

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

WESTSIDE BOWLING LANES, INC.,	)	
	)	
Appellant,	)	Case No. 07C-054
	)	
v.	)	DECISION AND ORDER
	)	REVERSING THE DECISION OF
HALL COUNTY BOARD OF	)	THE HALL COUNTY BOARD OF
EQUALIZATION,	)	EQUALIZATION
	)	
Appellee.	)	

The above-captioned case was called for a hearing on the merits of an appeal by Westside Bowling Lanes, Inc. ("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 July 29, 2008, pursuant to an Order for Hearing and Notice of Hearing issued May 19, 2008. Commissioners Wickersham, Warnes, and Hotz were present. Commissioner Wickersham was the presiding hearing officer. 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).

Roy D. Fredrickson, President of Westside Bowling Lanes, Inc., was present at the hearing without legal counsel.

Michelle J. Oldham, County Attorney for Hall County, Nebraska, was present as legal counsel for the Hall 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 this case is as follows.

## **I. ISSUES**

The Taxpayer has asserted that actual value of the subject property as of January 1, 2007, is less than actual value as determined by the County Board. The issues on appeal related to that assertion are:

Whether the decision of the County Board determining actual value of the subject property is unreasonable or arbitrary; and

The actual value of the subject property on January 1, 2007.

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 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, 2007, ("the assessment date") by the Hall County Assessor, value as proposed in a timely protest, and actual value as determined by the County Board is shown in the following table:

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Description: Sub Lot 1 Commonwealth Business Park, Grand Island, Hall County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$289,305.00	\$195,000.00	\$289,305.00
Improvement	\$402,550.00	\$240,000.00	\$402,550.00
Total	\$691,855.00	\$435,000.00	\$691,855.00

4. An appeal of the County Board's decision was filed with the Commission.
5. The County Board was served with a Notice in Lieu of Summons and duly answered that Notice.
6. An Order for Hearing and Notice of Hearing issued on May 19, 2008, set a hearing of the appeal for July 29, 2008, at 11:00 a.m. CDST.

7. An Affidavit of Service which appears in the records of the Commission establishes that a copy of the Order for Hearing and Notice of Hearing was served on all parties.
8. Actual value of the subject property as of the assessment date for the tax year 2007 is:

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Land value                \$289,305.00

Improvement value \$128,069.00

Total value              \$417,374.00.

### **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) (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. “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 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).
9. 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).
10. 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).

11. 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).
12. 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).
13. 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).
14. 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).
15. 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).

16. The presumption disappears if there is competent evidence to the contrary. *Id.*
17. 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).
18. 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).
19. "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).
20. 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).
21. 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).
22. A corporate officer or other representative of an entity, must be shown to be familiar with the property in question and have a knowledge of values generally in the vicinity to be

qualified to offer an opinion of value. *Kohl's Dept. Stores v. Douglas County Bd. of Equal.*, 10 Neb.App. 809, 638 N.W.2d, 881 (2002).

23. 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).
24. 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).
25. 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 is an improved commercial parcel in Grand Island, Nebraska. The improvements on the parcel include a 30,047 square foot steel building built in 1975 and 48,210 square feet of asphalt paving for parking. (2:2). The parcel contains 135,000 square feet of land. (E2:2). The parcel is used for the operation of a bowling alley.



The Taxpayer contends that the taxable value of the subject property should be comparable to the value of another bowling alley in Grand Island. The other Grand Island bowling alley is the Super Bowl. The Super Bowl operates on an 848,984 square foot parcel. (E3:3). Super Bowl improvements include a 35,112 square foot concrete building, 130,820 square feet of asphalt paving for parking, a 1,500 square foot storage garage, a mini golf course, and a bumper car course. (E3:3). Most of the Super Bowl improvements were constructed in 1981. (E3:3).

Actual value of the subject property as determined by the County Board as of January 1, 2007 was \$691,855. (E1:1). Actual value of the Super Bowl parcel as determined by the County Assessor without a protest to the County Board was \$439,971. (E6:2). Actual value of both parcels for tax year 2007 was determined 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; (5) 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*, 2<sup>nd</sup> Ed., International Association of Assessing Officers, 1996, pp. 128 - 129.

“Physical deterioration is the loss in value due to wear and tear in service and the disintegration of an improvement from the forces of nature. All man made objects begin a slow process of deterioration as soon as they are created. . . Among the most common causes of physical deterioration are wear and tear through use, breakage, negligent care, infestation of termites, dry rot, moisture, and the elements. *Property Assessment Valuation*, 2<sup>nd</sup> Ed., International Association of Assessing Officers, 1996, pp. 154.

“Functional utility is the overall usefulness and desirability of a property; the ultimate criterion is whether the improvement efficiently satisfies the wants and needs of the market. Functional obsolescence is the loss of value in a property improvement due to changes in style, taste, technology, needs and demands. Functional obsolescence exists where a property suffers from poor or inappropriate architecture, lack of modern equipment, wasteful floor plans, inappropriate room sizes, inadequate heating or cooling capacity, and so on. It is the ability of a structure to perform adequately the function for which it is currently used.” *Property Assessment Valuation*, 2<sup>nd</sup> Ed., International Association of Assessing Officers, 1996, pp. 154 - 155.

“External Obsolescence is loss in value as a result of an impairment in utility and desirability caused by factors external to the property (outside the property’s boundaries) and is generally deemed to be incurable.” *Property Assessment Valuation*, 2<sup>nd</sup> Ed., International Association of Assessing Officers, 1996, pp. 155.

The following table shows information used in the application of the cost approach to determine actual value of the subject property and Super Bowl for the tax year 2007.

<b>Descriptor</b>	<b>Subject</b>	<b>Super Bowl</b>
Exhibit	2	3
Bowling Alley	\$1,194,068.00	\$1,574,071.00
Refinements	\$ <u>123,804.00</u>	\$ <u>1,178,439.00</u>
Replacement Cost New	\$1,317,872.00	\$2,823,835.00
Physical Depreciation	(\$ <u>915,322.00</u> )	(\$ <u>2,582,092.00</u> )
RCN Less Depreciation	\$ 402,550.00	\$ 241,743.00
Land	\$ <u>289,305.00</u>	\$ <u>198,228.00</u>
Actual Value	\$ <u><u>691,855.00</u></u>	\$ <u><u>439,971.00</u></u>

Replacement costs were calculated using Marshall & Swift data. (2:2 and E3:3).

There is no indication that the cost factors were not uniformly applied. The physical depreciation deducted from replacement cost new (“RCN”) for the two parcels varies considerably. The physical depreciation factor applied to the bowling alley that is part of the Super Bowl parcel is 90%. (E3:3) The Super Bowl bowling alley is concrete block and was built in 1981. (E8:4). The physical depreciation factor applied to the bowling alley on the subject property is 70%. (E2:2). The subject property bowling alley is a steel building constructed in 1975. (E2:2). The refinements present on the Super Bowl parcel received 93% physical depreciation, including a storage garage built in 2001. (E3:3). The storage garage is built of concrete block and was in good condition. (E8:4). Refinements on the subject property built in 1975, asphalt paving, lighting, and a metal fence received 65% or 50% of physical depreciation. (E2:2). Asphalt paving, lighting and a metal fence on the Super Bowl parcel built in 1981 received 93% physical depreciation. (E3:3). The Commission finds that physical depreciation factors were not uniformly calculated and applied to improvements on the subject property and the Super Bowl

parcel. The disparity in calculation and application of physical depreciation factors is unexplained.

The contribution of the land component to the actual value for the subject property is \$289,305.00 (E1:1). That is 2.143/square foot. ( $\$289,305 \div 135,000 = \$2.143$ ). The contribution to actual value of the land component for the Super Bowl parcel is \$198,228 or \$1.75/ square foot. (E3:3). The County Assessor testified that the subject property is at a location which is superior to the Super Bowl parcel. The County Assessor testified that the subject property is in a growth area and that additional commercial development is expected near the subject property. No other evidence of the contribution to actual value of the land component was presented.

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). The object of constitutionally required uniformity in the taxation of real property is accomplished if all of the property within the taxing jurisdiction is assessed and taxed at a uniform standard of value. *Gage County v. State Bd of Equalization and Assessment*, 185 Neb. 749, 178 N.W.2d 759 (1970). If taxable values are to be equalized, it is necessary for a Taxpayer to establish by clear and convincing evidence that the 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). An estimate of actual value using the cost approach and utilizing the depreciation factors found for the Super Bowl parcel may be made for the subject property. The resulting calculations for the subject property are as follows:

Bowling Alley	\$1,194,068.00	
90 % physical deprecation	<u>(\$1,074,661.20)</u>	\$119,406.80
Refinements	\$ 123,804.00	
93% physical deprecation	<u>(\$ 115,137.72)</u>	\$ 8,662.28
RCN less depreciation		\$ 128,069.08
Land		\$ 289,305.00
Actual Value		<u>\$ 417,374.08</u>

The disparity between actual value (\$691,855) as determined by the County Board and actual value as uniformly determined using physical depreciation factors applicable to the Super Bowl parcel (\$417,374) shows that the unequalized taxable value of the subject property is grossly excessive when compared with the taxable value of the Super Bowl parcel. The County Board had before it a recommendation of a referee and a referee coordinator to equalize the taxable value of the subject property with the Super Bowl parcel. The county Assessor did not recommend equalization. The County Board failed to act on the recommendation of the referee and referee coordinator. Given the obvious disparity between the physical depreciation factors applied to the subject property and the Super Bowl parcel and the resulting determinations of actual value failure of the County Board to equalize the two parcels is a failure of a plain legal duty, and not a mere error of judgement.

As noted below the only evidence of actual value for the subject property and the Super Bowl parcels are the determination of the County Board for the subject property and determination of the County Assessor for the Super Bowl. Both determinations were made using a methodology with greatly varying factors for physical depreciation. The resulting values for

apparently similar parcels are significantly different. The results cannot be related to a uniform standard of value.

The Commission finds that the Taxpayer has rebutted by competent evidence the presumption that the County Board faithfully performed its duties and operated on sufficient competent evidence. The Taxpayer has shown by clear and convincing evidence that the County Board was arbitrary or unreasonable in its determination.

The Taxpayer has proven grounds for relief. Based on use of physical depreciation factors for the Super Bowl parcel uniformly applied to the subject property the equalized taxable value of the subject property is \$417,374.00.

No evidence of actual value other than actual value as determined by the County Board was presented. The Taxpayer's claim that actual value for the subject property was lower than as determined by the County Board is not supported by the evidence.

## **V. CONCLUSIONS OF LAW**

1. The Commission has subject matter jurisdiction in this appeal.
2. The Commission has jurisdiction over the parties to this appeal.
3. The Taxpayer has produced competent evidence that the County Board failed to faithfully perform its official duties and to act on sufficient competent evidence to justify its actions.
4. The Taxpayer has adduced sufficient, clear and convincing evidence that the decision of the County Board is unreasonable or arbitrary and the decision of the County Board should be vacated and reversed.

**VI.  
ORDER**

**IT IS ORDERED THAT:**

1. The decision of the County Board determining actual value of the subject property as of the assessment date, January 1, 2007, is vacated and reversed.
2. Actual value, for the tax year 2007, of the subject property is:

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Land value                \$289,305.00

Improvement value \$128,069.00

Total value                \$417,374.00.

3. This decision, if no appeal is timely filed, shall be certified to the Hall County Treasurer, and the Hall 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 September 4, 2008.

Signed and Sealed. September 4, 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 the 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. 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). 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. 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 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 district courts review 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 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. *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 Nebraska Supreme 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 v. York County Bd of Equal.*, 266 Neb. 297, 664 N.W.2d 445 (2003). The burden of proof to overcome the presumption is competent evidence. *City of York*, Supra. Clear and convincing evidence is required to show that a county board of equalization's decision was unreasonable or arbitrary. See, e.g. *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb.App. 171, 645 N.W.2d 821 (2002). Competent evidence that the county board of equalization failed to perform its duties or act upon sufficient competent evidence is not always evidence that the county board of equalization acted unreasonably or arbitrarily because the statutory standard of review remains even if the presumption is overcome. *City of York*, Supra. Clear and convincing evidence that a county board of equalization's determination, action, order, or decision was unreasonable or arbitrary, as those terms have been defined, may however overcome the presumption that the county board of equalization faithfully discharged its duties and acted on sufficient competent evidence. In any event the statutory standard has been met and relief may be granted. Both standards of review are met in the fourth possibility and relief may be granted. 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. 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 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.

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Wm R. Wickersham, Commissioner