

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

LINDA J. FRYZEK,)	
)	
Appellant,)	Case Nos. 08A 154, 08A 155
)	
v.)	DECISION AND ORDER
)	REVERSING THE DECISIONS OF
GARFIELD COUNTY BOARD OF)	THE GARFIELD COUNTY BOARD OF
EQUALIZATION,)	EQUALIZATION
)	
Appellee.)	

The above-captioned cases were called for a hearing on the merits of appeals 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 Avenue, Kearney, Nebraska, on September 16, 2009, pursuant to an Order for Hearing and Notice of Hearing issued July 14, 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.

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. 2008). The final decision and order of the Commission in the consolidated cases is as follows.

**I.
ISSUES**

The Taxpayer has asserted that taxable value of the subject property as of January 1, 2008, is less than taxable value as determined by the County Board. The issues on appeal related to that assertion are:

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

The taxable value of the subject property on January 1, 2008.

The Taxpayer has asserted that taxable value of the subject property as of January 1, 2008, is not equalized with the taxable value of other real property. The issues on appeal related to that assertion are:

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

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

The equalized taxable value of the subject property on January 1, 2008.

**II.
FINDINGS OF FACT**

The Commission finds and determines that:

1. The Taxpayer has a sufficient interest in the outcome of the above captioned appeals to maintain them.
2. The parcels of real property to which the above captioned appeals pertain ("the Subject Property") are described in the tables below.
3. Taxable value of each parcel of the subject property placed on the assessment roll as of January 1, 2008, ("the assessment date") by the Garfield County Assessor, value as proposed in timely protests, and taxable value as determined by the County Board is shown in the following tables:

Case No. 08A 154

Description: Pt N½ Section 5, Township 12, Range 16 .74 AC, Garfield County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Agricultural Land	\$770.00	\$269.00	\$740.00
Total	\$770.00	\$269.00	\$740.00

Case No. 08A 155

Description: E½SW¼, SW¼SE¼ lying North of the Calamus River Section 5, Township 21, Range 16, Garfield County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Agricultural Land	\$81,000.00	\$10,255.00	\$81,000.00
Total	\$81,000.00	\$10,255.00	\$81,000.00

4. Appeals of the County Board's decisions were filed with the Commission.
5. The County Board was served with Notices in Lieu of Summons and duly answered those Notices.
6. The appeals were consolidated for hearing by order of the Commission.

7. An Order for Hearing and Notice of Hearing issued on July 14, 2009, set a hearing of the appeals for September 16, 2009, at 2:00 p.m. CDST.
8. An Affidavit of Service, which appears in the records of the Commission, establishes that a copy of the Order for Hearing and Notice of Hearing was served on all parties.
9. Taxable value of each parcel for the tax year 2008 is:

Case No. 08A 154

Agricultural land \$ 555.00

Total \$ 555.00

Case No. 08A 155

Agricultural land \$ 11,100.00

Total \$ 11,100.00.

**III.
APPLICABLE LAW**

1. Subject matter jurisdiction of the Commission in each of the above captioned appeals is over all questions necessary to determine taxable value. Neb. Rev. Stat. §77-5016(7) (Cum. Supp. 2008).
2. “Actual value is the most probable price expressed in terms of money that a property will bring if exposed for sale in the open market, or in an arm’s length transaction, between a willing buyer and a willing seller, both of whom are knowledgeable concerning all the uses to which the real property is adapted and for which the real property is capable of being used. In analyzing the uses and restrictions applicable to real property the analysis

- shall include a full description of the physical characteristics of the real property and an identification of the property rights valued.” Neb. Rev. Stat. §77-112 (Reissue 2003).
3. Actual value may be determined using professionally accepted mass appraisal methods, including, but not limited to, the (1) sales comparison approach using the guidelines in section 77-1371, (2) income approach, and (3) cost approach. Neb. Rev. Stat. §77-112 (Reissue 2003).
 4. “Actual value, market value, and fair market value mean exactly the same thing.”
Omaha Country Club v. Douglas County Board of Equalization, et al., 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).
 5. Taxable value is the percentage of actual value subject to taxation as directed by section 77-201 of Nebraska Statutes and has the same meaning as assessed value. Neb. Rev. Stat. §77-131 (Reissue 2003).
 6. All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation. Neb. Rev. Stat. §77-201(1) (Cum. Supp. 2008).
 7. Agricultural land and horticultural land shall be valued for purposes of taxation at seventy five percent of its actual value. Neb. Rev. Stat. §77-201 (2) (Cum. Supp. 2008).
 8. Agricultural land and horticultural land means a parcel of land which is primarily used for agricultural or horticultural purposes, including wasteland lying in or adjacent to and in common ownership or management with other agricultural land and horticultural land. Agricultural land and horticultural land does not include any land directly associated with any building or enclosed structure." Neb. Rev. Stat. §77-1359 (1) (Cum. Supp. 2008).

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

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

(b) Land enrolled in a federal or state program in which payments are received for removing such land from agricultural or horticultural production shall be defined as agricultural land or horticultural land." Neb. Rev. Stat. §77-1359 (2)

(Cum. Supp. 2008).

10. "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.

11. Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value. *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).

12. The purpose of equalization of assessments is to bring the assessment of different parts of a taxing district to the same relative standard, so that no one of the parts may be compelled to pay a disproportionate part of the tax. *MAPCO Ammonia Pipeline v. State*

Bd. of Equal., 238 Neb. 565, 471 N.W.2d 734 (1991); *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).

13. Equalization to obtain proportionate valuation requires a comparison of the ratio of assessed to actual value for the subject property and comparable property. See *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).
14. 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).
15. 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).
16. 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).
17. 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).

18. 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).
19. 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).
20. 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).
21. The presumption disappears if there is competent evidence to the contrary. *Id.*
22. 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).

23. Proof that the order, decision, determination, or action appealed from was unreasonable or arbitrary must be made by clear and convincing evidence. See, e.g., *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb.App. 171, 645 N.W.2d 821 (2002).
24. "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).
25. 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).
26. 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).
27. "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).
28. 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).
29. 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).

30. 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 consists of two unimproved rural parcels. The smaller parcel is used for access to the larger parcel.

The County Board conceded that the subject property is primarily used for agricultural or horticultural purposes. Agricultural land and horticultural land may have other uses affecting its actual value. Actual value is to be determined based on the highest and best use of the parcel. 350 Neb. Admin. Code, ch. 50, §.00204A (01/07). Highest and best use is the most reasonable and probable use of the property that will support the highest present value. It is the recognition of the contribution of that specific use to community environment or community development goals in addition to wealth maximization of individual property owners. 350 Neb. Admin. Code, ch. 10, §001.13 (1/07). The County Board determined that the highest and best use of the subject property was as recreational land and that its actual value should be based on that use. Actual value of the parcel described in Case No. 08A-154 for recreational use as determined by the

County Board is \$740. (E20:1). Actual value of the parcel described in Case No. 08A-154 for recreational use as determined by the County Board is \$81,000. (E18:1). There is no evidence that the subject property has qualified for special valuation allowing it to be taxed at 75% of its value for agricultural or horticultural purposes or uses. Because the subject property is agricultural land and horticultural land not qualified for special valuation its taxable value is 75% of its actual value as determined for its highest and best use. Neb. Rev. Stat. §77-201 (2) (Cum. Supp. 2008).

The subject property borders a river. The subject property is also near a highway and golf course. (E15). The State Appraiser testified that the subject property is zoned as transitional ag. Transitional ag zoning is given for the express purpose of allowing the development of non-agricultural uses along major roadways near urban communities. (E16:3). The subject property has potential for recreational use and may be used for recreational purposes. The Taxpayer submitted no evidence showing that actual value of the subject property was less than actual value as determined by the County Board. Classification and valuation of the subject property as recreational land is not unreasonable or arbitrary.

The Taxpayer testified that at least one parcel that is comparable to the subject property was being used for recreational purposes with picnic tables and outhouses. That specific use of the parcel was unknown to the State Appraiser until the hearing on the merits of the Taxpayer's appeal. There is no evidence that the County Board had any knowledge of the recreational use described by the Taxpayer. 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). Because the State Appraiser and the County Board had no knowledge of the recreational use described by the Taxpayer it cannot be said that they intentionally treated the Taxpayer differently. Nor is there any showing that the State Appraiser or County Board breached a duty by failing to discover the recreational use described by the Taxpayer. Absent an inspection of every parcel on December 31 of each year, unobserved changes in use may occur as of January 1 each year. The State Appraiser testified that she would inspect the property on which the Taxpayer testified recreational uses were occurring. That is all that can be required. The Taxpayer has not shown a basis for relief on her equalization claim on the basis of the actual use of another parcel for recreational purposes.

The Taxpayer asserts that parcels similar to the subject property have potential for use as recreational land but are classified and taxed on their value for agricultural or horticultural purposes or uses. If parcels are not properly classified they may not be valued based on their highest and best use. The highest and best use of a parcel is the most reasonable and probable use of the property that will support the highest present value. Neb. Admin. Code, ch 10 §001.13 (01/07). Improper classification may result in a lack of uniformity. See *Beynon v. Board of Equalization of Lancaster County*, 213 Neb. 488, 329 N.W.2d 857 (1983).

Highest and best use is not dependent on actual use. The State Appraiser testified that parcels larger than 50 acres were not being sold at values reflecting recreational use. Four of the parcels submitted by the Taxpayer as similar in recreational potential to the subject property

exceed 50 acres in size. (E7:4, 7, 10, 19, & 25). One parcel with 74.70 acres is adjacent to the subject property. (E7:23-25). Four tests are employed in the determination of the highest and best use of a parcel: Is the use legally permissible?; Is the use physically possible?; Is the use financially feasible?; and Is the use maximally productive? *Appraisal of Real Estate 13th Edition*, Appraisal Institute, 279 (2008). Recreational use of the larger parcels may be legally permissible and physically possible. However, as noted, the State Appraiser testified that parcels over 50 acres were not being purchased at values associated with recreational use. Implicitly that is a recognition in the market that recreational use is not either financially possible or that use is not maximally productive in parcels over 50 acres. Three of the parcels are smaller than 50 acres. (E7:11, 16, & 22). The State Appraiser testified that the smaller parcels were all used in conjunction with adjacent parcels with common ownership, and the aggregate of the parcels in common ownership exceeded 50 acres. For example, the three parcels found in Exhibit 7 at pages 14-21 total 171.9 acres ($42.46 + 112.7 + 16.74 = 171.9$). The State Appraiser also testified that the highest and best use of the smaller parcels was determined based on the size of the aggregated parcels held in common ownership. If aggregated parcels held in common ownership exceeded 50 acres in size, recreational use was not considered to be the highest and best use. Adjacent parcels with common ownership were then valued on the same basis as a parcel with more than 50 acres and a single legal description. Factors the aggregated parcels and large parcels have in common are use and location. What they do not have in common is a single legal description.

On or before March 19 of each year the county assessor is required to prepare an assessment roll of the taxable real property in each county. Neb. Rev. Stat. §77-1303(1) (Cum.

Supp. 2006). The assessment roll shows the ownership of each parcel, its size, and the assessed values of land and improvements as applicable. Neb. Rev. Stat. §77-1303(2) (Cum. Supp. 2006). A parcel is defined as a contiguous tract of land determined by its boundaries, under the same ownership, and in the same tax district and section. Neb. Rev. Stat. 77-132 (Cum. Supp. 2006). Assessment is based on a parcel and the factors or characteristics that affect its value.

The Taxpayer has shown, however, that the highest and best use of other parcels less than 50 acres in size, situated near roads and rivers, was not deemed by the State Appraiser to be recreational. The only basis in evidence for distinguishing between the highest and best use determinations made for those parcels and the subject property is the presence or absence of other contiguous lands with the same owner. Nebraska's Supreme Court has determined that classifications of real property based on ownership violate the uniformity clause of our Constitution. *Constructors, Inc. v. Cass County Bd. Of Equalization*, 258 Neb. 866, 600 N.W.2d 786 (2000). In *Constructors, Inc.*, the Court determined that the assessor had in effect created two subclasses of agricultural land: (1) Land controlled by someone who does not operate mining operations elsewhere in Cass County, and (2) land controlled by those who own or have entered some type of agreement with companies who operate mining operations elsewhere in Cass County. *Supra*, at 874, 793. The de facto classifications found by the Court violated the uniformity clause because they were not based on a substantial difference of situation between the mine operators and others whose minerals were attributed to have no value or a public policy reason that would support differential tax treatment. *Supra*, at 875, 793. Here the difference is ownership of contiguous parcels that total more than 50 acres. That de facto classification is not

permitted. The Taxpayer is entitled to have the subject property valued on the same basis as other parcels of less than 50 acres which have similar recreational potential.

At least two parcels submitted by the Taxpayer are under 50 acres, situated near a road and abutting a river. (E7:14-16 and E7:20-22). The valuation of those parcels is based on their use for agricultural and horticultural purposes. (E7:16 & E7:22). The soil symbols associated with the parcel in Case No 08A 155 are IGB, WN, BAA, and WST. (E5:2). The soil symbols associated with the lands described in Case No. 08A 154 are unknown. The subject property is grassland. Applying the soil symbols to the associated LCGs and taxable values as found in the sold inventories for another parcel shown at Exhibit 7 page 4, taxable value of the subject property can be determined as follows:

Soil Symbol	Soil Name	Land Use	LVG code	Acres	Ag/Acre ¹	Value
IGB	Ipage 0-3	Grass	3G	14	350	4,900
WN	Wann 0-1	Grass	2G	5	435	2,175
BAA	Barney Loam	Grass	4G	4	245	980
LR	Loup 0-2	Grass	4G1	9	285	2,565
WST	Waste	Waste	WST	6	80	<u>480</u>
Total taxable value						<u>11,110</u>
1. 75% of actual value						

Equalized taxable value of the portion of the subject property described in Case No. 08A 155 is \$11,110. The equalized taxable value of the portion of the subject property described in Case No. 08A 154 cannot be determined. Taxable value of the portion of the subject property described in Case No. 08A 154 at 75% of its actual value is \$555 ($\$740 \times .75 = \555).

**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 decisions of the County Board are unreasonable or arbitrary and the decisions of the County Board should be reversed.

**VI.
ORDER**

IT IS ORDERED THAT:

1. The decisions of the County Board determining taxable values of the parcels comprising subject property as of the assessment date, January 1, 2008, are vacated and reversed.
2. Taxable value, for the tax year 2008, of each parcel described in an appeal as referenced by the Case No. is:

Case No. 08A 154

Agricultural land	\$ 555.00
Total	<u>\$ 555.00</u>

Case No. 08A 155

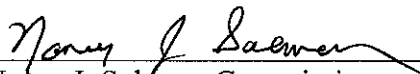
Agricultural land	\$ 11,100.00
Total	<u>\$ 11,100.00.</u>

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. 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 November 3, 2009.

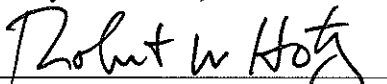
Signed and Sealed. November 3, 2009.



SEAL



Nancy J. Salmon, Commissioner



Robert W. Hotz, Commissioner

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.

The analysis above considers two standards of review for review. One standard of review is stated as a presumption found in case law, the other is found as stated in statute. I do not believe consideration of two standards of review are required by statute or case law.

The Commission is an administrative agency of state government. See *Creighton St. Joseph Regional Hospital v. Nebraska Tax Equalization and Review Commission*, 260 Neb. 905, 620 N.W.2d 90 (2000). As an administrative agency of state government the Commission has

only the powers and authority granted to it by statute. *Id.* The Commission is authorized by statute to review appeals from decisions of a county board of equalization, the Tax Commissioner, and the Department of Motor Vehicles. Neb. Rev. Stat. §77-5007 (Supp. 2007). In general, the Commission may only grant relief on appeal if it is shown that the order, decision, determination, or action appealed from was unreasonable or arbitrary. Neb. Rev. Stat. §77-5016(8) (Cum. Supp. 2008).

The Commission is authorized to review decision of a county board of equalization determining taxable values. Neb. Rev. Stat. §77-5007 (Supp. 2007). Review of county board of equalization decisions is not new in Nebraska law. As early as 1903 Nebraska Statutes provided for review of County Board assessment decisions by the district courts. Laws 1903, c. 73 §124. The statute providing for review did not state a standard for that review. *Id.* A standard of review stated as a presumption was adopted by Nebraska's Supreme Court. See *State v. Savage*, 65 Neb. 714, 91 N.W. 716 (1902) (citing *Dixon Co. v. Halstead*, 23 Neb. 697, 37 N.W. 621 (1888) and *State v. County Board of Dodge Co.* 20 Neb. 595, 31 N.W. 117 (1887)). The presumption was that the County Board had faithfully performed its official duties and had acted upon sufficient competent evidence to justify its actions. See *id.* In 1959, the legislature provided a statutory standard for review by the district courts of county board of equalization, assessment decisions. 1959 Neb Laws, LB 55, §3. The statutory standard of review required the District Court to affirm the decision of the county board of equalization unless the decision was arbitrary or unreasonable or the value as established was too low. *Id.* The statutory standard of review was codified in section 77-1511 of the Nebraska Statutes. Neb. Rev. Stat. §77-1511 (Cum. Supp. 1959). After adoption of the statutory standard of review Nebraska Courts have

held that the provisions of section 77-5011 of the Nebraska Statutes created a presumption that the County Board has faithfully performed its official duties and has acted upon sufficient competent evidence to justify its actions. See, e.g., *Ideal Basic Indus. V. Nuckolls Cty. Bd. Of Equal.*, 231 Neb. 653, 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