

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

ALFORD BROOK PARK, INC., a )  
Nebraska Corporation, )  
 )  
Appellant, )  
 )  
v. )  
 )  
DOUGLAS COUNTY BOARD OF )  
EQUALIZATION, )  
 )  
Appellee. )

Case No. 08C 199

DECISION AND ORDER  
AFFIRMING THE DECISION OF  
THE DOUGLAS COUNTY BOARD OF  
EQUALIZATION

The above-captioned case was called for a hearing on the merits of an appeal by Kenneth N. Alford ("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 January 12, 2010, pursuant to an Order for Hearing and Notice of Hearing issued September 23, 2009 as amended by an Order dated December 10, 2009. Commissioners Salmon, Wickersham and Warnes were present. Commissioner Warnes was the presiding hearing officer. Commissioner Hotz was excused. The appeal was heard by a quorum of a panel of the Commission.

Kenneth N. Alford, President of Alford Brook Plaza, Inc., a Nebraska corporation, was present at the hearing. No one appeared as legal counsel for the Taxpayer.

Thomas S. Barrett, a Deputy County Attorney for Douglas County, Nebraska, was present as legal counsel for the Douglas 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 Douglas 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: LANDS SEC-TWN-RGE 10-15-12 IRREG N 220.63 S 508.63 E 179.70 FT & KNOWN AS PARCEL A TX LT 2, Douglas County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$115,000.00	\$115,000.00	\$115,000.00
Improvement	\$622,200.00	\$185,000.00	\$385,000.00
Total	\$737,200.00	\$300,000.00	\$500,000.00

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 September 23, 2009, as amended by an Order issued on December 10, 2009, set a hearing of the appeal for January 12, 2010, at 1:00 p.m. CST.
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           \$115,000.00

Improvement value \$385,000.00

Total value         \$500,000.00.

**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 an improved commercial parcel with a Class C office building built in 1970. (E2:5). The building is rated average for quality and condition. (E2:5). The Commission received conflicting evidence of the size of the building. The County's exhibits state the size of the building as 8,556 square feet, Exhibit 2 page 2; 7,920 square feet, Exhibit 2 page 11; and 8,516 square feet, Exhibit 2 page 5. The Taxpayer testified that the size of the building was 8,489 square feet.

Both parties gave opinions of valuation using the income approach. The Income Approach can be defined as “a set of procedures through which an appraiser derives a value indication for an income-producing property by converting its anticipated benefits (cash flows and reversion) into property value. This conversion can be accomplished in two ways. One year’s income expectancy can be capitalized at a market-derived rate or at a capitalization rate that reflects a specified income pattern, return on investment, and change in the value of the investment. Alternatively, the annual cash flows for the holding period and the reversion can be discounted at a specified yield rate.” *The Dictionary of Real Estate Appraisal*, Fourth Edition, Appraisal Institute, 2002, 143. The steps required for use of the income approach with direct capitalization may be summarized as: (1) estimate potential gross income; (2) deduct estimated vacancy and collection loss to determine effective gross income; (3) deduct estimated expenses to determine net operating income; and (4) divide net operating income by an estimated capitalization rate to yield indicated value. *The Appraisal of Real Estate* 13<sup>th</sup> Edition, The

Appraisal Institute, 2008, 466. A variety of techniques may be used to quantify various components of any application of the approach. *Id.* at chs 20-24.

Two major methods are used to develop an indication of value using the income approach: direct capitalization and yield capitalization. *Id.* at 465. The direct capitalization method produces an indication of value based on a single year's estimated income. *Id.* A yield capitalization method requires an analysis of income and expected returns over multiple years. *Id.* Discounted cash flow analysis is a refinement of the yield capitalization method in which cash flows and an eventual sale price are discounted at a rate to indicate a present value. *Id.* at 540.

The Taxpayer's president testified that he was a Nebraska licensed certified general appraiser. The Taxpayer provided evidence of the potential gross income for the subject property by using the actual income received for the past three years and using the market rent for the two vacant suites of \$7.50/square foot. (E6:7). The Taxpayer's president estimated the potential gross income as \$66,495. (E6:7). In addition, the Taxpayer provided the market rent for comparable parcels. (E6:6). The Taxpayer's president showed that the actual vacancy rate for the subject property was 28% in the first quarter of 2008 and had been less than 28% only once in recent years. (E6:8 & 9). Evidence regarding the market rate of vacancy, 59%, was also provided. (E6:6). The Taxpayer's president estimated the vacancy rate and collection loss as 28% for the subject property. The Taxpayer's president provided three years of operating history of the subject property showing income and expenses. (E6:10). The actual operating history of a subject property can be considered for appraisal purposes. *The Appraisal of Real Estate* 13<sup>th</sup> Edition, The Appraisal Institute, 2008, 481 - 483. An analysis using the actual

operating expenses of a parcel requires a multi-year analysis that is then used as a basis for comparison only, with comparable properties. The analysis of the Taxpayer's president is shown on his Exhibit 6 page 14 showing a net operating income of \$38,460.

The projected operating statement for the subject property, prepared by the Taxpayer's president, is shown on page 10 of Exhibit 6 and contains a deduction for taxes. When property is valued for ad valorem tax purposes, taxes should not be considered as an expense. The appropriate use of taxes is to include a factor for taxes in the capitalization rate. A "loaded" capitalization rate includes the effective tax rate. Property Assessment Valuation, Supra, at 233. The basis for that position is the interplay between tax rates, value, and resulting tax when a valuation estimate is developed using the income approach. The income approach at its simplest can be described as a formula in which income is divided by a capitalization rate to derive an estimate of value ( $I \div R = V$ ). Income equals the sum of income less expenses. As the formula is applied, if an expense is increased income is reduced and the indication of value is reduced. The inverse is true for the reduction of an expense. The reduction of an expense produces an increase in income and an increase in the value indication. Taxes to be paid are a function of both the rate and the value to which the rate is applied. If taxes are deducted for purposes of determining value; the tax rate is applied to a stated value, the tax is determined, and a deduction is taken. The process produces a circularity in the calculations. If, for example, value is reduced the resulting tax deduction should be reduced producing in turn a higher indication of value when the formula is rerun. Because the objective in an ad valorem tax proceeding is to determine the value to which the tax rate is to be applied, the formula calls for use of an unknown that will be found only with the use of the unknown itself. Use of a loaded capitalization rate avoids the

circularity produced by an expense deduction for taxes because the loaded capitalization rate is indifferent to the items of income or expense the sum of which it is divided into.

Statutory provisions for determination of actual value, the levy, and payment of the resulting tax are also important considerations. Actual or taxable value is determined as of January 1 of each year. Neb. Rev. Stat. §77-1301 (Cum. Supp. 2006). Levies on taxable value are determined by October 15 of each year. Neb. Rev. Stat. §77-1601 (Reissue 2003). The resulting amount of tax is then determined and a notice sent to a taxpayer. Neb. Rev. Stat. §77-1701 (Reissue 2003). The tax is due and payable on December 31 of each year. Neb. Rev. Stat. §77-203 (Reissue 2003). Payment of the tax due may be made in two installments, the first due on May 1 or April 1, and the second due on September 1 or August 1 of the year following its levy. Neb. Rev. Stat. §77-204 (Reissue 2003). If taxes are paid in the year after levy, and considered an expense item in the year paid, the taxes paid may not be those which are attributable to the year in which other expenses or income being annualized were determined. In short, one expense item, real property taxes, will be a year off the time frame of all other items if the taxes are paid immediately prior to the delinquency dates. Use of a loaded cap rate makes consideration of an adjustment to financial information unnecessary. For the reasons stated the use of a loaded capitalization rate will produce a more accurate estimate of actual value when the income approach is used to estimate actual value for ad valorem tax purposes.

Evidence provided by the Taxpayer's president regarding his basis for choosing the capitalization rate is shown on Exhibit 6 pages 14 and 15. His calculations resulted in a capitalization rate of 8.58%. That capitalization rate when divided into the net operating income of \$38,460 results in the indicated value being \$448,252 ( $\$38,460 / .0858$ ). The Taxpayer's

president then deducted from the \$448,252 valuation the sum of \$150,000 representing “excess deferred maintenance” for a final indicated value of \$298, 252 which he then rounds off to \$300,000. The Taxpayer’s president testified that his opinion of the actual value of the subject property for 2008 using the income approach to valuation was \$300,000.

However, the Commission notes that neither the Taxpayer nor the County used a “loaded capitalization rate”. (E6:16 and E2:11). The Taxpayer’s president did itemize and deduct taxes from the effective gross income; however, the County used a percentage deduction for expenses of 44% of the effective gross income. The Taxpayer’s president used a capitalization rate of 8.58 % while the County used 9%.

The Taxpayer alleges that his calculations are more credible than those of the County because he has provided evidence in their support while he alleges that the County does not have supporting evidence for its calculations.

The Commission finds that the calculations and supporting documentation of the Taxpayer have two deficiencies. First, the Taxpayer has taken as a deduction from his total valuation of the subject property of \$448,252, the entire “excessive deferred maintenance” of \$150,000 which he testified was the total of the excessive deferred maintenance, of \$192,000, shown on Exhibit 6 page 13, less what he considered to be an amount of a normal replacement rate of \$8,500/year times 5 years. (E6:13). This deduction is not in accordance with accepted appraisal practices which require that this item be amortized over a period of years, if considered at all.

It is the finding of the Commission that the Taxpayer’s “excessive deferred maintenance” should be allocated as “replacement allowance”. *The Appraisal of Real Estate* 13<sup>th</sup> Edition, The

Appraisal Institute, 2008, 490. “Replacement allowance is an allowance that provides for the periodic replacement of building components that wear out more rapidly than the building itself and must be replaced during the building’s economic life; sometimes referred to as reserves.” *Id.* at 460. Examples of building components that may require a replacement allowance include: roof covering, carpeting, parking areas, etc. *Id.* at 491. These are examples similar to those items the Taxpayer showed as needing reserves for replacement. (E6, page 13). The Taxpayer’s president showed a reserve as a “replacement allowance” on Exhibit 6 page 14 of \$8,500 per year.

Second, the Taxpayer deducted real estate taxes as an expense as discussed above, when he should have capitalized the tax rate when value for ad valorem tax purposes is being determined and added the effective tax rate to obtain a loaded capitalization rate. The Commission notes that both parties used an unloaded capitalization rate.

A recalculation of the valuation of the subject property making the adjustments discussed above results in the Taxpayer’s president’s Net Operating Income (NOI) of \$38,460 having added back the real estate taxes of \$6,470 (Exhibit 6 page 11) plus a reduction for reserves of \$8,500 (Exhibit 6 page 13) for a revised NOI of \$36,430 ( $\$38,460 + \$6,470 - \$8,500 = \$36,430$ ). This revised NOI of \$36,430 would then be divided by the loaded capitalization rate which is calculated by adding the effective tax rate (etr) of 2.05 % (Exhibit 6 page 11) to the capitalization rate of 8.58% (Exhibit 6 page 15) for a total of 10.63% ( $8.58\% + 2.05\% = 10.63\%$ ). This results in a taxable valuation of \$342,709 ( $\$36,430 / .1063 = \$342,709$ ). This is not; however, the opinion of value testified to by the Taxpayer’s president.

The Taxpayer testified that he had also performed the sales comparison approach to valuation of the subject property which he alleged supported the valuation he obtained from the income approach. (E6:17 and E7:1 to 26). His testimony was that the valuation of the subject property using his sales comparison approach to valuation was \$52.80 per square feet. (E6:17). This valuation per square foot multiplied times the square footage of the subject property, 8,489 results in a valuation of \$448,219. This valuation, using the sales comparison approach to valuation, compares to the \$342,709 valuation derived from the income valuation approach. The two valuations derived from the Taxpayers evidence do not support each other.

"There is a presumption that a board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action. That presumption remains until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence adduced on appeal to the contrary. From that point forward, the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon all the evidence presented. The burden of showing such valuation to be unreasonable rests upon the taxpayer on appeal from the action of the board." *DeBruce Grain, Inc. v. Otoe County Bd. of Equalization*, 7 Neb.App. 688, 696, 584 N.W.2d 837, 842 - 843 (1998).

The Commission finds that the Taxpayer has not rebutted the presumption that the County Board of Equalization faithfully performed its duties and had sufficient competent evidence for its decision. The Commission has reviewed all of the evidence presented and further finds that the Taxpayer has not shown by clear and convincing evidence that the County Board's decision was either arbitrary or unreasonable. The appeal of the Taxpayer is denied.

**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:

Case No. 08C 199

Land value            \$115,000.00

Improvement value \$385,000.00

Total value            \$500,000.00.

3. This decision, if no appeal is timely filed, shall be certified to the Douglas County Treasurer, and the Douglas 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 February 23, 2010.

Signed and Sealed. February 23, 2010.

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Nancy J. Salmon, Commissioner

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William C. Warnes, Commissioner

**SEAL**

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

I concur in the result.

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

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

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

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

held that the provisions of section 77-5011 of the Nebraska Statutes created a presumption that the County Board has faithfully performed its official duties and has acted upon sufficient competent evidence to justify its actions. See, e.g., *Ideal Basic Indus. V. Nuckolls Cty. Bd. Of Equal.*, 231 Neb. 653, 437 N.W.2d 501 (1989). The presumption stated by the Court was the presumption that had been found before the statute was enacted.

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

The Tax Equalization and Review Commission was created in 1995. 1995 Neb. Laws, LB 490 §153. Section 77-1511 of the Nebraska Statutes was made applicable to review of county board of equalization assessment decisions by the Commission. *Id.* In 2001 section 77-1511 of Nebraska Statutes was repealed. 2001 Neb. Laws, LB 465, §12. After repeal of section 77-1511 the standard for review to be applied by the Commission in most appeals was stated in section 77-5016 of the Nebraska Statutes. Section 77-5016(8) requires a finding that the decision

being reviewed was unreasonable or arbitrary. *Brenner v. Banner County Board of Equalization*, 276 Neb. 275, 753 N.W.2d 802 (2008). The Supreme Court has stated that the presumption which arose from section 77-1511 is applicable to the decisions of the Commission. *Garvey Elevators, Inc. V. Adams County Bd. of Equalization*, 261 Neb. 130, 621 N.W.2d 518 (2001).

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

determination, action, order, or decision was unreasonable or arbitrary, as those terms have been defined, may however overcome the presumption that the county board of equalization faithfully discharged its duties and acted on sufficient competent evidence. In any event the statutory standard has been met and relief may be granted. Both standards of review are met in the fourth possibility and relief may be granted.

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

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Wm R. Wickersham, Commissioner