

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

RANDY & HELEN STRODE,)	
)	
Appellant,)	Case No. 09C 254
)	
v.)	DECISION AND ORDER
)	AFFIRMING THE DECISION OF
SAUNDERS COUNTY BOARD OF)	THE SAUNDERS COUNTY BOARD OF
EQUALIZATION,)	EQUALIZATION
)	
Appellee.)	

The above-captioned case was called for a hearing on the merits of an appeal by Randy & Helen Strode ("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 9, 2011, pursuant to an Order for Hearing and Notice of Hearing issued December 29, 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 Hotz was excused. Commissioner Salmon was present. The appeal was heard by a quorum of a panel of the Commission.

Randy & Helen Strode was present at the hearing. Terry K. Barber appeared as legal counsel for the Taxpayer.

Scott Tingelhoff, County Attorney for Saunders County, Nebraska, was present as legal counsel for the Saunders 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.

**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 Saunders 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: Lots 10-11 Block 21 Stambaughs Addition, Ashland, Saunders County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$7,480.00	\$-0-	\$7,480.00
Total	\$7,480.00	\$-0-	\$7,480.00

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 December 29, 2010, set a hearing of the appeal for March 9, 2011, at 9:00 a.m. CST.
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	\$7,480.00
Total value	<u>\$7,480.00.</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. A presumption exists that the County Board has faithfully performed its duties and has acted on competent evidence. *City of York v. York County Bd. Of Equalization*, 266 Neb. 297, 64 N.W.2d 445 (2003).

8. The presumption in favor of the county board may be classified as a principle of procedure involving the burden of proof, namely, a taxpayer has the burden to prove that action by a board of equalization fixing or determining valuation of real estate for tax purposes is unauthorized by or contrary to constitutional or statutory provisions governing taxation. *Gordman Properties Company v. Board of Equalization of Hall County*, 225 Neb. 169, 403 N.W.2d 366 (1987).
9. The presumption disappears if there is competent evidence to the contrary. *Id.*
10. The order, decision, determination, or action appealed from shall be affirmed unless evidence is adduced establishing that the order, decision, determination, or action was unreasonable or arbitrary. Neb. Rev. Stat. §77-5016 (8) (Reissue 2009).
11. 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).
12. "Clear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved." *Castellano v. Bitkower*, 216 Neb. 806, 812, 346 N.W.2d 249, 253 (1984).
13. A decision is "arbitrary" when it is made in disregard of the facts and circumstances and without some basis which could lead a reasonable person to the same conclusion. *Phelps Cty. Bd. of Equal. v. Graf*, 258 Neb 810, 606 N.W.2d 736 (2000).
14. A decision is unreasonable only if the evidence presented leaves no room for differences of opinion among reasonable minds. *Pittman v. Sarpy Cty. Bd. of Equal.*, 258 Neb 390, 603 N.W.2d 447 (1999).

15. “An owner who is familiar with his property and knows its worth is permitted to testify as to its value.” *U. S. Ecology v. Boyd County Bd. Of Equalization*, 256 Neb. 7, 16, 588 N.W.2d 575, 581 (1999).
16. The County Board need not put on any evidence to support its valuation of the property at issue unless the taxpayer establishes the Board's valuation was unreasonable or arbitrary. *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).
17. A Taxpayer, who only produced evidence that was aimed at discrediting valuation methods utilized by the county assessor, failed to meet burden of proving that value of property was not fairly and proportionately equalized or that valuation placed upon property for tax purposes was unreasonable or arbitrary. *Beynon v. Board of Equalization of Lancaster County*, 213 Neb. 488, 329 N.W.2d 857 (1983).
18. A Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued. Cf. *Josten-Wilbert Vault Co. v. Board of Equalization for Buffalo County*, 179 Neb. 415, 138 N.W.2d 641 (1965) (determination of actual value).

IV. ANALYSIS

The subject property is an unimproved parcel within the city limits of Ashland, Saunders County, Nebraska. The Taxpayer described his use of the subject property as storage for steel to be used in a steel fabrication business operated on the subject property and adjacent parcels. Use of the property by the Taxpayer has been the subject of litigation. Specifically on March 14,

2005 the District Court for Saunders County found that the zoning regulations of the City of Ashland prohibited all uses of the subject property except those allowed within PUB Public and Semi-Public Districts or allowed non conforming uses. (E28). The District court also determined that the subject property with adjacent parcels had been used for the storage of unlicensed and/or inoperable vehicles, automobile parts, construction equipment, tools, machinery trailers, metal parts and junk and that those uses were unallowed non-conforming uses. (E28:2).

The uses allowed within PUB Public and Semi-Public districts are found in Section 5:15 of the zoning ordinances for the City of Ashland. (E16). The uses allowed are: “Permitted Uses a. Recreational uses including the following: parks, ball field, swimming pools, soccer fields, trails, and associated uses. b. Other public uses including : cemeteries and fairgrounds. ... Accessory Uses a. All secondary uses associated with Permitted Uses. b. Parking as allowed in Article 7. c. Signs as allowed in Article 7.” (E16:55) Sections or articles 7.03 & 7.04 of the zoning ordinance both restrict and mandate parking. (E16:97 & 98). None of the restrictions for requirements found in sections 7.03 and 7.04 of the zoning ordinance are applicable to the activities permitted in a PUB Public Semi-Public District. Sections or articles 7.05, 7.06, and 7.07 of the zoning ordinance describe permitted signs and designate the districts in which various types of signs may be used. (E16:99-100). Within a PUB district real estate signs announcement signs and name plate signs may be used. (E16:100). Real estate signs may not be larger than 6 feet square, must be set back 20 feet from the road right of way or road easement, must be temporary. (E16:99). No more than 2 real estate signs may be placed on a lot. (E16:99). Announcement signs are defined as “Small announcement or professional signs, not over 6

square feet in area except that an announcement sign or bulletin board not over 18 square feet in area, set back at least 20 feet from any highway, street, road, or roadway easement may be erected in connection with any of the permitted principal uses of a nonresidential nature.” (E16:99). Name plate signs for a dwelling not exceeding 2 square feet. (E16:99).

Non-conforming uses are allowed if existing on the date the zoning ordinance was adopted and the non conforming use has not ceased for a period of twelve months. (E16:27).

The District Court found that all of the Taxpayer’s uses of the subject property were unallowed non-conforming uses

Property must be assessed based on its actual value. Neb. Rev. Stat. 77-201 (Reissue 2009). Actual value is to be determined based on the highest and best use of the parcel. 350 Neb. Admin. Code, ch. 50, §.00204A (01/07). Highest and best use is the most reasonable and probable use of the property that will support the highest present value. 350 Neb. Admin. Code, ch. 10, §001.13 (3/09). It is the recognition of the contribution of that specific use to the community environment or community development goals in addition to wealth maximization of individual property owners. *Id.* “Highest and best use may be defined as follows: the reasonably probable and legal use of vacant land or an improved property that is physically possible, appropriately supported, and financially feasible and that results in the highest value.” *The Appraisal of Real Estate*, 13th Edition, Appraisal Institute, 2008 at 277. Both definitions require valuation of the use that will maximize value.

The theoretical basis of the concept of highest and best use and the practical aspects of its application in the valuation of property have not been discussed in Nebraska law. The theoretical

basis for the concept of highest and best use and practical guides for its application in the valuation of property are well developed in professional literature.

“The theoretical focus of highest and best use analysis is on the potential uses of the land as though vacant.” *Id.* at 278. “In the analysis of highest and best use of land as though vacant, the appraiser seeks the answers to several questions: Should the land be developed or left vacant? If left vacant, when would future development be financially feasible? If developed, what kind of improvement should be built? In the analysis of the highest and best use of the property as improved, additional questions must be answered: Should the existing improvements on the property be maintained in their current state, should they be altered in some manner to make them more valuable, or should they be demolished to create a vacant site for a different use? If renovation or redevelopment is warranted, when should the new improvements be built?” *Id.* at 278.

“In general, if the value of a property as improved is greater than the value of the land as though vacant, the highest and best use is the use of the property as improved. However, a property’s existing use may represent an interim use, which begins with the land value for the new highest and best use and adds the contributory value of the current improvements until the new highest and best use can be achieved.” *Id.* at 278.

Four steps are implicit and are applied to develop adequate support for highest and best use opinion is the use being considered: 1. Legally permissible; 2. Physically permissible 3. Financially feasible; 4. Maximally productive *Id.* at 278-279. The highest and best use of land as though vacant is concluded after the four criteria have been applied and various alternative

uses have been eliminated. The remaining use that fulfills all four of the criteria is the highest and best use. *Id* at 281.

Prior to Ashland's action to enforce its zoning regulations the subject property had been used for the storage of unlicensed and/or inoperable vehicles, automobile parts, construction equipment, tools, machinery trailers, metal parts and junk. That use was found to be an unallowed nonconforming use and was enjoined. The only activities legally permissible on the subject property are those allowed in Section 5:15 of the City of Ashland's Zoning Ordinance. Whether any of the legally permissible uses are physically permissible, or financial feasible is not in evidence. Likewise which of the permitted uses might be maximally productive is not in evidence. The only evidence is that the highest and best use of the subject property are the legally permitted uses as described in the City of Ashland's zoning ordinance.

The Taxpayer, testified that in his opinion the subject property had no value as of January 1, 2009, because its use was restricted by the City of Ashland's zoning ordinance. "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). The Nebraska Supreme Court also has observed that "(a)s a general rule the valuation of property for tax purposes by the proper assessing officers should not be overthrown by the testimony of one or more interested witnesses that the values fixed by such officers were excessive or discriminatory when compared with the values placed thereon by such witnesses. Otherwise no assessment could ever be sustained." *Helvey v. Dawson County Board of Equalization*, 242 Neb. 379, 387, 495 N.W.2d 261, 267 (1993). The Taxpayer's unsupported opinion is not clear and convincing evidence that the decision of the County Board was unreasonable or arbitrary.

Exhibit 2 was offered by the County Board and received. In Exhibit 2 an unknown person opines that actual value of the subject property is \$1,000. The only basis for that opinion was an assertion that the total value of four parcels with the subject property included would be equal to their purchase price. The subject property was purchased by the Taxpayer in 2002 for \$1,000. (E6:1). 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). In this instance the sale and purchase of the subject property occurred over six years before the assessment date. Exhibit 2 is not clear and convincing evidence that the decision of the County Board was unreasonable or arbitrary.

An assessment record for the subject property shows that as of March 8, 2004 the County Assessor believed that zoning restrictions applicable to it were those for commercial property. (E17). The assessment records as of January 13, 2011 show that as of that date the County Assessor believed zoning restrictions applicable to the subject property were other. (E3:1). A change of zoning classification in the assessment records sometime between March 8, 2004 and January 12, 2011 is not clear and convincing evidence that the County Boards decision for the year 2009 was arbitrary or unreasonable.

**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.

**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:

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Land value	\$7,480.00
Total value	<u>\$7,480.00.</u>

3. This decision, if no appeal is timely filed, shall be certified to the Saunders County Treasurer, and the Saunders 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 March 16, 2011.
- Signed and Sealed. March 16, 2011.

Nancy J. Salmon, 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 (Reissue 2009). 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) (Reissue 2009).

The Commission is authorized to review decision of a County Board of Equalization determining taxable values. Neb. Rev. Stat. §77-5007 (Reissue 2009). Review of County Board of Equalization decisions is not new in Nebraska law. As early as 1903, Nebraska Statutes provided for review of County Board assessment decisions by the district courts. Laws 1903, c. 73 §124. The statute providing for review did not state a standard for that review. *Id.* A standard of review stated as a presumption was adopted by Nebraska's Supreme Court. See, *State v. Savage*, 65 Neb. 714, 91 N.W. 716 (1902) (citing *Dixon Co. v. Halstead*, 23 Neb. 697, 37 N.W. 621 (1888) and *State v. County Board of Dodge Co.* 20 Neb. 595, 31 N.W. 117 (1887)). The presumption was that the County Board had faithfully performed its official duties and had acted upon sufficient competent evidence to justify its actions. *See id.* In 1959, the legislature provided a statutory standard for review by the district courts of county board of equalization, assessment decisions. 1959 Neb Laws, LB 55, §3. The statutory standard of review required the District Court to affirm the decision of the county board of equalization unless the decision was arbitrary or unreasonable or the value as established was too low. *Id.* The statutory standard of review was codified in section 77-1511 of the Nebraska Statutes. Neb. Rev. Stat. §77-1511 (Cum. Supp. 1959). After adoption of the statutory standard of review, Nebraska Courts have held that the provisions of section 77-5011 of the Nebraska Statutes created a presumption that the County Board has faithfully performed its official duties and has acted upon sufficient

competent evidence to justify its actions. *See, e.g. Ideal Basic Indus. V. Nucholls Cty. Bd. Of Equal.*, 231 Neb. 297, 437 N.W.2d 501 (1989). The presumption stated by the Court was the presumption that had been found before the statute was enacted.

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

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

which arose from section 77-1511 is applicable to the decisions of the Commission. *Garvey Elevators, Inc. V. Adams County Bd. of Equalization*, 261 Neb. 130, 621 N.w.2d 518 (2001).

The possible results from application of the presumption as a standard of review and the statutory standard of review are: (1) the presumption is not overcome and the statutory standard is not overcome; (2) the presumption is overcome and the statutory standard is not overcome; (3) the presumption is not overcome and the statutory standard is overcome; (4) and finally the presumption is overcome and the statutory standard is overcome. The first possibility does not allow a grant of relief, neither standard of review has been met. The second possibility does not therefore allow a grant of relief even though the presumption is overcome because the statutory standard remains. *See City of York v. York County Bd of Equal.*, 266 Neb. 297, 664 N.W.2d 445 (2003). The third possibility requires analysis. The presumption and the statutory standard of review are different legal standards, and the statutory standard remains after the presumption has been overcome. *See id.* The burden of proof to overcome the presumption is competent evidence. *Id.* Clear and convincing evidence is required to show that a county board of equalization's decision was unreasonable or arbitrary. *See, e.g. Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb.App. 171, 645 N.W.2d 821 (2002). Competent evidence that the county board of equalization failed to perform its duties or act upon sufficient competent evidence is not always evidence that the county board of equalization acted unreasonably or arbitrarily because the statutory standard of review remains even if the presumption is overcome. *City of York v. York County Bd of Equal.*, 266 Neb. 297, 664 N.W.2d 445 (2003). 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