

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

GAYLORD D. LACY,)	
)	
Appellant,)	Case No. 08R 010
)	
v.)	DECISION AND ORDER
)	AFFIRMING THE DECISION OF
KEITH COUNTY BOARD OF)	THE KEITH COUNTY BOARD OF
EQUALIZATION,)	EQUALIZATION
)	
Appellee.)	

The above-captioned case was called for a hearing on the merits of an appeal by Gaylord D. Lacy ("the Taxpayer") to the Tax Equalization and Review Commission ("the Commission"). The hearing was held in the Hampton Inn, 200 Platte Oasis Parkway, North Platte, Nebraska, on July 27, 2009, pursuant to an Order for Hearing and Notice of Hearing issued May 28, 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.

Gaylord D. Lacy was present at the hearing. George Zeilinger appeared as legal counsel for the Taxpayer.

J. Blake Edwards, County Attorney for Keith County, Nebraska, was present as legal counsel for the Keith 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 is 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 Keith County Assessor, value as proposed in a timely protest, and actual value as determined by the County Board is shown in the following table:

Description: Leasehold and Improvements Lots 18 & 19 K-1 Cabin Area, Lake McConaughy, Keith County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$70,000.00	In Total	\$70,000.00
Improvement	\$87,210.00	In Total	\$87,210.00
Total	\$157,210.00	\$122,210.00	\$157,210.00

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 May 28, 2009, set a hearing of the appeal for July 27, 2009, at 3:00 p.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:

Case No. 08R 010

Land value \$ 70,000.00

Improvement value \$ 87,810.00

Total value \$157,210.00.

**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 a tract of leased land with improvements. Central Nebraska Public Power and Irrigation District (“District”) is the Lessor and the Taxpayer is the Lessee.

District is a governmental subdivision of the State of Nebraska. The interest of District is usually described for valuation purposes as a leased fee. See, *The Appraisal of Real Estate, Appraisal Institute*, 13th Ed. 2008 p 114. The interest of the Taxpayer is usually referred to as a leasehold interest. *Id.* Leasehold interests are a taxable interest in real property. See, *Omaha Country Club v. Douglas County Board of Equalization*, 11 Neb.App. 171, 645 N.W.2d 821 (2002). In addition, state law requires assessment of the value of improvements and the value of the lease to the tenant of lands owned by a governmental subdivision. Neb. Rev. Stat. §77-1374 (Cum. Supp 2008).

As noted, land that is leased gives rise to two interests: the leased fee interest held by the owner, and the leasehold interest held by the tenant. Section 77-1374 of Nebraska Statutes prescribes taxation of the value of the lease. The interest valued by the County in this case is the leasehold interest of the Taxpayer. It is necessary to determine whether taxation of only the leasehold interest to the Taxpayer is contemplated by the Statute. The provisions of section 77-1374 requiring assessment of the value of the lease to the tenant became law in 1903. At the time of enactment, property of the State and its governmental subdivisions was wholly exempt from taxation. In 1998, Nebraska's Constitution was amended to allow taxation of property of the State or its governmental subdivisions. Since the leased fee interest of District could not have been assessed at the time the provisions of 77-1374 were enacted, the term lease should be construed to refer to the leasehold interest of the tenant which could have been assessed.

The Taxpayer introduced a spreadsheet with data concerning sales for what are known as K property areas. (E2). The sales are mixed between areas K1, K3 and K4. The data on the

spreadsheet, if analyzed, shows a median assessment to sale ratio for the K1 area of 98.81%.

(E2). That ratio does not indicate that the subject property is over assessed.

An appraiser employed by the County Assessor's office ("Appraiser") testified that taxable value of the subject property was determined by the County Board relying on the cost approach to valuation. 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; (4) Subtract the total amount of accrued depreciation from the total cost new of the primary improvements to arrive at the depreciated cost of improvements; (5) Estimate the total cost new of any accessory improvements and site improvements, then estimate and deduct all accrued depreciation from the total cost new of these improvements; (6) Add site value to the depreciated cost of the primary improvements, accessory improvements, and site improvements, to arrive at a value indication by the cost approach." *Property Assessment Valuation*, 2nd Ed., International Association of Assessing Officers, 1996, pp. 128 - 129.

The Taxpayer does not dispute the valuation or contribution to taxable value of the subject property made by the improvements. It is the contribution to taxable value of the Taxpayer's leasehold interest that is at issue. The lease agreement that defines the Taxpayer's leasehold interest is not in evidence

A leasehold interest may have value if contract rent is less than market rent, creating a rental advantage for the tenant. *The Appraisal of Real Estate*, Supra p. 114 & 115. When the

contract rent exceeds market rent the leasehold is said to have negative value. *The Appraisal of Real Estate*, Supra p. 115.

Market value may be determined based on transactions. If the argument of the taxpayer is that only the discount rate method may be used to estimate the contribution to value of the land component, the leasehold interest, and the County should have developed the information necessary to use the discounted cash flow technique, that argument is not persuasive. In this appeal, there is evidence of transactions from which contributions to value may be estimated. The transactions are sales of improvements with an assignment of the lot lease. Because a transaction would include both improvements and an interest in land, it is necessary to extract the contribution to value of the interest in land from the total transaction if an estimate of value for the land component of other parcels is to be estimated using the cost approach. An estimate of the contribution to value of the land component may be made by deducting the estimated contribution to value of the improvements from the transaction price. *The Appraisal of Real Estate*, Supra p. 366. The contribution to value of the improvements may be estimated at their depreciated cost. Id.

The Appraiser testified that the contribution to value of the improvements was estimated as their replacement cost new less depreciation. The contribution to value of the improvements may be estimated at their depreciated cost. Id. After extraction of an estimated contribution to value of the leasehold interest, those estimates were evaluated to determine the effects of four factors; access to Lake McConaughy from the lot, view of the lake, access to the lot, and size of the lot. The Appraiser testified that three values, \$70,000, \$50,000, and \$30,000 were assigned to the leasehold interests of lots in the K1 area based on the four factors. The value assigned to

the leasehold interest in the two lots comprising the subject property was \$70,000. The Appraiser testified that after determining the contribution to value of the leasehold interest, the replacement cost new of the improvements and the combined total was analyzed based on its assessment to sale ratio. The assessment to sale ratios of the sold parcels, even after consideration of a \$70,000, \$50,000 or \$30,000 contribution to value of the leasehold interest, were 87.8%, 94.66%, 98.81%, 103.34% and 104.35%. (E4:27 & 28). A ratio of 100% indicates that the assessed value of a parcel is equal to its sale price.

The County Board's estimate of value was based on use of the cost approach. Contribution to actual value of the land component, the leasehold interest, was determined using an extraction technique as described above. The contribution to actual value of the improvements was their replacement cost new less depreciation. The approach relied on by the County Board is based on generally accepted appraisal techniques and is not 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:

Case No. 08R 010

Land value \$ 70,000.00

Improvement value \$ 87,810.00

Total value \$157,210.00.

3. This decision, if no appeal is timely filed, shall be certified to the Keith County Treasurer, and the Keith 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 September 18, 2009.

Signed and Sealed. September 18, 2009.

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 majority has considered two standards of review for its review of the County Board's decision. One standard of review is stated as a presumption found in case law and the other is stated as found in statute. 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 decision of a County Board of Equalization determining taxable values. Neb. Rev. Stat. §77-5007 (Supp. 2007). Review of County Board of Equalization decisions is not new in Nebraska law. As early as 1903 Nebraska Statutes provided for review of County Board assessment decisions by the district courts. Laws 1903, c. 73 §124. The statute providing for review did not state a standard for that review. *Id.* A standard of review stated as a presumption was adopted by Nebraska's Supreme Court. See, *State v. Savage*, 65 Neb. 714, 91 N.W. 716 (1902) (citing *Dixon Co. v. Halstead*, 23 Neb. 697, 37 N.W. 621 (1888) and *State v. County Board of Dodge Co.* 20 Neb. 595, 31 N.W. 117 (1887)). The presumption was that the County Board had faithfully performed its official duties and had acted upon sufficient competent evidence to justify its actions. See, *Id.* In 1959 the legislature provided a statutory standard for review by the district courts of county board of equalization, assessment decisions. 1959 Neb Laws, LB 55, §3. The statutory standard of review required the District Court to affirm the decision of the county board of equalization unless the decision was arbitrary or unreasonable or the value as established was too low. *Id.* The statutory standard of review was codified in section 77-1511 of the Nebraska Statutes. Neb. Rev. Stat. §77-1511 (Cum. Supp. 1959). After adoption of the statutory standard of review Nebraska Courts have held that the provisions of section 77-5011 of the Nebraska Statutes created a presumption that the County Board has faithfully performed its official duties and has acted upon sufficient competent evidence to justify its actions. See, e.g. *Ideal Basic Indus. V. 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