

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

MAURICE C. REINER,)	
)	
Appellant,)	Case No. 08R 376
)	
v.)	DECISION AND ORDER
)	AFFIRMING THE DECISION OF
DOUGLAS COUNTY BOARD OF)	THE DOUGLAS COUNTY BOARD OF
EQUALIZATION,)	EQUALIZATION
)	
Appellee.)	

The above-captioned case was called for a hearing on the merits of an appeal by Maurice C. Reiner ("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 February 26, 2010, pursuant to an Order for Hearing and Notice of Hearing issued December 29, 2009. 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 Hotz was excused. Commissioner Salmon was present. The appeal was heard by a quorum of a panel of the Commission.

Maurice C. Reiner was present at the hearing. No one appeared as legal counsel for the Taxpayer.

Thomas S. Barrett, a Deputy County Attorney for Douglas County, Nebraska, was present as legal counsel for the Douglas 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, 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.

The Taxpayer has asserted that taxable value of the subject property as of January 1, 2008, 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, 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 Douglas 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. 08R 376

Description: Lot 109 Block 0 Huntington Park, Omaha, Douglas County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$28,000.00	\$28,000.00	\$28,000.00
Improvement	\$373,100.00	\$261,893.00	\$311,000.00
Total	\$401,100.00	\$289,893.00	\$339,000.00

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 December 29, 2009, set a hearing of the appeal for February 26, 2010, at 1:00 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 2008 is:

Case No. 08R 376

Land value	\$ 28,000.00
Improvement value	<u>\$311,000.00</u>
Total value	<u><u>\$339,000.00.</u></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) (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. “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 is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value. *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).
9. The purpose of equalization of assessments is to bring the assessment of different parts of a taxing district to the same relative standard, so that no one of the parts may be compelled to pay a disproportionate part of the tax. *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991); *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).

10. Equalization to obtain proportionate valuation requires a comparison of the ratio of assessed to actual value for the subject property and comparable property. See *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).
11. 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).
12. 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).
13. 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).
14. 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).
15. 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).

16. 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).
17. 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).
18. The presumption disappears if there is competent evidence to the contrary. *Id.*
19. 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).
20. 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).

21. "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).
22. 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).
23. 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).
24. "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).
25. 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).
26. 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).
27. 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 lot in Omaha, Douglas County, Nebraska. The improvement on the subject property is a 3,069 square foot 2 story residence built in 1996. (E5:6). The residence has an attached 775 square foot garage, and a 1,109 square foot basement, 975 feet of which are finished. (E5:6). The Taxpayer purchased the subject property in April of 2008.

The Taxpayer asserts that the purchase price of the subject property is the best evidence of its actual value and that purchase price as stated in the County Assessor's records is not correct. In support of his contention that the purchase price of the real estate was \$226,500 the Taxpayer produced Exhibit 9 pages 3 & 4, a bill of sale for personal property purchased with the real property and Exhibit 2 pages 9 & 10 a Real Estate transfer Statement, and Exhibit 2 page 11 an Addendum to Purchase Agreement for a rebate on the sale of \$2,500. Taken together the items show that the Taxpayer purchased the subject property for \$326,500 (\$339,000 - \$10,000 - \$2,500 = \$326,500). It is true that the purchase price of property may be taken into consideration in determining the actual value thereof for assessment purposes, together with all other relevant elements pertaining to such issue; however, standing alone, it 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).

The Taxpayer has furnished information concerning the purchase price of five other parcels he considered comparable to the subject property. The physical characteristics, attributes and amenities of the subject property and the parcels presented by the Taxpayer for comparison, with assessment and sale information, is summarized in the following tables.

Descriptor	Subject	Parcel 1	Parcel 2	Parcel 3
Exhibit	E5:6 & 7	E4:8-13	E4:14-20	E4:21-27
Location	3015 N 160 Ave	2805 N 160 Ave	2615 N 157 St	2545 N 160 Ave
Lot Size	13,300	13,300	13,950	14,560
Condition	Good	Fair	Very good	Good
Quality	Very Good	Very Good	Very Good	Very Good
Yr Built	1996	1997	2005	1996
Exterior Walls	Frm Siding	Frm Siding	Frm Siding	Frm Siding
Style	2 Story	2 Story	2 Story	2 Story
Area Above Ground	3,069	3,753	2,620	3,441
Roof Type	Hip/Gable			
Roof Cover	Wood Shake	Wood Shake	Comp Shing	Wood Shake
HVAC	Cent Air to Air	Cent Air to Air	Cent Air to Air	Cent Air to Air
Basement	1,109	1,742	1,296	1,751
Finished	975	1,599	None	1,200
Walkout	1	1		1
Bedrooms	4	4	4	4

Bathrooms	3.5	4.5	3.5	3.5
Garage Type	Att	Built In	Built In	Built In
Garage Area	775	637	752	850
Misc Imp	Rf Slab, Wd Deck, 2 Gas FP, Brk Veneer 1,200 units	Gas FP, Intercom, Wd Deck, Sec System, Wd Fence, Sprinkler Syst, Brk Veneer 400 units	Wd Deck, Gas FP, Rf Slab, Sprinkler Syst, Brk Veneer 350 units	2 Wd decks, Mtl FP, Intercom, Rf Slab, Sprinkler Syst, Brk Veneer 900 units
Lot Value	\$28,000	\$28,000	\$34,200	\$29,100
Imp Value	\$311,000	\$363,500	\$304,400	\$398,000
Taxable Value	\$339,000	\$391,500	\$338,600	\$427,100
Sale Date	4/14/08	5/9/08	8/14/07	1/31/08
Sale Price	\$339,000 ¹	\$391,500	\$287,757 ²	\$370,000

1. The County Assessor's records show the sale price as \$339,000. The Taxpayer produced evidence that the sale price was \$326,500.
2. Parcel 2 also sold on 2/14/2008 to Federal Home Loan Mortgage for \$233,400. (E4:14).

Descriptor	Subject	Parcel 4	Parcel 5
Exhibit	E5:6 & 7	E4:28-33	E4:34-39
Location	3015 N 160 Ave	15660 Grant St	2804 N 160 Ave
Lot Size	13,300	14,014	12,150
Condition	Good	Good	Good
Quality	Very Good	Good	Good
Yr Built	1996	1997	2000
Exterior Walls	Frm Siding	Frm Siding	Frm Siding
Style	2 Story	2 Story	2 Story
Area Above Ground	3,069	3,432	3,487
Roof Type	Hip/Gable		
Roof Cover	Wood Shake	Wood Shake	Wood Shake
HVAC	Cent Air to Air	Cent Air to Air	Cent Air to Air

Basement	1,109	1,764	1,544
Finished	975	None	None
Walkout	1		
Bedrooms	4	4	4
Bathrooms	3.5	3.5	3.5
Garage Type	Att	Built In	Att
Garage Area	775	726	738
Misc Imp	Rf Slab, Wd Deck, 2 Gas FP, Brk Veneer 1200 units	Gas FP, Wd Deck, Brk Veneer 1,100 units	Wd Deck, Mtl FP, Rf Slab, Security Syst, Brk Veneer 400 units
Lot Value	\$28,000	\$28,600	\$70,000
Imp Value	\$311,000	\$295,900	\$293,200
Taxable Value	\$339,000	\$324,500	\$363,200
Sale Date	4/14/08	12/12/07	12/3/07
Sale Price	\$339,000 ¹	\$310,000	\$345,000

1. The County Assessor’s records show the sale price as \$339,000. The Taxpayer produced evidence that the sale price was \$326,500.

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, 98. The Taxpayer considered parcels 1 and 3 to be the most comparable parcels to the subject property. 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, 103. Most adjustments are for physical characteristics. *Property Assessment Valuation*, 2nd Ed., 1996, 105. “Financing terms, market conditions, location, and physical characteristics are items that must be considered when making adjustments . . .” *Property Assessment Valuation*, 2nd Ed., 1996, 98. The residence

on Parcel 1 is 684 square feet (22.28%) larger than the residence on the subject property (3,753 - 3,069 = 684) ($684 \div 3,069 = .2228$). The basement in the residence on Parcel 1 is 633 square foot (57.07%) larger and has 624 square feet more finished area (64% greater). ($1,742 - 1,109 = 633$ & $1,599 - 975 = 624$) ($633 \div 1,109 = .5707$) ($624 \div 975 = .64$). The garage built in to the residence on Parcel 1 is 138 square feet smaller than the attached garage on the subject property ($775 - 637 = 138$). The condition of the residence on Parcel 1 was fair and the condition of the residence on the subject property was good. Parcel 1 sold for \$391,500 on May 9, 2008.

Adjustments of the sale price for Parcel 1 to account for the differences between Parcel 1 and the subject property are not in evidence.

The residence on Parcel 3 is 372 square feet (12.12%) larger than the residence on the subject property ($3,441 - 3,069 = 372$) ($372 \div 3,069 = .1212$). The basement in the residence on Parcel 3 is 642 square feet (56.26%) larger and has 225 square feet more finished area (23.07% greater). ($1,751 - 1,109 = 642$ & $1,200 - 975 = 225$) ($624 \div 1,109 = .5626$) ($225 \div 975 = .2307$). The garage built in to the residence on Parcel 3 is 75 square feet larger than the attached garage on the subject property ($850 - 775 = 75$). Parcel 3 sold for \$370,000 on January 31, 2008.

Adjustments of the sale price for Parcel 3 to account for the differences between Parcel 3 and the subject property are not in evidence.

Parcel 2 has not been analyzed further because among other differences the residence on the subject property is nine years older than the residence on parcel 2. Parcels 4 & 5 have not been analyzed further because among other differences the residences on those parcels do not have walkout entrances to the basements and the basements do not have finished areas.

The evidence is that the subject property had been listed for over one year and that the listing had been revised after initial efforts to sell were not successful. The sale was subject to concessions made within 3 days of closing. The concessions were made based on a leak in a kitchen window. The allocation of purchase price is unsupported. The County Board's reliance on the sales price reported by the County Assessor, for its determination of actual value for the subject property, was a not good valuation practice. The Taxpayer's assertion that the adjusted sales price should be used to determine actual value of the subject property is subject to the same criticism. The unadjusted sales of Parcel 1 and 3 are not a basis for lowering actual value as determined by the County Board.

The Taxpayer offered his opinion that taxable value of the subject property as of January 1, 2008 was \$325,560. The Taxpayer's opinion is based on his calculation of the average per square foot sale price calculated for the subject property ($\$326,500 \div 3,069 = \106.39) and the per square foot sales prices of Parcels 1 and 3 described above ($\$391,500 \div 3753 = \104.32 and $\$370,000 \div 3,441 = \107.53). The average of those three calculations is $\$106.08$ ($\$106.39 + \$104.32 + \$107.53 = \$318.24 \div 3 = \$106.08$). That number when multiplied by the square feet found in the subject property results in $\$325,559.62$ ($\$106.08 \times 3,069 = \$325,559.52$). The Taxpayer's approach is deficient for several reasons. First, the idea that actual value of the subject property can be indicated by the average of sales prices is not a recognized appraisal technique. Second, even if the average sales prices of sold parcels could be deemed an indicator of value, inclusion of the sale price of the subject property to find its value is circular. Finally, just as the sale price of the subject property is not necessarily its actual value the sales process of

Parcels 1 and 3 may not be indicative of their actual values on their sales dates. The Taxpayer's opinion is not persuasive.

**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 376

Land value	\$ 28,000.00
Improvement value	<u>\$311,000.00</u>
Total value	<u><u>\$339,000.00.</u></u>

3. This decision, if no appeal is timely filed, shall be certified to the Douglas County Treasurer, and the Douglas 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 2008.
7. This order is effective for purposes of appeal on March 11, 2010.

Signed and Sealed. March 11, 2010.

Nancy J. Salmon, 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