

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

THOMAS G. & MARY E. DOUGLAS, )  
TRUSTEES, THOMAS GREGG )  
DOUGLAS & MARY E. DOUGLAS )  
TRUST, )

Appellant,

v.

MERRICK COUNTY BOARD OF )  
EQUALIZATION, )

Appellee.

Case No. 09R 089

DECISION AND ORDER  
REVERSING THE DECISION OF  
THE MERRICK COUNTY BOARD OF  
EQUALIZATION

The above-captioned case was called for a hearing on the merits of an appeal by Thomas G. & Mary E. Douglas, Trustee, Thomas Gregg Douglas & Mary E. Douglas Trust ("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 December 14, 2010, pursuant to an Order for Hearing and Notice of Hearing issued October 22, 2010. Commissioner Wickersham, Chairperson of the Commission, was the presiding hearing officer. Commissioner Warnes was absent. Commissioner Wickersham, as Chairperson, designated Commissioners Wickersham, Salmon, and Hotz as a panel of the Commission to hear the appeal. Commissioner Hotz was excused. Commissioner Salmon was present. The appeal was heard by a quorum of a panel of the Commission.

Thomas G. & Mary E. Douglas, Trustee of Thomas Gregg Douglas & Mary E. Douglas Trust, were present at the hearing. No one appeared as legal counsel for the Taxpayer.

Steven M. Curry, County Attorney for Merrick County, Nebraska, was present as legal counsel for the Merrick 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 (Reissue 2009). The final decision and order of the Commission in this case is as follows.

## **I. ISSUES**

The Taxpayer has asserted that taxable value of the subject property as of January 1, 2009, 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, 2009.

## **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, 2009, ("the assessment date") by the Merrick County Assessor, value as proposed in a timely protest, and actual value as determined by the County Board is shown in the following table:

Case No. 09R 089

Description: Lot 29 Bucktail Lake, Section 18, Township 14, Range 4, Merrick County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$54,000.00	\$30,000.00	\$54,000.00
Improvement	\$281,475.00	\$178,160.00	\$281,475.00
Total	\$335,475.00	\$208,160.00	\$335,475.00

4. An appeal of the County Board's decision was filed with the Commission.
5. An Order for Hearing and Notice of Hearing issued on October 22, 2010, set a hearing of the appeal for December 14, 2010, at 9:00 a.m. CST.
6. 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.
7. Actual value of the subject property as of the assessment date for the tax year 2009 is:

Case No. 09R 089

Land value	\$ 54,000.00
Improvement value	<u>\$280,245.00</u>
Total value	<u>\$334,245.00.</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) (Reissue 2009).
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 2009).
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 2009).

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 2009).
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) (Reissue 2009).
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 different parts of a taxing district to the same relative standard, so that no one of the parts may be compelled to pay a disproportionate part of the tax. *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991); *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623, (1999).

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) (Reissue 2009).
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)

#### **IV. ANALYSIS**

The subject property is an improved parcel in rural Merrick County. The improvements on the parcel include a one story single family residence 2,785 square feet of above ground living space with a 960 square foot garage, and a yard shed. (E2:20). The Taxpayer does not contend that actual value of the subject property is less than its assessed value.

The Taxpayer contends that actual value of the subject property was determined using a technique that is different than the technique used to determine the actual value of other parcels. The property record file for the subject property shows an estimate of value in the amount of \$289,655 based on use of the cost approach. (E20:20). The property record file for the subject property also shows an estimate of value in the amount of \$335,475. (E2:21). The second estimate of value is the assessed value as determined by the County Board. A contract appraiser employed by the County Assessor described the basis on which the \$335,475 estimate was made. As described by the appraiser a model derived from sales was developed taking into account factors such as above ground living space, quality of construction, condition, presence of a basement and the degree of finish in the basement, and garages if any. From the model a contribution of value per square foot of above ground residential space would be determined for a home. The assigned per square foot value would then be multiplied by the square foot of above

ground residential area to obtain an estimate of the contribution to value made by the residence. The contributions to value of additional structures such as shed or docks were determined using the cost approach. The contribution to value of the land was determined based on sales. The sum of the contribution to value estimated for the residence, the other improvements, and the land were then summed to obtain an aggregate estimate of value. Application of the technique as described by the appraiser is shown in the notes section of the property record file. As an example the property record file for the subject property shows a calculation of  $100 \times 2785 = 275800$ . The per square foot value attributed to the above ground living area was 100 the above ground living area was 2,785 square feet. A dock value of 1230 LV for land value 54000 and shed value of 1745 are added to 275800 to obtain a total of 335,475. Application of the technique as applied to other parcels can be seen in the notes section of Exhibit 2 at pages 26, 30, 33 & 34, 37, 40, 43, 46, 50, 53, 56, 59, 62, 65, 68 & 69, 72 & 73, 77, 80 & 81, 86 & 87, 90 & 91, 96 & 97, 100 & 101, 104 & 105, 108, 111, 114, 117 & 118, 121, 124 & 125, 128 & 129, 132, 138, 141 & 142, 156 & 157, 160, & 161, 164, and 167, in Exhibit 4 at page 2, in Exhibit 5 at page 2, In Exhibit 6 at page 2, In Exhibit 7 at page 2, in Exhibit 8 at page 2, in Exhibit 9 at page 2, and in Exhibit 14 at page 2. Parcels described in Exhibit 2 at pages 135, 145, 148, and 152, in Exhibit 11 at page 2, in Exhibit 12, and in Exhibit 13 at page 2 do not show use of the technique and a comparison of the value indicated by the cost approach and the assessment of the parcels show that value as indicated by the cost approach was used for the valuation of those parcels. The appraiser indicated that for those parcels it was possible that the value indicated by the cost approach and the technique used for the subject property produced equal results. Some of the records bear a notation "ok" beside the total property value indicated by the cost approach.

(E2:148, E11:2, and E12). The evidence is that if the cost approach indicated a value equal to the technique used to value the subject property that the cost approach value was used for assessment purposes. Whether one technique or another is the basis for a determination of value is immaterial as long as it is shown that both resulted in the same value or are correlated to the same standard of value. *Banner County v. State Board of Equalization*, 226 Neb. 236, 411 N.W.2d 35 (1987).

Assessed value of the subject property was \$232,160 for the tax year 2008. (E2:19). Assessed value of the subject property for the tax year 2009. as determined by the County Board is \$335,475. (E1). The Taxpayer contends generally that the \$103,315 increase in valuation from tax year 2008 to tax year 2009, a 44.50% increase, for the subject property cannot be reconciled with the small increases or in some instances decreases in valuation assigned to other similar parcels for tax year 2009. The prior year's assessment is not relevant to the subsequent year's valuation. *DeVore v. Bd. Of Equal.*, 144 Neb. 351, 13 N.W.2d 451 (1944); *Affiliated Foods Coop v. Madison Co. Bd. Of Equal.*, 229 Neb. 605, 428 N.W.2d 201 (1988). If a prior year's assessment is not relevant then it follows that a percentage increase from that assessment is not a relevant consideration when valuation for a subsequent year is being considered. The rationale for the rule is illustrated by the facts in this appeal. On review of the subject property it was determined that for the prior assessment year the above ground living space was understated by 312 square feet and that the size of the garage had been overstated by 336 square feet. (E2:22). The per square foot contribution to value of the residence as determined for prior years was \$71.34. (E2:22). The per square foot contribution to value of the residence as determined for tax year 2009 was \$100. (E2: 20). The differential in per square foot contributed to value

from 2008 to 2009 by the residence is \$28.66 ( $\$100 - \$71.34 = \$28.66$ ). Application of the differential to the 2008 base shows that value would have increased \$70,876 ( $\$28.66 \times 2,473 = \$70,876.18$ ) based a change to \$100 per square foot. The additional 312 square feet account for a \$31,200 ( $\$100 \times 312 = \$31,200$ ) increase in value. The aggregate of the two changes is \$102,076 ( $\$70,876 + \$31,200 = \$102,076$ ). Other changes made include a reduction in the size of the garage and assessment of a dock and shed. The assessment of the dock and shed added \$1,230 and \$1,745 to value. (E2:20 & 21). The contribution to value of land was increased by \$4,000 to \$54,000 from \$50,000. (E2:19). The total of the increases to value is then \$109,051 ( $\$102,076 + \$1,230 + \$1,745 + \$4,000 = \$109,051$ ). The net increase for assessment purposes was as noted above \$103,315. The increase in valuation for tax year 2009 is explained by correction of errors in assessment for prior years and a revaluation of the subject property and others like it.

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). The Taxpayer concedes that actual value of the subject property is \$335,475 for tax year 2009. The assessed value determined for the subject property is \$335,475. (E1). The ratio of assessed to actual value for the subject property is 1. The Taxpayer has not shown that the assessed value of any parcel he considered comparable is different than the assessed value of the parcel. The evidence is that the ratio of assessed value to actual value for the parcels submitted by the Taxpayer is 1. There is no showing that the assessed value of the subject property is not equalized with the assessed value of other parcels.

The Taxpayer contends that the dock assessed as the real property is personal property. The Taxpayer testified that the dock is a “rolla dock” weighing about 250 pounds, and that the dock is on wheels and can be removed from the water. Whether an item is a fixture or removable personalty may depend on the relationship of the parties, i.e. landlord/tenant, vendor/vendee, mortgagee/mortgagor or other creditor. See, *The Fixtures Doctrine; Was It Ever Really the Law?*, Ronald W. Polston, Whittier Law Review, (1995). In this appeal the parties with differing points of reference are the Taxpayer and the County Board, and the issue is the determination of whether an item is a fixture and taxable as real property. All real property is subject to taxation unless exempted. Neb. Const, Art VIII §§ 1 and 2. As of January 1, 2007, real property as defined in statute included land, buildings, and fixtures. Neb. Rev. Stat. §77-103 (Reissue 2003). Fixtures are those items of property that have become a part of real property. Whether an item of property has become a part of real property is determined by consideration of three factors: (1) Whether the item is actually annexed to real property or something appurtenant to real property, (2) Appropriation of the item to the use or purposes of that part of the realty with which it is connected, and (3) The intention of the party making the annexation to make the item a permanent accession to the freehold. *Northern Natural Gas Co. v. State Bd. of Equalization and Assessment*, 232 Neb. 806, 443 N.W.2d 249 (1989). The three-factor analysis stated in *Northern Natural* is restated in rules and regulations promulgated by the Property Tax Administrator. 350 Neb. Admin. Code, ch 10, §001.01A (05/05). The three-factor analysis is also described and analyzed in Directive 06-02 issued by the Property Tax Administrator. The only evidence before the Commission is that the “rolla dock” is on wheels and is not attached to the subject property. The “rolla dock” is not annexed to real estate and the first part of the three part test has not been

met. The “rolla dock” was deemed to contribute \$1,230 to the value of the subject property.

(E2:20). The “rolla dock”, on the evidence before the Commission, is personal property and the contribution to value of the other improvements on the real estate should be reduced by \$1,230. The contribution to value of the other improvements on the subject property is \$1,745 ( $\$2,975 - \$1,230 = \$1,745$ ).

## **V. CONCLUSIONS OF LAW**

1. The Commission has subject matter jurisdiction in this appeal.
2. The Commission has jurisdiction over the parties to this appeal.
3. The Taxpayer has produced competent evidence that the County Board failed to faithfully perform its official duties and to act on sufficient competent evidence to justify its actions.
4. The Taxpayer has adduced sufficient, clear and convincing evidence that the 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, 2009, is reversed.
2. Actual value, for the tax year 2009, of the subject property is:

Case No. 09R 089

Land value	\$ 54,000.00
Improvement value	<u>\$280,245.00</u>
Total value	<u>\$334,245.00.</u>

3. This decision, if no appeal is timely filed, shall be certified to the Merrick County Treasurer, and the Merrick County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Reissue 2009).
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 2009.
7. This order is effective for purposes of appeal on December 22, 2010.

Signed and Sealed. December 22, 2010.

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Nancy J. Salmon, Commissioner

**SEAL**

**APPEALS FROM DECISIONS OF THE COMMISSION MUST SATISFY THE REQUIREMENTS OF NEB. REV. STAT. §77-5019 (REISSUE 2009), 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 (Reissue 2009). 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) (Reissue 2009).

The Commission is authorized to review decision of a County Board of Equalization determining taxable values. Neb. Rev. Stat. §77-5007 (Reissue 2009). 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 v. York County Bd of Equal.*, 266 Neb. 297, 664 N.W.2d 445 (2003). 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