

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

BRADLEY A. MOREHOUSE,)	
)	
Appellant,)	Case No. 10R 060
)	
v.)	DECISION AND ORDER
)	AFFIRMING THE DECISION OF
SARPY COUNTY BOARD OF)	THE SARPY COUNTY BOARD OF
EQUALIZATION,)	EQUALIZATION
)	
Appellee.)	

The above-captioned case was called for a hearing on the merits of an appeal by Bradley A. Morehouse ("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 8, 2011, pursuant to an Order for Hearing and Notice of Hearing issued December 6, 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 Hotz was excused. Commissioner Salmon was present. The appeal was heard by a quorum of a panel of the Commission.

Bradley A. Morehouse was present at the hearing. Thomas J. Garvey appeared as legal counsel for the Taxpayer.

Michael A. Smith, a Deputy County Attorney for Sarpy County, Nebraska, was present as legal counsel for the Sarpy 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 taxable value of the subject property as of January 1, 2010, 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, 2010.

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, 2010, ("the assessment date") by the Sarpy 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. 10R 060

Description: Lot 90 Portal Ridge, Sarpy County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$38,000.00	\$38,000.00	\$38,000.00
Improvement	\$380,885.00	\$325,000.00	\$380,885.00
Total	\$418,885.00	\$363,000.00	\$418,885.00

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 December 6, 2010, set a hearing of the appeal for February 8, 2011, at 11:00 a.m. CST.
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 2010 is:

Case No. 10R 060

Land value \$ 38,000.00

Improvement value \$380,885.00

Total value \$418,885.00.

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. “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) (Reissue 2009).
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)

IV. ANALYSIS

The subject property is an improved parcel. The improvement on the parcel is a single family residence with 3,671 square feet of above ground living space, a 2,220 square foot basement, and an attached 825 square foot garage. The Taxpayer asserts that taxable value of the

subject property is not equalized with other similar parcels. The Taxpayer presented assessment records for several parcels in support of his position. The parcels the Taxpayer considered most comparable were Lots 5 & 33 Portal Ridge and Lot 45 Lake Ridge Estates. The physical characteristics, attributes, and amenities of the subject property and the parcels considered most comparable by the Taxpayer, with assessment are summarized in the following table.

Descriptor	Subject	Parcel 1	Parcel 2	Parcel 3
Exhibit	E6	E19:1-4	E19:17-20	E19:5-8 & E23
Location	8515 S 102 St, Lot 90 Portal Ridge	10061 Centennial Rd, Lot 33 Portal Ridge	10055 Shannon Rd, Lot 5 Portal Ridge	16648 Chesterfield Dr, Lot 45 Lake Ridge Estates
Lot Size	16,634 Sq Ft	11,163 Sq Ft	14,711Sq Ft	1.44 Ac
Condition	Very Good	Average +	Average +	Very Good
Quality	Average	Average	Average	Average
Yr Built	2007	2009	2009	2003
Exterior Walls	85% Siding 15% Face-Brick	85% Siding 15% Masonry- Veneer	85% Siding 15% Masonry- Veneer	100% Siding
Style	2 Story	2 Story	1½ Story	1½ Story
Area Above Ground	3,671 Sq Ft	3,633 Sq Ft	3,721 Sq Ft	3,221 Sq Ft
Roof Cover	Comp Shingles	Comp Shingles	Comp Shingles	Comp Shingles
HVAC	100% Warm & Cooled	100% Warm & Cooled	100% Warm & Cooled	100% Warm & Cooled
Basement	2,220 Sq Ft	2,233 Sq Ft	2,728 Sq Ft	2,168 Sq Ft
Finished		112		
Walkout		1	1	

Descriptor	Subject	Parcel 1	Parcel 2	Parcel 3
Bedrooms	4	5	4	4
Bathrooms	3.5	2	2.5	3.5
Garage	Attached	Built In	Attached	Attached
Garage	825 Sq Ft	834 Sq Ft	760 Sq Ft	867 Sq Ft
Misc Imp	Bsmt Energy Pkg, Fireplace, Porch, Wood Deck, 3 Car Driveway	Fireplace, Porch, Wood Deck, 3 Car Driveway	Fireplace, 3 Porches, Elevator, 3 Car Driveway	Fireplace, 3 Porches, Wood Deck, Driveway
Lot Value	\$38,000	\$44,000	\$40,000	\$94,400
Imp Value	\$380,885	\$283,526	\$305,429	\$346,385
Tax Value	\$418,885	\$327,526	\$345,429	\$440,785

The Taxpayer acknowledged that Parcel 2 was not as comparable to the subject property as Parcels 1 and 3 because it had been adapted for use by a handicapped person. Parcel 3, which the Taxpayer considered to be the most comparable parcel, is in a different subdivision. The residence on parcel 3 is 6 years older than the residence on the subject property, the residences differ in style 2 story vs 1½ story and the residence on the subject property is 450 square feet larger than the residence on parcel 3. The Taxpayer asserted that the contribution to value made by the residence on parcel 3 should be equivalent to the contribution to value made by the residence on the subject property. As noted above there are differences between the two residences.

An appraiser employed by the County Assessor testified that taxable value of the subject property and taxable value of parcel 3 was estimated using the cost approach. The cost approach includes six steps:

(1) Estimate the land (site) value as if vacant and available for development to its highest and best use; (2) Estimate the total cost new of the improvements as of the appraisal date, including direct costs, indirect costs, and entrepreneurial profit from market analysis; (3) Estimate the total amount of accrued depreciation attributable to physical deterioration, functional obsolescence, and external (economic) obsolescence; (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) at 128 - 129.

The appraiser testified that replacement cost new was determined using costing data provided by Marshall and Swift. The effects that physical characteristics such as quality, size, and design can have in the valuation process when the cost approach is used are illustrated by the construction cost tables found in the Residential Cost Handbook published by Marshall and Swift. The construction cost tables are divided into segments based on quality ranging from low to excellent. Within the quality divisions cost tables for various styles of construction, one story, one and one half story, two story, two and one half story, bi level, and split level are provided. The style tables are further stratified by size in 100 square foot increments up to 1400 square feet

and in 200 square foot increments thereafter. If the tables are compared, it can be seen that generally the base construction cost per square foot increases as the quality of the structure increases and decreases as the size increases. Style also affects construction cost per square foot. The base cost to construct a one story, average quality, 2000 square foot residence is higher than the cost to construct a two story, average quality, 2000 square foot. Other generalizations concerning the effect of style on cost require style by style comparison of the six styles found in the tables. The tables show clearly that two houses with the same square footage may have different per square foot values. The tables also show that a larger residence with a higher gross value than another residence may have a lower per square foot value.

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). There is no evidence that actual values of the subject property and parcel 3 are other than as shown in the assessment records. The ratio of assessed value to actual value for each parcel based on the evidence is 1. If, however, two parcels are so similar that they could be expected to have the same actual value and difference in taxable values is grossly excessive relief may be obtained. A comparison of the calculations on page 3 of Exhibit 6, page 7 of Exhibit 19 and page 3 of Exhibit 3 shows that the differences between the residence on the subject property and the residence on parcel 3 were taken into account. The evidence does not support a conclusion that taxable value of the subject property and parcel 3 would be the same.

The Taxpayer asserts that taxable value of the subject property should be compared to the taxable value of parcel 1. The residence on parcel 1 is similar to the residence on the subject

property. Some differences in the contribution to value of the residence on the subject property and the residence on parcel 1 may be attributed to differences in area above ground, basement, basement finish and a walkout entry and age differences. As noted above quality of construction can affect the estimate of value derived from use of the cost approach. The quality of construction rating for the residence on the subject property is very good the quality of construction rating for the residence on parcel 1 is average +. The appraiser testified that the quality of construction rating of average for the residence on parcel 1 for tax year 2010 was an error. The error came to her attention too late to make a correction for tax year 2010. The error will be corrected for tax year 2011. The error in rating of quality of construction is the only explanation in evidence for much of the difference between the contributions to value of the residence on the subject property and the residence on parcel 1. Not every error in assessment gives rise to an equalization claim. 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). Here the evidence is that the error did not come to the attention of an assessing official until it was too late to act in tax year 2010. There is no showing of difference of assessment between the subject property and parcel 1 as a result of systematic will or failure of a plain legal duty, and not mere error of judgement.

**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, 2010, is affirmed.
2. Actual value, for the tax year 2010, of the subject property is:

Case No. 10R 060

Land value \$ 38,000.00

Improvement value \$380,885.00

Total value \$418,885.00.

3. This decision, if no appeal is timely filed, shall be certified to the Sarpy County Treasurer, and the Sarpy 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 2010.
 7. This order is effective for purposes of appeal on February 16, 2011.
- Signed and Sealed. February 16, 2011.

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 (Reissue 2009). 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) (Reissue 2009).

The Commission is authorized to review decision of a County Board of Equalization determining taxable values. Neb. Rev. Stat. §77-5007 (Reissue 2009). 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. 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 v. York County Bd of Equal.*, 266 Neb. 297, 664 N.W.2d 445 (2003). 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