

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

NANCY A. BAILEY,)	
)	
Appellant,)	Case No. 08R 076
)	
v.)	DECISION AND ORDER
)	AFFIRMING THE DECISION OF
PLATTE COUNTY BOARD OF)	THE PLATTE COUNTY BOARD OF
EQUALIZATION,)	EQUALIZATION
)	
Appellee.)	

The above-captioned case was called for a hearing on the merits of an appeal by Nancy A. Bailey ("the Taxpayer") to the Tax Equalization and Review Commission ("the Commission"). The hearing was held in the Platte County Courthouse, Community Room, Basement Level, Nebraska, on August 31, 2009, pursuant to an Order for Hearing and Notice of Hearing issued February 12, 2009, as amended by an Order dated May 21, 2009, and as amended by an Order dated June 10, 2008. Commissioners Wickersham, Salmon, and Hotz were present. Commissioner Wickersham was the presiding hearing officer.

Nancy A. Bailey was present at the hearing. Mark M. Sipple appeared as legal counsel for the Taxpayer.

Sandra Allen, County Attorney for Platte County, Nebraska, was present as legal counsel for the Platte 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, 2008, 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, was unreasonable or arbitrary; and

The actual value of the subject property on January 1, 2008.

**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, 2008, ("the assessment date") by the Platte 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 29 Tract 1, Christopher's Cove 3rd, Columbus, Platte County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$48,000.00	\$48,000.00	\$48,000.00
Improvement	\$357,615.00	\$293,000.00	\$365,455.00
Total	\$405,615.00	\$341,000.00	\$413,455.00

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 12, 2009, as amended by an Order issued on May 21, 2009, set a hearing of the appeal for August 31, 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 2008 is:

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Land value \$ 48,000.00

Improvement value \$365,455.00

Total value \$413,455.00.

**III.
APPLICABLE LAW**

1. Subject matter jurisdiction of the Commission in this appeal is over all questions necessary to determine taxable value. Neb. Rev. Stat. §77-5016(7) (Cum. Supp. 2008).

2. “Actual value is the most probable price expressed in terms of money that a property will bring if exposed for sale in the open market, or in an arm’s length transaction, between a willing buyer and a willing seller, both of whom are knowledgeable concerning all the uses to which the real property is adapted and for which the real property is capable of being used. In analyzing the uses and restrictions applicable to real property the analysis shall include a full description of the physical characteristics of the real property and an identification of the property rights valued.” Neb. Rev. Stat. §77-112 (Reissue 2003).
3. Actual value may be determined using professionally accepted mass appraisal methods, including, but not limited to, the (1) sales comparison approach using the guidelines in section 77-1371, (2) income approach, and (3) cost approach. Neb. Rev. Stat. §77-112 (Reissue 2003).
4. “Actual value, market value, and fair market value mean exactly the same thing.”
Omaha Country Club v. Douglas County Board of Equalization, et al., 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).
5. Taxable value is the percentage of actual value subject to taxation as directed by section 77-201 of Nebraska Statutes and has the same meaning as assessed value. Neb. Rev. Stat. §77-131 (Reissue 2003).
6. All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation. Neb. Rev. Stat. §77-201(1) (Cum. Supp. 2008).

7. 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) (Cum. Supp. 2006).
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).

**IV.
ANALYSIS**

The subject property is an improved residential parcel. The residence built in 1997 has 2,558 square feet of above grade living space, a 2,558 square foot basement with 1,786 square feet of partition finish, and a 793 square foot attached garage. (E14:6).

The Taxpayer testified that actual value of the subject property as of January 1, 2008 was \$380,00. The Taxpayer's opinion is based on discussions with real estate agents, the asking price of an unsold neighboring house, and the assessed values of similar parcels. None of the real estate agents consulted by the Taxpayer appeared and the basis for their advice to the Taxpayer is unknown. A neighboring residence has been for sale for eight years and remains unsold. The initial listing for the neighboring residence was \$425,000. The listing price was increased to \$435,000 after changes were made to the residence. The neighboring residence is labeled parcel 1 in the table below. The physical characteristics, attributes, and amenities of the subject property and the parcels presented by the Taxpayer for comparison with assessment information is summarized in the following tables.

Descriptor	Subject	Parcel 1	Parcel 2	Parcel 3
Exhibit	E14:6	E7:5	E7:7	E7:8
Location	1854 E Camino Real	108 E Camino Real	1872 E Camino Real	1865 E Camino Real
Lot Size				
Condition	Good	Good	Good	Good
Quality	Very Good	Very Good	Very Good	Very Good
Yr Built	1997	2000	1999	1987

Descriptor	Subject	Parcel 1	Parcel 2	Parcel 3
Exterior Walls	BrkVenr 65% VnlSide 35%	BrkVenr 35% VynlSide 65%	BrkVenr 30% VynlSide 70%	WdSidng
Style	1 Story	1 Story	2 Story	1 Story
Area Above Ground	2,558	2,760	2,703	2,969
Roof Type				
Roof Cover	CompShg	CompShg	CompShg	CompShg
HVAC	Ht Pump	Ht Pump	Ht Pump	WrmCool
Basement	2,558	2,760	1,975	3,324
Finished	1,786		847	1,712
Walkout				
Bedrooms	2	3	4	4
Fixtures	19	17	18	27
Garage Type	Att	Att	Att	2 Att
Garage Area	793	816	744	504 and 480
Misc Imp	Porch, Fireplace, Drive	Swimming Pool, 2 Porches, Fireplace, Drive	2 Porches, Fireplace, Drive	2 Wood Decks Fireplace, Drive
Lot Value	\$48,000	\$40,000	\$40,000	\$85,000
Imp Value	\$365,455	\$377,565	\$353,440	\$391,010
Taxable Value	\$413,455	\$417,565	\$393,440	\$476,010

Descriptor	Subject	Parcel 4	Parcel 5	Parcel 6
Exhibit	E14:6	E7:10	E7:12	E7:14
Location	1854 E Camino Real	1860 W Camino Real	1964 W Camino Real	1782 E Calle Colombo
Lot Size				
Condition	Good	Good	Good	Good

Descriptor	Subject	Parcel 4	Parcel 5	Parcel 6
Quality	Very Good	Excellent	Very Good	Excellent
Yr Built	1997	1989	1991	1998
Exterior Walls	BrkVenr 65% VnlSide 35%	BrkVenr 100%	WdSidng 80% BrkVenr 20%	BrkVenr 100%
Style	1 Story	1.5 Story	1.5 Story	2 Story
Area Above Ground	2,558	4,050	3,008	4,651
Roof Cover	CompShg	Shake	Shake	Shake
HVAC	Ht Pump	Ht Pump	Ht Pump	Ht Pump
Basement	2,558	2,677	1,884	2,920
Finished	1,786	946	1,884	2,620
Bedrooms	2			
Fixtures	19	17	16	15
Garage Type	Att	Att	Att	Att
Garage Area	793	875	808	1,024
Misc Imp	Porch, Fireplace, Drive	2 Porches, Wood Deck, Fireplace, Drive	2 Wood Decks, Fireplace, Porch, Drive	Porch, Wood Deck, Fireplace, Drive
Lot Value	\$48,000	\$60,000	\$60,000	\$60,000
Imp Value	\$365,455	\$516,615	\$376,610	\$637,770
Taxable Value	\$413,455	\$576,615	\$436,610	\$697,765

Descriptor	Subject	Parcel 7	Parcel 8	Parcel 9
Exhibit	E14:6	E8:2	E9:2	E10:2
Location	1854 E Camino Real	3474 24 Ave Columbus	2316 Murfield Pl	2315 Singletree
Lot Size				
Condition	Good	Very Good	Very Good	Very Good

Descriptor	Subject	Parcel 7	Parcel 8	Parcel 9
Quality	Very Good	Excellent	Excellent	Excellent
Yr Built	1997	1993	2001	1997
Exterior Walls	BrkVenr 65% VnlSide 35%	BrkVenr 100%	BrkVenr 100%	Stucco 85% StnVenr 15%
Style	1 Story	1.5 Story	2 Story	1.5 Story
Area Above Ground	2,558	3,535	4,650	4,533
Roof Cover	CompShg	Shake	CompShg	Shake
HVAC	Ht Pump	Ht Pump	Ht Pump	Ht Pump
Basement	2,558	2,361	3,081	3,121
Finished	1,786		2,576	2,288
Bedrooms	2	4		4
Fixtures	19	13	26	20
Garage Type	Att	Att	Att	Att
Garage Area	793	761	863	1,111
Misc Imp	Porch, Fireplace, Drive	2 Porches, Drive	4 Porches, Fireplace, Drive	2 Porches, Fireplace, Drive, Pool & Cover
Lot Value	\$48,000	\$27,000	\$30,000	\$35,000
Imp Value	\$365,455	\$355,275	\$621,080	\$547,060
Taxable Value	\$413,455	\$382,275	\$651,080	\$583,065

Descriptor	Subject	Parcel 10	Parcel 11	Parcel 12
Exhibit	E14:6	E11:2	E12:2	E13:2
Location	1854 E Camino Real	3570 23 Ave	4606 Country Shadows Pl	4708 Country Shadows Pl
Lot Size				
Condition	Good	Good	Good	Average

Descriptor	Subject	Parcel 10	Parcel 11	Parcel 12
Quality	Very Good	Very Good	Very Good	Good
Yr Built	1997	1992	1996	1996
Exterior Walls	BrkVenr 65% VnlSide 35%	MtlSide 65% BrkVenr 35%	BrkVenr 100%	VnlSide 70% BrkVenr 30%
Style	1 Story	2 Story	1 Story	1 Story
Area Above Ground	2,558	3,600	2,848	2,337
Roof Cover	CompShg	CompShg	Shake	CompShg
HVAC	Ht Pump	Ht Pump	Ht Pump	Ht Pump
Basement	2,558	1,581	1,422	2,328
Finished	1,786	1,200	1,422	2,176
Bedrooms	2	5	3	5
Fixtures	19	20	16	16
Garage Type	Att	Att	Att	Att
Garage Area	793	998	823	748
Misc Imp	Porch, Fireplace, Drive	Porch, Fireplace, Drive	2 Porches, Fireplace, Drive	2 Porches, Wood Deck, Fireplace, Drive
Lot Value	\$48,000	\$30,000	\$26,000	\$23,000
Imp Value	\$365,455	\$351,510	\$381,690	\$289,500
Taxable Value	\$413,455	\$381,505	\$407,685	\$312,500

The Taxpayer analyzed the assessment information and concluded that the per square foot assessed value of the residence on the subject property exceeds the per square foot assessed value of every other residence. An appraiser employed by the County Assessor ("Appraiser") testified that the contribution to value of each residence was estimated using the cost 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, 128-129 (1996). “Physical deterioration is the loss in value due to wear and tear in service and the disintegration of an improvement from the forces of nature. All man made objects begin a slow process of deterioration as soon as they are created ... Among the most common causes of physical deterioration are wear and tear through use, breakage, negligent care, infestation of termites, dry rot, moisture, and the elements. *Property Assessment Valuation*, 2nd Ed., International Association of Assessing Officers, 154 (1996). “Functional utility is the overall usefulness and desirability of a property; the ultimate criterion is whether the improvement efficiently satisfies the wants and needs of the market. Functional obsolescence is the loss of value in a property improvement due to changes in style, taste, technology, needs and demands. Functional obsolescence exists where a property suffers from poor or inappropriate architecture, lack of modern equipment, wasteful floor plans, inappropriate

room sizes, inadequate heating or cooling capacity, and so on. It is the ability of a structure to perform adequately the function for which it is currently used.” *Property Assessment Valuation*, 2nd Ed., International Association of Assessing Officers, 154-155 (1996). “External Obsolescence is loss in value as a result of an impairment in utility and desirability caused by factors external to the property (outside the property’s boundaries) and is generally deemed to be incurable.” *Property Assessment Valuation*, 2nd Ed., International Association of Assessing Officers, 155 (1996).

The Appraiser testified that economic depreciation of 10% was deducted when estimating the replacement cost, new less depreciation of each residence rated as excellent quality. The Appraiser also testified that some of the parcels submitted by the Taxpayer as similar properties were in a different neighborhood for valuation purposes and that different cost tables were used to calculate replacement cost new. The Appraiser also testified that depreciation was estimated and deducted as the adjustment necessary to bring the calculation of replacement cost, new less depreciation to an acceptable level between 92 to 100% of market value, as indicated by assessment sales ratio studies.

Whatever differences exist in the assessed value per square foot of the residence on the subject property and the residences on the comparison parcels is the result of the mechanical application of the cost tables and depreciation described by the Appraiser. Where the evidence shows the assessed value of property has been determined by a formula which is an accepted method for the determination of value, and that formula has been uniformly and impartially applied, such assessed value will not ordinarily be disturbed on appeal on evidence indicating a mere difference of opinion as to the valuation. *Greenwood Ranch v. Morrill Cty. Bd. of Equal.*,

232 Neb. 114, 439 N.W.2d 760 (1989); *Lexington Building Co., Inc. v. Board of Equalization*, 186 Neb. 821, 187 N.W.2d 94 (1971).

The Taxpayer contends that the actual or fair market value of the subject property should be determined based on the taxable or “assessed” value per square foot of other parcels. A Taxpayer wishing to use taxable “assessed” values to prove actual or fair market value must show that the approach used is a professionally approved mass or fee appraisal approach and demonstrate application of the approach.

A determination of actual value may be made for mass appraisal and assessment purposes by using approaches identified in Nebraska Statutes. Neb. Rev. Stat. §77-112 (Reissue 2003). The approaches identified are the sales comparison approach, the income approach, the cost approach and other professionally accepted mass appraisal methods. *Id.* Comparison of assessed values is not identified in the Nebraska Statutes as an accepted approach for a determination of actual value for purposes of mass appraisal. *Id.* Because the method is not identified in statute, proof of its professional acceptance as an accepted appraisal approach would have to be produced. *Id.* No evidence has been presented to the Commission that comparison of assessed values is a professionally accepted mass or fee appraisal approach.

The Taxpayer in this case asks the Commission to presume that the taxable “assessed” value of each offered comparable is equal to its actual value. A presumption can arise that an assessor properly determined taxable “assessed” value. *Woods v. Lincoln Gas and Electric Co.*, 74 Neb. 526, 527 (1905), *Brown v. Douglas County*, 98 Neb. 299, 303 (1915), *Gamboni v. County of Otoe*, 159 Neb. 417, 431, 67 N.W.2d 489, 499 (1954), *Ahern v. Board of Equalization*, 160 Neb. 709, 711, 71 N.W.2d 307, 309 (1955). A presumption can also arise that

a County Board's determination of taxable "assessed" value is correct. *Constructor's Inc. v. Cass Cty. Bd. of Equal.*, 258 Neb. 866, 606 N.W.2d 786 (2000). A presumption is not, however, evidence of correctness in and of itself but may be classified as a principle of procedure involving the burden of proof. See, *Gordman Properties Company v. Board of Equalization of Hall County*, 225 Neb. 169, 403 N.W.2d 366 (1987).

The weight of authority is that assessed value is not in and of itself direct evidence of actual value. See, *Lienemann v. City of Omaha*, 191 Neb. 442, 215 N.W.2d 893 (1974). If however, the "taxable 'assessed' value comparison approach" was shown to be a professionally accepted approach for determination of actual value, and that the taxable "assessed value of the proposed comparables was equal to actual value, further analysis would be required. Techniques for use of the approach would have to be developed.

Techniques used in the sales comparison approach are instructive. In the sales comparison approach, a sale price is an indication of actual value for a sold property but must be adjusted to account for differences between properties to become an indicator of actual value for another property. *The Appraisal of Real Estate* 13th Edition, The Appraisal Institute, (2008). An analysis of differences and adjustments to the taxable "assessed" value of comparison properties would be necessary to obtain an indication of actual value for a subject property. See, *DeBruce Grain v. Otoe County Board of Equalization*, 7 Neb.App. 688, 584 N.W.2d 837 (1998). No adjustments or analysis of adjustments necessary to compensate for differences between the subject property and the taxable "assessed" values of other parcels was presented.

The opinion of value offered by the Taxpayer was not supported by evidence of value derived from the sales of comparable parcels or any other acceptable methodology. 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).

The Taxpayer produced testimony concerning the sales of two parcels the County Board submitted as comparable parcels. The physical characteristics, attributes, and amenities of the subject property and the parcels for which the Taxpayer produced testimony with assessment and sale information is summarized in the following table.

Descriptor	Subject	Parcel 13	Parcel 14
Exhibit	E14:6	14:10-15	14:40
Location	1854 E Camino Real	4601 Country Shadows Pl	4621 Country Shadows Pl
Lot Size			
Condition	Good	Good	Good
Quality	Very Good	Very Good	Very Good
Yr Built	1997	1997	1998
Exterior Walls	BrkVenr 65% VnlSide 35%	BrkVenr 100%	BrkVenr 100%
Style	1 Story	1 Story	1.5 Story
Area Above Ground	2,558	2,258	2,296
Roof Type			
Roof Cover	CompShg	CompShg	CompShg
HVAC	Ht Pump	Ht Pump	Ht Pump

Descriptor	Subject	Parcel 13	Parcel 14
Basement	2,558	2,258	1,694
Finished	1,786	1,865	1,468
Walkout			
Bedrooms	2	3	4
Fixtures	19	16	15
Garage Type	Att	Att	Att
Garage Area	793	788	1,092
Misc Imp	Porch, Fireplace, Drive	Porch, Wood Deck, Fireplace, Drive	Porch, Fireplace, Drive
Lot Value	\$48,000	\$26,000	\$25,000
Imp Value	\$365,455	\$354,275 ¹	\$326,340
Taxable Value	\$413,455	\$380,270	\$351,340
Sale Date		03/3/07	3/4/07
Sale Price		\$389,900	\$365,000

¹ Page 12 of Exhibit 10 shows \$354,275 as the value of improvements. Page 10 of Exhibit 10 shows \$354,270 as the value of improvements.

The Taxpayer showed that the sale of parcel 13 was an unsolicited sale. The seller was approached by the buyer without a listing. The seller was advised that the buyer would not pay more than \$400,000 for a residence. One of the owners of parcel 13 had been a licensed real estate appraiser. Parcel 14 was purchased by the seller of parcel 13 as a substitute residence. The Commission need not determine whether the sales of parcels 13 and 14 were arms length transactions. 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).

The Taxpayer has not shown with clear and convincing evidence that the decision of the County Board was unreasonable or arbitrary.

**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, 2008, is affirmed.
2. Actual value, for the tax year 2008, of the subject property is:

Land value	\$ 48,000.00
Improvement value	<u>\$365,455.00</u>
Total value	<u>\$413,455.00.</u>

3. This decision, if no appeal is timely filed, shall be certified to the Platte County Treasurer, and the Platte 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 2008.
 7. This order is effective for purposes of appeal on October 22, 2009.
- Signed and Sealed. October 22, 2009.

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 (CUM. SUPP. 2006), 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 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 77-5011 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*, 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