

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

GROVER STREET ACQUISITION LLC,)	
)	
Appellant,)	Case No. 08C 186
)	
v.)	DECISION AND ORDER
)	REVERSING 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 Grover Street Acquisition LLC ("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 November 6, 2009, pursuant to an Order for Hearing and Notice of Hearing issued September 8, 2009. Commissioners Wickersham, Warnes and Hotz were present. Commissioner Wickersham was the presiding hearing officer.

Lowell L. Frederes, Managing Member of Grover Street Acquisition LLC, 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.

With the consent of the parties the Commission ordered a reformation of the caption of the appeal to reflect the interest of Grover Street Acquisition LLC.

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.

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. 08C 186

Description: Parcel Number 1615530006, Douglas County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$1,250,000.00	\$1,250,000.00	\$1,250,000.00
Improvement	\$2,620,000.00	\$1,791,000.00	\$2,620,000.00
Total	\$3,870,000.00	\$3,042,000.00	\$3,870,000.00

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 September 8, 2009, set a hearing of the appeal for November 6, 2009, at 9:00 a.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. 08C 186

Land value	\$1,250,000.00
Improvement value	<u>\$1,747,891.00</u>
Total value	<u>\$2,997,891.00.</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) (Cum. Supp. 2008).
2. “Actual value is the most probable price expressed in terms of money that a property will bring if exposed for sale in the open market, or in an arm’s length transaction, between a willing buyer and a willing seller, both of whom are knowledgeable concerning all the uses to which the real property is adapted and for which the real property is capable of being used. In analyzing the uses and restrictions applicable to real property the analysis shall include a full description of the physical characteristics of the real property and an identification of the property rights valued.” Neb. Rev. Stat. §77-112 (Reissue 2003).
3. Actual value may be determined using professionally accepted mass appraisal methods, including, but not limited to, the (1) sales comparison approach using the guidelines in section 77-1371, (2) income approach, and (3) cost approach. Neb. Rev. Stat. §77-112 (Reissue 2003).

4. “Actual value, market value, and fair market value mean exactly the same thing.”
Omaha Country Club v. Douglas County Board of Equalization, et al., 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).
5. Taxable value is the percentage of actual value subject to taxation as directed by section 77-201 of Nebraska Statutes and has the same meaning as assessed value. Neb. Rev. Stat. §77-131 (Reissue 2003).
6. All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation. Neb. Rev. Stat. §77-201(1) (Cum. Supp. 2008).
7. “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. A corporate officer or other representative of an entity, must be shown to be familiar with the property in question and have a knowledge of values generally in the vicinity to be qualified to offer an opinion of value. *Kohl's Dept. Stores v. Douglas County Bd. of Equal.*, 10 Neb.App. 809, 638 N.W.2d, 881 (2002).
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 commercial parcel. The primary improvement on the parcel is a 169 room hotel with a lounge and restaurant. The hotel was remodeled in 2006 and 2007. Remodeling was completed by January 1, 2008.

An appraiser employed by the County Assessor for Douglas County ("Appraiser") testified that actual value of the subject property for tax year 2008 was determined using the income approach. The Income Approach can be defined as "a set of procedures through which an appraiser derives a value indication for an income-producing property by converting its anticipated benefits (cash flows and reversion) into property value. This conversion can be accomplished in two ways. One year's income expectancy can be capitalized at a market-derived rate or at a capitalization rate that reflects a specified income pattern, return on investment, and change in the value of the investment. Alternatively, the annual cash flows for the holding period and the reversion can be discounted at a specified yield rate." *The Dictionary of Real Estate Appraisal*, Fourth Edition, Appraisal Institute, 2002, 143. The steps required for use of the

income approach with direct capitalization may be summarized as: (1) estimate potential gross income; (2) deduct estimated vacancy and collection loss to determine effective gross income; (3) deduct estimated expenses to determine net operating income; and (4) divide net operating income by an estimated capitalization rate to yield indicated value. *The Appraisal of Real Estate* 13th Edition, The Appraisal Institute, 2008, 466. A variety of techniques may be used to quantify various components of any application of the approach. *Id.* at chs 20-24.

Two major methods are used to develop an indication of value using the income approach: direct capitalization and yield capitalization. *Id.* at 465. The direct capitalization method produces an indication of value based on a single year's estimated income. *Id.* A yield capitalization method requires an analysis of income and expected returns over multiple years. *Id.* Discounted cash flow analysis is a refinement of the yield capitalization method in which cash flows and an eventual sale price are discounted at a rate to indicate a present value. *Id.* at 540.

Application of the income approach as used by the County Assessor's office to determine actual value of the subject property for tax year 2008 is shown in Exhibit 2 at page 13.

The Taxpayer produced a calculation of value based on the income approach as shown in Exhibit 5 at page 9. The calculation shown on page 9 of Exhibit 5 is largely based on the assumptions made by the County Assessor's Office. The two sources of variance affect the calculation of effective gross income. The Taxpayer used actual income for the year 2007 in lieu of a calculation of potential income based on market room income and a market derived deduction for vacancy and collection loss.

The Taxpayer's reliance on actual income of the subject property is not in accordance with generally accepted appraisal practice. "The income and expenses that are proper and acceptable for income tax purposes are not the same as those that are appropriate for the income approach. Only the reasonable and typical expenses necessary to support and maintain the income-producing capacity of the property should be allowed." *Property Assessment Valuation*, 2nd Ed., International Association of Assessing Officers, 1996, 204. That position has also been adopted by Nebraska Courts. See *In re Assessment of OL & B Ry. Co.*, 213 Neb. 71, 327 N.W.2d 108 (1982) and *Spencer Holiday House, Inc., v. Board of Equalization of Hall County*, 220 Neb. 607, 371 N.W.2d 286 (1985).

The actual operating history of a subject property can be considered for appraisal purposes. *The Appraisal of Real Estate* 13th Edition, The Appraisal Institute, 2008, 481 - 483. An analysis using the actual operating expenses of a parcel requires a multi-year analysis that is then used as a basis for comparison only, with comparable properties. *Id.* The subject property was remodeled in 2006 and 2007. There is in effect only one year of operating history as a remodeled hotel. In those circumstances one year of actual operations is clearly not a sufficient basis for a determination of value using the income approach or the determination of one element of the income approach.

The Taxpayer also asserted that taxable value of the subject property was not equalized with a hotel at 4706 S 108 St in Omaha. The property record file for that hotel is found in Exhibit 3 at pages 10 - 13. The hotel at 4706 S 108 St is a 100 room hotel and was renovated prior to January 1, 2008. The Appraiser testified that the hotel at 4706 S 108 St is comparable to the subject property. The subject property was revalued in 2007 as it was undergoing renovation.

Renovation of the subject property was completed for tax year 2008 and its valuation was again reviewed. The Appraiser testified that revaluations of a parcel occur if a building permit is issued and that a building permit is necessary if a hotel is being remodeled. An examination of the valuation history for the hotel at 4706 S 108 St, as it appears at page 13 of Exhibit 3, shows that the hotel was not revalued until 2009, at least one year after the completion of its remodeling.

The Appraiser testified that the income approach and the model shown at page 13 of Exhibit 2 was used to develop estimates of value for the subject property and other hotels. The calculation of value for the subject property as shown on Exhibit 2 at page 13 as the basis for the County Board’s determination, and application of the model to the hotel at 4706 S 108 St, is as follows:

	Subject Property		4706 S 108 St	
Units	169		100	
Rental Rate Per Unit	90		90	
Potential Gross Income		5,551,650 ¹		3,285,000 ²
Vacancy & Collection Rate	55%	(3,053,408) ³		(1,806,750) ⁴
Effective Gross Income		2,498,243 ^{5 21}		1,478,250 ⁶
Expenses	72.8%	(1,819,720) ^{7 22}		(1,076,166) ⁸
Effective Operating Income		678,523 ^{9 22}		402,084 ¹⁰
Return on Personal Property	12%	(81,423) ^{11 22}		(48,250) ¹²
Going Concern	7%	(47,497) ^{13 22}		(28,146) ¹⁴

Reserves for Replacement	4%	(24,141) ^{15 22}	(16,083) ¹⁶
Net Operating Income		522,462 ^{17 22}	309,605 ¹⁸
Capitalization Rate	13.5%		
Value		3,870,088 ^{19 22}	2,293,370 ²⁰

1. $169 \times 90 \times 365 = 5,551,650$
2. $100 \times 90 \times 365 = 3,285,000$
3. $5,551,650 \times .55 = 3,053,408$
4. $3,285,000 \times .55 = 1,806,750$
5. $5,551,650 - 3,053,408 = 2,498,243$ ²¹
6. $3,285,000 - 1,806,750 = 1,478,250$
7. $.728 \times 2,498,243$ ²¹ = 1,819,720 not rounded²²
8. $.728 \times 1,478,250 = 1,076,166$
9. $2,498,243 - 1,819,720$ ²² = 678,523
10. $1,478,250 - 1,076,166 = 402,084$
11. $.12 \times 678,523 = 81,423$
12. $.12 \times 402,084 = 48,250$
13. $.07 \times 678,523 = 47,497$
14. $.07 \times 402,084 = 28,146$
15. $.04 \times 678,523 = 27,141$
16. $.04 \times 402,084 = 16,083$
17. $678,523 - 81,423 - 47,497 - 24,141 = 522,462$
18. $402,084 - 48,250 - 28,146 - 16,083 = 309,605$
19. $522,462 \div .135 = 3,870,088$
20. $309,605 \div .135 = 2,293,370$
21. The true sum is 2,498,242 the exhibit number is in error by 1.
22. The calculations at page 13 of Exhibit 13 contain a mathematical error, $.728 \times 2,498,243 = 1,818,720$ without rounding, not 1,819,720. The \$1,000 difference overstates expenses and therefore understates value. The expense factor indicated in the calculations for the subject property on page 13 of Exhibit 2 is .07283 or 72.83% ($1,819,720 \div 2,498,243 = .7283$). If corrections for the error are carried through, the value indicated by corrected calculations is \$3,875,785. Since the Commission has not relied on the calculated value of the subject property for its decision, the numbers shown in Exhibit 2 at page 13 have not been adjusted for the error.

Taxable value of the hotel at 4706 S 108 St for the tax year 2008 was 1,773,900. (E3:13).

It is clear from the analysis above that it was not valued on the same basis as the subject property.

In addition, the evidence shows that even though the hotel at 4706 S 108 St was remodeled prior to January 1, 2008 it was not revalued, a different process than the revaluation of the subject property during and after its remodeling. The County has a duty to abide by established procedures and valuation models to produce uniform and proportionate valuation. The evidence shows a failure to follow established procedures and a failure to make consistent use of models developed for valuation of parcels like the subject property. The Taxpayer is entitled to relief on its equalization claim.

The evidence is that the hotel at 4706 S 108 St has 100 rooms. Each of those rooms is assessed at \$17,739 per room ($\$1,773,900 \div 100 = \$17,739$). If the subject property is valued on the same basis its taxable value is \$2,997,891 ($\$17,739 \times 169 = \$2,997,891$). Equalized taxable value of the subject property for the tax year 2008 is \$2,997,891.

**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, 2008, is vacated and reversed.
2. Actual value, for the tax year 2008, of the subject property is:

Land value	\$1,250,000.00
Improvement value	<u>\$1,747,891.00</u>
Total value	<u><u>\$2,997,891.00.</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 (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 December 18, 2009.

Signed and Sealed. December 18, 2009.

Robert W. Hotz, Commissioner

William C. Warnes, 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.

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