

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

LINDA J. FRYZEK,	)	
	)	
Appellant,	)	Case No. 07R-158
	)	
v.	)	DECISION AND ORDER
	)	REVERSING THE DECISION OF
GARFIELD COUNTY BOARD OF	)	THE GARFIELD COUNTY BOARD OF
EQUALIZATION,	)	EQUALIZATION
	)	
Appellee.	)	

The above-captioned case was called for a hearing on the merits of an appeal by Linda J. Fryzek ("the Taxpayer") to the Tax Equalization and Review Commission ("the Commission"). The hearing was held in the Holiday Inn Express, 508 2nd Ave. Kearney, Nebraska, on November 5, 2008, pursuant to an Order for Hearing and Notice of Hearing issued September 5, 2008. Commissioners Wickersham, Warnes and Salmon were present. Commissioner Warnes was the presiding hearing officer. A panel of three commissioners was created pursuant to 442 Neb. Admin. Code, ch. 4, §011 (10/07).

Linda J. Fryzek was present at the hearing. No one appeared as legal counsel for the Taxpayer.

Dale C. Crandall, County Attorney for Garfield County, Nebraska, was present as legal counsel for the Garfield County Board of Equalization ("the County Board").

The Commission took statutory notice, received exhibits, and heard testimony.

The Commission is required to state its final decision and order concerning an appeal, with findings of fact and conclusions of law, on the record or in writing. Neb. Rev. Stat. §77-5018 (Cum. Supp. 2006). The final decision and order of the Commission in this case is as follows.

**I.  
ISSUES**

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

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

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

The Taxpayer has asserted that taxable value of the subject property as of January 1, 2007, is not equalized with the taxable value of other real property. The issues on appeal related to that assertion are:

Whether the decision of the County Board determining the equalized taxable value of the subject property is unreasonable or arbitrary;

Whether the equalized taxable value of the subject property was determined by the County Board in a manner and an amount that is uniform and proportionate as required by Nebraska's Constitution in Article VIII §1; and

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

**II.  
FINDINGS OF FACT**

The Commission finds and determines that:

1. The Taxpayer has a sufficient interest in the outcome of the above captioned appeal to maintain the appeal.

2. The parcel of real property to which this appeal pertains ("the Subject Property") is described in the table below.
3. Actual value of the subject property placed on the assessment roll as of January 1, 2007, ("the assessment date") by the Garfield County Assessor, value as proposed in a timely protest, and actual value as determined by the County Board is shown in the following table:

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Description: E1/2SW1/4 - SW1/4 SE 1/4 SECTION 5 LYING NO OF THE CENTER OF THE CALAMUS, T21 - R16 38 ACRES Garfield County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$60,900.00	\$9,149.20	\$60,900.00
Improvement	\$None	\$None	\$None
Total	\$60,900.00	\$9,149.20	\$60,900.00

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

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Land value	\$45,675.00
Improvement value	\$ <u>None</u>
Total value	<u>\$45,675.00.</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. "Taxes shall be levied by valuation uniformly and proportionately upon all real property and franchises as defined by the Legislature except as otherwise provided in or permitted by this Constitution." *Neb. Const.*, Art. VIII, §1.
8. Equalization to obtain proportionate valuation requires a comparison of the ratio of assessed to actual value for the subject property and comparable property. *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).
9. Uniformity requires that whatever methods are used to determine actual or taxable value for various classifications of real property that the results be correlated to show uniformity. *Banner County v. State Board of Equalization*, 226 Neb. 236, 411 N.W.2d 35 (1987).
10. Taxpayers are entitled to have their property assessed uniformly and proportionately, even though the result may be that it is assessed at less than the actual value. *Equitable Life v. Lincoln County Bd. of Equal.*, 229 Neb. 60, 425 N.W.2d 320 (1988); *Fremont Plaza v. Dodge County Bd. of Equal.*, 225 Neb. 303, 405 N.W.2d 555 (1987).

11. The constitutional requirement of uniformity in taxation extends to both rate and valuation. *First Nat. Bank & Trust Co. v. County of Lancaster*, 177 Neb. 390, 128 N.W.2d 820 (1964).
12. In the evaluation of real property for tax purposes, where buildings and improvements are taxable as a part of the real estate, the critical issue is the actual value of the entire property, not the proportion of that value which is allocated to the land or to the buildings and improvements by the appraiser. *Bumgarner v. Valley County*, 208 Neb. 361, 303 N.W.2d 307 (1981).
13. If taxable values are to be equalized it is necessary for a Taxpayer to establish by clear and convincing evidence that valuation placed on his or her property when compared with valuations placed on similar property is grossly excessive and is the result of systematic will or failure of a plain legal duty, and not mere error of judgement. There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity. *Newman v. County of Dawson*, 167 Neb. 666, 94 N.W.2d 47 (1959).
14. A presumption exists that the County Board has faithfully performed its duties and has acted on competent evidence. *City of York v. York County Bd. Of Equalization*, 266 Neb. 297, 64 N.W.2d 445 (2003).
15. The presumption in favor of the county board may be classified as a principle of procedure involving the burden of proof, namely, a taxpayer has the burden to prove that action by a board of equalization fixing or determining valuation of real estate for tax purposes is unauthorized by or contrary to constitutional or statutory provisions

- governing taxation. *Gordman Properties Company v. Board of Equalization of Hall County*, 225 Neb. 169, 403 N.W.2d 366 (1987).
16. The presumption disappears if there is competent evidence to the contrary. *Id.*
  17. The order, decision, determination, or action appealed from shall be affirmed unless evidence is adduced establishing that the order, decision, determination, or action was unreasonable or arbitrary. Neb. Rev. Stat. §77-5016 (8) (Cum. Supp. 2006).
  18. Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence. See, e.g. *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb.App. 171, 645 N.W.2d 821 (2002).
  19. "Clear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved." *Castellano v. Bitkower*, 216 Neb. 806, 812, 346 N.W.2d 249, 253 (1984).
  20. A decision is "arbitrary" when it is made in disregard of the facts and circumstances and without some basis which could lead a reasonable person to the same conclusion. *Phelps Cty. Bd. of Equal. v. Graf*, 258 Neb 810, 606 N.W.2d 736 (2000).
  21. A decision is unreasonable only if the evidence presented leaves no room for differences of opinion among reasonable minds. *Pittman v. Sarpy Cty. Bd. of Equal.*, 258 Neb 390, 603 N.W.2d 447 (1999).
  22. "An owner who is familiar with his property and knows its worth is permitted to testify as to its value." *U. S. Ecology v. Boyd County Bd. Of Equalization*, 256 Neb. 7, 16, 588 N.W.2d 575, 581 (1999).

23. The County Board need not put on any evidence to support its valuation of the property at issue unless the taxpayer establishes the Board's valuation was unreasonable or arbitrary. *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).
24. A Taxpayer, who only produced evidence that was aimed at discrediting valuation methods utilized by the county assessor, failed to meet burden of proving that value of property was not fairly and proportionately equalized or that valuation placed upon property for tax purposes was unreasonable or arbitrary. *Beynon v. Board of Equalization of Lancaster County*, 213 Neb. 488, 329 N.W.2d 857 (1983).
25. A Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued. Cf. *Lincoln Tel. and Tel. Co. v. County Bd. Of Equalization of York County*, 209 Neb. 465, 308 N.W.2d 515 (1981); *Arenson v. Cedar County*, 212 Neb. 62, 321 N.W.2d 427 (1982) (determination of equalized taxable value) *Josten-Wilbert Vault Co. v. Board of Equalization for Buffalo County*, 179 Neb. 415, 138 N.W.2d 641 (1965) (determination of actual value).

#### **IV. ANALYSIS**

The subject property is a 38 acre unimproved parcel. (E16:5) The Calamus River forms a boundary on the south side of the parcel. (E14:1). The subject property was divided out of a larger parcel of 128.6 acres which the entire parcel before division had been valued as agricultural and or horticultural land. (E3:1 and 3:2).

The Taxpayer purchased the subject property for \$100,000 on November 1, 2006 and was delivered a deed on November 6, 2006, as shown on the Form 521, Real Estate Transfer



Statement. (E16:1). The Warranty Deed from the grantor to the Taxpayer was dated November 6, 2006, and filed on November 13, 2006. (E16:2).

Prior to the subject property having been sold to the Taxpayer, it had been assessed as agricultural and/or horticultural land for 2006. (E8:1) Its land classification for assessed value for 2006 as agricultural and/or horticultural land was \$10,280. (E8:1). The subject property has been assessed by the Garfield County Assessor as rural residential for 2007 at \$60,900. (E1:1).

The first issue that the Commission examines is that of equalization and the allegation from the testimony of the Taxpayer that comparable parcels to the subject property were not assessed uniformly and proportionally with the subject property. The Taxpayer provided a list of parcels which she alleged were comparable to the subject property, but were assessed as agricultural and/or horticultural land. (4:1) The Taxpayer provided as evidence the property record files for these alleged comparable parcels. (E4:2 to E4:43).

The testimony of the Appraiser for the County Assessor addressed each of the 11 parcels shown on the Taxpayer's Exhibit 4 page one. Her testimony was that none of the 11 alleged comparable parcels were in fact comparable and that she treated all of the parcels uniformly in classifying them as agricultural and/or horticultural. She testified that there were some parcels that were less than 40 acres, but which she classified as agricultural if the property owner owned other farmland adjacent to or within the County which totaled more than 40 acres.

The Commission next addresses whether the subject property has been correctly classified as rural residential for purposes of valuation. The Commission finds that the County Assessor did in fact correctly classify the subject property as rural residential and determine actual value based on its highest and best use. The factors which the Commission weighed in

making this finding include the following. First, the location of the subject property is adjacent to the County's comparable #1 which sold for \$60,000 in September, 2004. (E17:4 and E14:1) This parcel has been assessed as rural residential for 2007. (E17:4). The location is just south of a golf course, restaurant and housing development as seen on the aerial map provided on Exhibit 14 page one.

The second factor in favor of the finding that the land classification should be rural residential is the purchase price paid for the subject property. The Taxpayer testified that she paid \$100,000 for the subject property as stated above which is \$2,631 per acre ( \$100,000/38 acres). The Taxpayer testified that she paid too much for the parcel, but she was unfamiliar with the going price for grassland in the County. The Commission examined the 2007 Reports and Opinions for Statewide Equalization to determine the assessed values for the grassland classifications located on the subject property. (E36:72). The grassland classifications for the subject property are found on Exhibit 8 page one and are shown in the table below. The Commission finds from its review of the tabled assessed values below, the Taxpayer did in fact pay more per acre for the subject property than was being assessed for the same agricultural and/or horticultural land for 2007. (E36:72).

Grass Type on Subject Property (E8:1)	Dollar Value per Acre - 2007 (E36:72)
3 G	\$350
2G	\$435
4G	\$241
4G1	\$285
Wasteland	\$80

The third factor weighed by the Commission is the intended use to be made of the subject property by the Taxpayer. The Taxpayer testified that the previous owner had discussed prior to her purchase another potential buyer's interest to place a recreational camp ground on the subject property. Her testimony was that in part her desire to purchase the subject property was to prevent this use of the subject property for a recreational campground as she and her family had hunted on the north side of the river adjacent to the subject property and such a development would interfere with this activity. Her testimony did not state that, at the time of her purchase, she intended to use the subject property for agricultural and/or horticultural use.

Despite the highest and best use identified by the appraiser for the County Assessor, the Commission looks to the actual use made of the subject property as of January 1, 2007, for purposes of determining its taxable value.

The Appraiser for the County testified that her policy in Garfield County for determining whether a parcel met the definition of agricultural and/or horticultural use as defined in Neb Rev Stat §77 - 1359 (Cum. Supp. 2006) is shown in Exhibit 12. This policy was designed by the Appraiser for the County Assessor to comply with Directive 7-01 from the Property Assessment Division of the Department of Revenue. (E11). The testimony of the Appraiser for the County Assessor was that she had determined that any parcel 40 acres or more would automatically be classified as agricultural and/or horticultural while any parcel less than 40 acres would automatically be reviewed. Her testimony was that parcels less than 40 acres would normally be classified as rural residential or recreational.

The testimony of the Appraiser for the County Assessor was that since the subject property was less than 40 acres, her review of the parcel included an inspection of the subject

property, which she did “from the road” on July 11, 2007, and did not see any agricultural and/or horticultural use being made of the subject property. Her further testimony confirmed that she saw grass growing, but not harvested. She testified that she did not contact the Taxpayer to determine what use was going to be made of the subject property and she knew that the Taxpayer had a full time job in town and that income from the subject property would not be her sole means of support.

The Commission next addresses the actual use made of the subject property on January 1, 2007, and finds that the Taxpayer was working toward and intended to use the parcel for agricultural and/or horticultural use. The factors the Commission weighed in this finding included the advice sought by the Taxpayer from the County Weed Superintendent. (E6:2) The Taxpayer testified that his advice was to let the land lay fallow for two years since it had been over grazed. The Taxpayer’s testimony included the fact that stumps were left by the prior owner and haying equipment could not be used until the stumps were removed. The Taxpayer also testified that she sought the advice of the Natural Resource Conservation Service and learned the number of cattle/calves that the subject property could sustain with proper management. (E5). The Taxpayer testified that it was her intentions to repair and replace the old fence posts and to cut out the Cedar trees and stumps. The Commission notes that despite the fact that the deed conveying title of the subject property was made on November 13, 2006, as stated above, access to the subject property was not obtained until April 7, 2007. (E18:1). The Commission finds that the actions were timely of the Taxpayer to prepare to use the subject property for agricultural and/or horticultural use given the facts and circumstances. The subject property is capable of

providing pasture for 40 cow yearlings. (E5:4). The only improvements are to assist in agricultural production.

The statutory definition of agricultural land and horticultural land contains various terms which are critical to an understanding of the statute. 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. That definition without examination appears circular simply using the word commerce to define commercial.

Commerce may, however be defined as “the exchange or buying or selling of commodities esp. on a large scale and involving transportation from place to place, compare trade, traffic.” *Id.* Trade may mean “the business of buying and selling or bartering commodities: exchange of goods for convenience or profit: commerce.” *Supra* at p 2421. Traffic may mean “a commercial activity usually involving import and export trade, or to engage in commercial activity: buy or sell regularly or the activity of exchanging commodities by bartering or buying and selling.” *Supra* at 2422-2423.

An alternate definition of the term commercial is “from the point of view of profit: having profit as the primary aim.” *Supra* at 456. A definition of the word commercial also appears in the rules and regulations of the Tax Commissioner. “Commercial shall mean all

parcels of real property predominately used or intended to be used for commerce, trade, or business.” 350 Neb. Admin. Code, ch. 10, §001.05C (3/07). That definition is used for the classification of real property for assessment purposes. See, 350 Neb. Admin. Code, ch. 10, §004.02 B (3/07). The Property Tax Administrator has advised that commercial production means agricultural or horticultural products produced for the primary purpose of obtaining a monetary profit. Directive 07-01, Property Tax Administrator, )(03/07).

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 with the intent to make a profit gives effect to the change in terminology as adopted by the Legislature . The Commission finds that the critical element to the term commercial production is the intent to make a profit and not whether a profit was in fact made.

The Commission finds that the subject property is correctly classified as a rural residential parcel and its actual value is \$60,900; however, the land use made of the subject property as of January 1, 2007, was for agricultural and/or horticultural use and as such its assessed valuation shall be 75% of its actual value or \$45,675 ( $\$60,900 \times 75\%$ ) for 2007.

## **V. CONCLUSIONS OF LAW**

1. The Commission has subject matter jurisdiction in this appeal.

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

**VI.  
ORDER**

**IT IS ORDERED THAT:**

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

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Land value           \$45,675.00

Improvement value \$   None

Total value           \$45,675.00.

3. This decision, if no appeal is timely filed, shall be certified to the Garfield County Treasurer, and the Garfield County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Cum. Supp. 2006).

4. Any request for relief, by any party, which is not specifically provided for by this order is denied.
5. Each party is to bear its own costs in this proceeding.
6. This decision shall only be applicable to tax year 2007.
7. This order is effective for purposes of appeal on March 24, 2009.

Signed and Sealed. March 24, 2009.

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Nancy J. Salmon, 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. 2006), 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