

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

WOODMEN OF THE WORLD LIFE)
INSURANCE SOCIETY,)
)
Appellant,)
)
v.)
)
DOUGLAS COUNTY BOARD OF)
EQUALIZATION,)
)
Appellee.)

Case No. 08C 059

DECISION AND ORDER
REVERSING 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 Woodmen of the World Life Insurance Society ("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 26, 2009, pursuant to an Order for Hearing and Notice of Hearing issued September 15, 2009 as amended by an Order dated November 9, 2009. Commissioners Wickersham, Warnes, Salmon, and Hotz were present. Commissioner Wickersham was the presiding hearing officer.

Dean Holdsworth, Director of Mortgage Underwriting for Woodmen of the World Life Insurance Society, was present at the hearing. Steven D. Davidson 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: Lot 4 Block 116 City Lots, Omaha, Douglas County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$234,300.00	\$234,300.00	\$234,300.00
Improvement	\$4,119,900.00	\$2,315,700.00	\$3,666,400.00
Total	\$4,354,200.00	\$2,550,000.00	\$3,900,700.00

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 15, 2009, as amended by an Order issued on November 9, 2009, set a hearing of the appeal for January 26, 2009, at 9:00 a.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 \$ 234,300.00

Improvement value \$2,315,700.00

Total value \$2,550,000.00.

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. 2008).
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. A corporate officer or other representative of an entity, must be shown to be familiar with the property in question and have a knowledge of values generally in the vicinity to be qualified to offer an opinion of value. *Kohl's Dept. Stores v. Douglas County Bd. of Equal.*, 10 Neb.App. 809, 638 N.W.2d, 881 (2002).
16. The County Board need not put on any evidence to support its valuation of the property at issue unless the taxpayer establishes the Board's valuation was unreasonable or arbitrary. *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).
17. A Taxpayer, who only produced evidence that was aimed at discrediting valuation methods utilized by the county assessor, failed to meet burden of proving that value of property was not fairly and proportionately equalized or that valuation placed upon property for tax purposes was unreasonable or arbitrary. *Beynon v. Board of Equalization of Lancaster County*, 213 Neb. 488, 329 N.W.2d 857 (1983).
18. A Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued. Cf. *Josten-Wilbert Vault Co. v. Board of Equalization for Buffalo County*, 179 Neb. 415, 138 N.W.2d 641 (1965).

IV. ANALYSIS

The subject property is a multistory office building built in 1912 and remodeled in the late 1980's by its current owner and sole occupant. The subject property is used by its owner and sole user in conjunction with a much larger, newer office tower to which it is connected. Employees of the owner have use of a parking garage connected to the subject property and the office tower by a skywalk. The basement of the subject property is used as a print shop.

Actual value of the subject property as determined by the County Assessor was \$4,354,200. (E1:1). The County Assessor's determination of actual value was derived from use of the income approach. (E5:9). After a protest was filed a referee reviewed the County Assessor's determination. The referee recommended that actual value of the subject property be reduced to \$3,900,700. (E4:1). The referee's recommendation was derived from use of the income approach. (E4:1). A coordinator agreed with the referee's recommendation. (E4:2). The County Board adopted the recommendation of the referee and coordinator. (E1:1). An assessment report prepared by an appraiser employed by the County Assessor was offered by the County Board and received. The assessment report adopted by the County Board shows use of the income approach to estimate actual value of the subject property. (E2:12). An appraiser appearing on behalf of the Taxpayer also used the income approach to estimate actual value of the subject property. (E7:68-82).

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* 13th 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 major components of applications of the cost approach submitted by the parties are shown in the following table.

	Referee	County Assessor	Appraiser
Exhibit	E4:1	E2:12 & 13	E7:80 & 82
Rent/sq ft	\$14	\$14	\$11
Rentable sq ft	51,836 ¹ (57,836)	58,632	64,915
Gross Potential Income	\$809,704 ¹	\$820,848	\$714,065
Vacancy	14%	14%	20%
Effective Gross Income	\$624,105	\$705,929	\$571,252
Operating Expense	50%	50%	56.6%
Net Operating Income	\$312,053	\$352,965	\$247,845
Capitalization Rate	8% ²	9% ²	10.05%
Indicated value	\$3,900,700	\$3,921,800	\$2,470,000

1. The referee’s calculations contain a mathematical error $\$14 \times 57,836 = \$801,836$. $\$14 \times 51,836 = \$725,704$. The County Assessor’s submission to the County Board indicated the subject property contained 51,836 square feet of rentable space. (E5:8). The referee used \$725,704 as effective gross income.

2. The capitalization rate used by the referee and the County Assessor are unloaded. When property is valued for ad valorem tax purposes, taxes should not be considered an expense item.” *Property Assessment Valuation, 2nd Ed.*, International Association of Assessing Officers, 1996, 240. 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.

The opinion of value offered by the Taxpayer's Appraiser was supported by estimates of value developed using the income approach and the sales comparison approach. The estimate of value developed by the Taxpayer's Appraiser was based on the elements set out above. The estimate of rentable square feet used by the Taxpayer's Appraiser was derived from an examination of floor plan drawings shown in Exhibit 7 at pages 35 through 44 and other information obtained from the owner. Gross rentable square feet as determined by the Taxpayer's Appraiser is supported by the evidence.

The subject property has a basement, mezzanine area, and auditorium that are not suitable for use as office space. The Taxpayer's Appraiser testified that the basement, mezzanine, and auditorium would command a lower rent than other rentable space in the subject property. The Taxpayer's Appraiser estimated gross rent per square foot at \$11 per square foot as an average

rate applicable to the full 64,915 rentable square feet. A real estate broker, employed by the Taxpayer to advise it on potential uses of the subject property, gave his opinion that the subject property would command an average rent of \$11 as of the assessment date. The use of a gross rental rate of \$11/square foot of rentable space is supported by the evidence.

The Taxpayer's Appraiser utilized a vacancy rate of 20%. The vacancy rate was derived from a review of reports pertaining to the central business district, the area in which the subject property is located, and for class or quality of the subject property. The subject property was rated as a high class C or a low Class B property by the Taxpayer's Appraiser. The broker agreed with that characterization. The vacancy rate adopted by the Taxpayer's Appraiser is supported by the evidence.

The Taxpayer's Appraiser estimated operating costs for the subject property based on an examination of the operating history of the subject property and typical operating expenses. The operating history considered is shown in Exhibit 7, pages 103 through 107. The estimate of typical expenses was derived as detailed in Exhibit 7, pages 77 through 79. The operating history of the subject property does not include all expenses that would be incurred if the subject property were not owner occupied. "The income and expenses that are proper and acceptable for income tax purposes are not the same as those that are appropriate for the income approach. Only the reasonable and typical expenses necessary to support and maintain the income-producing capacity of the property should be allowed." *Property Assessment Valuation*, 2nd Ed., International Association of Assessing Officers, 1996, 204. That position has also been adopted by Nebraska Courts. See *In re Assessment of OL & B Ry. Co.*, 213 Neb. 71, 327 N.W.2d 108, (1982); *Spencer Holiday House, Inc., v. Board of Equalization of Hall County*, 220 Neb. 607,

371 N.W.2d 286 (1985). The reliance of the Taxpayer's Appraisal on estimated typical operating expenses for the subject property is in accordance with generally accepted appraisal techniques and the law of this state.

The Taxpayer's estimate of operating expenses did not include a deduction for real estate taxes. For reasons stated above, that modification of expenses is appropriate when using the income approach to estimate value for ad valorem tax purposes.

The estimate of operating expenses developed by the Taxpayer's Appraiser is supported with a discussion of the basis for the inclusion and the amount of each expense. (E7:77-79). Operating expenses as described by the Taxpayer's Appraiser are supported by the evidence.

The Taxpayer's Appraiser developed an unloaded capitalization rate using three sources; first, a rate developed using the market extraction method, second, a rate found in a national survey of capitalization rates; and third, a rate of return developed using what he characterized as a mortgage-equity analysis. (E7:81 &82). The market extraction method, in which a capitalization rate is derived from sales of comparable properties, is a generally accepted method for estimating a capitalization rate. See *The Appraisal of Real Estate* 13th Edition, The Appraisal Institute, 2008, 501-502. The mortgage-equity analysis is likewise a generally accepted method for estimating a capitalization rate. *The Appraisal of Real Estate* 13th Edition, The Appraisal Institute, 2008, 505-507. Capitalization rates were properly developed by the Taxpayer's Appraiser using both techniques. The results were evaluated against the national survey data and a final estimate of an unloaded capitalization rate was expressed. The evidence supports the unloaded capitalization rate developed by the Taxpayer's Appraiser.

After development of an unloaded capitalization rate, the Taxpayer's Appraiser loaded the capitalization rate with the addition of a factor for the local tax rate. For reasons stated above that is an appropriate method.

The Taxpayer's Appraiser also developed an estimate of value using the sales comparison approach. E7: 49 through 67. Nine sales were analyzed and adjusted by the Taxpayer's Appraiser. The basis for adjustments was explained and supported. The Taxpayer's Appraiser concluded that "a value estimate near that indicated by sales #4 and #5 would be supported by comparables requiring the least adjusting, and also the majority of the sales with some downward rounding as noted above." (E7:67). That conclusion is supported by the evidence.

The Taxpayer's Appraiser correlated the estimate of value obtained using the income approach, \$2,470,000, and the estimate of value using the sales comparison approach, \$2,600,000, and derived an opinion of actual value at \$2,550,000. The opinion of value given by the Taxpayer's Appraiser is supported by the evidence.

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). The opinion of value offered by the Taxpayer's Appraiser is supported by the evidence. The opinion of actual value offered by the Taxpayer's Appraiser is \$1,350,700 less than actual value as determined by the County Board ($\$3,900,700 - \$2,550,000 = \$1,350,700$). There is a 34.62 % difference between the two values ($\$1,350,700 \div \$3,900,700 = .3462$). 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). The County Board's determination of

actual value assumes that the subject property contains 51,836 square feet of rentable space. That assumption is not supported in the evidence. The County Board's determination of value is unreasonable or arbitrary.

The remaining question is actual value of the subject property considering all of the evidence. See *Garvey Elevators Inc., v. Adams County Board of Equalization*, 261 Neb. 130, 621 N.W.2d 518 (2001). The opinion of value given by the Taxpayer's Appraiser is supported by the evidence. The determination of the County Board is unsupported and is based on at least one erroneous assumption. The evidence is that actual value of the subject property as of January 1, 2008 was \$2,550,000.

**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 vacated and reversed.

**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 vacated and reversed.
2. Actual value, for the tax year 2008, of the subject property is:

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Land value	\$ 234,300.00
Improvement value	<u>\$2,315,700.00</u>
Total value	<u>\$2,550,000.00.</u>

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 July 28, 2010.

Nancy J. Salmon, Commissioner

Robert W. Hotz, Commissioner

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.

Wm R. Wickersham, Commissioner