

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

JANA R. ALLMAN FORSLING,)	
)	
Appellant,)	Case No. 07R-1026
)	
v.)	DECISION AND ORDER
)	REVERSING 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 Jana R. Allman Forsling ("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, Nebraska, on November 3, 2008, pursuant to an Order for Hearing and Notice of Hearing issued April 2, 2008 as amended by an Order dated July 24, 2008. Commissioners Wickersham, Warnes and Salmon were present. Commissioner Warnes was the presiding hearing officer. A panel of three commissioners was created pursuant to 442 Neb. Admin. Code, ch. 4, §011 (10/07).

Jana R. Allman Forsling was present at the hearing. No one 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. 2006). 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 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:

Case No. 07R-1026

Description: LOT 3 100 x 180 HARRIS' SUB IAFF - 0 -----16, Keith County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$14,000.00	\$7,000.00	\$14,000.00
Improvement	\$276,600.00	\$150,220.00	\$241,755.00
Total	\$290,660.00	\$157,200.00	\$255,755.00

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 April 2, 2008, as amended by an Order issued on July 24, 2008, set a hearing of the appeal for November 3, 2008, at 2:00 p.m. CST.
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:

Case No. 07R-1026

Land value	\$14,000.00
Improvement value	<u>\$279,480.00</u>
Total value	<u>\$293,480.00.</u>

**III.
APPLICABLE LAW**

1. Subject matter jurisdiction of the Commission in this appeal is over all questions necessary to determine taxable value. Neb. Rev. Stat. §77-5016(7) (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 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 with a one story house which was started to be built in 2002 as shown in Exhibit 14 pages ten and eleven. The Appraiser for the County inspected the subject property on June 19, 2008. (E15:1). Adjustments were made due

to the corrections noted in the inspection. (E15:3) Using the corrected information from the inspection, the house has 1,950 square feet of finished living area and a total basement area of 1,304 square feet. (E15:3:3). The basement has 1,304 square feet of "Part finished" basement. (E15:3). The house has a 646 square foot attached garage and in addition has an additional attached garage of 2,018 square feet. (E15:3). The other attributes and improvements to the subject property are itemized on Exhibit 15 page three. These attributes include three decks, four concrete slabs and three concrete drives. The Assessor's notice of actual value as sent out to the Taxpayer was \$290,660. (E1:1) The Assessor's recommendation of actual value to the County Board of Equalization at the time of the protest hearing was a valuation of \$292,980. (E14:21 and E14:97). The Assessor's recommendation of actual value at the time of this appeal hearing is, \$293,480. (E15:1).

The County's Appraisal Report and Analysis provides a summary of the Taxpayer's protest hearing. (E14:11) "During the protest the appraiser, Bryan Hill, recommended changed (sic) the concrete to a value of \$2.94 per square feet and the bathroom fixtures were changed per owner's information. The new value was a total of \$292,980. Doug Teaford, County Commissioner, voted to request quality to average, but when changed realized it was too much of a drop and changed it to average plus. The new value went to \$255,755. The board agreed and the value was set at land \$14,000 and improvements \$241,755 and a total value at \$255,755". (E14:11). The Commission finds that the actions taken by the County Board at the protest hearing show by clear and convincing evidence that the County Board acted in an arbitrary and unreasonable manner in making its decision regarding the assessed valuation of the subject property.

"There is a presumption that a board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action. That presumption remains until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence adduced on appeal to the contrary. From that point forward, the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon all the evidence presented. The burden of showing such valuation to be unreasonable rests upon the taxpayer on appeal from the action of the board." *DeBruce Grain, Inc. v. Otoe County Bd. of Equalization*, 7 Neb.App. 688, 696, 584 N.W.2d 837, 842 - 843 (1998) .

The Commission finds that the Taxpayer has rebutted the presumption that the County Board faithfully fulfilled its duties and had sufficient competent evidence to reach its decision.

The Commission turns its attention to the evidence provided by the Taxpayer to determine if from the evidence presented a new taxable value has been proven and whether the subject property has not been assessed uniformly and proportionately with other property in the County.

The Taxpayer provided a total of 9 parcels which she alleges are comparable to the subject property and which she testified supported her belief that actual value of the subject property as of January 1, 2007, is less than actual value as determined by the County Board and that the taxable value of the subject property as of January 1, 2007, is not equalized with the taxable value of other real property. Four of these parcels were presented to the County Board at the time of the protest hearing. (E13:3). Three of those four parcels are shown as part of the eight parcels the Taxpayer presented to the Commission as part of this appeal hearing. (E3:1 and E3:2). The Commission

does not find the property record file for the fourth parcel shown on Taxpayer’s Exhibit 13 page three, property ID 255801300 which was presented to the County Board. The physical characteristics and valuation factors of the additional 8 parcels provided by the Taxpayer in her Exhibits are tabled below. These parcels are listed on the Taxpayers Exhibit 3 pages one and two and the property record cards for the parcels are shown on Exhibits 4 to 12.

	A Subject Property	B	C	D	E	F	G	H	I
Parcel Number	243500300	240502400	257006233	203022200	256603400	211500800	210800100	256700700	203012800
Exhibit Number	4:1-2	5:1-2	6:1-2	7:1-2	8:1-2	9:1-2	10:1-2	11:1-2	12:1-2
Style	One Story	57% Two Story 43% One Story	One Story	52% One Story 48% Two Story	52% 1 ½ Story 48% One Story	One Story	One Story	One Story	One Story
Year Built	2005 (100%)	1995	2003	2003	1979	1998	1997	1988	1999
Quality	Good - Changed to Average (E14:21)	Good	Average	Average	Average	Fair	Average	Fair	Fair
Condition	Good	Average	Average	Average	Average	Average	Average	Average	Average
Base Area - (Square Feet)	2,074	3,973	2,233	2,556	2,860	1,911	1,545	1,140	1,572
Basement - Total (Square feet)	848	None	2,233	None	1,079	144 Crawl Area 1,767	None	None	Crawl Area - 1,572
Basement - Finished (Square Feet)	848	None	None	None	971	None	None	None	None
Garage	820	2,241 Sub Basement	550	900	648	879	662	900	784
Miscellaneous Improvements (See note below)	\$65,550	\$20,085	\$15,050	\$12,675	\$5,810	\$8,155	\$5,735	\$4,450	\$9,135

Note: The valuations shown for miscellaneous improvements may include depreciation for some of the items included. The specific items included are shown on the exhibits for each parcel.

The miscellaneous improvements vary between the subject property and the alleged comparable parcels. The subject property has a 2,123 square foot “attached garage” not found on any of the alleged comparable parcels.

The Commission has included in the above table the information shown in the Taxpayer’s exhibits 5 to 12. This finding is made after noting that the valuation shown for 2007 on each

property record card does not match the valuation shown on the supporting calculation page for each of the parcels except those parcels shown on exhibit 8,9 and 12. As an example, the valuation shown for the subject property for 2007 is \$255,755. (E4:1). The supporting calculation page follows and uses the cost approach to valuation and the valuation shown is \$292,980. (E4:5). The County's exhibits for the property records of the subject property shows the same information. (E14:20 and 21). The assessed valuation shown on each of the property record files for 2007 are not supported by the worksheets except as noted for those parcels shown on exhibits 8,9 and 12.

When using "comparables" to determine value, similarities and differences between the subject property and the comparables must be recognized. *Property Assessment Valuation*, 2nd Ed., 1996, p.103. Most adjustments are for physical characteristics. *Property Assessment Valuation*, 2nd Ed., 1996, p.105. "Financing terms, market conditions, location, and physical characteristics are items that must be considered when making adjustments . . ." *Property Assessment Valuation*, 2nd Ed., 1996, p. 98.

"Comparable properties" share similar quality, architectural attractiveness (style), age, size, amenities, functional utility, and physical condition. *Property Assessment Valuation*, 2nd Ed., International Association of Assessing Officers, 1996, p. 98.

The Commission's analysis of the information provided by the Taxpayer in Exhibit 3 and Exhibits 4 to 12 shows wide variations in the style, size and other physical attributes of the parcels that the Taxpayer alleges are comparable to the subject property. The Taxpayer has not made any adjustments for the differences. The Commission finds that none of the parcels identified by the Taxpayer are comparable to the subject property without adjustments being made for differences between them and the subject property. The most comparable parcel provided by the Taxpayer to

the subject property is the Taxpayer's parcel C, Exhibit 6, but the Commission notes that the residence on parcel C has a larger base area, 2,233 square feet compared to 1,950 for the subject property, a larger total basement area, 2,233 square feet compared to 1,304 square feet, and no finished basement compared to 1,304 square feet. (E6:2). The Commission finds that Parcel C has fewer miscellaneous improvements than the subject property. This finding is made by a comparison of the miscellaneous improvements for parcel C as shown on Exhibit 6 page two, to those of the subject property, Exhibit 4 page two. The large attached garage/shop of the subject property is 2,015 square feet. (E15:3). This miscellaneous improvement must be taken into account when comparing the assessed valuation of the subject property with the other parcels.

VALUATION

The Taxpayer attempts to provide evidence of the actual value of the subject property by determining the value per square foot of other alleged comparable parcels. This analysis fails for at least two reasons. First, none of the alleged comparable parcels are truly comparable to the subject property without significant adjustments to their valuation due to differences in style, size, condition, quality and all of the miscellaneous improvements to each parcel. Second, the Taxpayer has attempted to evidence the actual value of the subject property through the use of the assessed value of other parcels. In other words, the Taxpayer is alleging that the County erred in assessing the actual value of the subject property, but is alleging that the County's assessment of other properties is correct.

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*, Twelfth Edition, Appraisal Institute, Chs 17, 18, 19, (2001). 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 assessed values of the parcels described in Exhibit 3 are not evidence of actual value even if they are comparable to the subject property.

The appraiser for the County Assessor testified that in his opinion, actual value of the subject property as of January 1, 2007, was \$293,480. The appraiser’s opinion of value was based on 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, 1996, pp. 128 - 129.

The appraiser’s application of the cost approach to the subject property is shown on Exhibit 15 page 3 and supports his opinion of value for the subject property for 2007 at \$293,480. The Commission takes notice of the fact that the Taxpayer had notice of this value by her receipt of the appraiser’s letter dated June 20, 2008, in advance of this hearing of her appeal.

As noted above, the Commission finds that the decision of the County Board was unreasonable or arbitrary. The remaining question for the Commission is the actual value of the subject property as of the assessment date. The Commission finds that the opinion of the actual value offered by the appraiser for the County Assessor is supported by the use of the cost approach. The opinion of value offered by the Taxpayer is not supported by clear and convincing evidence of a new valuation for the subject property. The Commission finds that the actual value of the subject property for 2007 is \$293,480.

EQUALIZATION

“Equalization is the process of ensuring that all taxable property is placed on the

assessment rolls at a uniform percentage of its actual value. The purpose of equalization of assessments is to bring assessments from different parts of the taxing district to the same relative standard, so that no one part is compelled to pay a disproportionate share of the tax. Where it is impossible to secure both the standards of the true value of a property for taxation and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law. If a taxpayer's property is assessed in excess of the value at which others are taxed, then the taxpayer has a right to relief. However, the burden is on the taxpayer to show by clear and convincing evidence that the valuation placed upon the taxpayer's property when compared with valuation placed on other similar property is grossly excessive.” *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597, 597 N.W.2d 623, 635 (1999). The Commission finds that the Taxpayer has not proven that the difference in assessed valuation for 2007 between the subject property and similar parcels is grossly excessive nor has there been any evidence of a systematic exercise of intentional will or failure of plain duty by the County to not value the subject property uniformly and proportionately with other comparable properties. This finding is based on the Commission’s finding that there are significant differences between the subject property and the alleged comparable parcels and that none of the parcels are truly comparable.

**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:

Case No. 07R-1026

Land value \$ 14,000.00

Improvement value \$279,480.00

Total value \$293,480.00.

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. 2006).
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 February 20, 2009.

Signed and Sealed. February 20, 2009.

Nancy J. Salmon, Commissioner

William C. Warnes, 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 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) (Supp. 2007).

Nebraska courts have held that the provisions of section 77-5016(8) of the Nebraska Statutes create a presumption that the County Board has faithfully performed its official duties and has acted upon sufficient competent evidence to justify its actions. *City of York v. York County Board of*

Equalization, 266 Neb. 297, 664 N.W.2d 445 (2003). The presumption cited in *York* has roots in the early jurisprudence of Nebraska. 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)). 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.*

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). Review of district court decisions made pursuant to section 77-1511 was de novo. *Future Motels, Inc. v. Custer County Board of Equalization*, 252 Neb. 565, 563 N.W.2d 785 (1997). The presumption functioned as a standard of review. See, e.g. *Gamboni v. County of Otoe*, 159 Neb. 417, 67 N.W.2d 492 (1954).

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 requires a finding that the decision being reviewed was unreasonable or arbitrary. The basis for that determination is the evidence presented to the

Commission in a new record. See, Neb. Rev. Stat. §77-5016 (Cum. Supp. 2006). Commission decisions are reviewed for error on the record. See, Neb. Rev. Stat. 77-5019(5) (Cum. Supp. 2006). The statutory basis for Commission review and the review of its decisions is analogous to district courts review of decisions made by administrative agencies. The basis for district court review of decisions made by administrative agencies is de novo on the record. *Tyson Fresh Meats v. State*, 270 Neb. 535, 704 N.W.2d 788 (2005). The decisions of the district court examining the administrative decision are reviewed for error on the record. *Thorson v. Nebraska Dept. of Health & Human Servs.*, 274 Neb. 322, 740 N.W.2d 27 (2007). The similarities are enough to suggest that the framework for review applied to district court decisions could be made applicable to decisions of the Commission.

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. 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). As noted however review was de novo and the reviewing court was not bound by the standard of review imposed on district court. *Loskill v. Board of Equalization of Adams County*, 186 Neb. 707, 185 N.W.2d 852 (1971). 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 the district courts; one statutory, and the other judicial stated as a presumption that the county board of equalization faithfully performed its official duties and acted upon sufficient competent evidence. No attempt was made by the *Hastings* Court to reconcile the two standards of review that were applicable to the district courts.

The possible results from application of the presumption and the statutory standard of review by the Commission 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. If the presumption is overcome the statutory standard remains. See, *City of York v. York County Bd of Equal.*, 266 Neb. 297, 664 N.W.2d 445 (2003). The second possibility does not therefore allow a grant of relief even though the presumption is overcome. The third possibility requires analysis. The presumption and the statutory standard of review are different legal standards, one remaining after the other has been met. See. *City of York v. York County Bd of Equal.*, 266 Neb. 297, 664 N.W.2d 445 (2003). The burden of proof to overcome the presumption is competent evidence. *City of York*, Supra. 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. Each analyses of the standards of review allowing a grant of relief requires a finding that the statutory standard has been met.

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 possible conflict or difficulties inherent in the application of two standards of review. The *Gordman* analysis requires the Commission to consider all of the evidence produced in order to determine whether there is clear and convincing evidence that the decision, action, order, or determination being reviewed was unreasonable or arbitrary. It is within that framework that I have analyzed the evidence.

Wm R. Wickersham, Commissioner