BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

WAYNE A. DUIS, TRUSTEE of the WAYNE ALLEN DUIS FIRST TRUST	)	Case No 07SV-020
Appellant,	)	DECISION AND ORDER AFFIRMING THE DECISION OF THE LANCASTER COUNTY BOARD OF EQUALIZATION
v.	)	
LANCASTER COUNTY BOARD OF EQUALIZATION,	)	
Appellee.	)	

The above-captioned case was called for a hearing on the merits of an appeal by Wayne A. Duis, Trustee of the Wayne Allen Duis First Trust, ("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 March 4, 2008, pursuant to an Order for Hearing and Notice of Hearing issued December 18, 2007. Commissioners Wickersham, Warnes, and Salmon were present. Commissioner Hotz was excused from participation by the presiding hearing officer. The appeal was heard by a panel of three commissioners pursuant to 442 Neb. Admin. Code, ch. 4, §11 (10/07). Commissioner Warnes was the presiding hearing officer.

Wayne A. Duis, Trustee of the Wayne Allen Duis First Trust was present. No one appeared as legal counsel for the Taxpayer.

Michael E. Thew, a Deputy County Attorney for Lancaster County, Nebraska, was present as legal counsel for the Lancaster County Board of Equalization ("the County Board").

The Commission took statutory notice, received exhibits and heard testimony. The caption of the Appeal was modified by agreement of the parties to reflect that the Taxpayer is the Trustee of the Wayne A. Duis First Trust.

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. 2006). The final decision and order of the Commission in this case is as follows.

I.
ISSUES

Was the County Board's decision upholding the County Assessor's disqualification of the land described in this appeal for special valuation unreasonable or arbitrary?

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 is described as S35, T12, R7, 6TH PRINCIPAL MERIDIAN, LOT 16 SE, Lancaster County, Nebraska, ("the subject property").
3. Prior to March 19, 2007, the County Assessor made a determination that the subject property should be disqualified for use of special valuation.
4. The Taxpayer protested that determination.

5. The County Board affirmed the determination of the County Assessor.

6. An appeal of the County Board's decision was filed with the Commission.

7. The County Board was served with a Notice in Lieu of Summons and duly answered that Notice.

8. An Order for Hearing and Notice of Hearing issued on December 18, 2007, set a hearing of the appeal for March 4, 2008, at 11:00 a.m. CST.

9. 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.

III.
APPLICABLE LAW

1. Subject matter jurisdiction of the Commission in this appeal is over all questions necessary to determine taxable value. Neb. Rev. Stat. §77-5016 (7) (Supp 2007).

2. The Legislature may provide that agricultural land and horticultural land, as defined by the Legislature, shall constitute a separate and distinct class of property for purposes of taxation and may provide for a different method of taxing agricultural land and horticultural land which results in values that are not uniform and proportionate with all other real property and franchises but which results in values that are uniform and proportionate upon all property within the class of agricultural land and horticultural land. Neb. Const. art. VIII, §1 (4).

3. For purposes of sections 77-1359 to 77-1363:

(1) Agricultural land and horticultural land means a parcel of land which is primarily used

for agricultural or horticultural purposes, including wasteland lying in or adjacent to and in common ownership or management with other agricultural land and horticultural land. Agricultural land and horticultural land does not include any land directly associated with any building or enclosed structure;

(2) Agricultural or horticultural purposes means used for the commercial production of any plant or animal product in a raw or unprocessed state that is derived from the science and art of agriculture, aquaculture, or horticulture. Agricultural or horticultural purposes includes the following uses of land:

(a) Land retained or protected for future agricultural or horticultural purposes under a conservation easement as provided in the Conservation and Preservation Easements Act except when the parcel or a portion thereof is being used for purposes other than agricultural or horticultural purposes; and

(b) Land enrolled in a federal or state program in which payments are received for removing such land from agricultural or horticultural production;

(3) Farm home site means not more than one acre of land contiguous to a farm site which includes an inhabitable residence and improvements used for residential purposes, and such improvements include utility connections, water and sewer systems, and improved access to a public road; and

(4) Farm site means the portion of land contiguous to land actively devoted to agriculture which includes improvements that are agricultural or horticultural in nature, including any uninhabitable or unimproved farm home site. Neb. Rev. Stat. §77-1359 (Cum. Supp. 2006).

4. The Legislature may enact laws to provide that the value of land actively devoted to agricultural or horticultural use shall for property tax purposes be that value which such land has for agricultural or horticultural use without regard to any value which such land might have for other purposes or uses. Neb. Const. art. VIII, §1 (5).

5. Agricultural or horticultural land which has an actual value as defined in section 77-112 reflecting purposes or uses other than agricultural or horticultural purposes or uses shall be assessed as provided in subsection (3) of section 77-201 if the land meets the qualifications of this subsection and an application for such special valuation is filed and approved pursuant to section 77-1345. In order for the land to qualify for special valuation all of the following criteria shall be met: (a) The land is located outside the corporate boundaries of any sanitary and improvement district, city, or village except as provided in subsection (2) of this section; and (b) the land is agricultural or horticultural land. Neb. Rev. Stat. §77-1344 (1) (Supp. 2007).

6. The eligibility of land for the special valuation provisions is be to determined each year as of January 1, but if the land so qualified becomes disqualified on or before December 31 of that year, it shall be valued at its recapture value. Neb. Rev. Stat. §77-1344 (3).

7. Parcel means a contiguous tract of land determined by its boundaries, under the same ownership, and in the same tax district and section. Parcel also means an improvement on leased land. If all or several lots in the same block are owned by the same person and are contained in the same tax district, they may be included in one parcel. Neb. Rev. Stat. §77-132 (Cum. Supp. 2006).

8. At any time, the county assessor may determine that land no longer qualifies for special valuation pursuant to sections 77-1344 and 77-1347. Neb. Rev. Stat. §77-1347.01 (Supp. 2007).

9. If land is deemed disqualified, the county assessor shall send a written notice of the determination to the applicant or owner within fifteen days after his or her determination, including the reason for the disqualification. §Neb. Rev. Stat. §77-1347.01 (Supp. 2007).

10. A protest of the county assessor's determination may be filed with the county board of equalization within thirty days after the mailing of the notice. Neb. Rev. Stat. §77-1347.01 (Supp. 2007).

11. The county board of equalization shall decide the protest within thirty days after the filing of the protest. The county clerk shall, within seven days after the county board of equalization's final decision, mail to the protester written notification of the board's decision. Neb. Rev. Stat. §77-1347.01 (Supp. 2007).

12. The decision of the county board of equalization may be appealed to the Tax Equalization and Review Commission in accordance with section 77-5013 within thirty days after the date of the decision. Neb. Rev. Stat. §77-1347.01 (Supp. 2007).

13. A presumption exists that the County Board has faithfully performed its duties and has acted on competent evidence. *Omaha Country Club v. Douglas County Bd. of Equalization,* 11 Neb.App. 171, 645 N.W.2d 821 (2002).

14. 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).

15. The presumption disappears if there is competent evidence to the contrary. Id.

16. Competent evidence means evidence which tends to establish the fact in issue. *In re Application of Jantzen*, 245 Neb. 81, 511 N.W.2d 504 (1994).

17. The Taxpayer has a burden to adduce evidence that the decision, action, order, or determination appealed from was unreasonable or arbitrary as prescribed by statute. *City of York v. York County Bd. of Equalization*, 266 Neb. 297, 664 N.W.2d 445 (2003)

18. The Commission may not grant relief unless it is shown that the action of the County Board was unreasonable or arbitrary. Neb. Rev. Stat. §77-5016 (8) (Cum. Supp. 2006),

19. Proof that the action of the County Board 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).

20. "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).

21. 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).

22. 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).

IV.
FACTS

This is an appeal of the County Board's denial of special value for the subject property for 2007. The subject property is a 9.00 acre parcel on which there are improvements of a residence, Exhibits 2:1, and a farm utility building, Exhibit 2:3. The Taxpayer's spouse testified that the farm utility building was used for personal use. The Taxpayer's spouse testified she and her husband had planted some 125 evergreen trees to the north and northwest of the residence as a windbreak and shelterbelt. The evergreen trees were not for sale. One acre of the subject property has been classified as a home site leaving 8.00 acres for examination. Of these 8.00 acres the Commission can see from the aerial map provided, Exhibit 3:1, that some of the 8.00 acres are utilized for the evergreen trees and the farm utility building. Exhibit 5:1. The Taxpayer stated on an Agricultural & Horticultural Questionnaire that 6 acres of the parcel was planted in alfalfa. Exhibit 5:1. The Commission finds that 6 acres is the number of acres that may be considered for greenbelt status, subject to it complying with the requirements of the new greenbelt law.

The testimony of the Taxpayer's spouse and the Taxpayer was that the agricultural activity on the subject property was as of and prior to January 1, 2007 the raising and cutting of brome grass or alfalfa. In 2007 the alfalfa was plowed up and corn was planted. The testimony of the Taxpayer was that he had a verbal agreement with a tenant farmer to cut and bale the hay

prior to January 1, 2007. He received a portion of the net proceeds after the hay was cut and sold which amounted to approximately $350 to $400 per year. The testimony of the Taxpayer was that there were years in the past were he did the cutting, raking and baling, but in most years, the tenant farmer did the farm work. There was no evidence provided of the amount of payments received, nor any itemization of expenses. The Taxpayer testified that beginning in 2007 he went to a cash rent verbal agreement with the same tenant farmer with who had previously farmed the 6 acres.

V.
ANALYSIS

Only agricultural land and horticultural land as defined by the legislature is eligible for special valuation. Neb. Rev. Stat. §77-1344 (1) (Supp. 2007). The statutory definition of agricultural land and horticultural land contains various terms which are critical to an understanding of the statute. The term “parcel” has been defined by Nebraska’s Legislature. "Parcel means a contiguous tract of land determined by its boundaries, under the same ownership, and in the same tax district and section. Parcel also means an improvement on leased land. If all or several lots in the same block are owned by the same person and are contained in the same tax district, they may be included in one parcel." Neb. Rev. Stat. §77-132 (Cum. Supp. 2006).

Other significant terms within the statutory definition of agricultural land and horticultural land have not been defined by the Legislature. The term “commercial production” has not been defined but only land used for the “commercial production” of any plant or animal product in a raw or unprocessed state that is derived from the science and art of agriculture,

aquaculture, or horticulture, with exceptions noted above, may be agricultural land and horticultural land. The Commission has not found in statute or in Nebraska case law a definition of the term "commercial production." Commercial can mean "of, in or relating to commerce." *Webster's Third New International Dictionary*, Merriam-Webster, Inc., (2002), p. 456. That definition without examination appears circular simply using the word commerce to define commercial. Commerce may, however be defined as "the exchange or buying or selling of commodities esp. on a large scale and involving transportation from place to place, compare trade, traffic. " Id. Trade may mean "the business of buying and selling or bartering commodities: exchange of goods for convenience or profit: commerce." Supra at p 2421. Traffic may mean "a commercial activity usu. involving import and esprit trade, or to engage in commercial activity: buy or sell regularly or the activity of exchanging commodities by bartering or buying and selling." Supra at 2422-2423.

An alternate definition of the term commercial is "from the point of view of profit: having profit as the primary aim." Supra at 456. A definition of the word commercial also appears in the rules and regulations of the Tax Commissioner. "Commercial shall mean all parcels of real property predominately used or intended to be used for commerce, trade, or business." 350 Neb. Admin. Code, ch. 10, §001.05C (3/07). That definition is used for the classification of real property for assessment purposes. See, 350 Neb. Admin. Code, ch. 10, §004.02 B (3/07). The Property Tax Administrator has advised that commercial production means agricultural or horticultural products produced for the primary purpose of obtaining a monetary profit. Directive 07-01, Property Tax Administrator, (3/07).

Prior to adoption of amendments to the statute defining agricultural land and horticultural land in 2006, the definition of agricultural and horticultural land contained a requirement that the land be used for the "production" of agricultural products. Neb. Rev. Stat. §77-1359 (Reissue 2003). The new term "commercial production" did not appear in the definition. Id. A statute should be construed to give effect to purposeful change in its provisions. A construction of "commercial production" to mean production from the point of view of making a profit gives effect to the change in terminology as adopted by the legislature and is adopted by the Commission.

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It is appropriate to consider a number of factors to determine whether or not an activity is undertaken with a view to making a profit. See, Wood, 548 T.M., Hobby Losses. Among the factors to be considered are: whether the activity is conducted in a business like manner with adequate records and adaption of operating methods to changing circumstances; expertise of the Taxpayer, if any, necessary for conduct of the operation; consultation with experts, if necessary, and reliance on appraisals or other data for decision making as necessary; time and effort expended by the Taxpayer in furtherance of the operation; any expectation of appreciation in the assets employed in the operation; success the Taxpayer has had in carrying on similar or

dissimilar operations; the Taxpayer's history of profits or losses with respect to the operation discounting startup losses and losses or gains due to unusual circumstances; any profits earned and the possibility of profits if none have been earned to date; the Taxpayer's financial status i.e. the ability to sustain losses or incur costs without regard to returns; and elements of personal pleasure or recreation, or other motives other than profit or gain. The same factors are relevant to a determination of whether commercial production of a plant or animal product in a raw or unprocessed state that is derived from the science and art of agriculture, aquaculture, or horticulture ("commercial production") has occurred on the parcel. In addition the Commission will consider other factors as presented for consideration on a case by case basis.

Based on the Taxpayer's evidence the Commission concludes that the requirement for commercial production on 6 acres of the parcel has been met. But that is not the only requirement for the approval of special valuation.

Section 77-1359 of Nebraska statutes requires a determination that the primary use of a parcel be for commercial production before it can be deemed agricultural land and horticultural land. Given the definition of parcel found in section 77-132 of Nebraska Statutes and the use of that term in section 77-1359 of Nebraska statutes it is clear that the parcel as a whole is to be considered when determining whether or not a parcel is agricultural land or horticultural land. The remaining question is then whether the subject property (parcel) is primarily used for the commercial production of a plant or animal product in a raw or unprocessed state that is derived from the science and art of agriculture, aquaculture, or horticulture. Primarily can be defined as first of all or in the first place. *Webster's Third New International Dictionary*, Merriam-Webster, Inc., (2002). p. 1800. Primary can be defined as the "first in rank or importance." Id.

"Value can have many meanings in real estate appraisal: the applicable definition depends on the context and usage. In the market place value is commonly perceived as the anticipated benefits to be received in the future." *The Appraisal of Real Estate*, Twelfth Edition, Appraisal Institute, (2001) p 20. "The economic concept of value is not inherent in the commodity, good, or service to which it is ascribed; it is created in the minds of the individuals who make up the market." Id p 29. Typically four independent factors create value; utility, scarcity, desire, and effective purchasing power. Id p. 29. "Utility is the ability of a product to satisfy a human want, need or desire." Id. p 29. "Scarcity is the present or anticipated supply of an item relative to the demand for it." Id. p 30. "Desire is a purchaser's wish for an item to satisfy human needs (e.g., shelter, clothing, food, companionship) or individual wants beyond the essential required to support life." Id. p 30. "Effective purchasing power is the ability of an individual or group to participate in a market ---- that is, to acquire goods with cash or its equivalent." Id. p 30. The value of a parcel of real estate is the sum of its component parts. *See, The Appraisal of Real Estate*, Twelfth Edition, Appraisal Institute, (2001). "The value of owner-occupied residential property is based primarily on the expected future advantages, amenities, and pleasures of ownership and occupancy." *The Appraisal of Real Estate*, Twelfth Edition, Appraisal Institute, (2001) p. 35. "The value of income-producing real estate is based on the income it will generate in the future." Id. In the context of this appeal if greater utility is assigned to a use it will have a greater value. Greater value is then an indicator of the primary use of the parcel. Actual values of components of the subject property as determined by the County Assessor as of January 1, 2007, were not disputed. The total actual value of the residence, farm utility building, and their sites as determined by the County Assessor was $130,826 (Total assessment of $155,126 less

assessment on 8 acres of $24,300. E2:1. Actual value of the 6 unimproved acres used for commercial production was $24,300 ($32,400/8 acres = $4,050/acre x 6 acres = $24,300). E2:1. These relative values do not indicate that the parcel's primary or most important use is for commercial production or that it is primarily used for that purpose.

The acres devoted to differing uses on the parcel are 6 acres for commercial production. There are 9.0 acres in the subject property. Exhibit 2:1. The fact that the number of acres used for commercial production exceeds the number of acres used for all other purposes indicates that commercial production may be the primary use of the subject property.

The Property Tax Administrator, in Directive 07-01, advised that criteria other than area could be applied. (E21:3). The Property Tax Administrator also advised that "primarily used" meant "for the most part" and that case law usually referred to "primarily" as more than 51%. (E21:3). A comparison of the size of areas of use within a parcel is suited to use of the "for the most part" and "51%" criteria . The Property Tax Administrator, in Directive 07-01, indicated that other criteria uniformly applied could be used. In this appeal factors such as the relative values of the components of the subject property strongly indicate that the most important or primary use of the subject property is for residential purposes.

Use of the property and its improvements does not support a finding that the primary use of the subject property is for the commercial production of agricultural or horticultural products.

The factors considered in this appeal to determine the primary use of the parcel are based on the facts presented. Factors in addition to those discussed in this appeal may be presented in other appeals and will be considered as presented. An exhaustive list of factors is not possible based on the facts of this appeal or perhaps never possible. It is however the consideration of all

factors as applicable for each parcel rather than reliance on a single factor that is necessary to make a reasonable determination of primary use for a parcel.

The Commission finds that the Taxpayer has not rebutted the presumption. Further analysis by the Commission would not be required since the Taxpayer has failed to rebut the presumption by competent evidence that the County Board had faithfully performed its duties and acted upon sufficient competent evidence. Despite this finding that the Taxpayer has failed to rebut the presumption the Commission finds from all of the evidence presented that the Taxpayer has failed to prove by clear and convincing evidence that the decision of the County Board was either arbitrary or unreasonable.

The appeal of the Taxpayer is denied.

VI.
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 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.

VII.
ORDER

IT IS ORDERED THAT:

1. The decision of the County Board determining that the subject property was eligible for special valuation is affirmed.

2. This decision, if no appeal is timely filed, shall be certified to the Lancaster County Treasurer, and the Lancaster County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Cum. Supp. 2006).

3. Any request for relief, by any party, which is not specifically provided for by this order is denied.

4. Each party is to bear its own costs in this proceeding.

5. This decision shall only be applicable to tax year 2007.

6. This order is effective for purposes of appeal on April 7, 2008.

Signed and Sealed. April 7, 2008.

_____
Nancy J. Salmon, Commissioner

_____
William C. Warnes, Commissioner

SEAL

APPEALS FROM DECISIONS OF THE COMMISSION MUST SATISFY THE REQUIREMENTS OF NEB. REV. STAT. §77-5019 (CUM. SUPP. 2006), OTHER PROVISIONS OF NEBRASKA STATUTES, AND COURT RULES.

Commissioner Wickersham concurring in the result.

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) (Supp. 2007).

Nebraska courts have held that the provisions of section 77-5016(8) of Nebraska Statutes create a presumption that the County Board has faithfully performed its official duties and has acted upon sufficient competent evidence to justify its actions. *City of York v. York County Board of Equalization*, 266 Neb. 297, 664 N.W.2d 445 (2003). The presumption as cited in *York* has roots in the early jurisprudence of Nebraska. 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 functioned as a standard of review. See, e.g. *Gamboni v. County of Otoe*, 159 Neb. 417, 67 N.W.2d 492 (1954).

Roots of the Commission's statutory standard of review are not as old. As early as 1903 Nebraska Statutes provided for review of County Board valuation decisions by the district courts. Laws 1903, c. 73 §124. The statute providing for review did not state a standard for that review. Id. In 1959 the legislature provided a statutory standard of review. Neb Laws 1959, LB 55 §3. The statutory standard of review required the district Court to affirm the decision of the county board 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 Nebraska Statutes. Neb. Rev. Stat. §77-1511 (Cum. Supp. 1959). Section 77-1511 of Nebraska Statutes was made applicable to reviews by the Commission in 1995. Neb Laws 1995, LB 49 §153. In 2001 section 77-1511 of Nebraska Statutes was repealed. Neb Laws 2001, LB 465 §12. After repeal

of section 77-1511 the standard for review in most appeals to the Commission was stated in section 77-5016 of Nebraska Statutes.

Many appeals pursuant to section 77-1511 were decided without reference to the statutory standard of review after its adoption. 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). The first case explicitly citing the statutory standard of review as the basis for a decision was *Loskill v. Board of Equalization of Adams County*, 186 Neb. 707, 185 N.W.2d 852 (1971). In *Hastings Building Co., v. Board of Equalization of Adams County*, 190 Neb. 63, 206 N.W.2d 338 (1973), the court acknowledged that two standards of review existed one statutory and the other judicially prescribed stated as a presumption that the county board of equalization faithfully performed its official duties and acted upon sufficient competent evidence. No attempt was made *Hastings* Court to reconcile the two standards of review.

The possible results from application of the presumption and the statutory standard or 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. If the presumption is overcome the statutory standard remains. See, *City of York v. York County Bd of Equal*., 266 Neb. 297, 664 N.W.2d 445 (2003). The second possibility does not there allow a grant of relief even though the presumption is overcome. The third possibility requires analysis. The presumption and the statutory standard of review are different legal standards one remaining after the other has been met. See. *City of*

York Supra. The burden of proof to overcome the presumption is competent evidence. *City of York* Supra. Clear and convincing evidence is required to show that the County Board'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 failed to perform its duties or act upon sufficient competent evidence is not always evidence that the County Board 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'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 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. Each analyses of the standards of review allowing a grant of relief requires a finding that the statutory standard has been met.

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 returned to its roots as a burden of proof. Id. The *Gordman* court acknowledged the difficulty of using two standards of review and classified the presumption in favor of the county board 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 possible conflict or difficulties inherent in the application of two standards of review. The *Gordman* framework requires the Commission to consider all of the evidence produced in order to determine whether there is clear and convincing evidence that the decision, action, order, or determination being reviewed was unreasonable or arbitrary. It is within that framework that I have analyzed the evidence.

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Wm. R. Wickersham, Commissioner