

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, 2008, ("the assessment date") by the Custer County Assessor, value as proposed in a timely

The Commission finds and determines that:

**II.
FINDINGS OF FACT**

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

Nebraska's Constitution in Article VIII §1; and

County Board in a manner and an amount that is uniform and proportionate as required by

Whether the equalized taxable value of the subject property was determined by the

subject property, is unreasonable or arbitrary;

Whether the decision of the County Board, determining the equalized taxable value of the

to that assertion are:

2008, is not equalized with the taxable value of other real property. The issues on appeal related

The Taxpayer has asserted that taxable value of the subject property as of January 1,

**I.
ISSUES**

APPLICABLE LAW

III.

Total value \$77,103.00.
 Improvement value \$71,978.00
 Land value \$ 5,125.00

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8. Actual value of the subject property as of the assessment date for the tax year 2008 is: a copy of the Order for Hearing and Notice of Hearing was served on all parties.
7. An Affidavit of Service, which appears in the records of the Commission, establishes that appeal for September 16, 2009, at 10:00 a.m. CDST.
6. An Order for Hearing and Notice of Hearing issued on July 14, 2009, set a hearing of the Notice.
5. The County Board was served with a Notice in Lieu of Summons and duly answered that
4. An appeal of the County Board's decision was filed with the Commission.

Total	\$109,958.00	\$90,125.00	\$102,508.00
Improvement	\$104,833.00	\$85,000.00	\$97,383.00
Land	\$5,125.00	\$5,125.00	\$5,125.00
Assessor Notice Value		Taxpayer Protest Value	Board Determined Value

Description: 100' x 125' parcel SE¼SE¼ Section 32, Township 17, Range 20, Broken Bow, Custer County, Nebraska.

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table:

protest, and actual value as determined by the County Board is shown in the following

1. Subject matter jurisdiction of the Commission in this appeal is over all questions necessary to determine taxable value. Neb. Stat. 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. Stat. 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. Stat. 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. Stat. 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. Stat. Rev. Stat. §77-201(1) (Cum. Supp. 2008).

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 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 Equalization, 238 Neb. 565, 471 N.W.2d 734 (1991).*

9. 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 Equalization, 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).

10. 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).

11. 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).

12. 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 Equalization, 229 Neb. 60, 425 N.W.2d 320 (1988); Fremont Plaza v.

Dodge County Bd. of Equalization, 225 Neb. 303, 405 N.W.2d 555 (1987).

13. 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).
14. 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).
15. 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 judgment. 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).
16. A presumption exists that the County Board has faithfully performed its duties and has acted on competent evidence. *City of York v. York County Bd. Of Equalization*, 266 Neb. 297, 64 N.W.2d 445 (2003).
17. The presumption in favor of the county board may be classified as a principle of procedure involving the burden of proof, namely, a taxpayer has the burden to prove that action by a board of equalization fixing or determining valuation of real estate for tax purposes is unauthorized by or contrary to constitutional or statutory provisions

- governing taxation. *Gordman Properties Company v. Board of Equalization of Hall County*, 225 Neb. 169, 403 N.W.2d 366 (1987).
18. The presumption disappears if there is competent evidence to the contrary. *Id.*
19. The order, decision, determination, or action appealed from shall be affirmed unless evidence is adduced establishing that the order, decision, determination, or action was unreasonable or arbitrary. Neb. Rev. Stat. §77-5016 (8) (Cum. Supp. 2006).
20. Proof that the order, decision, determination, or action 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).
21. "Clear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved." *Castellano v. Bitkower*, 216 Neb. 806, 812, 346 N.W.2d 249, 253 (1984).
22. A decision is "arbitrary" when it is made in disregard of the facts and circumstances and without some basis which could lead a reasonable person to the same conclusion. *Phelps Cty. Bd. of Equal. v. Graf*, 258 Neb 810, 606 N.W.2d 736 (2000).
23. A decision is unreasonable only if the evidence presented leaves no room for differences of opinion among reasonable minds. *Pittman v. Sarpy Cty. Bd. of Equal*, 258 Neb 390, 603 N.W.2d 447 (1999).
24. "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).

The subject property is an improved residential parcel. The 1,390 square foot residence with a 732 square foot basement, 372 square feet of which are finished, and attached 308 square foot garage was built in 1960.

The Taxpayer acknowledged that the subject property sold twice in the last two years for more than actual value as determined by the County Board. The subject property sold on June 29, 2006 for \$115,000 and on June 26, 2007 for \$116,000. (E4:7). The Taxpayer asserts that the taxable value of the subject property is not equalized. The Taxpayer asserts that actual value of the subject property was determined based on its sale price and that the actual value of unsold

ANALYSIS
IV.

27. 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).
26. 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. 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. *Bottom v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).

residential parcels in the same neighborhood were not increased in a manner comparable to the increases determined for sold residential parcels. The Taxpayer contends that the valuations of sold and unsold parcels were not determined on the same basis.

The Taxpayer submitted property record files in support of her assertion. Pertinent information derived from property record files submitted by the Taxpayer and the County Board is set out in the following table.

Ex	Qual	Cond	Age	Rem yr	Rem Type	Eff Age	Phy Dep	Sale Date	Chg in Value ¹ of Res ²	% chg in Val of Res ²
E 4:7&8	Ave	Gd	49		REM	27	31%	7/2007	31,484	47%
E 2:1&2	Ave	Gd	99	2004	REM	27	31%	5/2006	32,403	47%
E 2:3&4	Ave	Gd	109		REM	42	59%	6/2006	13,320	18%
E 2:5&6	Gd	V Gd	49		REM	29	35%	7/2007	49,820	46%
E 2:7&8	Gd	Ave	61	1966	REM	32	40%	12/2006	52,795	41%
E 2:9&10	Gd	Ave	47			40	55%	10/2006	32,778	56%
E 3:1&2	Fair	Ave	48			40	55%		1,448	2%
E 3:3&4	Ave	Ave	59			40	55%	6/2009	7,681	16%
E 3:5&6	Ave	Ave	49			48	68%	5/2004	0	0%
E 3:7&8	Ave	Ave	49			40	55%		9,710	16%
E 3:9&10	Ave	V Gd	48			37	49%		3,610	7%
E 3:11&12	Ave	Gd	47	1992		37	49%		4,196	7%
E 3:13&14	Ave	V Gd	51			37	49%		7,859	17%
E 3:15&16	Gd	Gd	53			42	59%		4,067	5%
E 3:17&18	Gd	Ave	50			42	59%		3,320	5%
E 3:19&20	Gd	Ave	47			40	55%		15,215	15%
E 3:21&22	Ave	Ave	47			40	55%		3,024	4%
E 3:23&24	Ave	Ave	29			27	30%	11/2005	-810	

residential parcels in Broken Bow because a review of preliminary statistics indicated that values

The County Assessor testified that for the tax year 2008, adjustments were made to all

their sale prices in the year 2005. Unsold parcels received adjustments ranging from 4% to 20%.

shown in Exhibit 3 at pages 5 & 6, 23 & 24, and Exhibit 4 pages 9 & 10 were valued at or near

parcel was unsold at the time 2008 values were determined by the County Assessor. The parcels

56%. The sold parcel shown in Exhibit 3 at pages 3 & 4 received an adjustment of 16%. That

Sold parcels, with three exceptions received adjustments in value ranging from 30% to

contribution to value of the residence for the tax year 2007.

2. % change in val of res is calculated as the difference shown in the previous column divided by the

assessors records.

tax year 2008 and the contribution to value of the residence for the tax year 2008 as shown in the county

1. Chge in value of is calculated as the difference between the contribution to value of the residence for

E 4:13&14	Gd	Gd	39			27	31%	9/2005	27,118	30%
E 4:11&12	Ave+	Gd	53		REM	29	35%	1/2007	47,201	66%
E 4:9&10	Ave	Hx	18			18	20%	1/2005	8,566	7%
E 3:49&50	Gd	Gd	50			40	55%		8,773	10%
E 3:47&48	Ave	Ave	46			37	49%		13,865	18%
E 3:45&46	Ave	Gd	27			32	40%		7,154	7%
E 3:43&44	Ave	V Gd	45			37	49%		5,074	7%
E 3:41&42	Gd	Gd	54			37	49%		13,290	12%
E 3:39&40	Ave	Gd	56			42	59%		3,526	6%
E 3:37&38	Ave	V Gd	43			40	55%		1,526	2%
E 3:35&36	Ave	V Gd	58			37	49%		14,417	20%
E 3:33&34	Ave	Ave	43			37	49%		10,221	15%
E 3:31&32	Ave	Ave	49			40	55%		2,382	4%
E 3:29&30	Ave	Gd	46			37	49%		7,352	14%
E 3:27&28	Ave	Gd	47			37	49%		8,007	14%
E 3:25&26	Ave	Gd	26			27	31%		18,993	10%

of residential parcels in Broken Bow were below state standards. The preliminary statistic referred to is the assessment to sales ratio of 89.53 for residential sales in Broken Bow as shown in Exhibit 4 page 15. The statistic is obtained by dividing the sale price of parcels sold within a specified time frame by its assessed values of each parcel at the time of sale, and then determining the median of those ratios. The median is simply the midpoint of the array. The County Assessor also testified that she reviewed the data on residential sales by year built, shown at page 12 of the 2008 Reports and Opinions of the Property Tax Administrator for Custer County 21. Based on a review of those statistics, the County Assessor testified that she determined an adjustment of the homes built after 1960 was appropriate. The County Assessor had reported to the Property Tax Administrator that all properties dated 1950 and newer in Broken Bow were adjusted. 2008 Reports and Opinions of the Property Tax Administrator for Custer County 21 at page 28. Clearly the County Assessor took some action as can be seen from an analysis of the data in the 2008 Reports and Opinions of the Property Tax Administrator for Custer County 21. The before and after ratios are shown in the following table with the calculated percentage of adjustments to sold and unsold parcels as shown by the changes in ratios.

Strata	# of Sales	Preliminary	# of Sales	Final	% Change
2000-present	2	78.14	2	94.75	+21.25%
1995-1999	5	87.06	5	92.28	+5.99%
1990-1994	4	84.73	4	97.64	+15.23%
1980-1989	13	94.35	14	98.89	+4.81%
1970-1979	26	96.51	26	98.27	+1.82%
1960-1969	30	87.13	30	97.32	+11.69%
1950-1959	30	90.62	29	96.29	+6.25%
Broken Bow	155	89.53	154	97.44	+8.11%

In several strata, the number of sales analyzed changed. Because the ratio shown is the median or midpoint of an array, simply changing the number of sales can change the resulting statistic. The number of sales did not change in the 1960-1970 year built strata. Homes that were 48 to 38 years of age would have been found. The statistics show a change of 11.69%. Changes to value shown in the records for unsold parcels in that year built strata, based on effective age, vary from 2% to 18%. That variance would not be anticipated if the same percentage adjustment was applied to each parcel. The year built strata 1970-1979 does not show a change in the number of sales. Those homes would have been between 38 and 28 years of age for assessment year 2008. Changes to value shown in the records for unsold parcels in that year built strata, based on effective age, vary from 10% to 49%. Changes to value shown in the records for sold parcels in that year built strata, based on effective age, vary from 35% to 61%. The change in value shown in the statistics is 1.82%. The variance would not be anticipated if the same percentage adjustment was made to each parcel in the year built strata.

The County Assessor testified that she changed the depreciation schedule applicable to residential parcels in Broken Bow. Changes in the depreciation schedule would affect resulting calculations of value and would not necessarily produce changes in value that are uniform by percentage.

The County Assessor testified that if a parcel is sold above its assessed value she assumed the residence had been remodeled, noted that on the records and changed the effective age of the improvements. The effect was to reduce the amount of depreciation and thereby increase indicated value. The Taxpayer testified that the subject property was not remodeled until after

January 1, 2008. Assuming a home has been remodeled without an inspection or information other than an above-assessment-value sale is not an approved appraisal practice.

The County Assessor employed an unapproved appraisal practice to make a determination of actual value for the subject property. The records submitted by the Taxpayer show disparate changes in valuation for sold and unsold parcels with one story, brick residences in Broken Bow for tax year 2008. While absolute uniformity is not required, a reasonable attempt at uniformity is required. See *Constructor's, Inc. v. Cass County Bd of Equal*, 258 Neb. 866, 606 N.W.2d 786 (2000). When sold and unsold parcels in a class or subclass are not valued on a uniform basis the result is unequal valuation. See *County of Douglas v. Nebraska Tax Equalization and Review Commission*, 262 Neb. 578, 635 N.W.2d 413 (2001). The Taxpayer is entitled to uniform treatment and valuation on the same basis as unsold parcels.

The County Assessor testified that only depreciation was changed for the tax year 2008. The residence on the subject property has an age of 49 years, a quality rating of average, and a condition rating of good. The County Assessor's depreciation table considers effective age, condition, and quality as factors. As noted, the residence on the subject property was not remodeled but the County Assessor changed the effective age assuming a remodel. Unsold parcels with homes of average quality and good condition with an age 46 to 47 years all received 49% physical depreciation. (E3:11 & 12, 27& 28, and 29 & 30). An unsold parcel with a 48 year old residence of average quality, in very good condition received 49% physical depreciation. (E3:9&10). An unsold parcel with a 51 year old residence of average quality, in very good condition received 49% physical depreciation. (E3:13 & 14). While it is impossible to reconstruct the depreciation table used by the County Assessor, the samples noted are sufficient

IT IS ORDERED THAT:

ORDER
VI.

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.

CONCLUSIONS OF LAW
V.

to conclude that if the subject property had been valued on the same basis as unsold parcels the depreciation factor applied to the residence would have been 49%. Replacement cost new as determined by the County Board was \$141,133. (E4:8). Application of a 49% depreciation factor results in a replacement cost new less depreciation of \$71,978 (($\$141,133 \times .49 = \$69,155$) + (\$141,133 - \$69,155 = \$71,978). Adding the value of the land, the result is \$77,103 (\$71,978 + \$5,125 = \$77,103). Equalized taxable value of the subject property is \$77,103.

1. The decision of the County Board determining actual value of the subject property as of

the assessment date, January 1, 2008, is vacated and reversed.

2. Actual value, for the tax year 2008, of the subject property is:

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Land value \$ 5,125.00

Improvement value \$71,978.00

Total value \$77,103.00.

3. This decision, if no appeal is timely filed, shall be certified to the Custer County

Treasurer, and the Custer 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.

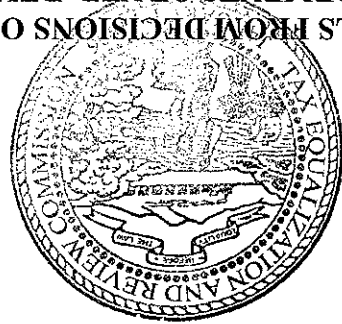
6. This decision shall only be applicable to tax year 2008.

7. This order is effective for purposes of appeal on November 3, 2009.

Signed and Sealed. November 3, 2009.

Nancy J. Salmon, Commissioner

Robert W. Hotz, Commissioner



SEAL

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

I concur in the result.

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. Halsstead*, 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., *Granger 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 City 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

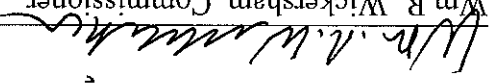
Fenner, *About Presumptions in Civil Cases*, 17 Creighton L. Rev. 307 (1984). In the view of that author, the presumption should be returned to its roots as a burden of proof. *Id.* Nebraska's

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