

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

DONALD D. HUDGENS,)	
)	
Appellant,)	Case No. 07R-338
)	
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 Donald D. Hudgens ("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 March 16, 2009, pursuant to an Order for Hearing and Notice of Hearing issued January 9, 2009. Commissioners Wickersham and Salmon were present. Commissioner Wickersham was the presiding hearing officer. Commissioner Warnes was excused from participation by the presiding hearing officer. A panel of three commissioners was created pursuant to 442 Neb. Admin. Code, ch. 4, §011 (10/07). Commissioner Hotz was absent. The appeal was heard by a quorum of a panel of the Commission.

Donald D. Hudgens was present at the hearing. No one appeared as legal counsel for the Taxpayer.

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

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

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

I. ISSUES

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

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

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

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

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

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

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

**II.
FINDINGS OF FACT**

The Commission finds and determines that:

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

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Description: Lot 5 Block 14, Pacific Heights, Omaha, Douglas County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$14,800.00	In Total	\$14,800.00
Improvement	\$190,100.0	In Total	\$184,100.00
Total	\$204,900.00	\$167,500.00	\$198,900.00

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 January 9, 2009, set a hearing of the appeal for March 16, 2009, at 9:00 a.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:

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Land value	\$ 14,800.00
Improvement value	<u>\$184,100.00</u>
Total value	<u><u>\$198,900.00.</u></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 an improved residential parcel. The 2,094 square foot residence was built in 1978, has a 1,060 square foot walkout basement with 530 square foot of finish and a 528 square foot attached garage. (E3:1).

The Taxpayer contends in part that the valuation of the subject property has been increased at an excessive rate. A prior year's assessment is not relevant to the subsequent year's valuation. *DeVore v. Bd. Of Equal.*, 144 Neb. 351, 13 N.W.2d 451 (1944). *Affiliated Foods Coop v. Madison Co. Bd. Of Equal.*, 229 Neb. 605, 428 N.W.2d 201 (1988). If a prior year's valuation is not relevant it follows that the percentage increase from year to year or over time is likewise not relevant.

The Taxpayer contends that the County Board should not have been allowed to furnish evidence of comparables in addition to or in substitution for comparables disclosed on consideration of his protest. Parties to an appeal before the Commission are not confined to evidence submitted at a protest. *See, Brenner v. Banner County Board of Equalization*, 276 Neb. 275, 753 N.W.2d 802 (2008) (explaining the application of the provisions of section 77-5016 of Nebraska Statutes). If evidence was presented at a protest that is in conflict with evidence presented before the Commission the Commission will, based on the evidence presented to it, resolve the conflict. Evidence cannot be excluded to prevent a conflict.

The Taxpayer contends that the Answer of the County Board to the Notice in Lieu of summons issued on the Taxpayers appeal was not timely and therefore the County Board should be deemed in default and relief granted to the Taxpayer. A Notice in Lieu of Summons directing that a response to the Taxpayer's appeal be made within 30 days after service was mailed by the Commission on October 19, 2007. (Case File). An Answer in response to the Notice in Lieu of Summons was placed in the mail on behalf of the County Board on November 19, 2007, and received by the Commission on November 20, 2007. (Case File). The Answer of the County Board was received on the 30th day after the earliest date it might have been received or served.

While there are other grounds to consider the Answer of the County Board to be timely, it is not necessary to discuss them.

The Taxpayer contends that the County Board has not complied with the requirements of Paragraph 14(b) of the Commission's order for hearing. Paragraph 14(b) of the Commission's Order for Hearing and Notice of Hearing requires the County Board to produce Copies of all document(s), **including attachments**, submitted to the County Board of Equalization as a protest or other basis for initiation of deliberations which lead to the decision, order, determination, or action of the County Board of Equalization from which the appeal in this case is taken. (Case File). The County Board produced Exhibit 12, the mail in protest filed by the Taxpayer, and it was received without objection. The County Board complied with the requirements of paragraph 14(b) of the Commission's Order for Hearing and Notice of Hearing.

The Taxpayer contends that the taxable value of the subject property should be 92% of its actual value. 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). For statistical analysis and equalization of the values of classes and subclasses of real property a range of 92 to 100% is acceptable for residential real property. Neb. Rev. Stat. §77-5023(2)(c) (Cum. Supp. 2006). That special use of a range has no application to the valuation of a specific parcel of real property. On a parcel by parcel basis the provisions of section 77-201(1) are applicable. The subject property is taxable on 100% of its actual value.

The Taxpayer offered his opinion that actual value of the subject property was \$168,000 or \$167,500 as of the assessment date. The Taxpayer based his opinion on the sales of 4 parcels and the assessment of 3 parcels he considered comparable based on style and appearance.

Physical characteristics of the subject property and the 4 sold parcels are summarized in the following table.

Subject Property and Sold Parcels Comparison

Descriptor	Subject	Parcel 1	Parcel 2	Parcel 3	Parcel 4
Exhibit	E3	7:3-11	E7:12-20	E7:21-29	E7:30-38
Location	16711 Pine St	16350 Poppleton	1715 S 167 Cr	16605 Pine St	1426 S 134 St
Lot Size	10,270	10,795	11,508	10,240	9,652
Condition	Good	Average	Average	Good	Good
Quality	Average	Average	Average	Average	Average
Yr Built	1978	1974	1979	1979	1973
Exterior Walls	Frame Siding	Frame Siding	Frame Siding	Frame Siding	Frame siding
Style	2 Story	Tri Level	2 Story	2 Story	Multi Level
Area Above Ground	2,094	2,016	2,432	2,501	1,896
Roof Type	Gable	Hip	Gable	Gable	
Roof Cover	Comp Shingle	Comp Shingle	Comp Shingle	Comp Shingle	Comp Shingle
HVAC	Central Air	Central Air	Central Air	Central Air	Central Air
Basement	1,060	700	1,260	1,241	624
Finished	530	476	630	620	300
Walkout	1		1	1	
Bedrooms	3	3	4	4	3
Bathrooms	2.5	2.5	2.5	2.5	2.5
Garage Type	Attached	Built In	Built In	Built In	Built In
Garage Area	528	528	816	517	528

Descriptor	Subject	Parcel 1	Parcel 2	Parcel 3	Parcel 4
Misc Imp	Metal Fireplace, Wood Deck, In Ground Pool	Masonry Fireplace, Wood Deck, Security System	Masonry Fireplace, Wood Deck	Masonry Fireplace, Wood Deck	Masonry Fireplace, Wood Deck
Lot Value	\$14,800	\$12,300	\$18,300	\$14,800	\$11,700
Imp Value	\$184,100	\$152,900	\$198,900	\$193,700	\$142,800
Taxable Value	\$198,900	\$165,200	\$217,200	\$208,500	\$154,500
Sale Date		5/16/2005	8/14/2006	3/14/2006	11/7/2006
Sale Price		\$163,500	\$220,000	\$160,000	\$158,000

Comparable properties share similar quality, architectural attractiveness (style), age, size, amenities, functional utility, and physical condition. *Property Assessment Valuation, 2nd Ed.*, International Association of Assessing Officers, 1996, p. 98. When using “comparables” to determine value, similarities and differences between the subject property and the comparables must be recognized. *Property Assessment Valuation, 2nd Ed.*, 1996, p.103. Parcels 1 and 4 are the most similar to the subject property based on size of the residences. There are, however, obvious differences. In the size of basements, the finished areas of the basements, and the walkout entrance to the basement that is unique to the subject property. In addition, the subject property is improved with an in ground swimming pool, an amenity that is unique to the subject property. In the sales comparison approach an opinion of value is developed by analyzing similar properties and comparing those properties with the subject property. *The Appraisal of Real Estate, 12th Edition*, Appraisal Institute, 2001, pg. 418. An opinion of value based on use of the sales comparison approach requires use of a systematic procedure:

“1. Research the competitive market for information on sales transactions, listings, and offers to purchase or sell involving properties that are similar to the subject property in terms of characteristics such as property type, date of sale, size, physical condition, location, and land use restraints. ...

2. Verify the information by confirming that the data obtained is factually accurate and that the transactions reflect arm’s-length market considerations. ...

3. Select relevant units of comparison (e.g., price per acre, price per square foot, price per front foot) and develop a comparative analysis for each unit. ...

4. Look for differences between the comparable sale properties and the subject property using the elements of comparison. Then adjust the price of each sale to reflect how it differs from the subject property or eliminate that property as a comparable. This step typically involves using the most comparable sale properties and then adjusting for any remaining differences.

5. Reconcile the various value indications produced from the analysis of comparables into a single value indication or a range of values.” *The Appraisal of Real Estate* 12th Edition, The Appraisal Institute, 2001, p 422. To develop an indication of value from the sales of the parcels adjustment to their sales prices would be required to develop an estimate of value. An analysis of the sold parcels does not support the Taxpayer’s opinion of actual value.

The physical characteristics of the 3 parcels considered by the Taxpayer to be comparable based on style and appearance are summarized in the following table.

Subject Property and Style and Appearance Parcels

Descriptor	Subject	Parcel 1	Parcel 2	Parcel 3
Exhibit	E3	E8:12-20	E8:21-29	E8:30-38
Location	16711 Pine St	5906 S 149 St	6005 S 149 St	16247 Wood Dr
Lot Size	10,270	11,250	8,750	10,575
Condition	Good	Good	Good	Good
Quality	Average	Average	Average	Average
Yr Built	1978	1975	1974	1976
Exterior Walls	Frame Siding	Frame Siding	Frame siding	Frame Siding
Style	2 Story	Tri Level	Tri Level	Tri Level
Area Above Ground	2,094	2,085	1,943	2,028
Roof Type	Gable			Gable
Roof Cover	Comp Shingle	Comp Shingle	Comp Shingle	Comp Shingle
HVAC	Central Air	Central Air	Central Air	Central Air
Basement	1,060	1,092	652	480
Finished	530			480
Walkout	1			
Bedrooms	3	3	3	3
Bathrooms	2.5	3	2.5	3
Garage Type	Attached	Built In	Built In	Built In
Garage Area	528	441	420	462
Misc Imp	Metal Fireplace, Wood Deck, In Ground Pool	Masonry Fireplace, Wood Deck	Masonry Fireplace	Metal Fireplace, Wood Deck
Lot Value	\$14,800	\$21,000	\$21,000	\$14,900
Imp Value	\$184,100	\$145,500	\$125,600	\$161,600
Taxable Value	\$198,900	\$166,400	\$146,600	\$176,500

The parcels selected by the Taxpayer based on style and appearance have many similarities with the subject property. There are differences in the size of the basements, basement finish and again the walkout basement entry that is unique to the subject property. The garage attached to the residence on the subject property is also larger than any other garage. As the subject property has a built in swimming pool, an amenity that is not found on any other parcel. None of the parcels selected as style and appearance comparables are similar enough to the subject property to require a conclusion that taxable value of the subject property should be equal to the taxable value of another parcel or determined based on the taxable value of another parcel.

In part the Taxpayer's estimate of value is based on a averaging of various values. The Commission in its review of appraisal literature has not found that averaging of values is an acceptable technique for developing an estimate of value.

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:

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Land value \$ 14,800.00

Improvement value \$184,100.00

Total value \$198,900.00.

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. 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 23, 2009.

Signed and Sealed. March 23, 2009.

Nancy J. Salmon, Commissioner

SEAL

APPEALS FROM DECISIONS OF THE COMMISSION MUST SATISFY THE REQUIREMENTS OF NEB. REV. STAT. §77-5019 (CUM. SUPP. 2006), OTHER PROVISIONS OF NEBRASKA STATUTES, AND COURT RULES.

I concur in the result.

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