

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

JOSEPH D. FREUND JR., TRUSTEE,	)	
JOSEPH D. FREUND, IRREVOCABLE	)	
TRUST,	)	Case Nos. 09A 045, 09A 046, 09A 047, 09A
	)	048, 09A 049, 09A 050, 09A 051
Appellant,	)	& 09A 052
	)	
v.	)	DECISION AND ORDER
	)	AFFIRMING THE DECISIONS OF
KIMBALL COUNTY BOARD OF	)	THE KIMBALL COUNTY BOARD OF
EQUALIZATION,	)	EQUALIZATION

Appellee.

The above-captioned cases were called for a hearing on the merits of appeals by Joseph D. Freund Jr., Trustee, Joseph D. Freund, Irrevocable Trust ("the Taxpayer") to the Tax Equalization and Review Commission ("the Commission"). The hearing was held in the Holiday Inn Express, 508 2nd Avenue South, Kearney, Nebraska, on November 29, 2010, pursuant to an Order for Hearing and Notice of Hearing issued March 19, 2010 as amended by an Order dated September 30, 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.

Douglas J. Lukassen, property manager for Joseph D. Freund Jr., Trustee of Joseph D. Freund, Irrevocable Trust, was present at the hearing. Sterling T. Huff appeared as legal counsel for the Taxpayer.

David L. Wilson, County Attorney for Kimball County, Nebraska, was present as legal counsel for the Kimball 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 the consolidated cases is as follows.

## **I. ISSUES**

The Taxpayer has asserted that taxable value of the subject property as of January 1, 2009, is less than taxable value as determined by the County Board. The issues on appeal related to that assertion are:

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

The taxable value of the subject property on January 1, 2009.

## **II. FINDINGS OF FACT**

The Commission finds and determines that:

1. The Taxpayer has a sufficient interest in the outcome of the above captioned appeals to maintain them.
2. The parcels of real property to which the above captioned appeals pertain are ("the Subject Property") described in the tables below.

3. Taxable value of each parcel of the subject property placed on the assessment roll as of January 1, 2009, ("the assessment date") by the Kimball County Assessor, value as proposed in timely protests, and taxable value as determined by the County Board is shown in the following tables:

Case No. 09A 045

Description: S½ Section 3, Township 13, Range 55, Kimball County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Agricultural Land	\$92,360.00	\$86,960.00	\$92,360.00
Total	\$92,360.00	\$86,960.00	\$92,360.00

Case No. 09A 046

Description: All Section 21, Township 14, Range 55, Kimball County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Agricultural Land	\$108,875.00	\$75,710.00	\$108,875.00
Total	\$108,875.00	\$75,710.00	\$108,875.00

Case No. 09A 047

Description: All Section 22, Township 14, Range 55, Kimball County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Agricultural Land	\$123,870.00	\$112,890.00	\$123,870.00
Home Site	\$8,725.00	In Ag Land	\$8,725.00
Residence	\$63,150.00	\$63,150.00	\$63,150.00
Farm Site	\$1,240.00	In Ag Land	\$1,240.00
Outbuilding	\$39,960.00	\$39,960.00	\$39,960.00
Total	\$236,945.00	\$216,000.00	\$236,945.00

Case No. 09A 048

Description: All Section 27, Township 14, Range 55, Kimball County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Agricultural Land	\$154,120.00	\$127,570.00	\$154,120.00
Farm Site	\$445.00	In Ag Land	\$445.00
Outbuilding	\$41,740.00	\$41,740.00	\$41,740.00
Total	\$196,305.00	\$169,310.00	\$196,305.00

Case No. 09A 049

Description: All (exc 5.71 acres in SE¼SE¼) Section 28, Township 14, Range 55, Kimball County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Agricultural Land	\$121,595.00	\$109,320.00	\$121,959.00
Total	\$121,595.00	\$109,320.00	\$121,595.00

Case No. 09A 050

Description: SE¼ Section 33, Township 14, Range 55, Kimball County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Agricultural Land	\$31,320.00	\$26,285.00	\$31,320.00
Total	\$31,320.00	\$26,285.00	\$31,320.00

Case No. 09A 051

Description: N½ less 3.78 acres Section 33, Township 14, Range 55, Kimball County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Agricultural Land	\$87,580.00	\$63,425.00	\$87,580.00
Total	\$87,580.00	\$63,425.00	\$87,580.00

Case No. 09A 052

Description: All Section 34, Township 14, Range 55, Kimball County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Agricultural Land	\$137,335.00	\$109,135.00	\$137,335.00
Total	\$137,335.00	\$109,135.00	\$137,335.00

4. Appeals of the County Board's decisions were filed with the Commission.
5. The appeals were consolidated for hearing by order of the Commission.
6. An Order for Hearing and Notice of Hearing issued on March 19, 2010, as amended by an Order issued on September 30, 2010, set a hearing of the appeals for November 29, 2010, at 2:00 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. Taxable value of each parcel for the tax year 2009 is:

**Case No. 09A 045**

Agricultural land \$ 92,360.00  
Total \$ 92,360.00

**Case No. 09A 046**

Agricultural land \$ 108,875.00  
Total \$ 108,875.00

**Case No. 09A 047**

Agricultural land \$ 123,870.00  
Farm Site \$ 1,240.00

Home Site	\$ 8,725.00
Residence	\$ 63,150.00
Out Buildings	<u>\$ 39,960.00</u>
Total	<u>\$236,945.00</u>

**Case No. 09A 048**

Agricultural land	\$154,120.00
Farm Site	\$ 445.00
Our Buildings	<u>\$ 41,740.00</u>
Total	<u>\$196,305.00</u>

**Case No. 09A 049**

Agricultural land	\$121,595.00
Total	<u>\$121,595.00</u>

**Case No. 09A 050**

Agricultural land	\$31,320.00
Total	<u>\$31,320.00</u>

**Case No. 09A 051**

Agricultural land	\$87,850.00
Total	<u>\$87,850.00.</u>

**Case No. 09A 052**

Agricultural land	\$137,335.00
Total	<u>\$137,335.00.</u>

### III. APPLICABLE LAW

1. Subject matter jurisdiction of the Commission in each of the above captioned appeals is over all questions necessary to determine taxable value. Neb. Rev. Stat. §77-5016(7) (Reissue 2009).
2. “Actual value is the most probable price expressed in terms of money that a property will bring if exposed for sale in the open market, or in an arm’s length transaction, between a willing buyer and a willing seller, both of whom are knowledgeable concerning all the uses to which the real property is adapted and for which the real property is capable of being used. In analyzing the uses and restrictions applicable to real property the analysis shall include a full description of the physical characteristics of the real property and an identification of the property rights valued.” Neb. Rev. Stat. §77-112 (Reissue 2009).
3. “Actual value may be determined using professionally accepted mass appraisal methods, including, but not limited to, the (1) sales comparison approach using the guidelines in section 77-1371, (2) income approach, and (3) cost approach.” Neb. Rev. Stat. §77-112 (Reissue 2009).
4. “Actual value, market value, and fair market value mean exactly the same thing.”  
*Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).
5. Taxable value is the percentage of actual value subject to taxation as directed by section 77-201 of Nebraska Statutes and has the same meaning as assessed value. Neb. Rev. Stat. §77-131 (Reissue 2009).

6. All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation. Neb. Rev. Stat. §77-201(1) (Reissue 2009).
7. Agricultural land and horticultural land shall be valued for purposes of taxation at seventy five percent of its actual value. Neb. Rev. Stat. §77-201 (2) (Reissue 2009).
8. "Agricultural land and horticultural land means a parcel of land which is primarily used for agricultural or horticultural purposes, including wasteland lying in or adjacent to and in common ownership or management with other agricultural land and horticultural land. Agricultural land and horticultural land does not include any land directly associated with any building or enclosed structure." Neb. Rev. Stat. §77-1359 (1) (Reissue 2009).
9. "Agricultural or horticultural purposes means used for the commercial production of any plant or animal product in a raw or unprocessed state that is derived from the science and art of agriculture, aquaculture, or horticulture. Agricultural or horticultural purposes includes the following uses of land:
  - (a) Land retained or protected for future agricultural or horticultural purposes under a conservation easement as provided in the Conservation and Preservation Easements Act except when the parcel or a portion thereof is being used for purposes other than agricultural or horticultural purposes; and
  - (b) Land enrolled in a federal or state program in which payments are received for removing such land from agricultural or horticultural production shall be defined as agricultural land or horticultural land." Neb. Rev. Stat. §77-1359 (2) (Reissue 2009).



10. 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).
11. 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).
12. The presumption disappears if there is competent evidence to the contrary. *Id.*
13. The order, decision, determination, or action appealed from shall be affirmed unless evidence is adduced establishing that the order, decision, determination, or action was unreasonable or arbitrary. Neb. Rev. Stat. §77-5016 (8) (Reissue 2009).
14. 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).
15. "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).
16. 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).

17. 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).
18. “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).
19. 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).
20. 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).
21. 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) (determination of actual value).

#### **IV. ANALYSIS**

The subject property consists of eight parcels of agricultural land and horticultural land in Kimball County, Nebraska. Two of the parcels are improved. The contribution to value of the improvements is not disputed by the Taxpayer. The unimproved lands are used for grazing or are enrolled in the Conservation Reserve Program (“CRP”). The Taxpayer contends that actual value of the subject property should be derived from its purchase in January of 2008 for \$1,100,000.

The subject property was purchased after a shareholder and officer in H. M. Vowers, Inc., the corporation owning the property, advised the tenant that the property would be listed the next day for \$1,200,000. The tenant stated he knew someone who might purchase the property and contacted the Taxpayer. The Taxpayer offered \$1,100,000 for the subject property to be paid within 30 days. The offer was accepted by the shareholders of H.M. Vowers, Inc., with the proviso that closing would not occur for 6 months allowing time for the purchase of another residence for one of the shareholders. At least one of the shareholders of H. M. Vowers was motivated to sell by an illness, leukemia, and a desire to be near a hospital. The tenant became the property manager for the Taxpayer after the subject property was purchased. The County Assessor for Kimball County testified that in her opinion the sale and purchase of the subject property was not an arm’s-length transaction and should not be considered for valuation of the subject property or any other property. The County Assessor for Kimball County based her opinion on the fact that the subject property has not been exposed for sale on the open market and that a prior business relationship existed between the tenant and the seller.

Arm's-length transactions are sales between two or more parties, each seeking to maximize their positions from the transaction. 350 Neb. Admin. Code, ch 12, §002.21 (03/09). Arm's-length transactions are deemed qualified sales. 350 Neb. Admin. Code, ch 12, §002.11 (3/09). Prices disclosed in qualified sales are used to estimate the value of unsold parcels. See, Neb. Admin. Code, chs 12 & 50, (03/09). "Sales that are not arms-length ... should be identified and rarely if ever used." *The Appraisal of Real Estate*, 13<sup>th</sup> Edition, Appraisal Institute, 2008, p. 304. Non arm's-length sales are usually not made on the open market or are not made with the objective of maximizing the financial position of the parties involved. Thus, they provide unreliable evidence of market value. *Mass Appraisal of Real Property*, International Association of Assessing Officers, p 53, (1999). Market value can be defined as "the most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeably, and assuming the price is not affected by undue stimulus. Implicit in this definition is the consummation of a sale as of a specified date and the passing of title from seller to buyer under conditions whereby (1) both buyer and seller are typically motivated; (2) both parties are well informed or well advised, and acting in what they consider their best interests; (3) a reasonable time is allowed for exposure in the open market; (4) payment is made in terms of cash in United States dollars or in terms of financial arrangements comparable thereto; (5) the price represents the normal consideration for the property sold unaffected by special or creative financing or sales concessions granted by anyone associated with the sale." *Property Assessment Valuation*, 2<sup>nd</sup> Ed., International Association of Assessing Officers, 1996, p. 100. Nebraska Statutes require the valuation of agricultural land and horticultural land at 75% of its actual value. Neb. Rev. Stat. §77-

201(2)(Reissue 2009). Actual value of real property for purposes of taxation means the market value of real property in the ordinary course of trade. Neb. Rev. Stat. 77-112 (Reissue 2009). “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). The Commission agrees with the County Assessor. The subject property was offered for sale to only one prospective purchaser. The seller, because of the illness of one of its shareholders, was motivated to sell by a factor other than the maximization of sale proceeds. Sale and purchase of the subject property was not an arms-length transaction and should not be considered evidence of its actual value.

Even if, however, sale and purchase of the subject property is considered to be an arm’s length transaction, the purchase price of property, standing alone, is not conclusive of the actual value of the property for assessment purposes; it is only one factor to be considered in determining actual value. *Reynolds v. Keith County Board of Equalization*, \_\_\_N.W.2d, 18 Neb.App. 616 (2010). The property manager for the Taxpayer testified that taxable value of each parcel should be a taxable value that equaled taxable value for the tax year 2008. The prior year’s assessment is not relevant to the subsequent year’s valuation. *DeVore v. Bd. Of Equal.*, 144 Neb. 351, 13 N.W.2d 451 (1944); *Affiliated Foods Coop v. Madison Co. Bd. Of Equal.*, 229 Neb. 605, 428 N.W.2d 201 (1988).

The County Assessor testified that taxable value of the subject property was 75% of its actual value for the agricultural land and horticultural land portions and 100% of actual value for the home sites, farm sites, and improvements. The County Assessor testified that actual value of the agricultural land and horticultural land was determined based on its soil types as assigned to

LVGs, use classifications and the values indicated by sales for each LVG within a use classification. The methodology described by the County Assessor meets the requirements of rules and regulations promulgated by the Tax Commissioner. There is no evidence that value of the agricultural lands and horticultural lands as derived from use of the County Assessor's methodology is not actual value of those portions of the subject property. As noted above the contribution to value of the improvements was not disputed by the Taxpayer.

**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 decisions of the County Board are unreasonable or arbitrary and the decisions of the County Board should be affirmed.

**VI.  
ORDER**

**IT IS ORDERED THAT:**

1. The decisions of the County Board determining taxable values of the parcels comprising subject property as of the assessment date, January 1, 2009, are affirmed.

2. Taxable value, for the tax year 2009, of each parcel described in an appeal as referenced by the Case No. is:

**Case No. 09A 045**

Agricultural land	\$ 92,360.00
Total	<u>\$ 92,360.00</u>

**Case No. 09A 046**

Agricultural land	\$ 108,875.00
Total	<u>\$ 108,875.00</u>

**Case No. 09A 047**

Agricultural land	\$ 123,870.00
Farm Site	\$ 1,240.00
Home Site	\$ 8,725.00
Residence	\$ 63,150.00
Out Buildings	<u>\$ 39,960.00</u>
Total	<u>\$236,945.00</u>

**Case No. 09A 048**

Agricultural land	\$154,120.00
Farm Site	\$ 445.00
Our Buildings	<u>\$ 41,740.00</u>
Total	<u>\$196,305.00</u>

**Case No. 09A 049**

Agricultural land	\$121,595.00
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Total \$121,595.00

**Case No. 09A 050**

Agricultural land \$31,320.00

Total \$31,320.00

**Case No. 09A 051**

Agricultural land \$87,850.00

Total \$87,850.00.

**Case No. 09A 052**

Agricultural land \$137,335.00

Total \$137,335.00.

3. This decision, if no appeal is timely filed, shall be certified to the Kimball County Treasurer, and the Kimball County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Reissue 2009).
4. Any request for relief, by any party, which is not specifically provided for by this order is denied.
5. Each party is to bear its own costs in this proceeding.
6. This decision shall only be applicable to tax year 2009.
7. This order is effective for purposes of appeal on November 3, 2010.

Signed and Sealed. November 3, 2010.

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Nancy J. Salmon, Commissioner

**SEAL**



**APPEALS FROM DECISIONS OF THE COMMISSION MUST SATISFY THE REQUIREMENTS OF NEB. REV. STAT. §77-5019 (REISSUE 2009), OTHER PROVISIONS OF NEBRASKA STATUTES, AND COURT RULES.**

I concur in the result.

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

The Commission is an administrative agency of state government. See, *Creighton St. Joseph Regional Hospital v. Nebraska Tax Equalization and Review Commission*, 260 Neb. 905, 620 N.W.2d 90 (2000). As an administrative agency of state government the Commission has only the powers and authority granted to it by statute. *Id.* The Commission is authorized by statute to review appeals from decisions of a county board of equalization, the Tax Commissioner, and the Department of Motor Vehicles. Neb. Rev. Stat. §77-5007 (Reissue 2009). In general, the Commission may only grant relief on appeal if it is shown that the order, decision, determination, or action appealed from was unreasonable or arbitrary. Neb. Rev. Stat. §77-5016(8) (Reissue 2009).

The Commission is authorized to review decision of a County Board of Equalization determining taxable values. Neb. Rev. Stat. §77-5007 (Reissue 2009). Review of County Board of Equalization decisions is not new in Nebraska law. As early as 1903, Nebraska Statutes provided for review of County Board assessment decisions by the district courts. Laws 1903, c. 73 §124. The statute providing for review did not state a standard for that review. *Id.* A standard of review stated as a presumption was adopted by Nebraska's Supreme Court. See, *State v. Savage*, 65 Neb. 714, 91 N.W. 716 (1902) (citing *Dixon Co. v. Halstead*, 23 Neb. 697, 37

N.W. 621 (1888) and *State v. County Board of Dodge Co.* 20 Neb. 595, 31 N.W. 117 (1887)). The presumption was that the County Board had faithfully performed its official duties and had acted upon sufficient competent evidence to justify its actions. See *Id.* In 1959, the legislature provided a statutory standard for review by the district courts of county board of equalization, assessment decisions. 1959 Neb Laws, LB 55, §3. The statutory standard of review required the District Court to affirm the decision of the county board of equalization unless the decision was arbitrary or unreasonable or the value as established was too low. *Id.* The statutory standard of review was codified in section 77-1511 of the Nebraska Statutes. Neb. Rev. Stat. §77-1511 (Cum. Supp. 1959). After adoption of the statutory standard of review, Nebraska Courts have held that the provisions of section 77-5011 of the Nebraska Statutes created a presumption that the County Board has faithfully performed its official duties and has acted upon sufficient competent evidence to justify its actions. See, e.g. *Ideal Basic Indus. V. Nucholls Cty. Bd. Of Equal.*, 231 Neb. 297, 437 N.W.2d 501 (1989). The presumption stated by the Court was the presumption that had been found before the statute was enacted.

Many appeals of decisions made pursuant to section 77-1511 were decided without reference to the statutory standard of review applicable to the district courts review of a county board of equalization's decision. See, e.g. *Grainger Brothers Company v. County Board of Equalization of the County of Lancaster*, 180 Neb. 571, 144 N.W.2d 161 (1966). In *Hastings Building Co., v. Board of Equalization of Adams County*, 190 Neb. 63, 206 N.W.2d 338 (1973), the Nebraska Supreme Court acknowledged that two standards of review existed for reviews by the district court; one statutory requiring a finding that the decision reviewed was unreasonable or arbitrary, and another judicial requiring a finding that a presumption that the county board of

equalization faithfully performed its official duties and acted upon sufficient competent evidence was overcome. No attempt was made by the *Hastings* Court to reconcile the two standards of review that were applicable to the District Courts.

The Tax Equalization and Review Commission was created in 1995. 1995 Neb. Laws, LB 490 §153. Section 77-1511 of the Nebraska Statutes was made applicable to review of county board of equalization assessment decisions by the Commission. *Id.* In 2001, section 77-1511 of Nebraska Statutes was repealed. 2001 Neb. Laws, LB 465, §12. After repeal of section 77-1511, the standard for review to be applied by the Commission in most appeals was stated in section 77-5016 of the Nebraska Statutes. Section 77-5016(8) requires a finding that the decision being reviewed was unreasonable or arbitrary. *Brenner v. Banner County Board of Equalization*, 276 Neb. 275, 753 N.W.2d 802 (2008). The Supreme Court has stated that the presumption which arose from section 77-1511 is applicable to the decisions of the Commission. *Garvey Elevators, Inc. V. Adams County Bd. of Equalization*, 261 Neb. 130, 621 N.W.2d 518 (2001).

The possible results from application of the presumption as a standard of review and the statutory standard of review are: (1) the presumption is not overcome and the statutory standard is not overcome; (2) the presumption is overcome and the statutory standard is not overcome; (3) the presumption is not overcome and the statutory standard is overcome; (4) and finally the presumption is overcome and the statutory standard is overcome. The first possibility does not allow a grant of relief, neither standard of review has been met. The second possibility does not therefore allow a grant of relief even though the presumption is overcome because the statutory standard remains. See, *City of York v. York County Bd of Equal.*, 266 Neb. 297, 664 N.W.2d 445 (2003). The third possibility requires analysis. The presumption and the statutory standard of

review are different legal standards, and the statutory standard remains after the presumption has been overcome. See *Id.* The burden of proof to overcome the presumption is competent evidence. *Id.* Clear and convincing evidence is required to show that a county board of equalization's decision was unreasonable or arbitrary. See, e.g. *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb.App. 171, 645 N.W.2d 821 (2002). Competent evidence that the county board of equalization failed to perform its duties or act upon sufficient competent evidence is not always evidence that the county board of equalization acted unreasonably or arbitrarily because the statutory standard of review remains even if the presumption is overcome. *City of York*, 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