

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

PETER A. JARDINE,	)	
	)	
Appellant,	)	Case No. 08R 399
	)	
v.	)	DECISION AND ORDER
	)	AFFIRMING THE DECISION OF
DOUGLAS COUNTY BOARD OF	)	THE DOUGLAS COUNTY BOARD OF
EQUALIZATION,	)	EQUALIZATION
	)	
Appellee.	)	

The above-captioned case was called for a hearing on the merits of an appeal by Peter A. Jardine ("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 April 6, 2010, pursuant to an Order for Hearing and Notice of Hearing issued December 31, 2009 as amended by an Order dated February 10, 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.

Peter A. Jardine 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 (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, 2008, is not equalized with the taxable value of other real property. The issues on appeal related to that assertion are:

Whether the decision of the County Board determining the equalized taxable value of the subject property is unreasonable or arbitrary;

Whether the equalized taxable value of the subject property was determined by the County Board in a manner and an amount that is uniform and proportionate as required by Nebraska's Constitution in Article VIII §1; and

The equalized taxable value of the subject property on January 1, 2008.

**II.  
FINDINGS OF FACT**

The Commission finds and determines that:

1. The Taxpayer has a sufficient interest in the outcome of the above captioned appeal to maintain the appeal.
2. The parcel of real property to which this appeal pertains ("the Subject Property") is described in the table below.

3. Actual value of the subject property placed on the assessment roll as of January 1, 2008, ("the assessment date") by the 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:

Case No. 08R 399

Description: Lot 104 Block 0 Thomsen Mile West, Omaha, Douglas County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$28,000.00	\$23,731.00	\$28,000.00
Improvement	\$228,500.00	\$209,277.00	\$213,000.00
Total	\$256,500.00	\$233,000.00 <sup>1</sup>	\$241,000.00

1. Exhibit 32 shows a total of \$233,000. The mathematical total is \$233,008.
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 December 31, 2009, as amended by an Order issued on February 10, 2010, set a hearing of the appeal for April 6, 2010, at 3:00 p.m. CDST.
7. An Affidavit of Service, which appears in the records of the Commission, establishes that a copy of the Order for Hearing and Notice of Hearing was served on all parties.
8. Actual value of the subject property as of the assessment date for the tax year 2008 is:

Case No. 08R 399

Land value	\$ 28,000.00
Improvement value	<u>\$213,000.00</u>
Total value	<u>\$241,000.00.</u>

**III.  
APPLICABLE LAW**

1. Subject matter jurisdiction of the Commission in this appeal is over all questions necessary to determine taxable value. Neb. Rev. Stat. §77-5016(7) (Cum. Supp. 2008).
2. “Actual value is the most probable price expressed in terms of money that a property will bring if exposed for sale in the open market, or in an arm’s length transaction, between a willing buyer and a willing seller, both of whom are knowledgeable concerning all the uses to which the real property is adapted and for which the real property is capable of being used. In analyzing the uses and restrictions applicable to real property the analysis shall include a full description of the physical characteristics of the real property and an identification of the property rights valued.” Neb. Rev. Stat. §77-112 (Reissue 2003).
3. Actual value may be determined using professionally accepted mass appraisal methods, including, but not limited to, the (1) sales comparison approach using the guidelines in section 77-1371, (2) income approach, and (3) cost approach. Neb. Rev. Stat. §77-112 (Reissue 2003).

4. “Actual value, market value, and fair market value mean exactly the same thing.”  
*Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).
5. Taxable value is the percentage of actual value subject to taxation as directed by section 77-201 of Nebraska Statutes and has the same meaning as assessed value. Neb. Rev. Stat. §77-131 (Reissue 2003).
6. All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation. Neb. Rev. Stat. §77-201(1) (Cum. Supp. 2008).
7. “Taxes shall be levied by valuation uniformly and proportionately upon all real property and franchises as defined by the Legislature except as otherwise provided in or permitted by this Constitution.” *Neb. Const.*, Art. VIII, §1.
8. Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value. *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).
9. The purpose of equalization of assessments is to bring the assessment of 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) (Cum. Supp. 2008).
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).

#### **IV. ANALYSIS**

The subject property is an improved parcel used for residential purposes. The two story residence on the parcel has a built in garage, and a partially finished basement. The Taxpayer asserts that taxable value of the subject property is not equalized with other parcels. 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 testified that he believed actual value of the subject property as of the assessment date was \$231,182. The County Board had determined that actual value of the subject property was \$241,000. If the Taxpayer is correct in his estimate of actual value, the ratio of actual value to assessed value for the subject property is 1.0424 ( $\$241,000 \div \$231,182 = 1.0424$ ). The Taxpayer's opinion of actual value was based on the product of the above ground square footage of the residence on the subject property multiplied by the average of the assessed value divided by above ground square footage of seven parcels he considered comparables. The methodology relied on by the Taxpayer relies on assessed values of other parcels to determine actual value of the subject property.

A Taxpayer wishing to use taxable "assessed" values to prove actual or fair market value must show that the approach used is a professionally approved mass or fee appraisal approach and demonstrate application of the approach.

A determination of actual value may be made for mass appraisal and assessment purposes by using approaches identified in Nebraska Statutes. Neb. Rev. Stat. §77-112 (Reissue 2003). The approaches identified are the sales comparison approach, the income approach, the cost approach and other professionally accepted mass appraisal methods. *Id.* Comparison of assessed values is not identified in the Nebraska Statutes as an accepted approach for a determination of actual value for purposes of mass appraisal. *Id.* Because the method is not identified in statute, proof of its professional acceptance as an accepted appraisal approach would have to be produced. *Id.* No evidence has been presented to the Commission that comparison of assessed values is a professionally accepted mass or fee appraisal approach.

The Taxpayer in this case asks the Commission to presume that the taxable “assessed” value of each offered comparable is equal to its actual value. A presumption can arise that an assessor properly determined taxable “assessed” value. *Woods v. Lincoln Gas and Electric Co.*, 74 Neb. 526, 527 (1905); *Brown v. Douglas County*, 98 Neb. 299, 303 (1915); *Gamboni v. County of Otoe*, 159 Neb. 417, 431, 67 N.W.2d 489, 499 (1954); *Ahern v. Board of Equalization*, 160 Neb. 709, 711, 71 N.W.2d 307, 309 (1955). A presumption can also arise that a County Board’s determination of taxable “assessed” value is correct. *Constructor's Inc. v. Cass Cty. Bd. of Equal.*, 258 Neb. 866, 606 N.W.2d 786 (2000). A presumption is not, however, evidence of correctness in and of itself but may be classified as a principle of procedure involving the burden of proof. See *Gordman Properties Company v. Board of Equalization of Hall County*, 225 Neb. 169, 403 N.W.2d 366 (1987).

The weight of authority is that assessed value is not in and of itself direct evidence of actual value. See *Lienemann v. City of Omaha*, 191 Neb. 442, 215 N.W.2d 893 (1974). If

however, the “taxable ‘assessed’ value comparison approach” was shown to be a professionally accepted approach for determination of actual value, and that the taxable “assessed value of the proposed comparables was equal to actual value, further analysis would be required. Techniques for use of the approach would have to be developed.

Techniques used in the sales comparison approach are instructive. In the sales comparison approach, a sale price is an indication of actual value for a sold property but must be adjusted to account for differences between properties to become an indicator of actual value for another property. *The Appraisal of Real Estate* 13<sup>th</sup> Edition, The Appraisal Institute, 2008, Ch 13. An analysis of differences and adjustments to the taxable “assessed” value of comparison properties would be necessary to obtain an indication of actual value for a subject property. See *DeBruce Grain v. Otoe County Board of Equalization*, 7 Neb.App. 688, 584 N.W.2d 837 (1998). No adjustments or analysis of adjustments necessary to compensate for differences between the subject property and the taxable “assessed” values of other parcels was presented.

The methodology of the Taxpayer presents an additional difficulty. The assessed values used by the Taxpayer may be affected by factors that add or detract from their value that are not present in the subject property. The value per square foot relied on by the Taxpayer would be affected by the relative size of the above ground area and the indicated contribution to value of other attributes or amenities. Using an unreliable number in conjunction with other unreliable numbers to arrive at an average does not make the average a reliable number. It has to be noted that the County Board did not use the average value per square foot of residential area to determine value, the number was used to evaluate value indicated by the cost approach.

Whatever the utility of the value per square foot of residential area may have for that purpose does not mean that it can be utilized in the manner adopted by the Taxpayer.

For reasons noted the Taxpayer's opinion of actual value is not persuasive.

An appraiser, employed by the County Assessor, testified that in his opinion actual value of the subject property as of the assessment date was \$263,572. Notice that a value higher than actual value, as determined by the County Board would be presented to the Commission, was not given pursuant to chapter 5 section 016.0A of the Commission's rules and regulations. The Commission will not, therefore, give further consideration to the increased actual value as testified to by the appraiser.

The evidence is then that actual value of the subject property is equal to its assessed value as determined by the County Board. There is no evidence that the actual value of any comparable is different than its assessed value. If, however a comparable parcel is so similar to the subject property that they should reasonably be expected to have equal actual values, then the assessed values of those parcels should also be equal.

The physical characteristics, attributes and amenities of the subject property and the parcels presented by the Taxpayer for comparison, with assessment and sale information, is summarized in the following tables.

<b>Descriptor</b>	<b>Subject</b>	<b>Parcel 1</b>	<b>Parcel 2</b>	<b>Parcel 3</b>
Exhibit	E5	E6:1-6	E6:7-12	E6:13-18
Location	4226 N 176 St	4130 N 175 St	17404 Taylor St	4210 N 176 St
Lot Size	10,454 Sq Ft	8,276 Sq Ft	17,860 Sq Ft	13,068 Sq Ft
Condition	Good	Good	Good	Good
Quality	Good	Good	Good	Good

Yr Built	2005	2007	2006	2006
Exterior Walls	Frame Siding	Frame Siding	Frame Siding	Frame Siding
Style	2 Story	2 Story	2 Story	2 Story
Area Above Ground	2,300 Sq Ft	2,351 Sq Ft	2,421 Sq Ft	1,003 Sq Ft
Roof Cover	Comp. Shingle	Comp. Shingle	Comp. Shingle	Comp. Shingle
HVAC	Cent. Air to Air	Cent. Air to Air	Cent. Air to Air	Cent. Air to Air
Basement	1,335 Sq Ft	1,034 Sq Ft	1,135 Sq Ft	2,187 Sq Ft
Finished	822 Sq Ft			
Bedrooms	4	4	3	4
Bathrooms	3.5	2.5	2.5	2.5
Garage Type	Built In	Built In	Built In	Built In
Garage Area	462 Sq Ft	790 Sq Ft	600 Sq Ft	794 Sq Ft
Misc Imp	Gas Fireplace, Wood Deck, Sprinkler System, Security System, Brick Trim	Sprinkler System, Brick Veneer	Gas Fireplace, Sprinkler system, Brick Veneer	Gas Fireplace, Sprinkler System, Brick Veneer
Lot Value	\$28,000	\$28,000	\$28,000	\$28,000
Imp Value	\$213,000	\$206,124	\$209,715	\$202,674
Taxable Value	\$241,000	\$234,124 <sup>1</sup>	\$237,715 <sup>1</sup>	\$230,674 <sup>1</sup>
Sale Date	3/14/08	8/31/07	4/30/07	11/17/06
Sale Price	\$241,000	\$232,202	\$247,500	\$246,690

<b>Descriptor</b>	<b>Subject</b>	<b>Parcel 4</b>	<b>Parcel 5</b>
Exhibit	E5	E6:19-24	6:25-30
Location	4226 N 176 St	4222 N 176	17577 Taylor St
Lot Size	10,454 Sq Ft	11,761 Sq Ft	8,276 Sq Ft

Condition	Good	Good	Good
Quality	Good	Good	Good
Yr Built	2005	2005	2005
Exterior Walls	Frame Siding	Frame Siding	Frame Siding
Style	2 Story	2 Story	2 Story
Area Above Ground	2,300 Sq Ft	2,355 Sq Ft	2,276 Sq Ft
Roof Cover	Comp. Shingle	Comp. Shingle	Comp. Shingle
HVAC	Cent. Air to Air	Cent. Air to Air	Cent. Air to Air
Basement	1,335 Sq Ft	1,083 Sq Ft	876 Sq Ft
Finished	822 Sq Ft		
Bedrooms	4	4	4
Bathrooms	3.5	2.5	2.5
Garage Type	Built In	Built In	Built In
Garage Area	462 Sq Ft	733 Sq Ft	941 Sq Ft
Misc Imp	Gas Fireplace, Wood Deck, Sprinkler System, Security System, Brick Trim	Metal Fireplace, Sprinkler System, Brick Veneer	Gas Fireplace, Sprinkler System, Brick Veneer
Lot Value	\$28,000	\$28,000	\$28,000
Imp Value	\$213,000	\$209,975	\$193,997
Taxable Value	\$241,000	\$237,975 <sup>1</sup>	\$221,997 <sup>1</sup>
Sale Date	3/14/08	5/27/05	7/15/05
Sale Price	\$241,000	\$248,623	\$204,000

<b>Descriptor</b>	<b>Subject</b>	<b>Parcel 6</b>	<b>Parcel 7</b>
Exhibit	E5	6:31-36	6:37-42
Location	4226 N 176 St	17628 Boyd St	4318 N 174 Av

Lot Size	10,454 Sq Ft	11,761 Sq Ft	7,841 Sq Ft
Condition	Good	Good	Good
Quality	Good	Good	Good
Yr Built	2005	2005	2005
Exterior Walls	Frame Siding	Frame Siding	Frame Siding
Style	2 Story	2 Story	2 Story
Area Above Ground	2,300 Sq Ft	1,944 Sq Ft	2,164
Roof Cover	Comp. Shingle	Comp. Shingle	Comp. Shingle
HVAC	Cent. Air to Air	Cent. Air to Air	Cent. Air to Air
Basement	1,335 Sq Ft	933 Sq Ft	941 Sq Ft
Finished	822 Sq Ft		
Bedrooms	4	4	4
Bathrooms	3.5	2.5	2.5
Garage Type	Built In	Built In	Built In
Garage Area	462 Sq Ft	600 Sq Ft	528 Sq Ft
Misc Imp	Gas Fireplace, Wood Deck, Sprinkler System, Security System, Brick Trim	Gas Fireplace, Sprinkler System, Brick Veneer, Wood Fence	Gas Fireplace, Sprinkler System, Brick Veneer
Lot Value	\$28,000	\$28,000	\$28,000
Imp Value	\$213,000	\$172,575	\$185,264
Taxable Value	\$241,000	\$200,575 <sup>1</sup>	\$213,264 <sup>1</sup>
Sale Date	3/14/08	6/6/05	5/25/07
Sale Price	\$241,000	\$202,851	\$227,000

1. Variances between values indicated as Total Property Value on the first page of the property profile and values indicated on real property values page may be attributed to rounding.

Parcel 4 is very similar to the subject property. The assessed value of Parcel 4 is \$3,025 less than the assessed value of the subject property (\$241,000 - \$237,975 = \$3,025). The

differences in assessed values do not indicate that the values are not equalized. Parcel 1 is also similar to the subject property even though it is two years newer. The assessed value of Parcel 1 is \$8,798 less than the assessed value of the subject property ( $\$241,000 - \$232,202 = \$8,798$ ). The difference is 3.65% of the assessed value of the subject property ( $\$8,798 \div \$241,000 = .0365$ ). The difference is not grossly excessive and does not represent a difference on which relief can be granted.

Finally, there is evidence that the assessed values of various parcels are not supported by the information supplied by the County Board. It is necessary to do more than criticize the County Board's determinations to obtain relief. For reasons stated above the Taxpayer's claim for relief cannot be granted.

## **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. 08R 399

Land value	\$ 28,000.00
Improvement value	<u>\$213,000.00</u>
Total value	<u>\$241,000.00.</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 May 26, 2010.

---

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 (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