

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

PAUL W. KENNEDY,)	
)	
Appellant,)	Case No. 09R 055
)	
v.)	DECISION AND ORDER
)	REVERSING THE DECISION OF
WEBSTER COUNTY BOARD OF)	THE WEBSTER COUNTY BOARD OF
EQUALIZATION,)	EQUALIZATION
)	
Appellee.)	

The above-captioned case was called for a hearing on the merits of an appeal by Paul W. Kennedy ("the Taxpayer") to the Tax Equalization and Review Commission ("the Commission"). The hearing was held in the Holiday Inn Express, 508 2nd Avenue South, Kearney, Nebraska, on July 15, 2010, pursuant to an Order for Hearing and Notice of Hearing issued April 21, 2010. Commissioner Wickersham, Chairperson of the Commission, was the presiding hearing officer. Commissioner Warnes was absent. Commissioner Wickersham, as Chairperson, designated Commissioners Wickersham, Salmon, and Hotz as a panel of the Commission to hear the appeal. Commissioner Salmon was excused. Commissioner Hotz was present. The appeal was heard by a quorum of a panel of the Commission.

Paul W. Kennedy was present at the hearing. No one appeared as legal counsel for the Taxpayer.

Jerry J. McDole, County Attorney for Webster County, Nebraska, was present as legal counsel for the Webster 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 (Reissue 2009). 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, 2009, 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, 2009.

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, 2009, ("the assessment date") by the Webster 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 13-18 Blk 18, Original Town, Cowles, Webster County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$695.00	Unknown	\$695.00
Improvement	\$28,670.00	Unknown	\$33,685.00
Total	\$29,365.00	Unknown	\$34,380.00

4. An appeal of the County Board's decision was filed with the Commission.
5. An Order for Hearing and Notice of Hearing issued on April 21, 2010, set a hearing of the appeal for July 15, 2010, at 3:00 p.m. CDST.
6. 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.
7. Actual value of the subject property as of the assessment date for the tax year 2009 is:

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Land value \$ 695.00

Improvement value \$33,163.00

Total value \$33,858.00.

**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) (Reissue 2009).

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 2009).
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 2009).
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 2009).
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) (Reissue 2009).

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. 2008).
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.

IV. ANALYSIS

The subject property is an improved lot within the municipal limits of Cowles, Nebraska. Improvements on the subject property are a 1,458 square foot 1½ story single family residence with a 380 square foot garage.

The Taxpayer asserts that actual value of the subject property is less than actual value as determined by the County Board. The Taxpayer stated his opinion that the subject property was worth less than \$20,000. The Taxpayer purchased the subject property in December 2008. The total consideration paid for purchase of the subject property as stated on the deed was \$20,000. (E2:8). The purchase price of property may be taken into consideration in determining the actual value together with all other relevant elements. Purchase price, however, standing alone, is not conclusive of the actual value of property for assessment purposes. Other matters relevant to the actual value thereof must be considered in connection with the sale price to determine actual value. Sale price is not synonymous with actual value or fair market value. *Forney v. Box Butte County Bd. of Equalization*, 7 Neb.App. 417, 582 N.W.2d 631 (1998). If, however, the evidence discloses the circumstances surrounding the sale and shows that it was an arm's length transaction between a seller who was not under compulsion to sell and a buyer who was not compelled to buy, it should receive strong consideration. *Potts v. Board of Equalization of Hamilton County*, 213 Neb. 37, 328 N.W.2d 175 (1982). The Seller acquired the subject property at a foreclosure sale in January of 2008, paid back taxes and began repairing the residence. The Taxpayer purchased the subject property to complement his ownership of an adjoining parcel in December of 2008. A portion of the consideration stated for the subject property, \$2,000, can be attributed to the purchase of another parcel by the Taxpayer from the Seller. The County Assessor determined that the sale and purchase of the subject property was not an arm's length transaction. The sale and purchase of the subject property for \$20,000 in December of 2008 is not clear and convincing evidence that the determination of the County Board was unreasonable or arbitrary.

The County Board's determination of actual value was based on use of the cost approach as developed by the County Assessor. 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, 128 - 129.

Application of the cost approach, as adopted by the County Board, is shown in Exhibit 2 at pages 10 & 11. The cost factors used to determine replacement cost new were obtained from Marshall & Swift based on June 2006 data. (E2:11). Cost factors as used by the County Board differ from those used by the County Assessor, in particular the Base SF cost employed by the County Assessor was \$87.20 and the Base SF cost employed by the County Board was \$104.13. (E2:11 & 13). The Commission did not have cost tables for June of 2006 available to it. Cost tables for June of 2005 and December 2005 were available to the Commission. Marshall and Swift cost tables for December 2006, applicable to a 1½ story 1,400 square foot residence, with good quality construction show a base cost of \$ \$90.24 per square foot for frame

construction/stucco. *Residential Cost Handbook*, Marshall & Swift, p. Good -19 (12/2006).

Marshall and Swift cost tables for December 2006 applicable to a 1½ story 1,400 square foot residence, with good quality construction, show a base cost of \$119.06 per square foot for brick construction. *Residential Cost Handbook*, Marshall & Swift, p. Good -19 (12/2006). Marshall and Swift cost tables for June 2005, applicable to a 1½ story 1,400 square foot residence, with good quality construction, show a base cost of \$ \$81.76 per square foot for frame construction/stucco. *Residential Cost Handbook*, Marshall & Swift, p. Good -19 (6/2005).

Marshall and Swift cost tables for June 2005 applicable to a 1½ story 1,400 square foot residence, with good quality construction, show a base cost of \$104.34 per square foot for brick construction. *Residential Cost Handbook*, Marshall & Swift, p. Good -19 (6/2005). The residence on the subject property is 80% brick construction. (E2:11). Costs are different for frame as opposed to brick construction and increased over time. The base SF cost initially used by the County Assessor and the base SF cost adopted by the County Assessor do not equal the numbers found in the tables available to the Commission. The base SF costs found in the tables available to the Commission do illustrate the differences in cost that may be attributed to brick construction versus frame construction. The base SF costs adopted by the County Board approximate those that could be attributed to a home with brick and stucco construction.

The Taxpayer testified that on January 1, 2009 the residence on the subject property did not have a furnace or functional air conditioning. An appraiser for the County Assessor inspected the subject property in February of 2009 but did not enter the basement to verify the presence or absence of a furnace. The Seller testified that the subject property was sold to the Taxpayer without a furnace. The County Assessor testified that if the subject property did not

contain a furnace on January 1, 2009, a proper adjustment to the estimate of value made using the cost approach is deletion of the contribution to value shown for heating and cooling.

In its application of the cost approach, the County Board utilized a physical depreciation factor of 75%. (E2:13). Physical deterioration is the loss in value due to wear and tear in service and the disintegration of an improvement from the forces of nature. All man made objects begin a slow process of deterioration as soon as they are created. . . Among the most common causes of physical deterioration are wear and tear through use, breakage, negligent care, infestation of termites, dry rot, moisture, and the elements. *Property Assessment Valuation, 2nd Ed.*, International Association of Assessing Officers, 1996, 154. The physical depreciation factor was determined based on factors shown in a table received as Exhibit 6. One of the factors used to determine depreciation is condition. The numeric condition rating shown in Exhibit 6 can be translated to 40 = Good, 35 = average +, 30 = Average, 20 = Fair, and 10 = Poor. Descriptions of improvements in Poor, Fair, Average, Good, Very Good, and Excellent condition are found in Exhibit 8. The condition rating given the improvements by the County Board was 35, or Average +. (E2:12). The condition rating adopted by the County Board was based on an inspection by an appraiser employed by the County Assessor in February of 2009.

In addition to physical depreciation, the County Board attributed 20% functional depreciation to the improvements on the subject property. (E2:11). Functional utility is the overall usefulness and desirability of a property; the ultimate criterion is whether the improvement efficiently satisfies the wants and needs of the market. Functional obsolescence is the loss of value in a property improvement due to changes in style, taste, technology, needs, and demands. Functional obsolescence exists where a property suffers from poor or inappropriate

architecture, lack of modern equipment, wasteful floor plans, inappropriate room sizes, inadequate heating or cooling capacity, and so on. It is the ability of a structure to perform adequately the function for which it is currently used.” *Property Assessment Valuation*, 2nd Ed., International Association of Assessing Officers, 1996, 154 - 155. The deduction for functional depreciation was based on the observations of the appraiser for the County Assessor based on the February 2009 inspection. The deduction for functional depreciation was attributed to the fact that only 1 bathroom was functional and other factors described on pages 5 and 6 of Exhibit 2.

Total depreciation deducted from replacement cost new by the County Board attributable to physical and functional depreciation was 80%. (E2:11). There is evidence that items for which functional depreciation was taken might be attributed to physical depreciation.

Depreciation taken was, however, based on an inspection by an appraiser for the County Assessor and the evidence is not sufficient to disturb the estimate of depreciation made by the County Board.

The County Board’s determination of value was based on the cost approach and the characteristics of the subject property as shown on page 11 of Exhibit 2. The determination of the County Board should be modified to reflect the absence of a furnace in the residence as of January 1, 2009. The appropriate adjustment is to reduce actual value as determined by the County Board removing the contribution to value of that element. The contribution to value made by the heating and cooling component before depreciation was \$2,160 as determined by the County Board. (E2:11). The contribution to value of the heating and cooling component after depreciation was \$522 ($(\$2,610 \times .75 = \$1,957.5)$ $(\$2,610 - \$1,957.5 = \$652.5)$ $(\$652.5 \times .20 = \$130.5)$ $(652.5 - \$130.5 = \$522)$). Subtraction of the contribution to value made by the heating

and cooling component results in a contribution to value made by the residence of \$33,163 ($\$33,685 - \$522 = \$33,163$). Addition of the contribution to value made by the land results in an indication of value of \$33,858 ($\$33,163 + \$695 = \$33,858$).

**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 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 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 vacated and reversed.

**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, 2009, is vacated and reversed.
2. Actual value, for the tax year 2009, of the subject property is:

Case No. 09R 055

Land value	\$ 695.00
Improvement value	<u>\$33,163.00</u>
Total value	<u>\$33,858.00.</u>

3. This decision, if no appeal is timely filed, shall be certified to the Webster County Treasurer, and the Webster County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Reissue 2009).
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 2009.
7. This order is effective for purposes of appeal on July 28, 2010.

Robert W. Hotz, Commissioner

SEAL

APPEALS FROM DECISIONS OF THE COMMISSION MUST SATISFY THE REQUIREMENTS OF NEB. REV. STAT. §77-5019 (REISSUE 2009), OTHER PROVISIONS OF NEBRASKA STATUTES, AND COURT RULES.

I concur in the result.

The analysis above considers two standards of review for review. One standard of review is stated as a presumption found in case law, the other is found as stated in statute. I do not believe consideration of two standards of review are required by statute or case law.

The Commission is an administrative agency of state government. See *Creighton St. Joseph Regional Hospital v. Nebraska Tax Equalization and Review Commission*, 260 Neb. 905,

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

The Commission is authorized to review 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. Nuckolls Cty. Bd. Of Equal.*, 231 Neb. 653, 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