TRUST,)
)
Appellant,)
)
v.)
)
DOUGLAS COUNTY BOARD OF)
EQUALIZATION,)
)
Appellee.)

Case No. 09C 281

DECISION AND ORDER
AFFIRMING THE DECISION OF
THE DOUGLAS COUNTY BOARD OF
EQUALIZATION

The above-captioned case was called for a hearing on the merits of an appeal by Don L. Short II, Trustee, Don L. Short II Revocable Trust ("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 23, 2010, pursuant to an Order for Hearing and Notice of Hearing issued January 25, 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.

Don L. Short II, Trustee of Don L. Short II Revocable Trust, was present at the hearing. Charles P. Fike appeared as legal counsel for the Taxpayer.

Thomas S. Barrett, a Deputy County Attorney for Douglas County, Nebraska, was present as legal counsel for the Douglas County Board of Equalization ("the County Board").

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

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

Case No. 09C 281

Description: Lot 7 Block 0 All Lts 6 & 7 100x 140, Douglas County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$112,000.00	\$58,800.00	\$112,000.00
Improvement	\$541,900.00	\$429,800.00	\$541,900.00
Total	\$653,900.00	\$488,500.00	\$653,900.00

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 25, 2010, set a hearing of the appeal for March 23, 2010, 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. Actual value of the subject property as of the assessment date for the tax year 2009 is:

Case No. 09C 281

Land value	\$112,000.00
Improvement value	<u>\$541,900.00</u>
Total value	<u><u>\$653,900.00.</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) (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).

IV. ANALYSIS

The subject property is an improved parcel in the city of Omaha, Douglas County, Nebraska. The subject property is zoned for general office use. The improvements on the subject property are a 7,362 square foot building with a parking lot. The building is used as an office for a company controlled by the Taxpayer. A portion of the building, 1,850 square feet, has not been finished for office use and is used for storage. The Taxpayer offered his opinion that actual value of the subject property was between \$400,000 and \$425,000 as of January 1, 2008, and that actual value as of January 1, 2009 was 5% less due to change in cost factors. In support of his opinion the Taxpayer had developed estimates of value using the cost approach and the income approach.

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, pp. 128 - 129.

For the first step in use of the cost approach, the Taxpayer estimated the contribution to value of the land component as its original cost grown at a compounded rate of 3% per annum, and deducted 10% from that result for location. Even if the assumption is correct that value of land increased at 3% per annum, over time the purchase price of property is not necessarily its actual value. See, *Forney v. Box Butte County Bd. of Equalization*, 7 Neb.App. 417, 582 N.W.2d 631, (1998). Site value can be estimated in the cost approach using a variety of techniques. *The Appraisal of Real Estate*, 13th Edition, Appraisal Institute, 2008, p. 385. The sales comparison approach is the preferred methodology for development of an estimate of site value. *The Appraisal of Real Estate*, 13th Edition, Appraisal Institute, 2008, p. 362. If adequate sales are not available other techniques such as market extraction, allocation, and various income capitalization techniques can be used. *Id.* The techniques used by the Taxpayer to estimate the contribution to value of the land component is not a recognized methodology. An estimate of value based on the use of the cost approach is only as good as the development of each component of the approach. Because the Taxpayer’s estimate of the contribution to value of the land component is not persuasive it is not necessary to examine other aspects of his use of the cost approach.

The Taxpayer also developed an estimate of value based on use of the income approach. The income approach can be defined as “a set of procedures through which an appraiser derives a value indication for an income-producing property by converting its anticipated benefits (cash flows and reversion) into property value. This conversion can be accomplished in two ways. One year’s income expectancy can be capitalized at a market-derived rate or at a capitalization rate that reflects a specified income pattern, return on investment, and change in the value of the investment. Alternatively, the annual cash flows for the holding period and the reversion can be discounted at a specified yield rate.” *The Dictionary of Real Estate Appraisal*, Fourth Edition, Appraisal Institute, p.143, (2002). The steps required for use of the income approach with direct capitalization may be summarized as: (1) estimate potential gross income; (2) deduct estimated vacancy and collection loss to determine effective gross income; (3) deduct estimated expenses to determine net operating income; and (4) divide net operating income by an estimated capitalization rate to yield indicated value. *The Appraisal of Real Estate* 13th Edition, The Appraisal Institute, 2008, pp. 466. A variety of techniques may be used to quantify various components of any application of the approach. *Id.*, at chs 20-24.

As part of his use of the income approach, the Taxpayer did not dispute the estimates for vacancy and collection loss, expense ratio, and capitalization rate adopted by the County Board. The Taxpayer developed a different base rent, applied the base rent to a different base area, and developed an adjustment for the cost to finish for office use an area used for storage. Alterations including major replacement, modernization, and renovation may be considered capital expenditures and are therefore not considered as expenses in an application of the income approach. *The Appraisal of Real Estate* 13th Edition, The Appraisal Institute, 2008, p. 489.

Development of the income approach, in its most basic description, is dependent on an estimate of income, expenses, and a capitalization rate. Expenditures for capital items may be recognized as an expense in a reserve for replacement. *The Appraisal of Real Estate* 13th Edition, The Appraisal Institute, 2008, p. 490. The capital items appropriate for recognition in a replacement allowance are those that provide for the periodic replacement of building components that wear out more rapidly than the building itself and must be replaced during the building's economic life. *Id.* An expenditure to upgrade a portion of a building cannot fall into that category because until the upgrade occurs there is nothing to replace. Aside from that issue, the deduction of a lump sum for a future expenditure that may or may not occur is not supported in the appraisal literature. The evidence supports a conclusion that some portion of the office building on the subject property is unfinished and is not rentable as office space. Appraisal literature indicates that the appropriate adjustment for unfinished area is to adjust the rent rate. The rationale is simple, an unfinished area will not command the rent that a finished area will. The appropriate rents for finished and unfinished areas should be determined and used to calculate gross rents.

The Taxpayer used the expense ratio adopted by the County Board. The expense ratio used by the County Board included the costs of insurance, utilities, and repairs. (E2:12). The Taxpayer testified that those expenses and others are paid by the tenant of the subject property. Despite application of a 35% expense ratio by the County Board, and adoption of that ratio by the Taxpayer, it is clear that a 35% expense ratio is not appropriate for the subject property. Evidence with which to establish a market derived cost ratio appropriate for application to the subject property is not before the Commission.

The Taxpayer made two assertions regarding gross rents as determined by the County Board: that the rent rate is excessive, and that the rent rate was applied to an incorrect estimate of the rentable space.

The Taxpayer asserted that the appropriate rental rate for the subject property was either \$10 or \$11 per square foot. The basis for the Taxpayer's opinion was a review of asking prices for industrial flex space in the neighborhood of the subject property and general office space rental rates for Class B to upper Class C office space. Industrial flex space is contained in a building that is largely storage space with a small office area. The subject property is at least 75% office space. Rentals for industrial flex space are not an indicator of rents that the subject property might command. The general rates described by the Taxpayer may or may not reflect the rental conditions found in the subject property, that is expenses paid by the tenant. Even if it is assumed that a base rent of \$10 or \$11 is appropriate for the subject property, the expenses paid by the tenant have not been considered as income. Even if the Commission should be indifferent to the deduction as an expense or the grossing up of rents for insurance, for example, the treatment of taxes endorsed by the Taxpayer and used by the County Board would result in overvaluation of the subject property at any given unadjusted rental rate because the capitalization rate expenses are understated. The Taxpayer's evidence concerning the rental rate that should be attributed to the subject property is not persuasive.

The amount of rentable space was disputed by the Taxpayer. It is clear that the office building contains 7,362 square feet of gross area. The Taxpayer contends that 1,850 square feet of the gross area are unfinished and usable only for storage. Based on those assumptions, the area used as office space is 5,512 square feet ($7,362 - 1,850 = 5,512$). In its application of the income

approach the County Board estimated the space available for rental as office space at 6,552 square feet. (E2:12). Neither the County Board nor the Taxpayer attributed any income to the space used as storage. Income at any rate per square foot would be underestimated by the Taxpayer because no income from storage space was recognized. Income as developed by the County Board is in error both because at any rate per square foot it assumes an incorrect number of square feet available for office space and because it does not recognize income attributable to storage space.

The treatment of taxes in the income approach as developed by the Taxpayer and by the County Board is not appropriate. For reasons stated below, the appropriate treatment of taxes if value is being developed for ad valorem tax purposes is to add the tax rate to the base capitalization rate creating a loaded cap rate. As an alternative, taxes are deducted as an expense when value is being estimated for other than ad valorem tax purposes. Taxes are not included in the list of items included in the 35% ratio used by the Taxpayer or by the County Board. (E2:12). An effective tax rate is not expressed as a component of the capitalization rate used by the Taxpayer and the County Board. (E2:13). Exhibit 12 at page 13 does provide a general statement concerning the treatment of taxes in the use of the income approach developed by the County Board. For purposes of discussion, that guidance is set out in full as follows: "Some classes of property may not include a component for the effective tax rate since they are rented on a full service basis and the landlord is responsible for taxes. The tax expense is included in the total expense of the property and therefore not added back in the appropriate effective tax rate." If a landlord is responsible for payment of taxes the appropriate treatment is to exclude taxes from expenses. *Property Assessment Valuation, 2nd Ed.*, International Association of Assessing Officers, 1996, p. 240. The tax rate should be included as a component of the capitalization rate.

Supra. at 233. The basis for that position is the interplay between tax rates, value, and resulting tax when a valuation estimate is developed using the income approach. The income approach at its simplest can be described as a formula in which income is divided by a capitalization rate to derive an estimate of value ($I \div R = V$). Income equals the sum of income less expenses. As the formula is applied, if an expense is increased, income is reduced, and the indication of value is reduced. The inverse is true for the reduction of an expense. The reduction of an expense produces an increase in income and an increase in the value indication. Taxes to be paid are a function of both the rate and the value to which the rate is applied. If taxes are deducted for purposes of determining value; the tax rate is applied to a stated value, the tax is determined, and a deduction is taken. The process produces a circularity in the calculations. If, for example, value is reduced, the resulting tax deduction should be reduced, producing in turn a higher indication of value when the formula is rerun. Because the objective in an ad valorem tax proceeding is to determine the value to which the tax rate is to be applied, the formula calls for use of an unknown that will be found only with the use of the unknown itself. Use of a loaded capitalization rate avoids the circularity produced by an expense deduction for taxes because the loaded capitalization rate is indifferent to the items of income or expense, the sum of which it is divided into.

Statutory provisions for determination of actual value, the levy, and payment of the resulting tax are also important considerations. Actual or taxable value is determined as of January 1 of each year. Neb. Rev. Stat. §77-1301 (Cum. Supp. 2008). Levies on taxable value are determined by October 15 of each year. Neb. Rev. Stat. §77-1601 (Reissue 2003). The resulting amount of tax is then determined and a notice sent to a taxpayer. Neb. Rev. Stat. §77-

1701 (Reissue 2003). The tax is due and payable on December 31 of each year. Neb. Rev. Stat. §77-203 (Reissue 2003). Payment of the tax due may be made in two installments, the first due on May 1 or April 1, and the second due on September 1 or August 1 of the year following its levy. Neb. Rev. Stat. §77-204 (Reissue 2003). If taxes are paid in the year after levy, and considered an expense item in the year paid, the taxes paid may not be those which are attributable to the year in which other expenses or income being annualized were determined. In short, one expense item, real property taxes, will be a year off the time frame of all other items if the taxes are paid immediately prior to the delinquency dates. Use of a loaded cap rate makes consideration of an adjustment to financial information unnecessary. For the reasons stated, the use of a loaded capitalization rate will produce a more accurate estimate of actual value when the income approach is used to estimate actual value for ad valorem tax purposes. The sentence reading, "Some classes of property may not include a component for the effective tax rate since they are rented on a full service basis and the landlord is responsible for taxes," does not express an appropriate valuation standard. In this appeal, the evidence is that taxes are paid by the tenant. Two treatments are possible if taxes are paid by the tenant: added income if the rental rate does not include payment of taxes as a factor, or addition to the capitalization rate. The discussion of a deduction for taxes is equally applicable to an addition to income for taxes. The acceptable practice is to capitalize the tax rate. The sentence reading, "The tax expense is included in the total expense of the property and therefore not added back in the appropriate effective tax rate," likewise does not express an appropriate valuation standard. The capitalization rate used by the County Board and adopted by the County Board is not adjusted for the tax rate. In this appeal, the evidence is that taxes are paid by the tenant. Taxes as paid by the tenant have not been recognized

as added income by the Taxpayer nor has the effective tax rate been included in the capitalization rate.

The Taxpayer asserts that the determination of actual value made by the County Board is unreasonable or arbitrary for two reasons. First, that the rental rate used is too high, and second that the area to which the rental rate is applied is too large. The Taxpayer's evidence concerning an appropriate rental rate is not persuasive. It is necessary to do more than criticize. The subject property has not been inspected by the County Assessor's office to verify the Taxpayer's assertions regarding the amount of storage space. The failure to inspect can be attributed to the Taxpayer's refusal to allow an inspection. The County Board utilized 6,552 square feet of rentable space in its determination. (E2:12). The gross building area is 7,362. Some allowance has been made. Without an inspection by the County Assessor's office, the Commission cannot conclude that the allowance made is not correct.

Actual value of the subject property and as determined by the County Board was \$653,900. (E1:1). The indication of actual value based on the County Board's application of the income approach is \$699,900. (E2:12).

A Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued. *Josten-Wilbert Vault Co. v. Board of Equalization for Buffalo County*, 179 Neb. 415, 138 N.W.2d 641 (1965). The Taxpayer has not met that burden and relief can not be granted on his valuation claim.

The Taxpayer asserts that taxable value of the subject property is not equalized with other similar parcels because a neighboring parcel is taxed at less than its purchase price on May 26, 2006. 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 only evidence of the actual value of the comparison parcel as of the assessment date offered by the Taxpayer was its purchase price in 2006. It is true that the purchase price of property may be taken into consideration in determining the actual value thereof for assessment purposes, together with all other relevant elements pertaining to such issue; however, standing alone, it is not conclusive of the actual value of property for assessment purposes. Other matters relevant to the actual value thereof must be considered in connection with the sale price to determine actual value. Sale price is not synonymous with actual value or fair market value. *Forney v. Box Butte County Bd. of Equalization*, 7 Neb.App. 417, 582 N.W.2d 631 (1998). The sale of the comparison parcel occurred 2½ years before the assessment date at issue in this appeal. None of the circumstances surrounding the sale of the comparison parcel are known. The sale price of the comparison parcel is not sufficient evidence of its actual value as of January 1, 2009. There is no evidence that actual value of the comparison parcel is different than its assessed value. The ratio of actual value to assessed value for the comparison parcel is 1. The ratio of actual value to assessed value for the subject property is also 1. Assessed value of the subject property is equalized with the assessed value of the comparison parcel.

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). The Taxpayer has not met that burden and relief can not be granted on his equalization claim.

**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 not 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 not 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 affirmed.
5. The Taxpayer has not produced competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued.

**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 affirmed.
2. Actual value, for the tax year 2009, of the subject property is:

Case No. 09C 281

Land value	\$112,000.00
Improvement value	<u>\$541,900.00</u>
Total value	<u>\$653,900.00.</u>

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 (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 September 1, 2010.

Signed and Sealed. September 1, 2010.

Nancy J. Salmon, Commissioner

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