

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

DEWAYNE HOLLIBAUGH,)	
)	
Appellant,)	Case Nos. 07A-049, 07A-050, 07A-051,
)	07A-052, 07A-053, 07A-054
v.)	
)	DECISION AND ORDER AFFIRMING
DAWES COUNTY BOARD OF)	THE DECISIONS OF THE DAWES
EQUALIZATION,)	COUNTY BOARD OF EQUALIZATION
)	
Appellee.)	

The above-captioned cases were called for a hearing on the merits of appeals by DeWayne Hollibaugh ("the Taxpayer") to the Tax Equalization and Review Commission ("the Commission"). The hearing was held in the Hampton Inn, 301 W Hwy 26, Scottsbluff, Nebraska, on May 21, 2008, pursuant to an Order for Hearing and Notice of Hearing issued February 13, 2008. Commissioners Wickersham, Warnes, and Hotz were present. Commissioner Salmon 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.

DeWayne Hollibaugh was present at the hearing without legal counsel.

Russell W. Harford, Special County Attorney for Dawes County, Nebraska, was present as legal counsel for the Dawes 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 (Cum. Supp. 2006). The final decision and order of the Commission in the consolidated cases is as follows.

**I.
ISSUES**

The Taxpayer has asserted that taxable value of the subject property as of January 1, 2007, 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, 2007.

**II.
FINDINGS OF FACT**

The Commission finds and determines that:

1. The Taxpayer has a sufficient interest in the outcome of the above captioned appeals to maintain them.
2. The parcels of real property to which the above captioned appeals pertain are described as S $\frac{1}{2}$ S $\frac{1}{2}$ SE $\frac{1}{2}$ Section 11, Township 30, Range 50; SE $\frac{1}{4}$ SW $\frac{1}{4}$, SW $\frac{1}{4}$ SE $\frac{1}{4}$, Section 12, Range 50; S $\frac{1}{2}$ SW $\frac{1}{4}$ Section 29, Township 30, Range 50; SE $\frac{1}{2}$ SE $\frac{1}{4}$ Section 30, Township 30, Range 50; E $\frac{1}{2}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$ Section 31, Township 30, Range 50; and NW $\frac{1}{4}$, S $\frac{1}{2}$ Section 32, Township 30, Range 50, all, Dawes County, Nebraska, ("the subject property").

3. Taxable value of each parcel of the subject property placed on the assessment roll as of January 1, 2007, ("the assessment date") by the Dawes County Assessor, value as proposed in timely protests, and taxable value as determined by the County Board is shown in the following tables:

Case No. 07A-049

Description: S $\frac{1}{2}$ S $\frac{1}{2}$ SE $\frac{1}{4}$ Section 11, Township 30, Range 50, Dawes County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Agricultural Land	\$10,450.00	\$15,395.00	\$8,975.00
Home Site	\$6,420.00	\$ In Ag land	\$6,420.00
Residence	\$67,660.00	\$50,000.00	\$67,660.00
Total	\$84,530.00	\$65,395.00	\$83,055.00

Case No. 07A-050

Description: SE $\frac{1}{4}$ SW $\frac{1}{4}$, SW $\frac{1}{4}$ SE $\frac{1}{4}$, Section 12, Range 50, Dawes County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Agricultural Land	\$21,380.00	\$25,750.00	\$19,330.00
Home Site	\$6,420.00	\$ In Ag land	\$6,420.00
Residence	\$9,150.00	\$5,000.00	\$9,150.00
Total	\$36,950.00	\$32,750.00	\$34,900.00

Case No. 07A-051

Description: S $\frac{1}{2}$ SW $\frac{1}{4}$ Section 29, Township 30, Range 50, Dawes County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Agricultural Land	\$19,060.00	\$17,860.00	\$19,060.00
Total	\$19,060.00	\$17,860.00	\$19,060.00

Case No. 07A-052

Description: SE½SE¼ Section 30, Township 30, Range 50, Dawes County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Agricultural Land	\$9,320.00	\$8,720.00	\$9,320.00
Total	\$9,320.00	\$8,720.00	\$9,320.00

Case No. 07A-053

Description: E½, NE¼SW¼ Section 31, Township 30, Range 50, Dawes County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Agricultural Land	\$74,800.00	\$87,530.00	\$74,800.00
Home Site	\$16,050.00	\$In Ag land	\$16,050.00
Residences	\$127,975.00	\$150,515.00	\$127,975.00
Farm Site	\$2,000.00	\$In Ag Land	\$2,000.00
Outbuilding	\$32,540.00	\$In Res	\$32,540.00
Total	\$253,365.00	\$238,045.00	\$253,365.00

Case No. 07A-054

Description: NW¼, S½ Section 32, Township 30, Range 50, Dawes County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Agricultural Land	\$117,845.00	\$110,620.00	\$117,845.00
Total	\$117,845.00	\$110,620.00	\$117,845.00

4. Appeals of the County Board's decisions were filed with the Commission.
5. The County Board was served with Notices in Lieu of Summons and duly answered those Notices.

6. The Taxpayer was served with Notices in Lieu of Summons and duly answered those Notices.
7. The appeals were consolidated for hearing by order of the Commission.
8. An Order for Hearing and Notice of Hearing issued on February 13, 2008, set a hearing of the appeals for May 21, 2008, at 8:00 a.m. MDST.
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.
10. Taxable value of each parcel for the tax year 2007 is:

Case No. 07A-049

Agricultural land	\$ 8,975.00
Farm Site	\$ 6,420.00
Residence	\$67,660.00
Total	<u>\$83,055.00</u>

Case No. 07A-050

Agricultural land	\$19,330.00
Farm Site	\$ 6,420.00
Residence	\$ 9,150.00
Total	<u>\$34,900.00</u>

Case No. 07A-051

Agricultural land	\$19,060.00
Total	<u>\$19,060.00</u>

Case No. 07A-052

Agricultural land	\$9,320.00
Total	<u>\$9,320.00</u>

Case No. 07A-053

Agricultural land	\$ 74,800.00
Farm Site	\$ 2,000.00
Home Site	\$ 16,050.00
Residence	\$127,975.00
Outbuildings	\$ 32,540.00
Total	<u>\$253,365.00</u>

Case No. 07A-54

Agricultural land	\$117,845.00
Total	<u>\$117,845.00.</u>

**III.
APPLICABLE LAW**

1. Subject matter jurisdiction of the Commission in each of the above captioned appeals is over all questions necessary to determine taxable value. Neb. Rev. Stat. 77-5016 (7) (Supp. 2007).
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. 2006).
 7. Agricultural land and horticultural land shall be valued for purposes of taxation at seventy five percent of its actual value. Neb. Rev. Stat. §77-201 (2) (Cum. Supp. 2006).
 8. 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." Neb. Rev. Stat. §77-1359 (1) (Cum. Supp. 2006).

9. "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 shall be defined as agricultural land or horticultural land." Neb. Rev. Stat. §77-1359 (2)

(Cum. Supp. 2006).

10. "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.
11. Equalization to obtain proportionate valuation requires a comparison of the ratio of assessed to actual value for the subject property and comparable property. *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).
12. 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).
13. 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).
 14. 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).
 15. 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).
 16. 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).

17. 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).
18. 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).
19. The presumption disappears if there is competent evidence to the contrary. *Id.*
20. 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).
21. Proof that the order, decision, determination, or action 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).
22. "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).
23. 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).

24. 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).
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 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. 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 values); and *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 consists of six parcels of agricultural land and horticultural land. Three of the parcels are improved. The improved parcels are the subject of appeals in Case Nos. 07A-049, 07A-50, and 07A-07A-53.

The Taxpayers contention with regard to the parcels which are the subject of appeals in Case Nos. 07A-049 and 07A-50 is that the contribution to taxable value of improvements should be zero because improvements on other parcels had a zero contribution to taxable value. It does not seem that the contribution to taxable value made by the land component of those parcels is in contention because relief granted by the County Board conformed to the request of the Taxpayer at least as it concerned special value.

The parcels which are the subject of appeals in Case Nos. 07A-51, 07A-52, an 07A-54 are located in Market Area 3 and are unimproved. The Taxpayer's contention is that the taxable value of those parcels should be determined with reference values determined for parcels in Market Area 1.

The parcel described in Case No 07A-53 is an improved parcel in Market Area 3. The Taxpayer contends that the contribution to value of the improvements, or at least the residential improvements, should be zero for the reason stated above and that the contribution to value of the land component should be determined with reference to values determined for parcels in Market Area 1.

All of the parcels in the subject property are subject to special valuation. Parcels subject to special valuation have both a special value and a recapture value assigned to them. Neb. Rev. Stat. §77-201(3) (Cum. Supp. 2006). Both values are generally noted on the protests filed by the Taxpayer. (E1 through E6). The County Board seemingly did not act on any claim that recapture should be adjusted except with regard to the parcels described in Case Nos. 07A-049 and 07A-50. The arguments of the Taxpayer with regard to use of Market Area 1 values will be deemed to include both the special values and the recapture values.

The Taxpayer asserts that application of the Market Area 1 values for parcels in Market Area 3 is appropriate because of the County Assessor advised the Property Tax Administrator values for the two areas should be the same for the tax year 2007. *2007 Reports and Opinions of the Property Tax Administrator for Dawes County*, p. 59. The County Assessor testified that the published statement was in error and that in fact for the tax year 2007 values used for as shown in Exhibit 10. The County Assessor testified that the error was the result of timing because the statement was prepared before final determinations had been made and oversight because the statement was not corrected until after final determinations had been made.

The Taxpayer noted County Board had acted in conformity with the request for adjustment to values used in Market Area 1 in Case Nos. 07A-49 and 07A-50. The parcels described in those appeals are in Market Area 2. The Assessor testified that values in Market Area 2 that should have been applied for the tax year 2006, were identical to those for tax year 2007, as shown in Exhibit 10. The County Board's action in those appeals apparently then conforms to the testimony of the County Assessor concerning the values which should have properly been applied and were applied by the County Board. (E1,E2, E13:1 and 3, and E14:1 and 3). How the protested values were determined is unknown but is not material to this appeal because the apparent errors were corrected by the County Board. The argument that because the County Board corrected errors with regard to parcels in Market Area 2 the same corrections should be made for parcels in Market Area 3 fails. Errors were corrected for parcels in Market Area 2 in conformity with the schedule of values shown in Exhibit 10. Any contention that the County Board is bound by an erroneous statement made by the County Assessor to the Property Tax Administrator rather than a schedule of values in fact applied to all parcels in Market Area 3

is without merit. The Taxpayer offered no other evidence that the County Board's determinations of the special value or recapture value for the parcels described in the appeals for Case Nos. 07A-51, 07A-52, 07A-53 or 07A-54 were unreasonable or arbitrary or that the County Board did not faithfully perform its duties or act on sufficient competent evidence to justify its actions.

A further contention of the Taxpayer is that the contributions to taxable value of the improvements on the parcels described in the appeals for Case Nos. 07A-49, 07A-50, and 07A-53 are not equalized with the contribution to value of improvements on parcels described in Exhibits 7 and 8. The Taxpayer asserts that it is necessary in order to equalize the taxable values of the five parcels that it is necessary to reduce the contribution to value for the improvements on the parcels subject to appeal to zero. In support of that argument the Taxpayer has shown that the contribution to value of a partially completed improvement on the parcel described in Exhibit 7, a "lighthouse," was zero as determined by the County Assessor but that a contribution to value should have entered on the assessment roll. A witness for the Taxpayer testified that prior to July 25, 2007, the County Board was aware that the contribution to value of the "lighthouse" was not entered on the assessment rolls. The County Assessor testified that although the "lighthouse" was described in the property record file, no contribution to value was entered on the assessment roll for that improvement. The omission of a contribution to value was explained as a computer problem.

A witness for the Taxpayer testified that a partially completed improvement was present on the parcel described in Exhibit 8, an addition to a residence, as of January 1, 2007, that no contribution to value for the addition was entered on the assessment roll for the parcel described

in that exhibit, that the County Board was aware prior to July 25 of the omission. A Deputy Assessor for Dawes County testified that she drove by the parcel described in Exhibit 8 after the first of the year in 2007 and observed dirt work but no other construction at the parcel. There is conflicting evidence concerning the status of the addition on January 1, 2007. It is not necessary for this decision to resolve that conflict.

Equalization to obtain proportionate valuation requires a comparison of the ratio of assessed to actual value for the subject property and comparable property. *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999). When a parcel is improved it is unnecessary to consider the contribution to value of each component to achieve equalization. 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). 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). A Taxpayer, who only produced evidence that was aimed at discrediting valuation methods utilized by 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). 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 values).

In these appeals there is no evidence of taxable value of the parcels described in Exhibits 7 and 8, with the described improvements, a light house and residential addition. Even assuming that value as assessed for the Taxpayer's parcels is 100% of taxable value there is no basis for calculation of a ratio of the value as assessed to true taxable value for the parcels described in Exhibits 7 and 8. Without comparison of the respective ratios there is no basis for relief.

The Taxpayer has failed to show the extent to which the taxable values of the parcels described in the appeals for Case Nos. 07A-049, 07A-50, and 07A-07A-53 are not equalized with the parcels described in Exhibits 7 and 8.

The evidence does not demonstrate that the decisions of the County Board was unreasonable or arbitrary or that the County Board did not faithfully perform its duties or act on sufficient competent evidence to justify its actions as it determined the equalized taxable value of the parcels described in the appeals for Case Nos. 07A-51, 07A-52, 07A-53 or 07A-54.

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 decisions of the County Board are unreasonable or arbitrary and the decisions of the County Board should be affirmed.

**VI.
ORDER**

IT IS ORDERED THAT:

1. The decisions of the County Board determining taxable values of the parcels comprising subject property as of the assessment date, January 1, 2007, are affirmed.
2. Taxable value, for the tax year 2007, of each parcel described in an appeal as referenced by the Case No. is:

Case No. 07A-049

Agricultural land	\$ 8,975.00
Farm Site	\$ 6,420.00
Residence	\$67,660.00
Total	<u>\$83,055.00</u>

Case No. 07A-050

Agricultural land	\$19,330.00
Farm Site	\$ 6,420.00
Residence	\$ 9,150.00
Total	<u>\$34,900.00</u>

Case No. 07A-051

Agricultural land	\$19,060.00
Total	<u>\$19,060.00</u>

Case No. 07A-052

Agricultural land	\$9,320.00
Total	<u>\$9,320.00</u>

Case No. 07A-053

Agricultural land	\$ 74,800.00
Farm Site	\$ 2,000.00
Home Site	\$ 16,050.00
Residence	\$127,975.00
Outbuildings	\$ 32,540.00
Total	<u>\$253,365.00</u>

Case No. 07A-54

Agricultural land	\$117,845.00
Total	<u>\$117,845.00.</u>

3. This decision, if no appeal is timely filed, shall be certified to the Dawes County Treasurer, and the Dawes County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Cum. Supp. 2006).
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 2007.
7. This order is effective for purposes of appeal on July 28, 2008.

Signed and Sealed. July 28, 2008.

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. 2006), OTHER PROVISIONS OF NEBRASKA STATUTES, AND COURT RULES.

I concur 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 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)). 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.*

In 1959 the legislature provided a statutory standard for review by the district courts of county board of equalization assessment decisions. 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). Review of district court decisions made pursuant to section 77-1511 was de novo. *Future Motels, Inc. v. Custer County Board of Equalization*, 252 Neb. 565, 563 N.W.2d 785 (1997). 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).

The Tax Equalization and Review Commission was created in 1995. Neb Laws 1995, LB 49 §153. Section 77-1511 of Nebraska Statutes was made applicable to review of county board of equalization assessment decisions by the Commission. *Id.* Review of commission decisions was prescribed by statute to be for error on the record. *Supra* §19. 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 to be applied by the Commission in most appeals was stated in section 77-5016 of Nebraska Statutes. Section 77-5016 requires a finding that the decision being reviewed was unreasonable or arbitrary. The basis for that determination is the evidence presented to the Commission in a new record. See, Neb. Rev. Stat. §77-5016 (Cum. Supp. 2006). Commission decisions are reviewed for error on the record. See, Neb. Rev. Stat. 77-5019(5) (Cum. Supp. 2006). The statutory basis for Commission review and the review of its decisions is analogous to review by district courts of decisions made by administrative agencies. The basis for district court review of decisions made by administrative agencies is *de novo* on the record. *Tyson Fresh Meats v. State*, 270 Neb. 535, 704 N.W.2d 788 (2005). The decisions of the district court examining the administrative decision are reviewed for error on the record. *Thorson v. Nebraska Dept. of Health & Human Servs.*, 274 Neb. 322, 740 N.W.2d 27 (2007). The similarities are enough to suggest that the framework for review applied to district court decisions could be made applicable to decisions of the Commission.

Many appeals of district courts decisions made pursuant to section 77-1511 were decided without reference to the statutory standard of review applicable to the district courts. 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). As noted however review was *de novo* and the reviewing

court was not bound by the standard of review imposed on district court. The statutory standard of review applicable to the district courts was however considered in the review of a district court decision made pursuant to section 77-1511 in 1971. *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 for the district courts; one statutory, and the other judicial 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 by the *Hastings* Court to reconcile the two standards of review that were applicable to the district courts.

The possible results from application of the presumption and the statutory standard of review by the Commission 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 therefore 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 be 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* analysis 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.

Wm R. Wickersham, Commissioner