

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

DON L. CLARKE,	)	
	)	
Appellant,	)	Case Nos. 08A 156, 08A 157, 08A 158, 08A
	)	159 & 08A 160
v.	)	
	)	DECISION AND ORDER
DODGE COUNTY BOARD OF	)	AFFIRMING THE DECISIONS OF
EQUALIZATION,	)	THE DODGE COUNTY BOARD OF
	)	EQUALIZATION
Appellee.	)	

The above-captioned cases were called for a hearing on the merits of appeals by Don L. Clarke ("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 22, 2009, pursuant to an Order for Hearing and Notice of Hearing issued May 21, 2009. Commissioners Wickersham and Salmon were present. Commissioner Wickersham was the presiding hearing officer. Commissioner Warnes was excused from participation by the presiding hearing officer. Commissioner Hotz was absent. The appeal was heard by a quorum of a panel of the Commission.

Don L. Clarke was present at the hearing. No one appeared as legal counsel for the Taxpayer.

Stacey Hultquist, a Deputy County Attorney for Dodge County, Nebraska, was present as legal counsel for the Dodge 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. 2008). 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, 2008, 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, 2008.

**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 ("the Subject Property") are described in the tables below.
3. Actual value of each parcel of the subject property placed on the assessment roll as of January 1, 2008, ("the assessment date") by the Dodge County Assessor, value as

proposed in timely protests, and actual value as determined by the County Board is shown in the following tables:

Case No. 08A 156

Description: Tax Lots 7 & 13, Section 32, Township 20, Range 7, Dodge County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$40,500.00	\$30,000.00	\$40,500.00
Total	\$40,500.00	\$30,000.00	\$40,500.00

Case No. 08A 157

Description: SE<sup>1</sup>/<sub>4</sub>SW<sup>1</sup>/<sub>4</sub> & Tax Lots 11 & 15, Section 32, Township 20, Range 7, Dodge County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$62,145.00	\$33,000.00	\$62,145.00
Total	\$62,145.00	\$33,000.00	\$62,145.00

Case No. 08A 158

Description: Tax Lots 27 & 30, Section 32, Township 20, Range 7, Dodge County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$22,005.00	\$12,525.00	\$22,005.00
Total	\$22,005.00	\$12,525.00	\$22,005.00

Case No. 08A 159

Description: Tax Lot 36, Section 32, Township 20, Range 7, Dodge County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$8,390.00	\$5,592.00	\$8,390.00
Improvement	\$1,500.00	-0-	\$1,500.00
Total	\$9,890.00	\$5,592.00	\$9,890.00

Case No. 08A 160

Description: Tax Lot 37 & 39, Section 32, Township 20, Range 7, Dodge County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$5,030.00	\$3,000.00	\$5,030.00
Total	\$5,030.00	\$3,000.00	\$5,030.00

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 appeals were consolidated for hearing by order of the Commission.
7. An Order for Hearing and Notice of Hearing issued on May 21, 2009, set a hearing of the appeals for July 22, 2009, at 9:00 a.m. CDST.
8. 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.
9. Actual value of each parcel for the tax year 2008 is:

Case No. 08A 156

Land value     \$40,500.00  
Total value     \$40,500.00

Case No. 08A 157

Land value \$ 62,145.00

Total value \$ 62,145.00

Case No. 08A 158

Land value \$22,005.00

Total value \$22,005.00

Case No. 08A 159

Land value \$8,390.00

Improvement \$1,500.00

Total value \$9,890.00

Case No. 08A 160

Land value \$5,030.00

Total value \$5,030.00.

**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) (Cum. Supp. 2008).
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. 2008).
  7. “Taxes shall be levied by valuation uniformly and proportionately upon all real property and franchises as defined by the Legislature except as otherwise provided in or permitted by this Constitution.” *Neb. Const.*, Art. VIII, §1.
  8. Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value. *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).

9. The purpose of equalization of assessments is to bring the assessment of different parts of a taxing district to the same relative standard, so that no one of the parts may be compelled to pay a disproportionate part of the tax. *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991); *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).
10. Equalization to obtain proportionate valuation requires a comparison of the ratio of assessed to actual value for the subject property and comparable property. See, *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).
11. Uniformity requires that whatever methods are used to determine actual or taxable value for various classifications of real property that the results be correlated to show uniformity. *Banner County v. State Board of Equalization*, 226 Neb. 236, 411 N.W.2d 35 (1987).
12. Taxpayers are entitled to have their property assessed uniformly and proportionately, even though the result may be that it is assessed at less than the actual value. *Equitable Life v. Lincoln County Bd. of Equal.*, 229 Neb. 60, 425 N.W.2d 320 (1988); *Fremont Plaza v. Dodge County Bd. of Equal.*, 225 Neb. 303, 405 N.W.2d 555 (1987).
13. The constitutional requirement of uniformity in taxation extends to both rate and valuation. *First Nat. Bank & Trust Co. v. County of Lancaster*, 177 Neb. 390, 128 N.W.2d 820 (1964).
14. In the evaluation of real property for tax purposes, where buildings and improvements are taxable as a part of the real estate, the critical issue is the actual value of the entire property, not the proportion of that value which is allocated to the land or to the buildings

and improvements by the appraiser. *Bumgarner v. Valley County*, 208 Neb. 361, 303 N.W.2d 307 (1981).

15. If taxable values are to be equalized it is necessary for a Taxpayer to establish by clear and convincing evidence that valuation placed on his or her property when compared with valuations placed on similar property is grossly excessive and is the result of systematic will or failure of a plain legal duty, and not mere error of judgement. There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity. *Newman v. County of Dawson*, 167 Neb. 666, 94 N.W.2d 47 (1959).
16. A presumption exists that the County Board has faithfully performed its duties and has acted on competent evidence. *City of York v. York County Bd. Of Equalization*, 266 Neb. 297, 64 N.W.2d 445 (2003).
17. The presumption in favor of the county board may be classified as a principle of procedure involving the burden of proof, namely, a taxpayer has the burden to prove that action by a board of equalization fixing or determining valuation of real estate for tax purposes is unauthorized by or contrary to constitutional or statutory provisions governing taxation. *Gordman Properties Company v. Board of Equalization of Hall County*, 225 Neb. 169, 403 N.W.2d 366 (1987).
18. The presumption disappears if there is competent evidence to the contrary. *Id.*
19. The order, decision, determination, or action appealed from shall be affirmed unless evidence is adduced establishing that the order, decision, determination, or action was unreasonable or arbitrary. Neb. Rev. Stat. §77-5016 (8) (Cum. Supp. 2006).



20. Proof that the order, decision, determination, or action appealed from was unreasonable or arbitrary must be made by clear and convincing evidence. See, e.g. *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb.App. 171, 645 N.W.2d 821 (2002).
21. "Clear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved." *Castellano v. Bitkower*, 216 Neb. 806, 812, 346 N.W.2d 249, 253 (1984).
22. A decision is "arbitrary" when it is made in disregard of the facts and circumstances and without some basis which could lead a reasonable person to the same conclusion. *Phelps Cty. Bd. of Equal. v. Graf*, 258 Neb 810, 606 N.W.2d 736 (2000).
23. A decision is unreasonable only if the evidence presented leaves no room for differences of opinion among reasonable minds. *Pittman v. Sarpy Cty. Bd. of Equal.*, 258 Neb 390, 603 N.W.2d 447 (1999).
24. "An owner who is familiar with his property and knows its worth is permitted to testify as to its value." *U. S. Ecology v. Boyd County Bd. Of Equalization*, 256 Neb. 7, 16, 588 N.W.2d 575, 581 (1999).
25. The County Board need not put on any evidence to support its valuation of the property at issue unless the taxpayer establishes the Board's valuation was unreasonable or arbitrary. *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).
26. A Taxpayer, who only produced evidence that was aimed at discrediting valuation methods utilized by the county assessor, failed to meet burden of proving that value of property was not fairly and proportionately equalized or that valuation placed upon

property for tax purposes was unreasonable or arbitrary. *Beynon v. Board of Equalization of Lancaster County*, 213 Neb. 488, 329 N.W.2d 857 (1983).

27. A Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued. Cf. *Lincoln Tel. and Tel. Co. v. County Bd. Of Equalization of York County*, 209 Neb. 465, 308 N.W.2d 515 (1981); *Arenson v. Cedar County*, 212 Neb. 62, 321 N.W.2d 427 (1982).

#### IV. ANALYSIS

The subject property is comprised of four unimproved parcels of rural land and one improved parcel. (E11, 12, 13, 14 and 15). Actual value as determined by the County Board for land component of each parcel is based on a recreational use. (E11:3, E12:3, E13:3 E14:3and E15:3). The parcel described in Exhibit 14 is improved. (E14:1). The improvements are travel trailers. (E14:1 & 2).

The Taxpayer contends that the subject property is agricultural land and horticultural land. The subject property has not qualified for special valuation and taxation at 75% of its value for agricultural and horticultural purposes. If the subject property is agricultural land and horticultural land it would be taxed at 75% of its actual value. See, *US Ecology, Inc. v. Boyd County Bd of Equalization*, 256 Neb. 7, 15, 588 N.W.2d 575, 581 (1999). The initial question is, however, whether the subject property is agricultural land and horticultural land.

Agricultural land and horticultural land as defined is defined as:

- (1)a parcel of land which is primarily used for agricultural or horticultural purposes, including wasteland lying in or adjacent to and in common ownership or management with other

agricultural land and horticultural land. Agricultural land and horticultural land does not include any land directly associated with any building or enclosed structure;

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

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

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

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

(4) Farm site means the portion of land contiguous to land actively devoted to agriculture which includes improvements that are agricultural or horticultural in nature, including any uninhabitable or unimproved farm home site. Neb. Rev. Stat. §77-1359 (Cum. Supp. 2006).. Neb. Rev. Stat. §77-1344(1) (Cum. Supp. 2008).

The statutory definition of agricultural land and horticultural land contains various terms which are critical to an understanding of the statute. The term “parcel” has been defined by

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

Other significant terms within the statutory definition of agricultural land and horticultural land have not been defined by the Legislature. The term "commercial production" has not been defined but only land used for the "commercial production" of any plant or animal product in a raw or unprocessed state that is derived from the science and art of agriculture, aquaculture, or horticulture, with exceptions noted above, may be agricultural land and horticultural land. The Commission has not found in statute or in Nebraska case law a definition of the term "commercial production." Commercial can mean "of, in or relating to commerce." *Webster's Third New International Dictionary*, Merriam-Webster, Inc., (2002). p. 456. An alternate definition is "from the point of view of profit: having profit as the primary aim." *Id.* Prior to adoption of amendments to the statute defining agricultural land and horticultural land in 2006 the definition of agricultural and horticultural land contained a requirement that the land be used for the "production" of agricultural products. Neb. Rev. Stat. §77-1359 (Reissue 2003). The new term "commercial production" did not appear in the definition. *Id.* A statute should be construed to give effect to purposeful change in its provisions. A construction of "commercial production" to mean production from the point of view of making a profit gives effect to the change in terminology as adopted by the legislature. The Commission finds that "commercial production" means production with the intent to make a profit .

It is appropriate to consider a number of factors to determine whether or not an activity is undertaken with a view to making a profit. See, Wood, 548 T.M., Hobby Losses. Among the factors to be considered are: whether the activity is conducted in a business like manner with adequate records and adaptation of operating methods to changing circumstances; expertise of the Taxpayer, if any, necessary for conduct of the operation; consultation with experts, if necessary, and reliance on appraisals or other data for decision making as necessary; time and effort expended by the Taxpayer in furtherance of the operation; any expectation of appreciation in the assets employed in the operation; success the Taxpayer has had in carrying on similar or dissimilar operations; the Taxpayer's history of profits or losses with respect to the operation discounting startup losses and losses or gains due to unusual circumstances; any profits earned and the possibility of profits if none have been earned to date; the Taxpayer's financial status i.e. the ability to sustain losses or incur costs without regard to returns; and elements of personal pleasure or recreation, or other motives other than profit or gain. The same factors are relevant to a determination of whether commercial production of a plant or animal product in a raw or unprocessed state that is derived from the science and art of agriculture, aquaculture, or horticulture ("commercial production") has occurred on the parcel. In addition the Commission will consider other factors as presented for consideration on a case by case basis.

Sometime in 2008 the Taxpayer had a gate constructed and placed at the entrance to the subject property. (E6:1). The Taxpayer paid for construction of the gate and its installation with an in kind payment of lifetime firewood gathering rights on subject property. (E6:1). The Taxpayer and the gate builder agreed that the transaction had a value of \$1,500. (E6:1). The Taxpayer has consulted with forester's and has maintained a record of the only transaction for the

sale of firewood from the subject property. Assuming without deciding that firewood is a horticultural product the Commission concludes that a one time transaction late in 2008 is not sufficient evidence that commercial production had occurred prior to January 1, 2008, or was planned for the tax year 2008. There is no evidence that the subject property was agricultural land or horticultural land as of January 1, 2008.

The Taxpayer testified that he and his family and guests used the subject property for hunting and camping. Recreational lands are those predominately used or intended to be used for diversion, entertainment, and relaxation on an occasional basis. 350 Neb. Admin Code ch 10 §001.05E (01/03/07). Some of the uses would include hunting, fishing, camping, boating, hiking, picnicking, and the access or views that simply allows relaxation, diversion and entertainment. Id. Actual value of the subject property was determined by the County Board based on its classification as recreational land.

The Taxpayer contends that other parcels similar in character to the subject property were valued for taxation as agricultural land or horticultural land. Exhibit 20 page 1 describes the basis for valuation of each of the comparison parcels. With one exception, the comparison parcels qualified for special valuation or were subject to special agreements affecting valuation. The subject property, as noted, is not subject to special valuation and there is no evidence of special agreements affecting its valuation.

The Taxpayer contended that the subject property should be valued as wasteland. "Wasteland includes those land types that cannot be used economically and are not suitable for recreational or agricultural use or production. Such land types include but are not limited to, blowouts, riverwash (recent unstabilized alluvial deposits), marshes, badlands, large deep gullies

(including streambeds and banks), bluffs, rockland, gravel areas, and salt flats. To qualify for wasteland the land must be lying in or adjacent to and in common ownership or management with land used for the production of agricultural products. Some of these areas could be developed or reclaimed for some beneficial use by land shaping, revegetation, drainage or possibly other special practices. Until they are reclaimed, developed, or restored to agricultural production or recreational use, they should be classified as wasteland. Other land types which may be classified as wasteland are the permanent easement acres associated with Bureau of Reclamation or irrigation districts. These areas are defined as open canals or ditches, laterals, drains, and service roads for the canal system. Assessors need to verify or be aware of the type of deed or easement that may be filed for these areas before making any determination of classification." 350 Neb. Admin. Code ch 14 §002.05 (01/03/07). The subject property is suitable for recreational use and is therefore not wasteland.

The Taxpayer contended that actual value of the subject property was affected by impaired access, groundwater pollution, flooding and vandalism. 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). While those factors might affect actual value there is no evidence of the affect in these appeals and no evidence of actual value except as determined by the County Board

There is no evidence that the classification of the subject land or determination of actual value as made by the County Board is unreasonable or arbitrary.

**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 actual values of the parcels comprising subject property as of the assessment date, January 1, 2008, are affirmed.
2. Actual value, for the tax year 2008, of each parcel described in an appeal as referenced by the Case No. is:

Case No. 08A 156

Land value	\$40,500.00
Total value	<u>\$40,500.00</u>



Case No. 08A 157

Land value	\$ 62,145.00
Total value	<u>\$ 62,145.00</u>

Case No. 08A 158

Land value	\$22,005.00
Total value	<u>\$22,005.00</u>

Case No. 08A 159

Land value	\$8,390.00
Improvement	\$1,500.00
Total value	<u>\$9,890.00</u>

Case No. 08A 160

Land value	\$5,030.00
Total value	<u>\$5,030.00.</u>

3. This decision, if no appeal is timely filed, shall be certified to the Dodge County Treasurer, and the Dodge County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Cum. Supp. 2008).
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 2008.

7. This order is effective for purposes of appeal on July 27, 2009.

Signed and Sealed. July 27, 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 majority has considered two standards of review for its review of the County Board's decision. of review one stated as a presumption the other stated in statute. I do not believe consideration of two standards of review is required by statute or case law.

The Commission is an administrative agency of state government. See, *Creighton St. Joseph Regional Hospital v. Nebraska Tax Equalization and Review Commission*, 260 Neb. 905, 620 N.W.2d 90 (2000). As an administrative agency of state government the Commission has only the powers and authority granted to it by statute. Id. The Commission is authorized by statute to review appeals from decisions of a county board of equalization, the Tax Commissioner, and the Department of Motor Vehicles. Neb. Rev. Stat. §77-5007 (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) (Cum. Supp. 2008).

The Commission is authorized to review decision of a County Board of Equalization determining taxable values. Neb. Rev. Stat. §77-5007 (Supp. 2007). Review of County Board of

Equalization decisions is not new in Nebraska law. As early as 1903 Nebraska Statutes provided for review of County Board assessment decisions by the district courts. Laws 1903, c. 73 §124. The statute providing for review did not state a standard for that review. *Id.* A standard of review stated as a presumption was adopted by Nebraska's Supreme Court. See, *State v. Savage*, 65 Neb. 714, 91 N.W. 716 (1902) (citing *Dixon Co. v. Halstead*, 23 Neb. 697, 37 N.W. 621 (1888) and *State v. County Board of Dodge Co.* 20 Neb. 595, 31 N.W. 117 (1887)). The presumption was that the County Board had faithfully performed its official duties and had acted upon sufficient competent evidence to justify its actions. See, *Id.* In 1959 the legislature provided a statutory standard for review by the district courts of county board of equalization, assessment decisions. 1959 Neb Laws, LB 55, §3. The statutory standard of review required the District Court to affirm the decision of the county board of equalization unless the decision was arbitrary or unreasonable or the value as established was too low. *Id.* The statutory standard of review was codified in section 77-1511 of the Nebraska Statutes. Neb. Rev. Stat. §77-1511 (Cum. Supp. 1959). After adoption of the statutory standard of review Nebraska Courts have held that the provisions of section 77-5011 of the Nebraska Statutes created a presumption that the County Board has faithfully performed its official duties and has acted upon sufficient competent evidence to justify its actions. See, e.g. *Ideal Basic Indus. V. Nucholls Cty. Bd. Of Equal.*, 231 Neb. 297, 437 N.W.2d 501 (1989). The presumption stated by the Court was the presumption that had been found before the statute was enacted.

Many appeals of decisions made pursuant to section 77-1511 were decided without reference to the statutory standard of review applicable to the district courts review of a county board of equalization's decision. See, e.g. *Grainger Brothers Company v. County Board of*

*Equalization of the County of Lancaster*, 180 Neb. 571, 144 N.W.2d 161 (1966). In *Hastings Building Co., v. Board of Equalization of Adams County*, 190 Neb. 63, 206 N.W.2d 338 (1973), the Nebraska Supreme Court acknowledged that two standards of review existed for reviews by the district court; one statutory requiring a finding that the decision reviewed was unreasonable or arbitrary, and another judicial requiring a finding that a presumption that the county board of equalization faithfully performed its official duties and acted upon sufficient competent evidence was overcome. No attempt was made by the *Hastings* Court to reconcile the two standards of review that were applicable to the District Courts.

The Tax Equalization and Review Commission was created in 1995. 1995 Neb. Laws, LB 490 §153. Section 77-1511 of the Nebraska Statutes was made applicable to review of county board of equalization assessment decisions by the Commission. *Id.* In 2001 section 77-1511 of Nebraska Statutes was repealed. 2001 Neb. Laws, LB 465, §12. After repeal of section 77-1511 the standard for review to be applied by the Commission in most appeals was stated in section 77-5016 of the Nebraska Statutes. Section 77-5016(8) requires a finding that the decision being reviewed was unreasonable or arbitrary. *Brenner v. Banner County Board of Equalization*, 276 Neb. 275, 753 N.W.2d 802 (2008). The Supreme Court has stated that the presumption which arose from section 77-1511 is applicable to the decisions of the Commission. *Garvey Elevators, Inc. V. Adams County Bd. of Equalization*, 261 Neb. 130, 621 N.W.2d 518 (2001).

The possible results from application of the presumption as a standard of review and the statutory standard of review are: (1) the presumption is not overcome and the statutory standard is not overcome; (2) the presumption is overcome and the statutory standard is not overcome; (3) the presumption is not overcome and the statutory standard is overcome; (4) and finally the

presumption is overcome and the statutory standard is overcome. The first possibility does not allow a grant of relief, neither standard of review has been met. The second possibility does not therefore allow a grant of relief even though the presumption is overcome because the statutory standard remains. See, *City of York v. York County Bd of Equal.*, 266 Neb. 297, 664 N.W.2d 445 (2003). The third possibility requires analysis. The presumption and the statutory standard of review are different legal standards, and the statutory standard remains after the presumption has been overcome. See. *Id.* The burden of proof to overcome the presumption is competent evidence. *Id.* Clear and convincing evidence is required to show that a county board of equalization's decision was unreasonable or arbitrary. See, e.g. *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb.App. 171, 645 N.W.2d 821 (2002). Competent evidence that the county board of equalization failed to perform its duties or act upon sufficient competent evidence is not always evidence that the county board of equalization acted unreasonably or arbitrarily because the statutory standard of review remains even if the presumption is overcome. *City of York*, *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.

Use of the presumption as a standard of review has been criticized. See, G. Michael Fenner, *About Presumptions in Civil Cases*, 17 Creighton L. Rev. 307 (1984). In the view of that author the presumption should be returned to its roots as a burden of proof. *Id.* Nebraska's

Supreme Court acknowledged the difficulty of using two standards of review and classified the presumption in favor of the county board of equalization as a principle of procedure involving the burden of proof, namely, a taxpayer has the burden to prove that action by a board of equalization fixing or determining valuation of real estate for tax purposes is unauthorized by or contrary to constitutional or statutory provisions governing taxation. *See, Gordman Properties Company v. Board of Equalization of Hall County*, 225 Neb. 169, 403 N.W.2d 366 (1987). Use of the *Gordman* analysis allows consideration of both the presumption and the statutory standard of review without the difficulties inherent in the application of two standards of review. It is within that framework that I have analyzed the evidence.

---

Wm R. Wickersham, Commissioner