

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

| | | |
|-------------------------|---|-----------------------------|
| THERESIA V. FINK, |) | |
| |) | |
| Appellant, |) | Case No. 07R-431 |
| |) | |
| v. |) | DECISION AND ORDER |
| |) | AFFIRMING THE DECISION OF |
| DOUGLAS COUNTY BOARD OF |) | THE DOUGLAS COUNTY BOARD OF |
| EQUALIZATION, |) | EQUALIZATION |
| |) | |
| Appellee. |) | |

The above-captioned case was called for a hearing on the merits of an appeal by Theresia V. Fink ("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 January 5, 2009, pursuant to an Order for Hearing and Notice of Hearing issued November 6, 2008. Commissioners Wickersham and Salmon were present. Commissioner Wickersham was the presiding hearing officer. Commissioner Warnes was excused from participation by the presiding hearing officer. A panel of three commissioners was created pursuant to 442 Neb. Admin. Code, ch. 4, §011 (10/07). Commissioner Hotz was absent. The appeal was heard by a quorum of a panel of the Commission.

Theresia V. Fink was not present at the hearing. The required presence of Theresia V. Fink was waived on motion. Christina M. Fink appeared as legal counsel for the Taxpayer.

Thomas S. Barrett, a Deputy County Attorney for Douglas County, Nebraska, was present as legal counsel for the Douglas County Board of Equalization ("the County Board").

The Commission amended the caption of the proceeding to reflect the interest of Theresia V. Fink

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 Douglas County Assessor, value as proposed in a timely protest, and actual value as determined by the County Board is shown in the following table:

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Description: Lot 13 Block A, Saunders and Himebaughs Add, Omaha, Douglas County, Nebraska.

| | Assessor Notice Value | Taxpayer Protest Value | Board Determined Value |
|-------------|-----------------------|------------------------|------------------------|
| Land | \$6,800.00 | \$In Total | \$6,800.00 |
| Improvement | \$52,400.00 | \$In Toal | \$52,400.00 |
| Total | \$59,200.00 | \$38,980.00 | \$59,200.00 |

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 November 6, 2008, set a hearing of the appeal for January 5, 2009, at 3:00 p.m. CST.
7. An Affidavit of Service which appears in the records of the Commission establishes that a copy of the Order for Hearing and Notice of Hearing was served on all parties.
8. Actual value of the subject property as of the assessment date for the tax year 2007 is:

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Land value \$ 6,800.00

Improvement value \$52,400.00

Total value \$59,200.00.

9. The Johann P. Fink is deceased. Theresia V. Fink was the owner of the subject property as of January 1, 2007.

**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. "An owner who is familiar with his property and knows its worth is permitted to testify as to its value." *U. S. Ecology v. Boyd County Bd. Of Equalization*, 256 Neb. 7, 16, 588 N.W.2d 575, 581, (1999).
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. A Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued. Cf. *Lincoln Tel. and Tel. Co. v. County Bd. Of Equalization of York County*, 209 Neb. 465, 308 N.W.2d 515 (1981); *Arenson v. Cedar County*, 212 Neb. 62, 321 N.W.2d 427 (1982) (determination

of equalized taxable value) *Josten-Wilbert Vault Co. v. Board of Equalization for Buffalo County*, 179 Neb. 415, 138 N.W.2d 641 (1965) (determination of actual value).

IV. ANALYSIS

The subject property is an improved residential parcel. The 1,346 square foot 1½ story residence with a 956 square foot basement was constructed in 1908. (E10:1).

The Taxpayer contends that actual value as determined by the County Board did not take into account the condition of the subject property. Estimates for the cost of various repairs were received as Exhibits 3 and 4. The Taxpayer contends that the cost of repairs should be deducted from actual value as determined by the County Board. Depreciation is the loss in value from any cause; the difference between the cost of an improvement on a valuation date and the market value of the improvement on the same date. *Dictionary of Real Estate Appraisal, 3rd Ed., Appraisal Institute, 1998, pp. 79-80.* 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, 2nd Ed., International Association of Assessing Officers, 1996, pp. 154.* Physical depreciation may be estimated by analysis of the items in need of repair. Items in need of repair can be separated for purposes of analysis into those that are defined as curable and those that are defined as incurable. *Property Assessment Valuation, Supra, p. 395.* Curable physical depreciation is sometimes

referred to as deferred maintenance. *Property Assessment Valuation*, Supra, p. 398. The tests to determine whether a physically deteriorated item is curable are: “First, if spending the money to ‘cure’ the item will result in a value increment equal to or greater than the expenditure, the item is normally considered curable. Second, if spending the money to cure the item will not result in a value increment equal to or greater than the expenditure *but will allow other existing items to maintain their value* then the item is normally considered curable.” *Property Assessment Valuation*, Supra, p. 398. In other words, if it is economic to repair the item of physical depreciation it is deemed curable. The items of physical depreciation that are not deemed curable are characterized as incurable. *Property Assessment Valuation*, Supra, p. 399. Incurable items of physical depreciation are further analyzed by differentiating between those that are short-lived and those that are long-lived. *Property Assessment Valuation*, Supra, p. 395. Short-lived items of physical depreciation are those that are not ready to be replaced on valuation date but will probably be replaced in the foreseeable future. *Property Assessment Valuation*, Supra, p. 399. Long-lived items of physical depreciation are those items not treated as curable or short-lived. *Property Assessment Valuation*, 2nd Ed., International Association of Assessing Officers, 1996, p. 399. A long-lived item for which physical depreciation is to be determined is not 100% physically deteriorated and does not need to be cured. Id. The analysis of depreciation as described above is a component of the cost approach when it is used to develop an estimate of value. *Property Assessment Valuation*, Supra, pp. 128 - 129. The usefulness of an estimate of depreciation in the cost approach is obvious because the starting point in the cost approach is the development of the cost for a new structure with the characteristics of the improvement being valued. Id. Unless the improvement is new and unused some adjustment is necessary to account

for wear and tear and the ravages of time. In the cost approach there is a starting point for the deduction of physical depreciation that is unaffected by the condition or physical depreciation of the improvement. The condition of the subject property as considered by the County Board is fair. (E10:3). A deduction of 10,000 was taken in the calculations which support the County Board's determination of actual value for the subject property. (E10:3). The Taxpayer's starting point for deduction of physical depreciation as noted below is a value that already recognizes the affects of age and use on actual value of the subject property. Subtracting the cost to repair or cure various items as shown in from actual value as determined by the County Board would necessarily be at least in part a duplication of a reduction in value attributable to use and time. The Taxpayer's evidence that physical depreciation be increased based on estimates of repair costs is not persuasive.

The Taxpayer asserts that taxable value as determined by the County Board is not equalized. 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). The Taxpayer presented two parcels as comparables to the subject property. The characteristics of the subject property and the two parcels the Taxpayer presented for consideration are shown in the table below.

| Descriptor | Subject | Parcel 1 | Parcel 2 |
|-------------------|------------------|------------------|------------------|
| Exhibit | E10 | E6 | E7 |
| Location | 4449 Franklin St | 4507 Franklin St | 4203 Franklin St |
| Lot Size | 7,500 Sq Ft | 5,000 Sq Ft | 5,850 Sq Ft |

| | | | |
|-------------------|--------------------|--------------|--------------|
| Condition | Fair | Fair | Fair |
| Quality | Average | Fair | Average |
| Yr Built | 1908 | 1892 | 1914 |
| Remodeled | | 1987 | |
| Exterior Walls | Frame Siding | Frame Siding | Frame Siding |
| Style | 1½ Story | 1½ Story | 2 Story |
| Area Above Ground | 1,346 | 1,080 | 1,464 |
| Roof Type | Gable | Gable | Gable |
| Roof Cover | Comp Shingle | Comp Shingle | Comp Shingle |
| HVAC | Central Air to Air | Forced Air | Forced Air |
| Basement | 956 | 712 | 668 |
| Finished | | | |
| Walkout | | | |
| Bedrooms | 4 | 3 | 4 |
| Bathrooms | 1.5 | 1 | 1 |
| Garage Type | | Detached | |
| Garage Area | | 180 | |
| Misc Imp | | | |
| Taxable Value | \$59,200 | \$41,905 | \$42,422 |

An examination of the property record files submitted shows that taxable values for the various parcels were calculated using a process that recognizes the value attributable to various characteristics of the parcel and improvements. The determination of actual value for the subject property is however an exception to that process. Total Mkt as determined by the process shown for subject parcel is \$69,180. (E10:3). Reconciled value that is actual value as determined by the County Board is \$59,200. (E1:1 and E10:2). The parcel described in Exhibit 7 shares

various characteristics with the subject property as shown above. Application of the valuation factors for the parcel shown in Exhibit 7 (Parcel 2 above) to the characteristics of the subject property results in the following calculations. The deduction for market age, the constant added, the value of central H & A and value of the lot are not derived from Exhibit 10.

| Characteristic | Units | Value Per Unit | Value |
|---------------------|-------|----------------|-------------|
| Base 8'blk Unfin | 956 | 10 | 9560 |
| Central H & A | 1346 | 5 | 6730 |
| Baths | 1.5 | 2500 | 3750 |
| Cond__Fr | 1 | -10000 | -10000 |
| SF | 1346 | 30 | 40380 |
| Porch Encl Screen | 202 | 15 | 3030 |
| 1½ Story or 2 Story | 1346 | -2 | -2692 |
| Market age | | | -24500 |
| Constant | | | 20000 |
| Lot | | | <u>6800</u> |
| Total | | | 53058 |

It is apparent after the analysis above that the differences between the subject property and the parcel described in Exhibit 7 (Parcel 2 above) affect any determination of value. The Taxpayer asserts that the equalized value of the subject property is \$38,980 or 28.96/ Sq Ft ($\$38,980 \div \$1,346 = \28.96). The request to be equalized at \$28.96/ Sq Ft is based on the taxable value of the parcel described in Exhibit 7 (Parcel 2 above). As shown above the subject property and the parcel described in Exhibit 7 are not truly comparable.

The parcel described in Exhibit 6 (Parcel 1 above) is older and smaller than the subject property. The parcel described in Exhibit 6 (Parcel 1 above) has been remodeled has a detached garage and is of fair quality. The parcel described in Exhibit 6 is not comparable to the subject property.

The Taxpayer has not shown that actual value of the subject property or any proposed comparable is different than taxable value. The evidence is that the ratio of actual value to taxable value for all parcels is 1. The Taxpayer has not proven a basis for relief based on equalization.

**V.
CONCLUSIONS OF LAW**

1. The Commission has subject matter jurisdiction in this appeal.
2. The Commission has jurisdiction over the parties to this appeal.
3. The Taxpayer has not produced competent evidence that the County Board failed to faithfully perform its official duties and to act on sufficient competent evidence to justify its actions.
4. The Taxpayer has not adduced sufficient, clear and convincing evidence that the decision of the County Board is unreasonable or arbitrary and the decision of the County Board should be affirmed.

**VI.
ORDER**

IT IS ORDERED THAT:

1. The caption of this appeal be changed to reflect the interest of Theresia V. Fink.
2. The decision of the County Board determining actual value of the subject property as of the assessment date, January 1, 2007, is affirmed.
3. Actual value, for the tax year 2007, of the subject property is:

| | |
|-------------------|----------------------------|
| Land value | \$ 6,800.00 |
| Improvement value | <u>\$52,400.00</u> |
| Total value | <u><u>\$59,200.00.</u></u> |

4. This decision, if no appeal is timely filed, shall be certified to the Douglas County Treasurer, and the Douglas County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Cum. Supp. 2006).
5. Any request for relief, by any party, which is not specifically provided for by this order is denied.
6. Each party is to bear its own costs in this proceeding.
7. This decision shall only be applicable to tax year 2007.
8. This order is effective for purposes of appeal on January 12, 2009.

Signed and Sealed. January 12, 2009.

Nancy J. Salmon, 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.

Wm R. Wickersham, Commissioner