

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

CONNECTICUT NATIONAL BANK TR,	)	
	)	
Appellant,	)	Case No. 07C-186
	)	
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 Connecticut National Bank Tr ("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 20, 2009, pursuant to an Order for Hearing and Notice of Hearing issued June 17, 2008 as amended by an Order dated November 13, 2008. Commissioners Wickersham, Warnes, Salmon, and Hotz were present. Commissioner Wickersham was the presiding hearing officer.

Daniel R. Carnahan, Linda Terrill, and Ben Neill appeared as legal counsel for the Taxpayer. The presence of an officer, director, shareholder or full-time employee of the Taxpayer was waived.

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 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.

**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:

Description: Lot 1 Block 0 and 60% Link Value 1200 Landmark Center Condominium, Douglas County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$3,045,700.00	In Total	\$3,045,700.00
Improvement	\$35,954,300.00	In Total	\$35,954,300.00
Total	\$39,000,000.00	\$33,000,000.00	\$39,000,000.00

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 June 17, 2008, as amended by an Order issued on November 13, 2008, set a hearing of the appeal for January 20, 2009, at 1:00 p.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:

Case No. 07C-186

Land value	\$ 3,045,700.00
Improvement value	<u>\$35,954,300.00</u>
Total value	<u>\$39,000,000.00.</u>

### 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. 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).
8. 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).
9. The presumption disappears if there is competent evidence to the contrary. *Id.*
10. 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).
11. 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).
12. "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).
13. 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).

14. 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).
15. 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).
16. 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).
17. A Taxpayer, who only produced evidence that was aimed at discrediting valuation methods utilized by the county assessor, failed to meet the 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).
18. 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. *Josten-Wilbert Vault Co. v. Board of Equalization for Buffalo County*, 179 Neb. 415, 138 N.W.2d 641 (1965).

#### **IV. ANALYSIS**

The subject property is a commercial condominium unit in downtown Omaha, Douglas County Nebraska. The condominium unit includes a six story building, a 40% interest in a lobby connecting the six story building to a 12 story building, and an easement for 133 parking slots in an attached parking structure. Five floors of the six story building are designed for use as a computer data center. Each of the floors designed for computer data center use have rooms for batteries to supply backup electrical power, storerooms for equipment, open floors for placement of computers, and office space for management of operations on the floor. Of the five floors designed for computer data center use, four have raised perforated floors that allow the placement of electrical and communication lines and the distribution of cool air so that a maximum temperature of 52° is maintained on the floor. The fifth floor, although designed for use as a computer data center, has not been fitted with the flooring and other specialized equipment for that use. The fifth floor is used for storage. The sixth, or penthouse floor, has generators and other equipment for operation on the first five floors and office space for the management of operations on that floor. The basement contains offices, equipment areas related to the chiller, fire suppression systems and other systems, as well as the electrical panels for distribution of electrical power to the computer data center floors. The lobby area contains some retail space.

An appraiser for the Taxpayer (“Appraiser”) testified that the highest and best use of the subject property was a mix of office space, two floors of computer storage with support areas, and loft warehouse/storage and office use. Highest and best use of the subject property as

identified by the Appraiser varies from the use for which the six story building was designed. Because the Appraiser's determination of highest and best use affected his opinion of value, an examination of that determination is required.

The theoretical basis for the concept of highest and best use and the practical aspects of its application in the valuation of property have not been discussed by Nebraska Courts. A thorough discussion of the concept of highest and best use is contained in *General Motors Corp., v. Linden City*, 22 N.J.Tax 95 (2005). The theoretical basis for the concept of highest and best use and practical guides for its application in the valuation of property are well developed in professional literature. A review of the professional literature will provide a basis for the Commission's evaluation of the Appraiser's determination of the highest and best use of the subject property.

In *General Motors*, the Court noted that, "The Appraisal of Real Estate" is a frequently used source of basic appraisal principles. *Supra* at p. 107. "When the purpose of an appraisal is to develop an opinion of market value, highest and best use analysis identifies the most profitable, competitive use to which the property can be put." *The Appraisal of Real Estate* 12<sup>th</sup> Edition, The Appraisal Institute (2001) p. 305. "Highest and best use may be defined as follows: the reasonably probable and legal use of vacant land or an improved property that is physically possible, appropriately supported, and financially feasible and that results in the highest value." *Id.* "In the development of an appraisal, the appraiser must distinguish between highest and best use of the land as though vacant and the highest and best use of the property as improved." *Id.*, at 306. "In the analysis of highest and best use of land as though vacant, the appraiser seeks the answers to several questions. First: Should the land be developed or left vacant? If the answer



to this question is that the land should be developed, a second question is: What kind of improvement should be built? The third question the appraiser asks relates to the highest and best use of the property as improved, which is a distinct concept developed by valuation theorists and practitioners to answer an important question that the original concept does not address. The question is: Should the existing improvements on the property be maintained in their current state or should they be altered in some manner to make them more valuable? Appraisal theory holds that as long as the value of the property as improved is greater than the value of the land as though vacant, the highest and best use is the use of the property as improved.” *Id.*, at 306.

“The highest and best use of a property as improved may be a continuation of the existing use. In such a case, the appraiser need not analyze expenditures or rates of return for alternative uses except to test or support the conclusion of highest and best use. However, the highest and best use of a property as improved may involve renovation or rehabilitation, expansion, adaption or conversion to another use, partial or total demolition, or some combination of these alternatives.” *Id.* at 315-316. “Successful completion of the test of maximum productivity should allow the appraiser to specify exactly what expenditures, if any, would allow the subject property to achieve its highest and best use. These expenditures should be reflected in the conclusion of the highest and best use of the property as improved as well as in the application of each approach to value.” *Id.* at 319.

“In addition to being reasonably probable, the highest and best use of both the land as though vacant and the property as improved must meet four implicit criteria. That is, the highest and best use must be 1. Physically possible 2. Legally permissible 3. Financially feasible 4. Maximally productive.” *Id.* at 307.

Application of the principles described requires that an appraiser include various analyses in an appraisal. If the goal of an appraisal is to identify the highest and best use among two or more potential uses, then the report should include the results of testing the alternatives (e.g., income and rent calculations for income-producing properties and/or the different value opinions derived from each alternative use) and the reasoning employed. *The Appraisal of Real Estate*, supra, p. 320. If the highest and best use of an improved property is different from its existing use, then the report should include justification for the conclusion. *Id.* “Because special-purpose properties are appropriate for only one use or for a limited number of uses, appraisers may encounter practical problems in specifying highest and best use. The highest and best use of a special-purpose property as improved is probably the continuation of its current use if that use remains viable.” *Id.* at 326. “Sometimes a special-purpose property must be analyzed and appraised on the basis of two highest and best uses—i.e., continuation of the existing special use and conversion to an alternative use. In such a situation the highest and best use conclusion depends largely on how the market is defined.” *Id.* If market demand for an existing use is low or nonexistent then the appraiser may project a highest and best use as conversion to some other appropriate alternative use. *Id.*

The floors configured for data center use have special attributes. Each floor has an interior wall that provides a corridor in which electrical and cooling equipment is distributed. The floor is perforated to allow chilled air to be forced up through it. The perforated floor has a weight restriction. (E2:50) There is no evidence that the specialized floor necessary for data center use will support warehouse storage use as proposed by the Appraiser. The Appraiser did not suggest that the subject property as a whole had a highest and best use as something other

than a data center despite its limitations for that use. The Appraiser testified that in various respects the subject property was not configured or located in an area deemed the most suitable for newly constructed data centers. “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 p. 155. The Appraiser did not find economic obsolescence that might be attributed to the subject property. (E2:51). A determination of external obsolescence is required if the principles of valuation at highest and best use are to be followed. The Appraiser did not compare the value of the subject property as-is, to its value converted as he proposed. The analysis of the Appraiser is only half complete and simply reaches an unsupported conclusion because two floors are not used by the current tenant and have not been subleased to others for use. Without an estimate of value as is, it is impossible to determine that the converted use, part computer data center and part loft warehouse storage, is the highest and best use.

The effect of the Appraiser’s unsupported conclusion can be seen by an analysis of his estimate of value. The Appraiser’s opinion of value includes a finding that computer storage rooms have a value of \$60.00/SF. (E2:117). The Appraiser’s opinion of value includes a finding that loft warehouse storage space has a value of \$30,00/SF. (E2:117). No part of the subject property has been converted to loft warehouse storage use. A conclusion that the use of three floors as loft warehouse storage would represent the highest and best use of the subject property is contrary to the simple comparison of values per square foot for computer storage and loft warehouse storage. What the Appraiser has shown is that the tenant is not fully utilizing the

space it has rented as a computer data center or part computer data center and part loft warehouse storage. That is to be distinguished from showing that the highest and best use of a property is a lower value use.

In a section of his report describing functional obsolescence, the Appraiser identified factors related to the design and location that could influence a determination of value based on its use as a data center. At the initiation of that discussion, the Appraiser specifically notes that the property was improved for use as a technology data center and related offices and mechanical support systems as of the assessment date. “The improvements are laid out in a manner as to be usable and the quality of materials and amenities are considered to be average for similar properties in Omaha.” (E2:49). The Appraiser also notes that based on a 2001 summary table developed as part of a rating system for data centers that the subject property would rate a II in a system that ranked centers from I to IV with I being the lowest ranking. (E2:50). The Appraiser considered that factor in his analysis and estimate of value as a data center based on the sales comparison approach. (E2:117).

For reasons noted above, the opinion of the Appraiser that highest and best use of the subject property as of the assessment date is mixed data center and loft warehouse storage is not clear and convincing evidence that the decision of the County Board was unreasonable or arbitrary.

In addition to highest and best use, another concept employed by the Appraiser needs to be examined. The Appraiser characterized two of the four floors configured for use as a data center as excess. The concept of excess land is described in professional literature. See, *The Appraisal of Real Estate* 12<sup>th</sup> Edition, The Appraisal Institute (2001) p. 198-199. Excess land is

land that cannot be used to support the existing use but cannot be sold. *Id.* In this case it is only clear that the existing tenant is not using the additional floors for data center purposes. There is no evidence that they are not usable by another tenant for data center purposes. Valuation of two of the four floors configured for data center use as “excess” floors is not appropriate.

The opinion of value offered by the Appraiser is not clear and convincing evidence that the decision of the County Board was unreasonable or arbitrary.

The Taxpayer asserts that the determination of value made by the County Board cannot be sustained because it is not supported by an appraisal developed in accordance with the Uniform Standards of Professional Appraisal Practice. The Commission does not need to reach the question of weight to be given to the evidence submitted by County Board. The burden of persuasion is on the Taxpayer to show that the decision of the County Board was unreasonable or arbitrary. *Brenner v. Banner County Board of Equalization*, 276 Neb. 275, 753 N.W.2d 802 (2008). 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). 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. *Josten-Wilbert Vault Co. v. Board of Equalization for Buffalo County*, 179 Neb. 415, 138 N.W.2d 641 (1965).

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

Case No. 07C-186

Land value	\$ 3,045,700.00
Improvement value	<u>\$35,954,300.00</u>
Total value	<u>\$39,000,000.00.</u>

3. 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. 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 2007.
7. This order is effective for purposes of appeal on June 8, 2009.

Signed and Sealed. June 8, 2009.

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Nancy J. Salmon, Commissioner

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Robert W. Hotz, Commissioner

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William C. Warnes, Commissioner

**SEAL**

**APPEALS FROM DECISIONS OF THE COMMISSION MUST SATISFY THE REQUIREMENTS OF NEB. REV. STAT. §77-5019 (CUM. SUPP. 2008), OTHER PROVISIONS OF NEBRASKA STATUTES, AND COURT RULES.**

I concur in the result.

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 decisions 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 77-1511 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.

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Wm R. Wickersham, Commissioner