BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

JERRY A. SNOW, Appellant, v. KEITH COUNTY BOARD OF EQUALIZATION, Appellee.	)	Case No. 08R 135 DECISION AND ORDER AFFIRMING THE DECISION OF THE KEITH COUNTY BOARD OF EQUALIZATION

The above-captioned case was called for a hearing on the merits of an appeal by Jerry A. Snow ("the Taxpayer") to the Tax Equalization and Review Commission ("the Commission"). The hearing was held in the Hampton Inn, 200 Platte Oasis Parkway, North Platte, Nebraska, on July 29, 2009, pursuant to an Order for Hearing and Notice of Hearing issued May 28, 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.

Jerry A. Snow was present at the hearing. No one appeared as legal counsel for the Taxpayer.

J. Blake Edwards, County Attorney for Keith County, Nebraska, was present as legal counsel for the Keith 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 this case is as follows.

I.
ISSUES

The Taxpayer has asserted that actual value of the subject property as of January 1, 2008, 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, 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 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 Keith 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: Leasehold and Improvements Lot 6 K-3, Lake McConaughy, Keith County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	$70,000.00	$20,000.00	$70,000.00
Improvement	$1,980.00	$1,980.00	$1,980.00
Total	$71,980.00	$21,980.00	$71,980.00

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 May 28, 2009, set a hearing of the appeal for July 29, 2009, at 10:00 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 2008 is:

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Land value $70,000.00

Improvement value $ 1,980.00

Total value $71,980.00.

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) (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. 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).

8. 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).

9. The presumption disappears if there is competent evidence to the contrary. Id.

10. 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).

11. 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).

12. "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).

13. 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).

14. 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).

15. "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).

16. 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).

17. 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).

18. 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. *Josten-Wilbert Vault Co. v. Board of Equalization for Buffalo County*, 179 Neb. 415, 138 N.W.2d 641 (1965).

IV.
ANALYSIS

The subject property is a tract of leased land with improvements. Central Nebraska Public Power and Irrigation District ("District") is the Lessor and the Taxpayer is the Lessee. District is a governmental subdivision of the State of Nebraska. The interest of District is usually described for valuation purposes as a leased fee. See, *The Appraisal of Real Estate, Appraisal Institute*, 13th Ed. 2008 p 114. The interest of the Taxpayer is usually referred to as a leasehold

interest. Id. Leasehold interests are a taxable interest in real property. See, *Omaha Country Club v. Douglas County Board of Equalization*, 11 Neb.App. 171, 645 N.W.2d 821 (2002). In addition, state law requires assessment of the value of improvements and the value of the lease to the tenant of lands owned by a governmental subdivision. Neb. Rev. Stat. §77-1374 (Cum. Supp 2008).

As noted, land that is leased gives rise to two interests: the leased fee interest held by the owner, and the leasehold interest held by the tenant. Section 77-1374 of Nebraska Statutes prescribes taxation of the value of the lease. The interest valued by the County in this case is the leasehold interest of the Taxpayer. It is necessary to determine whether taxation of only the leasehold interest to the Taxpayer is contemplated by the Statute. The provisions of section 77-1374 requiring assessment of the value of the lease to the tenant became law in 1903. At the time of enactment, property of the State and its governmental subdivisions was wholly exempt from taxation. In 1998, Nebraska's Constitution was amended to allow taxation of property of the State or its governmental subdivisions. Since the leased fee interest of District could not have been assessed at the time the provisions of 77-1374 were enacted, the term lease should be construed to refer to the leasehold interest of the tenant which could have been assessed.

An appraiser employed by the County Assessor's office ("Appraiser") testified that taxable value of the subject property was determined by the County Board relying on the cost approach to valuation. The Cost Approach includes six steps: "(1) Estimate the land (site) value as if vacant and available for development to its highest and best use; (2) Estimate the total cost new of the improvements as of the appraisal date, including direct costs, indirect costs, and entrepreneurial profit from market analysis; (3) Estimate the total amount of accrued depreciation

attributable to physical deterioration, functional obsolescence, and external (economic) obsolescence; (5) Subtract the total amount of accrued depreciation from the total cost new of the primary improvements to arrive at the depreciated cost of improvements; (5) Estimate the total cost new of any accessory improvements and site improvements, then estimate and deduct all accrued depreciation from the total cost new of these improvements; (6) Add site value to the depreciated cost of the primary improvements, accessory improvements, and site improvements, to arrive at a value indication by the cost approach." *Property Assessment Valuation,* 2nd Ed., International Association of Assessing Officers, 1996, pp. 128 - 129.

The Taxpayer does not dispute the valuation or contribution to taxable value of the subject property made by the improvements. It is the contribution to taxable value of the Taxpayer's leasehold interest that is at issue. The leasehold interest in this appeal is defined by an Agreement reached in 1985 between District and Lake McConaughy Lessees, a Corporation ("Corporation"), an Amended and Restated Modification Agreement entered into as of February 15, 1995, between District and Corporation, an Amendment No. 1 to the Amended and Restated Modification Agreement, effective September 10, 1999, an Amendment No. 2 to the Amended and Restated Modification Agreement, effective September 28, 2007, and a sublease of a lot by Corporation to the Taxpayer. The Taxpayer paid $26,000 for the leasehold interest in 1999. Since Corporation could not sublease a greater interest than it had, a description of the leasehold interest of Corporation derived from its three agreements with District follows.

Leased premises: Four cabin areas known as K1, K2, K3, and K4. Drawings of the four areas and lots within them are attached to the 1985 agreement;

Term of the lease: 31 years, with one year added to the term of the lease at the end of any year if the lease has not been terminated;

Rent: Rents are to be redetermined each ten years. The rent payable by a Lake Front sublessee is to be 5% of the fair market value of the average Lake Front lot as determined by an appraisal or appraisals, unless otherwise agreed. By agreement of District and Corporation: Rents payable by Lake Front sublesees for the year April 1, 2007 to March 31, 2008, were $450; Rents payable for the year April 1, 2008, to March 31 2009, by a Lake Front sublesee are $1,000; Rents payable for the year April 1, 2009, to March 31, 2010, by a Lake Front sublesee are $1,500; Rents payable for the year April 1, 2010, to March 31, 2011, and annually thereafter until April 1, 2018, by a Lake Front sublessee are $2,000. Rents payable by a Second Tier sublessee are 50% of the rents payable by a Lake Front sublessee. All taxes, assessments, or other public charges for public improvements or otherwise payable by District by reason of Corporation's use or a sublessee's use are payable to District as additional rents. All rents are payable to District;

Taxes: The Corporation or sublessees are obligated to pay as additional rent all taxes, assessments, and other public charges for public improvements or otherwise, lawfully levied, assessed or imposed, by any governmental authority on the property leased and any buildings, structures or improvements.

Repairs and Maintenance: Access roads and common areas are the responsibility of the Corporation. Improvements on a lot are the responsibility of the sublessee;

Insurance: Corporation is required to maintain a $300,000 blanket liability policy. Hazard and premises liability for lots are the responsibility of the sublessee;

Subleases: Restricted to one lot per tenant and a sublease is not assignable without consent of Corporation. District may consent to the assignment of a sublease to a tenant having an interest in another lot;

Construction of improvements: Plans for construction of all improvements are subject to approval by Corporation. A cabin must be constructed on every lot for which a sublease is issued within one year of the sublease date. Cabins must be placed above an elevation of 3,282 feet;

Removal of improvements: Buildings must be removed within 180 days following termination. All other improvements and buildings not removed become property of the District;

Access: Responsibility of Corporation and sublessees. All access is to be considered public access;

Utilities: Responsibility of Corporation and sublessees;

Termination: On thirty years' notice or for cause;

Restrictions on use: Lots may not be used for commercial purposes or in violation of agreements of District with the federal government and its agencies.

Subleases from Corporation to tenants such as the Taxpayer recite many of the conditions governing the lease from District and require the sublessee to acknowledge that they have received and read the agreements between the District and Corporation. Sublessees are responsible for taxes, utilities, maintenance, repairs, and insurance. A lease in which the tenant is responsible for all operating expenses is often referred to as net lease, triple net lease or a net-net-net lease. *Property Assessment and Administration*, International Association of Assessment Officers, 1990, p. 259. The term of each sublease is for 30 years, with rolling renewals at the end of each year so that a constant 30 year term is in effect unless terminated. Special assessments

may be made by Corporation for maintenance, development supervision, and management in each area.

The fact that the interest of the Taxpayer is derived from a sublease does not mean that it cannot be valued. The Taxpayer's interest in the subject property should be valued with consideration of the terms and condition of the lease and sublease.

The Taxpayer argues that the leasehold interest has no value because rent payable by a sublessee was determined at arms' length. A leasehold interest may have value if contract rent is less than market rent, creating a rental advantage for the tenant. *The Appraisal of Real Estate*, Supra p. 114 & 115. When the contract rent exceeds market rent the leasehold is said to have negative value. *The Appraisal of Real Estate,* Supra p. 115. A rent determined by arms' length agreement and the parties' estimate of market rents may not reflect the market's judgement. The argument of the Taxpayer is essentially the same argument that a purchaser might make that his or her purchase price is the market value of the property. Purchase price does not, however, equal market value, although it may be considered when a determination of market value is made. *Forney v. Box Butte County Bd. of Equalization*, 7 Neb.App. 417, 424, 582 N.W.2d 631, 637 (1998).

The Taxpayer asserts that the value of each lot should be determined based on the discounted cash flow method and that the value of a leasehold interest could not exceed that value. The discounted cash flow method of estimating value may require knowledge of current market rental rates, lease expiration dates, expected rental rate changes, lease concessions and their effect on market rents, existing base rents and contractual base rent adjustments, renewal options, existing and anticipated expense recovery (escalation) provisions, tenant turnover,

vacancy loss and collection expenses, operating expenses, net operating income, capital items including leasing commission and tenant improvement allowances, reversions and any selling or transaction costs, and discount rates. *The Appraisal of Real Estate*, Supra p 541. All of those considerations are clearly not applicable in this instance. In this appeal, only the base rent for the subject property is known. A yield rate that was applied to the parties' agreed fair market of an average lake front parcel is known. Whether that rate is a market rate and whether it would be an appropriate rate for use in a discounted cash flow analysis is unknown. There is no evidence of the amount or frequency of assessments by the Corporation or the repayment of taxes or in lieu of tax payments made by District. In this appeal, there is no evidence of an appropriate discount rate. Without a determination of gross rents and a discount rate, an estimate of market value is not possible using the discounted cash flow method.

Market value may be determined based on transactions. If the argument of the taxpayer is that only the discount rate method may be used to estimate the contribution to value of the land component, the leasehold interest, and the County should have developed the information necessary to use the discounted cash flow technique, that argument is not persuasive. In this appeal, there is evidence of transactions from which contributions to value may be estimated. The transactions are sales of improvements with an assignment of the lot lease. (E9:27 & 28). The Appraiser testified that because a transaction would include both improvements and an interest in land, it is necessary to extract the contribution to value of the interest in land from the total transaction if an estimate of value for the land component of other parcels is to be estimated using the cost approach. An estimate of the contribution to value of the land component may be

made by deducting the estimated contribution to value of the improvements from the transaction price. *The Appraisal of Real Estate*, Supra p. 366.

The Appraiser testified that the contribution to value of the improvements was estimated as their replacement cost new less depreciation. The contribution to value of the improvements may be estimated at their depreciated cost. Id. After extraction of an estimated contribution to value of the leasehold interest, those estimates were evaluated to determine the effects of four factors; access to Lake McConaughy from the lot, view of the lake, access to the lot, and size of the lot. The Appraiser testified that all of the lots in the K3 area have equivalent access to the Lake, view of the Lake, and access to the lot. Lots in the K3 area do vary in size, however, the Appraiser testified that size of the lot did not affect its indicated contribution to value. Each leasehold in the K3 area was determined to make a contribution to value of $70,000. The Appraiser testified that after determining the contribution to value of the leasehold interest, the replacement cost new of the improvements and the combined total was analyzed based on its assessment to sale ratio. The assessment to sale ratios of the sold parcels even after consideration of a $70,000 contribution to value of the leasehold interest were 67.55%, 69.78%, 77.46% and 112.28%. (E9:27 & 28). A ratio of 100% indicates that the assessed value of a parcel is equal to its sale price. All except one of the parcels sold for less than its assessed value for the year 2008.

The County Board's estimate of value was based on use of the cost approach. Contribution to actual value of the land component, the leasehold interest, was determined using an extraction technique as described above. The contribution to actual value of the improvements was their replacement cost new less depreciation. The approach relied on by the

County Board is based on generally accepted appraisal techniques and is not unreasonable or arbitrary.

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, 2008, is affirmed.

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

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Land value	$70,000.00
Improvement value	$ 1,980.00

Total value $71,980.00.

3. This decision, if no appeal is timely filed, shall be certified to the Keith County Treasurer, and the Keith 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 September 18, 2009.

Signed and Sealed. September 18, 2009.

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Nancy J. Salmon, Commissioner

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Robert W. Hotz, 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.

The majority has considered two standards of review for its review of the County Board's decision. One standard of review is stated as a presumption found in case law and the other is stated as found in statute. 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 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. Nucholls Cty. Bd. Of Equal*., 231 Neb. 297, 437 N.W.2d 501 (1989). The presumption stated by the Court was the presumption that had been found before the statute was enacted.

Many appeals of decisions made pursuant to section 77-1511 were decided without reference to the statutory standard of review applicable to the district courts review of a county board of equalization's decision. See, e.g. *Grainger Brothers Company v. County Board of Equalization of the County of Lancaster*, 180 Neb. 571, 144 N.W.2d 161 (1966). In *Hastings Building Co., v. Board of Equalization of Adams County*, 190 Neb. 63, 206 N.W.2d 338 (1973), the Nebraska Supreme Court acknowledged that two standards of review existed for reviews by the district court; one statutory requiring a finding that the decision reviewed was unreasonable or arbitrary, and another judicial requiring a finding that a presumption that the county board of equalization faithfully performed its official duties and acted upon sufficient competent evidence was overcome. No attempt was made by the *Hastings* Court to reconcile the two standards of review that were applicable to the District Courts.

The Tax Equalization and Review Commission was created in 1995. 1995 Neb. Laws, LB 490 §153. Section 77-1511 of the Nebraska Statutes was made applicable to review of county board of equalization assessment decisions by the Commission. Id. In 2001 section 77-

1511 of Nebraska Statutes was repealed. 2001 Neb. Laws, LB 465, §12. After repeal of section 77-1511 the standard for review to be applied by the Commission in most appeals was stated in section 77-5016 of the Nebraska Statutes. Section 77-5016(8) requires a finding that the decision being reviewed was unreasonable or arbitrary. *Brenner v. Banner County Board of Equalization*, 276 Neb. 275, 753 N.W.2d 802 (2008). The Supreme Court has stated that the presumption which arose from section 77-1511 is applicable to the decisions of the Commission. *Garvey Elevators, Inc. V. Adams County Bd. of Equalization*, 261 Neb. 130, 621 N.w.2d 518 (2001).

The possible results from application of the presumption as a standard of review and the statutory standard of review are: (1) the presumption is not overcome and the statutory standard is not overcome; (2) the presumption is overcome and the statutory standard is not overcome; (3) the presumption is not overcome and the statutory standard is overcome; (4) and finally the presumption is overcome and the statutory standard is overcome. The first possibility does not allow a grant of relief, neither standard of review has been met. The second possibility does not therefore allow a grant of relief even though the presumption is overcome because the statutory standard remains. See, *City of York v. York County Bd of Equal*., 266 Neb. 297, 664 N.W.2d 445 (2003). The third possibility requires analysis. The presumption and the statutory standard of review are different legal standards, and the statutory standard remains after the presumption has been overcome. See. Id. The burden of proof to overcome the presumption is competent evidence. Id. Clear and convincing evidence is required to show that a county board of equalization's decision was unreasonable or arbitrary. See, e.g. *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb.App. 171, 645 N.W.2d 821 (2002). Competent evidence that the county board of equalization failed to perform its duties or act upon sufficient competent

evidence is not always evidence that the county board of equalization acted unreasonably or arbitrarily because the statutory standard of review remains even if the presumption is overcome. *City of York,* supra. Clear and convincing evidence that a county board of equalization's determination, action, order, or decision was unreasonable or arbitrary, as those terms have been defined, may however overcome the presumption that the county board of equalization faithfully discharged its duties and acted on sufficient competent evidence. In any event the statutory standard has been met and relief may be granted. Both standards of review are met in the fourth possibility and relief may be granted.

Use of the presumption as a standard of review has been criticized. See, G. Michael Fenner, About Presumptions in Civil Cases, 17 Creighton L. Rev. 307 (1984). In the view of that author the presumption should be returned to its roots as a burden of proof. Id. Nebraska's Supreme Court acknowledged the difficulty of using two standards of review and classified the presumption in favor of the county board of equalization as a principle of procedure involving the burden of proof, namely, a taxpayer has the burden to prove that action by a board of equalization fixing or determining valuation of real estate for tax purposes is unauthorized by or contrary to constitutional or statutory provisions governing taxation. *See, Gordman Properties Company v. Board of Equalization of Hall County*, 225 Neb. 169, 403 N.W.2d 366 (1987). Use of the *Gordman* analysis allows consideration of both the presumption and the statutory standard of review without the difficulties inherent in the application of two standards of review. It is within that framework that I have analyzed the evidence.

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Wm R. Wickersham, Commissioner