

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

DALE S. & DORIS N. BARKHURST,)	
)	
Appellant,)	Case No. 08R 005
)	
v.)	DECISION AND ORDER
)	AFFIRMING THE DECISION OF
CASS COUNTY BOARD OF)	THE CASS COUNTY BOARD OF
EQUALIZATION,)	EQUALIZATION
)	
Appellee.)	

The above-captioned case was called for a hearing on the merits of an appeal by Dale S. & Doris N. Barkhurst ("the Taxpayer") to the Tax Equalization and Review Commission ("the Commission"). The hearing was held in the Commission's Hearing Room on the sixth floor of the Nebraska State Office Building in the City of Lincoln, Lancaster County, Nebraska, on June 18, 2009, pursuant to an Order for Hearing and Notice of Hearing issued April 15, 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.

Neither Dale S. or Doris N. Barkhurst were present at the hearing. The required presence of Dale S. or Doris N. Barkhurst was waived. Ronald D. Svoboda appeared as legal counsel for the Taxpayer.

Nathan B. Cox, County Attorney for Cass County, Nebraska, was present as legal counsel for the Cass 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 Cass County Assessor, value as proposed in a timely

protest, and actual value as determined by the County Board is shown in the following table:

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Description: Lots 15 to 18 Block 5 Chase's Additon, Weeping Water, Cass County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$20,588.00	In Total	\$20,588.00
Improvement	\$264,631.00	In Total	\$264,631.00
Total	\$285,219.00	\$183,000.00	\$285,219.00

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 15, 2009, set a hearing of the appeal for June 18, 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 \$ 20,588.00

Improvement value \$264,631.00

Total value \$285,219.00.

**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) (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. 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 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 the burden of proving that value of property was not fairly and proportionately equalized or that valuation placed upon property for tax purposes was unreasonable or arbitrary. *Beynon v. Board of Equalization of Lancaster County*, 213 Neb. 488, 329 N.W.2d 857 (1983).
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 4,096 square foot residence was built in 1967. (E4:9). The residence has a 2 car attached garage and a 1 car basement garage. (E4:9). The County Assessor's records show that the residence has a 1,173 square foot unfinished basement. (E4:9). The County Assessor testified that the presence of a basement was based on an exterior examination of the subject property. No one from the County Assessor's office had been allowed to make an interior inspection even though an inspection had been requested. The last exterior inspection was made in late 2007. The exterior examination and photographs show two windows at the level of the basement garage entrance. The Taxpayer submitted an appraisal of the subject property. (E2). The description of the residence in the appraisal does not indicate the presence of a basement. (E2:5).

The appraiser relied exclusively on the sales comparison approach to arrive at an indicated value. (E2:10). In the sales comparison approach an opinion of value is developed by analyzing similar properties and comparing those properties with the subject property. *The Appraisal of Real Estate*, 12th Edition, Appraisal Institute, 2001, pg. 418. An opinion of value based on use of the sales comparison approach requires use of a systematic procedure:

“1. Research the competitive market for information on sales transactions, listings, and offers to purchase or sell involving properties that are similar to the subject property in terms of characteristics such as property type, date of sale, size, physical condition, location, and land use restraints. ...

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

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

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

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

The appraiser chose parcels for an analysis with residences that were smaller than the residence on the subject property. The residences on the comparison parcels were 2,239 square feet ($4005 - 1,766 = 2,239$), 2,581 square feet ($4,005 - 1424 = 2,581$) and 2,509 square feet ($4,005 - 1,496 = 2,509$), smaller than the subject property. (E2:5). The size differences are larger if the Base Area square footage of 4,096 determined by the County Assessor is used. The value adjustments for size alone made by the appraiser @ \$18 per square foot are \$40,302 ($\$18 \times 2,239 = \$40,302$), \$46,458 ($\$18 \times 2,581 = \$46,458$), and \$45,162 ($\$18 \times 2509 = \$45,162$). (E2:5). Other adjustments were made as well.

The appraiser recognized that the square footage adjustments were more than normal. (E2:5). Value indicated by the sale of parcel 1 after adjustments by the appraiser is \$183,130.

(E2:5). The gross adjustments made by the appraiser to sale 1 to render the parcel comparable to

the subject property are 68.1% of its sale price. The appraiser placed the most weight on that sale and determined actual value of the subject property to be \$183,000. (E2:5).

The County Assessor testified that neither he nor other members of his staff considered the parcels used by the appraiser to be good comparables because the residences on the parcels described as comparables were less than one-half the size of the residence on the subject property.

The appraiser who authored the appraisal submitted by the Taxpayer did not testify.

The County Assessor testified that value as adopted by the County Board was developed using the cost approach and mass appraisal techniques. 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 County Assessor testified that the cost approach used relied on costs and physical depreciation factors as provided by Marshall and Swift applied to the characteristics of a residence as found in his records to make an initial estimate of the improvement value for all residences. The contribution to value made by the land was estimated based on sales of vacant land. If a parcel with a residence has sold within a specified time frame, the ratio of the sale price to the value indicated by the unadjusted application of the Marshall and Swift cost and depreciation factors to determine the contribution to value of the improvements and the estimated contribution to value of the land was calculated. That ratio, with others, was then used to determine if in general the indicated level of value for all parcels was within 92 to 100%. If the level of value was not within range an adjustment was made. An adjustment of 10% as economic depreciation was made for all residences in Weeping Water for tax year 2008 based on the described analysis.

The County Assessor recognized that the subject property is unique in the community of Weeping Water due to its size. The County Assessor searched his records for sales for parcels in Cass County for comparison to the subject property. The physical characteristics, attributes, and amenities of the subject property and the parcels presented by the County Board for comparison with assessment and sale information is summarized in the following table.

Descriptor	Subject	Parcel 1	Parcel 2	Parcel 3
Exhibit	E4:8-10	E4:11-12	E4:13-14	E4:15-20
Location	100 N Shryder, Weeping Water	2450 East Lake Dr., Union ²	18016 Peterson Rd., Plattsmouth	13302 S 72 St Papillion
Lot Size			2.6 Acres	9.5 Acres
Condition	Average	Good	Average +	Average

Descriptor	Subject	Parcel 1	Parcel 2	Parcel 3
Quality	Average +	Average	Average +	Good
Yr Built	1967	1966	1979	1965
Exterior Walls	100% Masonry Veneer	100% Hardboard	100% Hardboard	100% Face Brick
Style	One Story	One Story	One Story	One Story
Area Above Ground	4,096	2,600	2,703	4,331
Roof Cover	Comp Shingle	Comp Shingle	Comp Shingle	Wood Shakes
HVAC	100% Rev Heat Pump	100% Rev Heat Pump	100% Rev Heat Pump	100% warm & Cooled
Basement	1,173 ¹		2,645	1,395
Finished			962 ³	733
Bedrooms	3	3	2	4
Bathrooms	3	2	4	3
Garage Type	Attached/ Basement	Attached/ Detached	Attached/ Basement	Attached/ Detached
Garage Area	587/322	952/576	255/280	950/576
Misc Imp	Fireplace, Drives	2 Fireplaces, Boat Dock	2 Fireplaces, Decks, Drives	Fireplace, Well, Septic
Lot Value	\$20,588	\$38,520	\$43,650	\$124,250
Imp Value	\$264,631	\$213,707	\$271,980	\$383,495
Taxable Value	\$285,219	\$252,227	\$315,630	\$518,897
Sale Date		7/19/05	5/7/08	5/31/06
Sale Price		\$252,000	\$304,997	\$550,000 ⁴

1. The Taxpayer asserts that there is no basement and an appraiser retained by the Taxpayer did not list a basement in her description of the residence.
2. The lot description is Lots 209 & 209A Lake Wa Con DA Lots.
3. Recreational Finish.
4. Agent remarks indicate that the residence is built of imported Georgian marble with Georgian marble in the entry. (E4:17).

There are differences between the subject property and the parcels produced by the County Board for comparison. Parcel 1 is on a Lake and the residence is smaller than the residence on the subject property. Parcel 2 is on an acreage, the residence is smaller than the residence on the subject property, and it has recreational finish in the basement. Parcel 3 is on an acreage, the residence is larger than the residence on the subject property, and it has partition finish in the basement. No attempt was made to reach an estimate of value derived from sales of the parcels submitted for comparison by the County Board.

The appraisal of real estate is not an exact science. *Matter of Bock's Estate*, 198 Neb. 121, 124, 251 N.W.2d 872, 874 (1977). The parcels offered for comparison by the appraiser require larger than normal adjustments. Value as determined by the County Board may not recognize the fact the residence on the subject property is larger than other residences in Weeping Water. The Taxpayer is required, however, to produce clear and convincing evidence that the decision of the County Board was unreasonable or arbitrary. Exhibit 2, without testimony that supports use of parcels for comparison with the size and other differences shown, does not meet that standard.

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 005

Land value \$ 20,588.00

Improvement value \$264,631.00

Total value \$285,219.00.

3. This decision, if no appeal is timely filed, shall be certified to the Cass County Treasurer, and the Cass 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 June 24, 2009.

Signed and Sealed. June 24, 2009.

Robert W. Hotz, Commissioner

SEAL

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

I concur in the result.

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

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

The Commission is authorized to review decisions of a County Board of Equalization determining taxable values. Neb. Rev. Stat. §77-5007 (Supp. 2007). Review of County Board of

Equalization decisions is not new in Nebraska law. As early as 1903 Nebraska Statutes provided for review of County Board assessment decisions by the district courts. Laws 1903, c. 73 §124. The statute providing for review did not state a standard for that review. *Id.* A standard of review stated as a presumption was adopted by Nebraska's Supreme Court. See, *State v. Savage*, 65 Neb. 714, 91 N.W. 716 (1902) (citing *Dixon Co. v. Halstead*, 23 Neb. 697, 37 N.W. 621 (1888) and *State v. County Board of Dodge Co.* 20 Neb. 595, 31 N.W. 117 (1887)). The presumption was that the County Board had faithfully performed its official duties and had acted upon sufficient competent evidence to justify its actions. See, *Id.* In 1959 the legislature provided a statutory standard for review by the district courts of county board of equalization, assessment decisions. 1959 Neb Laws, LB 55, §3. The statutory standard of review required the District Court to affirm the decision of the county board of equalization unless the decision was arbitrary or unreasonable or the value as established was too low. *Id.* The statutory standard of review was codified in section 77-1511 of the Nebraska Statutes. Neb. Rev. Stat. §77-1511 (Cum. Supp. 1959). After adoption of the statutory standard of review Nebraska Courts have held that the provisions of section 77-1511 of the Nebraska Statutes created a presumption that the County Board has faithfully performed its official duties and has acted upon sufficient competent evidence to justify its actions. See, e.g. *Ideal Basic Indus. v. Nucholls Cty. Bd. Of Equal.*, 231 Neb. 297, 437 N.W.2d 501 (1989). The presumption stated by the Court was the presumption that had been found before the statute was enacted.

Many appeals of decisions made pursuant to section 77-1511 were decided without reference to the statutory standard of review applicable to the district courts review of a county board of equalization's decision. See, e.g. *Grainger Brothers Company v. County Board of*

Equalization of the County of Lancaster, 180 Neb. 571, 144 N.W.2d 161 (1966). In *Hastings Building Co., v. Board of Equalization of Adams County*, 190 Neb. 63, 206 N.W.2d 338 (1973), the Nebraska Supreme Court acknowledged that two standards of review existed for reviews by the district court; one statutory requiring a finding that the decision reviewed was unreasonable or arbitrary, and another judicial requiring a finding that a presumption that the county board of equalization faithfully performed its official duties and acted upon sufficient competent evidence was overcome. No attempt was made by the *Hastings* Court to reconcile the two standards of review that were applicable to the District Courts.

The Tax Equalization and Review Commission was created in 1995. 1995 Neb. Laws, LB 490 §153. Section 77-1511 of the Nebraska Statutes was made applicable to review of county board of equalization assessment decisions by the Commission. *Id.* In 2001 section 77-1511 of Nebraska Statutes was repealed. 2001 Neb. Laws, LB 465, §12. After repeal of section 77-1511 the standard for review to be applied by the Commission in most appeals was stated in section 77-5016 of the Nebraska Statutes. Section 77-5016(8) requires a finding that the decision being reviewed was unreasonable or arbitrary. *Brenner v. Banner County Board of Equalization*, 276 Neb. 275, 753 N.W.2d 802 (2008). The Supreme Court has stated that the presumption which arose from section 77-1511 is applicable to the decisions of the Commission. *Garvey Elevators, Inc. v. Adams County Bd. of Equalization*, 261 Neb. 130, 621 N.W.2d 518 (2001).

The possible results from application of the presumption as a standard of review and the statutory standard of review are: (1) the presumption is not overcome and the statutory standard is not overcome; (2) the presumption is overcome and the statutory standard is not overcome; (3) the presumption is not overcome and the statutory standard is overcome; (4) and finally the

presumption is overcome and the statutory standard is overcome. The first possibility does not allow a grant of relief, neither standard of review has been met. The second possibility does not therefore allow a grant of relief even though the presumption is overcome because the statutory standard remains. See, *City of York v. York County Bd of Equal.*, 266 Neb. 297, 664 N.W.2d 445 (2003). The third possibility requires analysis. The presumption and the statutory standard of review are different legal standards, and the statutory standard remains after the presumption has been overcome. See. *Id.* The burden of proof to overcome the presumption is competent evidence. *Id.* Clear and convincing evidence is required to show that a county board of equalization's decision was unreasonable or arbitrary. See, e.g. *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb.App. 171, 645 N.W.2d 821 (2002). Competent evidence that the county board of equalization failed to perform its duties or act upon sufficient competent evidence is not always evidence that the county board of equalization acted unreasonably or arbitrarily because the statutory standard of review remains even if the presumption is overcome. *City of York*, *supra*. Clear and convincing evidence that a county board of equalization's determination, action, order, or decision was unreasonable or arbitrary, as those terms have been defined, may however overcome the presumption that the county board of equalization faithfully discharged its duties and acted on sufficient competent evidence. In any event the statutory standard has been met and relief may be granted. Both standards of review are met in the fourth possibility and relief may be granted.

Use of the presumption as a standard of review has been criticized. See, G. Michael Fenner, *About Presumptions in Civil Cases*, 17 Creighton L. Rev. 307 (1984). In the view of that author the presumption should be returned to its roots as a burden of proof. *Id.* Nebraska's

Supreme Court acknowledged the difficulty of using two standards of review and classified the presumption in favor of the county board of equalization as a principle of procedure involving the burden of proof, namely, a taxpayer has the burden to prove that action by a board of equalization fixing or determining valuation of real estate for tax purposes is unauthorized by or contrary to constitutional or statutory provisions governing taxation. *See, Gordman Properties Company v. Board of Equalization of Hall County*, 225 Neb. 169, 403 N.W.2d 366 (1987). Use of the *Gordman* analysis allows consideration of both the presumption and the statutory standard of review without the difficulties inherent in the application of two standards of review. It is within that framework that I have analyzed the evidence.

Wm R. Wickersham, Commissioner