

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

NEBRASKA INDIAN COMMUNITY COLLEGE,)	
)	
)	Case No. 08E 031
Appellant,)	
)	
v.)	DECISION AND ORDER
)	REVERSING THE DECISION OF
)	THE THURSTON COUNTY BOARD OF
THURSTON COUNTY BOARD OF EQUALIZATION,)	EQUALIZATION
)	
)	
Appellee.)	
)	

The above-captioned case was called for a hearing on the merits of an appeal by Nebraska Indian Community College ("the Taxpayer") to the Tax Equalization and Review Commission ("the Commission"). The hearing was held in the Holiday Inn Express, 920 S 20th St., Norfolk, Nebraska, on May 18, 2009, pursuant to an Order for Hearing and Notice of Hearing issued February 12, 2009. Commissioners Wickersham, Salmon, and Hotz were present. Commissioner Wickersham was the presiding hearing officer. Commissioner Warnes was excused from participation by the presiding hearing officer. The Appeal was heard by a panel of the Commission

Michael Oltrogge, President, of Nebraska Indian Community College, was present at the hearing. Thayne E. Glenn appeared as legal counsel for the Taxpayer.

Albert Maul, a Deputy County Attorney for Thurston County, Nebraska, was present as legal counsel for the Thurston 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 the subject property should be exempt from taxation. The issues on appeal related to that assertion are:

Whether the decision of the County Board denying an application for exemption of the subject property from taxation is unreasonable or arbitrary; and

Whether the subject property is exempt from taxation.

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 A 20.07 acre tract of land in the N $\frac{1}{2}$ NE $\frac{1}{4}$ described in Deed Book 49, Thurston County, Nebraska.
3. An application for exemption of the subject property from taxation was filed by the Taxpayer.
4. The Assessor recommended disapproval.
5. The Assessor's recommendation was affirmed by the County Board.

6. The Tax Commissioner was served with a Notice in Lieu of Summons and exercised the statutory right to intervene.
7. An appeal of the County Board's decision was filed with the Commission.
8. The County Board was served with a Notice in Lieu of Summons and duly answered that Notice.
9. An Order for Hearing and Notice of Hearing issued on February 12, 2009, set a hearing of the appeal for May 18, 2009, at 3:00 p.m. CDST.
10. 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.

III. APPLICABLE LAW

1. Subject matter jurisdiction of the Commission in this appeal is over issues raised during the county board of equalization proceedings. *Arcadian Fertilizer, L.P. v. Sarpy County Bd. of Equalization*, 7 Neb.App. 655, 584 N.W.2d 353 (1998).
2. “Notwithstanding Article I, section 16, Article III, section 18, or Article VIII, section 1 or 4, of this Constitution or any other provision of this Constitution to the contrary: (1) The property of the state and its governmental subdivisions shall constitute a separate class of property and shall be exempt from taxation to the extent such property is used by the state or governmental subdivision for public purposes authorized to the state or governmental subdivision by this Constitution or the Legislature. To the extent such property is not used for the authorized public purposes, the Legislature may classify such property, exempt

such classes, and impose or authorize some or all of such property to be subject to property taxes or payments in lieu of property taxes except as provided by law; (2) the Legislature by general law may classify and exempt from taxation property owned by and used exclusively for agricultural and horticultural societies and property owned and used exclusively for educational, religious, charitable, or cemetery purposes, when such property is not owned or used for financial gain or profit to either the owner or user....”

Neb. Const., Art. VIII, § 1

3. Section 1 of Art VIII of Nebraska's Constitution, providing for tax exemption of certain property, is not self-executing, but requires action by the Legislature to carry such constitutional provision into effect. *Indian Hills Comm. Ch. v. County Bd. of Equal.*, 226 Neb. 510, 412 N.W.2d 459 (1987).
4. “(1) The following property shall be exempt from property taxes:...(d) Property owned by educational, religious, charitable, or cemetery organizations, or any organization for the exclusive benefit of any such educational, religious, charitable, or cemetery organization, and used exclusively for educational, religious, charitable, or cemetery purposes, when such property is not (i) owned or used for financial gain or profit to either the owner or user, (ii) used for the sale of alcoholic liquors for more than twenty hours per week, or (iii) owned or used by an organization which discriminates in membership or employment based on race, color, or national origin. For purposes of this subdivision, educational organization means (A) an institution operated exclusively for the purpose of offering regular courses with systematic instruction in academic, vocational, or technical subjects or assisting students through services relating to the origination, processing, or

guarantying of federally reinsured student loans for higher education or (B) a museum or historical society operated exclusively for the benefit and education of the public. For purposes of this subdivision, charitable organization means an organization operated exclusively for the purpose of the mental, social, or physical benefit of the public or an indefinite number of persons....” Neb. Rev. Stat. §77-202 (Cum. Supp 2006).

5. In reference to subsection (1)(d) of Nebraska Statutes section 77-202, exclusive use means the primary or dominant use of property, as opposed to incidental use. *Neb. Unit. Meth. Ch. v. Scotts Bluff Cty. Bd. of Equal.*, 243 Neb. 412, 499 N.W.2d 543 (1993).
6. Subsection (1)(d) of Nebraska Statutes section 77-202 contains a two-tier approach to property tax exemption: the first tier involves the nature, character, or status of a property owner, and the second tier concerns the use of the property. *Nebraska State Bar Found. v. Lancaster Cty. Bd. of Equal.*, 237 Neb. 1, 465 N.W.2d 111 (1991).
7. To be tax exempt, property must (1) be owned by an organization designated in subsection (1)(d) of Nebraska Statutes section 77-202; (2) be used exclusively for at least one of the purposes specified in subsection (1) (d) of Nebraska Statutes section 77-202; and (3) not be (a) owned or used for financial gain to the property owner or user, (b) used more than 20 hours per week for sale of alcoholic liquors, or (c) owned or used by an organization which discriminates in membership or employment based on race, color, or national origin. *Nebraska State Bar Found. v. Lancaster Cty. Bd. of Equal.*, 237 Neb. 1, 465 N.W.2d 111 (1991)
8. Statutes exempting property from taxation are to be strictly construed, property must come clearly within the statutory provisions granting such exemption, and the burden of

- proving the right to the exemption is upon the claimant. *United Way v. Douglas Co. Bd. of Equal.*, 215 Neb. 1, 337 N.W.2d 103 (1983).
9. A liberal and not a harsh or strained construction is to be given to the terms 'educational,' 'religious,' and 'charitable' in order that the true intent of the constitutional and statutory provisions may be realized. The interpretation should always be reasonable. *Young Men's Christian Assn. of City of Lincoln v. Lancaster County*, 106 Neb. 105, 182 N.W. 593 (1921).
 10. The burden of proof is upon one claiming property to be exempt from taxation to establish that its predominant use is for one of the purposes set out in this section. *OEA Senior Citizens, Inc. v. County of Douglas*, 186 Neb. 593, 185 N.W.2d 464 (1971)
Berean Fundamental Church Council, Inc. v. Board of Equalization, 186 Neb. 431, 183 N.W.2d 750 (1971).
 11. Regarding "mental" benefit of the public in subsection (1)(d) of section 77-202 of Nebraska Statutes as one of the requisite purposes of a charitable organization, "mental" means "intellectual," which means, among other things, engaged in creative literary, artistic, or scientific labor. *Nebraska State Bar Found. v. Lancaster Cty. Bd. of Equal.*, 237 Neb. 1, 465 N.W.2d 111 (1991).
 12. Relative to a charitable organization, "an indefinite number of persons" in subsection (1)(d) of this section means a group of persons with a common characteristic, that is, a class, uncertain in number and composed from the public at large or a community. *Nebraska State Bar Found. v. Lancaster Cty. Bd. of Equal.*, 237 Neb. 1, 465 N.W.2d 111 (1991).

13. “The word “charitable” has been held to mean something more than mere alms-giving or the relief of poverty and distress and it has been given a significance broad enough to include practical enterprises for the good of humanity operated at a moderate cost to those who receive the benefits.” *Lincoln Woman's Club*, 178 Neb. 357, 363-64, 133 N.W.2d 455, 460 (1965).
14. A tax exemption for charitable use is allowed because those exemptions “benefit the public generally and the organization performs services which the state is relieved pro tanto from performing.” *United Way v. Douglas Co. Bd. of Equal.*, 215 Neb. 1, 3, 337 N.W.2d 103, 105 (1983).
15. Under subsection (1)(d) of section 77-202 of Nebraska Statutes, a property owner's exemption from federal income taxation does not determine whether the owner's property is tax exempt under state law. *Nebraska State Bar Found. v. Lancaster Cty. Bd. of Equal.*, 237 Neb. 1, 465 N.W.2d 111 (1991).
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 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).

IV. ANALYSIS

The subject property is a 20.07 acre parcel on which a building was being constructed by the Taxpayer. The building is to be used for classrooms and administrative offices when completed. About 16 acres of the parcel is used for research projects related to restoration of a prairie.

The County Board reconsidered its decision of April 29, 2008, on May 13, 2008. The Taxpayer's appeal is from the final decision of the County Board on May 13, 2008.

The County Board stated that it believed the financial arrangements shown in Exhibit 12 pages 24 through 47 represented a guarantee of the Taxpayer's debt by another party and not a sale. The County Board conceded that the owner of the subject property as of January 1, 2008, was the Taxpayer.

The Parties stipulated that the sole issue before the Commission was whether the exclusive use of the subject property was for educational purposes.

The subject property has at least two components, an unfinished building with its site and an area in which efforts are being made to restore a prairie. It is possible for the portion of the subject property being used as a prairie restoration project to be exempt while the building and its site would not be exempt. See, *In Re Young Men's Christian Ass'n of City of Lincoln v. Lancaster County et. al.*, 106 Neb. 105, 182 N.W.2d 593 (1921). The evidence concerning the exempt use of each portion of the subject property will be considered separately.

The Prairie

Prairie restoration began on a portion of the subject property in 2004. (E12:82). The Taxpayer's natural resources director testified that the prairie restoration project had four components: cultural, conservation, potential economic development, and educational. Each year after 2004 an evaluation of the restoration has been made. The Taxpayer's natural resources director evaluated the growth and morphology of native Blue Flax on a portion of the project as part of his efforts to complete a master's thesis. The area in the project has been used as part of the curriculum for two classes offered each semester by the Taxpayer's natural resources director.

Test plots have been developed to evaluate the impact of intensive grazing and burning on the restoration of the prairie. Test plantings have been made to determine whether woody forbes could be recommended to others for commercial planting. The effect of the prairie restoration on soil erosion was evaluated along the watershed that runs through the subject property. The County Assessor testified that she recommended approval of an exemption for lands used in the manner described for the prairie restoration project and that the County Board approved her recommendation. The County Assessor testified that she had inspected the subject property on at least three occasions in 2008 and had not observed the prairie restoration project described by the Taxpayer's instructor. The Taxpayer's natural resources director testified that the observations of the County Assessor were specific to the dates visited and that those dates were not appropriate for observing wild flowers blooming as shown on page 4 of Exhibit 18. The Taxpayer's natural resources director testified that weeds would be seen on the subject property, but that as the prairie restoration continued, grasses and other plants would force out and replace the weeds observed by the County Assessor. The County Assessor also acknowledged that she had not observed all of the subject property.

The Nebraska Supreme Court has not defined the term "educational use." It has, however, discussed the meaning of the term educational. See, *Ancient and Accepted Scottish Rite v. Board of County Commissioners*, 122 Neb. 586, 241 N.W. 93 (1932), *Bethpage Community Services, Inc., v. County Board of Phelps County*, 221 Neb. 886, 381 N.W.2d 166 (1986). The Court in *Ancient and Accepted Scottish Rite* held that the term educational taken in its full sense is a "broad, comprehensive term and may be particularly directed to either mental, moral or physical faculties, but in its broadest and best sense it embraces them all, and includes

not merely the instructions received at school, college, or university, but the whole course of training— moral, intellectual, and physical.” *Ancient and Accepted Scottish Rite v. Board of County Commissioners*, 122 Neb. 586, 593-594, 241 N.W. 93, 95-96 (1932). In *Bethpage*, the Court expanded on the definition by stating that, “education should not be determined by some quantitative analysis of a formal curriculum but may be measurable in reference to training received as reflected in an individual’s enhanced behavior. In its most basic sense education is simply development, as fully as possible, of an individuals given capacity, preferably for desirable qualities.” *Bethpage Community Services, Inc., v. County Board of Phelps County*, 221 Neb. 886, 890, 381 N.W.2d 166, 170 (1986).

While the prairie restoration project might have been pursued with more rigor and effort it still fits within the broad rubric of an educational use described in the opinions of the Nebraska Supreme Court as cited above. No other use is made of that portion of the subject property. The exclusive use of the 16 acres devoted to the prairie restoration project is for an educational use and therefore, the application for exemption for that portion of the subject property should have been granted.

The building and building site portion of the subject property require a determination of whether property being constructed for future exempt use may be exempt from taxation. Rules and regulations promulgated by the Property Tax Administrator contain the following provision: “Use of the property includes ongoing construction of a building or improvement that, when complete will be used exclusively for exempt purposes. The future use of the completed building or improvement may be ascertained by the actions of the organization owning the property, including but not limited to resolutions of an organization’s board of directors, or the amendment

of the organization's articles of incorporation or bylaws, that indicate a clear intent to use the parcel for an exempt purpose. For ongoing construction to be sufficient to render the property exempt from tax, such construction must prevent other, nonexempt uses of the property." 350 Neb. Admin. Code ch 40, §005.03B(4). Seemingly the rule draws on *United Way of the Midlands v. Douglas County Board of Equalization*, 215 Neb. 1, 337 N.W.2d 103 (1983) as authority for its promulgation. In *United Way* the court determined that a vacant portion of a building qualified for exemption because the only use that could be made of the vacant space was a charitable use. The Court noted that a qualified organization often acquires or maintains building space in reasonable anticipation of full occupancy for exempt purposes but cannot do so because of economic conditions or other legitimate reasons. *Id.*, at 7, 107.

The Taxpayer's President testified that construction of the building was contingent on various grants and other funding. While not stated, it is reasonable to believe that funding is available only for the construction of classrooms and administrative offices. A purpose for which the Taxpayer was formed was "To provide, establish, and operate on a non-profit basis, educational institutions on the Omaha Reservation and the Santee Sioux Reservation, and any other Indian tribes and reservation or community of Indians, wherever they may be located." (E12:5 & 6). Powers of the Taxpayer including the power to hold real estate are limited to those in furtherance of its purposes. (E12:6 & 7). The Bylaws of the Taxpayer do not allow use of its real property for any purpose other than an educational use.

Construction work was completed on the building during the years 2006 & 2007. (E12:49 to 72). The Taxpayer's President testified that furnishings had been obtained from a donor for the building when complete. It can easily be concluded from the evidence that the

Taxpayer has an interest in completing construction of the building for use as classrooms and administrative offices so that students could be moved from another location. The Commission concludes that the only use that may be made of the building is an educational use and that it and its building site should also be exempt from taxation.

**V.
CONCLUSIONS OF LAW**

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

**VI.
ORDER**

IT IS ORDERED THAT:

1. The decision of the County Board determining that the subject property is taxable as of the assessment date January 1, 2008, is vacated and reversed.
2. The Subject property is not subject to tax for the tax year 2008.

3. This decision, if no appeal is timely filed, shall be certified to the Thurston County Treasurer, and the Thurston 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 June 2, 2009.

Signed and Sealed. June 2, 2009.

Nancy J. Salmon, Commissioner

Robert W. Hotz, 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.

Wm R. Wickersham, Commissioner