

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

ROBERT F. COLWELL, JR.,	)	
	)	
Appellant,	)	Case No. 07R-962
	)	
v.	)	DECISION AND ORDER
	)	AFFIRMING THE DECISION OF
DOUGLAS COUNTY BOARD OF	)	THE DOUGLAS COUNTY BOARD OF
EQUALIZATION,	)	EQUALIZATION
	)	
Appellee.	)	

The above-captioned case was called for a hearing on the merits of an appeal by Robert F. Colwell, Jr. ("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 May 22, 2009, pursuant to an Order for Hearing and Notice of Hearing issued February 20, 2009. Commissioners Wickersham and Hotz were present. Commissioner Wickersham was the presiding hearing officer. Commissioner Warnes was excused from participation by the presiding hearing officer. Commissioner Salmon was absent. The appeal was heard by a quorum of a panel of the Commission.

Robert F. Colwell, Jr. was present at the hearing. No one appeared as legal counsel for the Taxpayer.

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

The Commission took statutory notice, received exhibits, 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 (Cum. Supp. 2008). The final decision and order of the Commission in this case is as follows.

**I.  
ISSUES**

The Taxpayer has asserted that actual value of the subject property as of January 1, 2007, is less than actual value as determined by the County Board. The issues on appeal related to that assertion are:

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

The actual value of the subject property on January 1, 2007.

The Taxpayer has asserted that taxable value of the subject property as of January 1, 2007, 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, 2007.

**II.  
FINDINGS OF FACT**

The Commission finds and determines that:

1. The Taxpayer has a sufficient interest in the outcome of the above captioned appeal to maintain the appeal.
2. The parcel of real property to which this appeal pertains ("the Subject Property") is described in the table below.
3. Actual value of the subject property placed on the assessment roll as of January 1, 2007, ("the assessment date") by the Douglas County Assessor, value as proposed in a timely protest, and actual value as determined by the County Board is shown in the following table:

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Description: Lot 144 Block 0, Waterford, Omaha, Douglas County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$69,000.00	In Total	\$69,000.00
Improvement	\$475,000.00	In Total	\$473,000.00
Total	\$544,400.00	\$425,000.00	\$542,000.00

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 February 20, 2009, set a hearing of the appeal for May 22, 2009, at 11:00 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 2007 is:

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Land value	\$ 69,000.00
Improvement value	<u>\$473,000.00</u>
Total value	<u>\$542,000.00.</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) (Supp. 2007).
2. “Actual value is the most probable price expressed in terms of money that a property will bring if exposed for sale in the open market, or in an arm’s length transaction, between a willing buyer and a willing seller, both of whom are knowledgeable concerning all the uses to which the real property is adapted and for which the real property is capable of being used. In analyzing the uses and restrictions applicable to real property the analysis shall include a full description of the physical characteristics of the real property and an identification of the property rights valued.” Neb. Rev. Stat. §77-112 (Reissue 2003).
3. Actual value may be determined using professionally accepted mass appraisal methods, including, but not limited to, the (1) sales comparison approach using the guidelines in section 77-1371, (2) income approach, and (3) cost approach. Neb. Rev. Stat. §77-112 (Reissue 2003).
4. “Actual value, market value, and fair market value mean exactly the same thing.”  
*Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 ( 2002).

5. Taxable value is the percentage of actual value subject to taxation as directed by section 77-201 of Nebraska Statutes and has the same meaning as assessed value. Neb. Rev. Stat. §77-131 (Reissue 2003).
6. All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation. Neb. Rev. Stat. §77-201(1) (Cum. Supp. 2006).
7. “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 to obtain proportionate valuation requires a comparison of the ratio of assessed to actual value for the subject property and comparable property. *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).
9. 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).
10. 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).

11. 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).
12. 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).
13. 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).
14. 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).
15. 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).
16. The presumption disappears if there is competent evidence to the contrary. *Id.*
  17. 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).
  18. Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence. See, e.g. *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb.App. 171, 645 N.W.2d 821 (2002).
  19. "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).
  20. 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).
  21. 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).
  22. "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).

23. 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).
24. A Taxpayer, who only produced evidence that was aimed at discrediting valuation methods utilized by the county assessor, failed to meet the 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).
25. 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 residential parcel. The residence was built in 2006. The Taxpayer contends that actual value is less than the amount determined by the County Board because in part there are construction defects. The Taxpayer also contends that taxable value of the subject property is not equalized. The Taxpayer did not furnish property record files for parcels he considered comparable to the subject property but did provide information obtained from a web page. The physical characteristics, attributes, amenities and summary assessment

information for the subject property and the parcels the Taxpayer presented as comparables are summarized in the following table.

<b>Descriptor</b>	<b>Subject</b>	<b>Parcel 1</b>	<b>Parcel 2</b>	<b>Parcel 3</b>
Exhibit	3:1 - 6	7: 9 - 12	9: 13 - 16	9: 17-24
Location	15404 Weber St	15332 Weber St	15307 Weber St	15302 Weber St
Lot Size	11,475	11,475	12,360	16,848
Condition	Good	Good	Very Good	Good
Quality	Very Good	Very Good	Very Good	Very Good
Yr Built	2006	2004	2001	2003
Exterior Walls	Frame Siding	Frame Siding	Frame Siding	Frame Siding
Style	Ranch	2 Story	2 Story	Ranch
Area Above Ground	2,257 <sup>1</sup>	3,124	3,682	1,944
Roof Type	Hip/Gable	Hip	Hip/Gable	Hip
Roof Cover	Comp Shingle	Comp Shingle	Comp Shingle Heavy	Comp Shingle
HVAC	Central Air to Air			
Basement	2,257 <sup>1</sup>	1,520 <sup>3</sup>	1,945 <sup>3</sup>	2,096
Finished	1,943 <sup>2</sup>			1,500
Walkout	1	1	1	1
Bedrooms	1	4	4	1
Bathrooms	3.5	3.5	2.5	3.5
Garage Type	Attached	Built In	Built In	Attached
Garage Area	811	761	853	861

Descriptor	Subject	Parcel 1	Parcel 2	Parcel 3
Misc Imp	Gas Fireplace, Security System, Sprinkler System, Rock	3 Gas Fireplaces, Security System, Sprinkler System, Wood Deck	2 Metal Fireplaces, Security system, Wood Deck,	Gas Fireplace, Sprinkler System, Rock
Lot Value	\$69,000	\$64,800	\$48,100	\$64,800
Imp Value	\$473,000	\$340,100	\$385,700	\$293,500
Taxable Value <sup>4</sup>	\$542,000	\$404,900	\$433,800	\$358,300
Sale Date	11/17/06	2/10/04	8/15/03	
Sale Price	\$542,000	\$405,000	\$449,000	

1. The Taxpayer asserts that the area above ground is 2,180 square feet.
2. The Taxpayer asserts that the basement has 1,392 square feet of finish.
3. The Taxpayer contends part of the basement is finished. The assessors record does not show that any portion of the basement is finished.
4. Taxable value as of January 1, 2007.

The valuation date at issue in this proceeding is January 1, 2007. The parcels for which sales information is available were sold in February of 2004 and August of 2003. The age of the sales makes their use in the sales comparison approach problematic.

In addition, the Taxpayer has not furnished sufficient information to analyze the sales for comparison with the subject property. In the sales comparison approach an opinion of value is developed by analyzing similar properties and comparing those properties with the subject property. *The Appraisal of Real Estate*, 12<sup>th</sup> Edition, Appraisal Institute, 2001, pg. 418. An opinion of value based on use of the sales comparison approach requires use of a systematic procedure:

- “1. Research the competitive market for information on sales transactions, listings, and offers to purchase or sell involving properties that are similar to the subject property in terms of

characteristics such as property type, date of sale, size, physical condition, location, and land use restraints. ...

2. Verify the information by confirming that the data obtained is factually accurate and that the transactions reflect arm's-length market considerations. ...

3. Select relevant units of comparison (e.g., price per acre, price per square foot, price per front foot) and develop a comparative analysis for each unit. ...

4. Look for differences between the comparable sale properties and the subject property using the elements of comparison. Then adjust the price of each sale to reflect how it differs from the subject property or eliminate that property as a comparable. This step typically involves using the most comparable sale properties and then adjusting for any remaining differences.

5. Reconcile the various value indications produced from the analysis of comparables into a single value indication or a range of values.” *The Appraisal of Real Estate* 12<sup>th</sup> Edition, The Appraisal Institute, 2001, p 422.

There is no evidence on which to make adjustments that would render the parcels offered by the Taxpayer comparables to the subject property. Without adjustments, sales of the parcels offered as comparables are not persuasive evidence of the subject property's actual value.

The Taxpayer testified that in his opinion actual value of the subject property as of January 1, 2007 was \$425,000. For reasons noted above, there is no support for that opinion. The Nebraska Supreme Court 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). If the rule were otherwise there would be no necessity of an assessment process for the determination of actual value. Instead of assessment by an Assessor each owner of a parcel of real property would annually declare an opinion of its actual value and be assessed on that value.

The Taxpayer asserted that taxable value of the subject property was not equalized. The Commission considered information concerning parcels 1 through three as shown above in support of that assertion. In addition to the parcels provided by the Taxpayer the County Board provided property record files for parcels it considered to be comparable to the subject property. The physical characteristics, attributes, amenities and summary assessment information for the subject property and the parcels the County Board presented as comparables are summarized in the following table.

<b>Descriptor</b>	<b>Subject</b>	<b>Parcel 4</b>	<b>Parcel 5</b>	<b>Parcel 6</b>
Exhibit	3:1 - 6	4:1 - 6	4:7 - 12	4:13 - 18
Location	15404 Weber St	14744 Weber St	14822 Sharon CR	7602 N 153 CR
Lot Size	11,475	9,148	32,234	16,117
Condition	Good	Good	Good	Good
Quality	Very Good	Good	Excellent	Very Good
Yr Built	2006	2005	2005	2005
Exterior Walls	Frame Siding	Frame Siding	Frame siding	Frame Siding
Style	Ranch	Ranch	Ranch	Ranch
Area Above Ground	2,257 <sup>1</sup>	2,184	2,184	2,110
Roof Type	Hip/Gable	Hip	Hip	Hip/Gable

<b>Descriptor</b>	<b>Subject</b>	<b>Parcel 4</b>	<b>Parcel 5</b>	<b>Parcel 6</b>
Roof Cover	Comp Shingle	Comp Shingle	Comp Shingle Heavy	Comp Shingle Heavy
HVAC	Central Air to Air	Central Air to Air	Central Air to Air	Central Air to Air
Basement	2,257 <sup>1</sup>	2,184	2,215	2,056
Finished	1,943 <sup>2</sup>	2,028	1,634	1,856
Walkout	1	1	1	1
Bedrooms	1	2	1	2
Bathrooms	3.5	3	2.5	4
Garage Type	Attached	Attached	Attached	Attached
Garage Area	811	1,052	955	808
Misc Imp	Gas Fireplace, Security System, Sprinkler System, Rock	2 Gas Fireplaces, Security System, Sprinkler System, Rock, Wood Deck	2 Gas Fireplaces, Security System, Sprinkler System, Wood Dck	2 Gas Fireplaces, Security System, Sprinkler System, Brick Veneer, Wood Deck
Lot Value	\$69,000	\$37,000	\$101,800	\$64,800
Imp Value	\$473,000	\$366,800	\$446,500	\$418,100
Taxable Value <sup>3</sup>	\$542,000	\$403,800	\$548,300	\$482,900
Sale Date	11/17/06	12/7/05	8/25/07	9/28/05
Sale Price	\$542,000	\$410,000	\$484,500	\$509,500

1. The Taxpayer asserts that the area above ground is 2,180 square feet.
2. The Taxpayer asserts that the basement has 1,392 square feet of finish.
3. Taxable value as of January 1, 2007.

An analysis of the property record files shows that calculations associated with use of the cost approach were included in the property record file. 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*, 2<sup>nd</sup> Ed., International Association of Assessing Officers, 1996, pp. 128 - 129. For reasons that are illustrated by the following table the Commission cannot conclude that the cost approach was used to estimate actual value of the subject property or any of the parcels the County Board considered comparables.

<b>Descriptor</b>	<b>Subject</b>	<b>Parcel 1</b>	<b>Parcel 2</b>	<b>Parcel 3</b>
Exhibit	3:1 - 6	4:1 - 6	4:7 - 12	4:13 - 18
Location	15404 Weber St	14744 Weber St	14822 Sharon CR	7602 N 153 CR
RCN <sup>1</sup>	\$470,667	\$307,224	\$446,084	\$347,551
Depreciation	-0-	\$66,982 <sup>4</sup>	\$4,016 <sup>6</sup>	\$72,641 <sup>9</sup>
RCNLD <sup>2</sup>	\$475,374 <sup>3</sup>	\$366,763 <sup>5</sup>	\$446,489 <sup>7</sup>	\$418,069 <sup>10</sup>
Land	\$69,000	\$37,000	\$101,800	\$64,750
Estimate of Value	\$544,374	\$403,763	\$548,289	\$482,819
Taxable Value	\$542,000	\$403,800	\$548,300	\$482,900

Descriptor	Subject	Parcel 1	Parcel 2	Parcel 3
Sale Date	11/17/06	12/7/05	8/25/07	9/28/05
Sale Price	\$542,000	\$410,000	\$484,500 <sup>8</sup>	\$509,500

1. Replacement Cost New
2. Replacement Cost New Less Depreciation
3. It is obvious that the RCNLD is not the sum of RCN less Depreciation
4. Depreciation in the amount of \$61,445 is a design adjustment of 20% ( $\$307,223 \times .20 = \$61,446$ ). Physical depreciation of 2% ( $\$5,537$ ) is also shown. The base for 2% depreciation equaling  $\$5,537$  is  $\$276,850$  ( $\$5,537 \div .02 = \$276,850$ ). No combination of numbers used to determine RCN can be shown to match that amount. Design adjustment is usually added.
5. If  $\$66,982$  is added to  $\$307,223$  the total is  $\$374,205$ . Normally depreciation is subtracted.
6. Physical depreciation of 1% ( $\$4,016$ ) is shown. The base for 1% depreciation equaling  $\$4,016$  is  $\$401,600$  ( $\$4,016 \div .01 = \$401,600$ ). No combination of numbers used to determine RCN can be shown to match that amount.
7. RCNLD is not the sum of RCN less depreciation.
8. 8/30/2006 sale in the amount of  $\$575,000$  in addition to 2007 sale.
9. Depreciation in the amount of  $\$69,510$  is a design adjustment of 20% ( $\$347,549 \times .20 = \$69,510$ ). Physical depreciation of 1% ( $\$3,131$ ) is also shown. The base for 1% depreciation equaling  $\$3,131$  is  $\$313,100$  ( $\$3,131 \div .01 = \$3,131$ ). No combination of numbers used to determine RCN can be shown to match that amount.
10. If  $\$72,641$  is added to  $\$374,549$  the total is  $\$447,190$ . Normally depreciation is subtracted.

The only constant in the analysis above is that parcels have a taxable value closely associated with a sale price. Determining actual value of parcels based on their sales price is not an accepted mass appraisal technique. It is not possible, however, to show that the resulting values at least for the subject property and the comparable parcels are not uniform and proportionate.

Despite the obvious problems with calculations in the County records the Taxpayer has not provided a basis on which the Commission could determine either the actual or equalized taxable value of the subject property. 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). Relief cannot be granted.

**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, 2007, is affirmed.
2. Actual value, for the tax year 2007, of the subject property is:

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Land value	\$ 69,000.00
Improvement value	<u>\$473,000.00</u>
Total value	<u><u>\$542,000.00.</u></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 (Cum. Supp. 2008).
4. Any request for relief, by any party, which is not specifically provided for by this order is denied.
5. Each party is to bear its own costs in this proceeding.
6. This decision shall only be applicable to tax year 2007.
7. This order is effective for purposes of appeal on June 18, 2009.

Signed and Sealed. June 18, 2009.

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Robert W. Hotz, Commissioner

**SEAL**

**APPEALS FROM DECISIONS OF THE COMMISSION MUST SATISFY THE REQUIREMENTS OF NEB. REV. STAT. §77-5019 (CUM. SUPP. 2008), OTHER PROVISIONS OF NEBRASKA STATUTES, AND COURT RULES.**

I concur in the result.

I do not believe consideration of two standards of review is required by statute or case law.

The Commission is an administrative agency of state government. See, *Creighton St. Joseph Regional Hospital v. Nebraska Tax Equalization and Review Commission*, 260 Neb. 905, 620 N.W.2d 90 (2000). As an administrative agency of state government the Commission has only the powers and authority granted to it by statute. Id. The Commission is authorized by statute to review appeals from decisions of a county board of equalization, the Tax Commissioner, and the Department of Motor Vehicles. Neb. Rev. Stat. §77-5007 (Supp. 2007). In general the Commission may only grant relief on appeal if it is shown that the order, decision, determination, or action appealed from was unreasonable or arbitrary. Neb. Rev. Stat. §77-5016(8) (Cum. Supp. 2008).

The Commission is authorized to review decisions of a County Board of Equalization determining taxable values. Neb. Rev. Stat. §77-5007 (Supp. 2007). Review of County Board of Equalization decisions is not new in Nebraska law. As early as 1903 Nebraska Statutes provided for review of County Board assessment decisions by the district courts. Laws 1903, c. 73 §124. The statute providing for review did not state a standard for that review. Id. A standard of review stated as a presumption was adopted by Nebraska's Supreme Court. See, *State v. Savage*, 65 Neb. 714, 91 N.W. 716 (1902) (citing *Dixon Co. v. Halstead*, 23 Neb. 697, 37 N.W. 621 (1888) and *State v. County Board of Dodge Co.* 20 Neb. 595, 31 N.W. 117 (1887)). The presumption was that the County Board had faithfully performed its official duties and had acted upon sufficient competent evidence to justify its actions. See, Id. In 1959 the legislature provided a statutory standard for review by the district courts of county board of equalization, assessment decisions. 1959 Neb Laws, LB 55, §3. The statutory standard of review required the District Court to affirm the decision of the county board of equalization unless the decision was

arbitrary or unreasonable or the value as established was too low. *Id.* The statutory standard of review was codified in section 77-1511 of the Nebraska Statutes. Neb. Rev. Stat. §77-1511 (Cum. Supp. 1959). After adoption of the statutory standard of review Nebraska Courts have held that the provisions of section 77-1511 of the Nebraska Statutes created a presumption that the County Board has faithfully performed its official duties and has acted upon sufficient competent evidence to justify its actions. See, e.g. *Ideal Basic Indus. v. Nucholls Cty. Bd. Of Equal.*, 231 Neb. 297, 437 N.W.2d 501 (1989). The presumption stated by the Court was the presumption that had been found before the statute was enacted.

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

The Tax Equalization and Review Commission was created in 1995. 1995 Neb. Laws, LB 490 §153. Section 77-1511 of the Nebraska Statutes was made applicable to review of county board of equalization assessment decisions by the Commission. *Id.* In 2001 section 77-

1511 of Nebraska Statutes was repealed. 2001 Neb. Laws, LB 465, §12. After repeal of section 77-1511 the standard for review to be applied by the Commission in most appeals was stated in section 77-5016 of the Nebraska Statutes. Section 77-5016(8) requires a finding that the decision being reviewed was unreasonable or arbitrary. *Brenner v. Banner County Board of Equalization*, 276 Neb. 275, 753 N.W.2d 802 (2008). The Supreme Court has stated that the presumption which arose from section 77-1511 is applicable to the decisions of the Commission. *Garvey Elevators, Inc. v. Adams County Bd. of Equalization*, 261 Neb. 130, 621 N.W.2d 518 (2001).

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

evidence is not always evidence that the county board of equalization acted unreasonably or arbitrarily because the statutory standard of review remains even if the presumption is overcome. *City of York*, supra. Clear and convincing evidence that a county board of equalization's determination, action, order, or decision was unreasonable or arbitrary, as those terms have been defined, may however overcome the presumption that the county board of equalization faithfully discharged its duties and acted on sufficient competent evidence. In any event the statutory standard has been met and relief may be granted. Both standards of review are met in the fourth possibility and relief may be granted.

Use of the presumption as a standard of review has been criticized. See, G. Michael Fenner, *About Presumptions in Civil Cases*, 17 Creighton L. Rev. 307 (1984). In the view of that author the presumption should be returned to its roots as a burden of proof. *Id.* Nebraska's Supreme Court acknowledged the difficulty of using two standards of review and classified the presumption in favor of the county board of equalization as a principle of procedure involving the burden of proof, namely, a taxpayer has the burden to prove that action by a board of equalization fixing or determining valuation of real estate for tax purposes is unauthorized by or contrary to constitutional or statutory provisions governing taxation. See, *Gordman Properties Company v. Board of Equalization of Hall County*, 225 Neb. 169, 403 N.W.2d 366 (1987). Use of the *Gordman* analysis allows consideration of both the presumption and the statutory standard of review without the difficulties inherent in the application of two standards of review. It is within that framework that I have analyzed the evidence.

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Wm R. Wickersham, Commissioner