

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

GLORIA R. OTTERSBERG,	)	
	)	
Appellant,	)	Case No. 08R 156
	)	
v.	)	DECISION AND ORDER
	)	AFFIRMING THE DECISION OF
GAGE COUNTY BOARD OF	)	THE GAGE COUNTY BOARD OF
EQUALIZATION,	)	EQUALIZATION
	)	
Appellee.	)	

The above-captioned case was called for a hearing on the merits of an appeal by Gloria R. Ottersberg ("the Taxpayer") to the Tax Equalization and Review Commission ("the Commission"). The hearing was held in the Commission's Hearing Room on the sixth floor of the Nebraska State Office Building in the City of Lincoln, Lancaster County, Nebraska, on July 20, 2009, pursuant to an Order for Hearing and Notice of Hearing issued May 19, 2009. Commissioners Wickersham and Hotz were present. Commissioner Wickersham was the presiding hearing officer. Commissioner Warnes was excused from participation by the presiding hearing officer. Commissioner Salmon was absent. The appeal was heard by a quorum of a panel of the Commission.

Gloria R. Ottersberg was present at the hearing. No one appeared as legal counsel for the Taxpayer.

Randall R. Ritnour, County Attorney for Gage County, Nebraska, was present as legal counsel for the Gage 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.

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 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 Gage 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: Lots 1-5 Block 39 Glenover Addition, Beatrice, Gage County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$21,495.00	\$3,250.00	\$21,495.00
Improvement	\$43,560.00	\$37,000.00	\$35,400.00
Total	\$65,055.00	\$40,250.00	\$56,895.00

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 19, 2009, set a hearing of the appeal for July 20, 2009, at 3:00 p.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	\$21,495.00
Improvement value	<u>\$35,400.00</u>
Total value	<u>\$56,895.00.</u>

**III.  
APPLICABLE LAW**

1. Subject matter jurisdiction of the Commission in this appeal is over all questions necessary to determine taxable value. Neb. Rev. Stat. §77-5016(7) (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. “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 Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).
9. The purpose of equalization of assessments is to bring the assessment of diferent 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).

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 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).
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 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).

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).
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. *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).
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).
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) (determination of equalized taxable value) *Josten-Wilbert Vault Co. v. Board of Equalization for Buffalo County*, 179 Neb. 415, 138 N.W.2d 641 (1965) (determination of actual value).

#### **IV. ANALYSIS**

The subject property is an improved residential parcel. The residence contains 960 square feet. (E3:2). There are two detached garages on the parcel; one containing 672 square feet, and another containing 280 square feet. (E3:1). The Assessor's records show that the first portion of the residence was constructed in 1925. (E3:1). A page from an abstract indicated that initial building took place about 1924. (E14:37).

The Taxpayer noted at the hearing on the merits that the County Board failed to timely answer the Notice in Lieu of Summons issued by the Commission after filing of her appeal. The answer of the County Board was filed 36 days after service of the Notice in Lieu of Summons. The filing deadline imposed by the Commission's rules and regulation was 30 after service. 442 Neb. Admin. Code, ch 5, §004.01, (10/07). The Nebraska Supreme Court has held in *In re Application of Jantzen*, 245 Neb. 81, 511 N.W.2d 504 (1994), that the discretion of an administrative agency to allow or forbid a party to file an answer out of time “can be compared to a trial court’s discretion extending the time in which to file an untimely answer or reply. . . While the determination of whether a party in default may be permitted to answer rests largely within the discretion of the trial court. . . we have held that where it is apparent that the party in default has a meritorious defense to an action, the court must permit the answer to be filed despite the

fact that the time to answer has passed.” *Jantzen, supra*, at 96, 515. No Motion for Default Judgement was filed prior to filing of the County Board's answer. It was within the discretion of the Commission to allow a late filing of the County Board's Answer without a Motion for Default Judgement filed prior to filing of the Answer. The Taxpayer's complaint regarding late filing of the County Board's Answer is itself untimely and will not be considered further.

The Taxpayer testified that a portion of the subject property was in a 100 year flood plain and that any construction on that portion would have to be placed on three feet of fill. The Taxpayer testified generally concerning the assessment of parcels in and out of the 100 year flood plain. Much of the testimony concerned the contribution to value of the land component of various parcels. Property record files were received for the subject property and various parcels. Information concerning the land components of the parcels and various indications of contributions to actual value are summarized in the following table.

Owner	Exhibit	Parcel Size Sq. Ft.	Size Adj Value <sup>1</sup>	Factors Value <sup>2</sup>	Record Card <sup>3</sup>	Flood Plain <sup>4</sup>
Ottersberg	E3:2	35,980	\$21,495	\$21,530	\$21,495	Partial
Prebyl	E4:2	37,026	\$21,757	\$23,697	\$23,515	Unknown
Appleget	5:1	35,000	\$21,250	\$3,235	3,250 <sup>5</sup>	Yes
Houseman	6:2	14,000	\$12,000	\$12,040	\$12,000	No
Terwilleger	7:2	37,500	\$21,875	\$23,625	\$23,750	No
Blythe	8:2	16,000	\$13,000	\$2,160	2,165 <sup>5</sup>	Yes
Jurgens	9:2	42,000	\$23,000	\$3,906	3,900 <sup>5</sup>	Yes
Briggs	10:2	70,000	\$30,000	\$29,925	\$30,000	No
Buss	11:2	35,000	\$21,250	\$22,400	\$22,500	Yes
Kaiser	12:2	35,980	\$21,495	\$23,027	\$22,990	No

Owner	Exhibit	Parcel Size Sq. Ft.	Size Adj Value <sup>1</sup>	Factors Value <sup>2</sup>	Record Card <sup>3</sup>	Flood Plain <sup>4</sup>
Vogel	14:53	14,000	\$12,000	\$12,040	\$12,000	No

1. A contract appraiser testified that a formula was used to determine the contribution to value of the lots. The formula is shown in Exhibit 14 at page 55 as 10,000 = \$1.00 10,001 - 30,000 = .50% Sq. Ft, and 30,001 - up = .25% sq. ft. That expression is supported by Exhibit 14 pages 89 - 95 where the rate for Glenover is described as \$1.00 and the adjustments to the normal rate are as described.
2. Three elements for determining the contribution to value of the land component in each property record file: # of Units; Unit Value; and Adjustment. Lot Value can be calculated as the product of # of Units multiplied by Unit Value with the result multiplied by Adjustment. All of the elements vary from parcel to parcel.
3. Record card value equals the value entered in the assessment record.
4. Whether a parcel was in the flood plain or not was determined by reference to maps Exhibit 2, Exhibit 14 page 27, Exhibit 14 page 49 and Exhibit 14:50. Three parcels could not be located on the maps Prebyl, Briggs and Kaiser. Those parcels were called out of the flood plain if they lay West of the subject property.
5. The flood plain is defined as Nbhd 13 with no change in assessment indicated in the table in Exhibit 14 at page 89.

Five of the parcels are in the 100 year flood plain. A contract appraiser testified that the contribution to actual value of the land component of those parcels was not changed for tax year 2008. Exhibit 14 at page 89 indicates the flood plain is a neighborhood and that assessed value of the land would not change for 2008. The Appleget, Blythe and Jurgnes parcels had the contribution to actual value of the land component determined on that basis. The Buss parcel is described as Lots 6-10 of Block 36 Glenover. (E11:2). The Appleget parcel is described as lots 1-5 Block 36 Glenover. (E5:1). The Buss parcel adjoins the Appleget property. (E14:49). Exhibit 14 page 49 indicates that both the Appleget parcel and the Buss parcel are in the 100 year flood plain. Actual value of the land component of the Appleget parcel was not increased. (E5). The contribution to actual value of the land component of the Buss parcel was increased from

\$9,100 to \$22,500. (E11). An increase in the contribution to value of the land component of the Buss parcel does not however indicate that the subject property is overvalued.

The evidence is that the Appleget, Blythe and Jurgens parcels are completely in the flood plain. A portion of the subject property is in the flood plain but all existing improvements are not in the flood plain. The County Board reduced actual value of the subject property to \$56,895. (E1:1). Whether the County Board acted on the basis of information concerning the location of a portion of the subject property in the flood plain is unknown. The result, however, is that the taxable value of the subject property is the same as its 2006 and 2007 valuations. (E3:1). Actual value of the Appleget parcel did not increase for the tax year 2008 because it was unimproved, and land or its contributions to value were not increased for tax year 2008. The Buss parcel's taxable value increased for the tax year 2008 because the contribution to value of the improvements increased. (E11).

The Taxpayer contends that the subject property is not worth \$56,895 as determined by the County Board. The Taxpayer provided property record files for five parcels with sales information: Houseman, sale 2002, (E8:1); Jurgens, sale 2006 (E9:1); Briggs, sale 1997, (E10:1); Buss sale 1995 (E11:1); and Kaiser, sale 1995 (E12:1). The sales prior to 2006 are too remote in time for analysis.

The physical characteristics, attributes, and amenities of the subject property and the Jurgens parcel, with assessment and sale information, is summarized in the following tables.

<b>Descriptor</b>	<b>Subject</b>	<b>Jurgens</b>
Exhibit	E1 and 3	E9
Location	1113 Pellam	1301 Union

<b>Descriptor</b>	<b>Subject</b>	<b>Jurgens</b>
Lot Size	35,900	42,000
Condition	Average	Poor
Quality	Average	Low
Yr Built	1925	1925
Exterior Walls	100% Siding	100% Masonry Veneer
Style	One Story	One Story
Area Above Ground	960	535
Roof Type		
Roof Cover	Comp Shingle	Comp Shingle
HVAC	100% Warm and Cooled	
Basement	672 <sup>1</sup>	
Finished		
Walkout		
Bedrooms	3	3
Bathrooms	1	1
Garage Type	2 Detached	Detached
Garage Area	(1) 672 and (2) 280	400
Misc Imp	Porch	Porch
Lot Value	\$21,495	\$3,900
Imp Value	\$35,400	\$9,105
Taxable Value	\$56,895	\$13,005
Sale Date		1/1/06
Sale Price		\$14,000

1. The Taxpayer testified that the basement is smaller.

Comparable properties share similar quality, architectural attractiveness (style), age, size, amenities, functional utility, and physical condition. *Property Assessment Valuation*, 2<sup>nd</sup> Ed., International Association of Assessing Officers, 1996, p. 98. The differences in size, condition and quality of construction show that the subject property and the Jurgens parcel are not comparable. The sale price of a smaller residence that is inferior in quality and condition does not indicate that the subject property is overvalued.

The Taxpayer has not met her burden to show by clear and convincing evidence that the decision of the County Board was 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           \$21,495.00

Improvement value \$35,400.00

Total value           \$56,895.00.

3. This decision, if no appeal is timely filed, shall be certified to the Gage County Treasurer, and the Gage 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 2, 2009.

Signed and Sealed. September 2, 2009.

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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 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. 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