

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

THOMAS N. GOETZINGER,)	
)	
Appellant,)	Case No. 09R 078
)	
v.)	DECISION AND ORDER
)	REVERSING THE DECISION OF
SARPY COUNTY BOARD OF)	THE SARPY COUNTY BOARD OF
EQUALIZATION,)	EQUALIZATION
)	
Appellee.)	

The above-captioned case was called for a rehearing on the merits of an appeal by Thomas N. Goetzinger ("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 August 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 Salmon was excused. Commissioner Hotz was present. The appeal was heard by a quorum of a panel of the Commission.

Thomas N. Goetzinger was present at the hearing. No one appeared as legal counsel for the Taxpayer.

Michael A. Smith, a Deputy County Attorney for Sarpy County, Nebraska, was present as legal counsel for the Sarpy 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 actual value of the subject property as of January 1, 2009, 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, 2009.

II.
FINDINGS OF FACT

The Commission finds and determines that:

1. The Taxpayer has a sufficient interest in the outcome of the above captioned appeal to maintain the appeal.
2. The parcel of real property to which this appeal pertains ("the Subject Property") is described in the table below.
3. Actual value of the subject property placed on the assessment roll as of January 1, 2009, ("the assessment date") by the Sarpy 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: TAX LOT D3 27-13-13 (1.34 AC) LAPLATTE, Sarpy County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$37,560.00	\$9,450.00	\$37,560.00
Improvement	\$32,997.00	\$10,000.00	\$9,070.00
Total	\$70,557.00	\$19,450.00	\$46,630.00

4. An appeal of the County Board's decision was filed with the Commission.
5. An Order for Hearing and Notice of Hearing issued on May 12, 2010, as amended by an Order issued on July 27, 2010, set a hearing of the appeal for August 30, 2010, at 9:00 a.m. CDST.
6. An Affidavit of Service, which appears in the records of the Commission, establishes that a copy of the Order for Hearing and Notice of Hearing was served on all parties.
7. Actual value of the subject property as of the assessment date for the tax year 2009 is:

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Land value \$37,560.00

Improvement value \$ 8,835.00

Total value \$46,395.00.

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) (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. 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) (Reissue 2009).
11. Proof that the order, decision, determination, or action appealed from was unreasonable or arbitrary must be made by clear and convincing evidence. See, e.g., *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb.App. 171, 645 N.W.2d 821 (2002).
12. "Clear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved." *Castellano v. Bitkower*, 216 Neb. 806, 812, 346 N.W.2d 249, 253 (1984).

13. A decision is "arbitrary" when it is made in disregard of the facts and circumstances and without some basis which could lead a reasonable person to the same conclusion. *Phelps Cty. Bd. of Equal. v. Graf*, 258 Neb 810, 606 N.W.2d 736 (2000).
14. A decision is unreasonable only if the evidence presented leaves no room for differences of opinion among reasonable minds. *Pittman v. Sarpy Cty. Bd. of Equal.*, 258 Neb 390, 603 N.W.2d 447 (1999).
15. "An owner who is familiar with his property and knows its worth is permitted to testify as to its value." *U. S. Ecology v. Boyd County Bd. Of Equalization*, 256 Neb. 7, 16, 588 N.W.2d 575, 581 (1999).
16. The County Board need not put on any evidence to support its valuation of the property at issue unless the taxpayer establishes the Board's valuation was unreasonable or arbitrary. *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).
17. A Taxpayer, who only produced evidence that was aimed at discrediting valuation methods utilized by the county assessor, failed to meet burden of proving that value of property was not fairly and proportionately equalized or that valuation placed upon property for tax purposes was unreasonable or arbitrary. *Beynon v. Board of Equalization of Lancaster County*, 213 Neb. 488, 329 N.W.2d 857 (1983).
18. A Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued. Cf. *Lincoln Tel. and Tel. Co. v. County Bd. Of Equalization of York County*, 209 Neb. 465, 308 N.W.2d 515 (1981); *Arenson v. Cedar County*, 212 Neb. 62, 321 N.W.2d 427 (1982) (determination

of equalized taxable value); *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 is an improved parcel. The improvement on the parcel is a 1,064 square foot single family residence. (E6:1). A part of the subject property is in a floodway. (E5:1). New structures cannot be placed in the floodway. Most of the subject property is in a floodplain. Building in a floodplain is restricted. The Taxpayer purchased the subject property in August of 2008, for \$45,000. (E3:24). Immediately after purchase of the subject property the Taxpayer began remodeling the residence. The residence was not liveable as of January 1, 2009. Initial value of the subject property as determined by the County Assessor was \$70,557. (E1:1). Value as determined by the County Assessor did not reflect Taxpayer's remodeling project that had made the residence unliveable as of January 1, 2009. The County Board, on review, reduced the contribution to value made by the residence. (E1:1). After an inspection an appraiser for the County Assessor ("appraiser") determined, after correcting errors in the property record file, that the contribution to value made by the residence should be reduced further. (E2:1).

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.* The cost approach includes six steps: "(1) Estimate the land (site) value as if vacant and available for development to

its highest and best use; (2) Estimate the total cost new of the improvements as of the appraisal date, including direct costs, indirect costs, and entrepreneurial profit from market analysis; (3) Estimate the total amount of accrued depreciation attributable to physical deterioration, functional obsolescence, and external (economic) obsolescence; (4) Subtract the total amount of accrued depreciation from the total cost new of the primary improvements to arrive at the depreciated cost of improvements; (5) Estimate the total cost new of any accessory improvements and site improvements, then estimate and deduct all accrued depreciation from the total cost new of these improvements; (6) Add site value to the depreciated cost of the primary improvements, accessory improvements, and site improvements, to arrive at a value indication by the cost approach.”

Property Assessment Valuation, 2nd Ed., International Association of Assessing Officers, 1996, p. 128 - 129. The basis for the County Board’s determination of actual value is shown in Exhibit 3. Exhibit 3 illustrates application of the cost approach. The Taxpayer has not disputed the County Board’s determination that the residence contributed \$9,070 to value as shown in Exhibit 3 at page 25. After an inspection an appraiser determined that the contribution to value of the residence was \$8,835.00. (E2:1 and E6:1).

The County Board agreed with the County Assessor’s estimate and determined that the land component of the subject property contributed \$37,560 to actual value. (E1:1). The County Assessor’s estimate was based on an analysis of sales and a table developed for use in tax year 2008. The assessor’s analysis for the tax year 2009 was based on two sales. The table on which estimates of value were based was received as Exhibit 6 page 4. The table at page 4 of Exhibit 6 shows that if the method of valuation was based on acres in the parcel the first acre was deemed to contribute \$35,000 to value, the second acre \$8,000 and the third and each succeeding acre

\$3,000. (E6:4). The subject property contains 1.32 acres. (E6:1). As applied to the subject property the table in Exhibit 6 at page 4 indicates that the contribution to value made by the land component is \$37,560 ($\$35,000 + (\$8,000 \times .32 = \$2,560) = \$37,560$).

The Taxpayer contends that the land component contributes \$6,000 to \$7,000 per acre based on sales in the neighborhood of the subject property and prior year's valuation practices of the County Assessor. 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). Property record files for the sold parcels on which the Taxpayer relies are found in Exhibit 10. The first sale on which the Taxpayer relies is composed of three parcels totaling 89.3 acres ($56.37 + .25 + 32.68$). (E10:2, 5, & 8). The parcels sold on July 8, 2008 to the Girl Scouts of America for \$325,000. (E10:1, 4 & 7). The per acre price for the sale of the three parcels was \$3,639.42 ($\$325,000 \div 89.3 = \$3,639.42$).

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 (03/09). 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 arm's-length ... should be identified and rarely if ever used." *The Appraisal of Real Estate*, 13th 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). Sales involving charitable, religious, or educational institutions may not be arm's-length transactions. These are often full or partial gifts and thus not representative of market value. *Mass Appraisal of Real Property*, International Association of Assessing Officers, p. 53, (1999). There is no evidence that the sale to the Girl Scouts of America is an arm's-length transaction.

Sales of multiple parcels may be difficult to analyze. For example, in the context of ratio studies used to evaluate appraisal performance, sales of multiple parcels is subject to limitations. "If the appraiser needs to include multiple parcel sales, he or she should first determine whether the parcels are contiguous or whether the sale comprises a single economic unit or multiple economic units. Regardless of whether the parcels are contiguous, any multiple-parcel sale that also involves multiple economic units generally should not be used in ratio studies because of the likelihood that these sales include some plottage value or some discount for economies of scale, unless adequate adjustments for those factors can be made in the sales price." *Standard on Ratio Studies*, International Association of Assessing Officers, p. 50 (2010). Plottage value is created when combined parcels have greater value than they did separately. *Mass Appraisal of Real Property*, International Association of Assessing Officers, p. 213, (1999). Economies of scale in manufacturing enterprises produce lower unit costs if a large number of like items are produced. See, *Dictionary of Real Estate*, Fourth Edition, Appraisal Institute p. 92 (2002). Economies of scale in appraisal refers to the marginal utility of the next unit, acre, square foot purchased and its contribution to value of the whole. See, *Property Appraisal and Assessment Administration*, International Association of Assessing Officers, p. 41-43, (1990). The application of the concept of economies of scale or marginal utility is illustrated in the table shown in Exhibit 6 at page 4.

The Taxpayer has not shown that the contribution to value of each of the three parcels was not affected by plottage or economies of scale. Valuation of the three parcels as a single unit using the table developed by the County Assessor indicated that actual value of the parcels was \$304,900 ($\$35,000 + \$8,000 + (87.3 \times \$3,000 = \$261,900) = \$304,900$). The sale of 89.30 acres to the Girl Scouts of America for \$325,000 in three parcels, for a calculated average per acre price of \$3,639.42, is not evidence that the contribution to value of the land component of the subject property is between \$6,000 and \$7,000 as asserted by the Taxpayer. Nor is the sale to the Girl Scouts of America evidence that the contribution to value of the land component of the subject property is \$3,639.42 per acre.

The Taxpayer relied on the sale of a parcel described in Exhibit 26. The sale was recorded June 18, 2004. (E26:1). The assessment date at issue in this proceeding is January 1, 2009. The Taxpayer did not have an opinion of the effect a 4½ year interval would have on value that might be indicated by the sale. A sale in 2004 that is unadjusted for the effects of time is not evidence of the contribution to value made by the land component of the subject property for tax year 2009.

The Taxpayer also relied on a sale of parcels described in Exhibits 33 and 34. The sale was recorded September 25, 2003. (E33:1 & E34:1). The assessment date at issue in this proceeding is January 1, 2009. The Taxpayer did not have an opinion of the effect a five year interval would have on value that might be indicated by the sale. The sale of two parcels as shown in Exhibits 33 and 34 is complicated further by the fact that the lots are not contiguous, one of the lots is improved with a residence, one of the lots is unimproved, and one of the lots is in the flood plain while the other is in the flood way. A sale in 2003 composed of two parcels

with varying characteristics, and that is unadjusted for the effects of time, is not evidence of the contribution to value made by the land component of the subject property for tax year 2009.

The Taxpayer also relied on a sale of parcels described in Exhibits 37 and 38. The sale was recorded November 30, 2005. (E37:1 & E38:1). The assessment date at issue in this proceeding is January 1, 2009. The Taxpayer did not have an opinion of the effect a three year interval would have on value that might be indicated by the sale. The sale of two parcels as shown in Exhibits 37 and 38 is complicated further by the fact that the lots are not contiguous, one of the lots is improved with a residence, one of the lots is unimproved, and one of the lots is in the flood plain while the other is in the flood way. A sale in 2005, composed of two parcels with varying characteristics, and that is unadjusted for the effects of time, is not evidence of the contribution to value made by the land component of the subject property for tax year 2009.

For tax year 2008 the County Assessor created a subclass of real estate denominated as Rec or recreational. All lands along the Platte River, Elkhorn River, and Missouri River in a flood plain or flood way were included in the subclass. Although the subject property met those criteria, it was not included in the subclass for the tax year 2008. For tax year 2009, the subject property was included in the subclass. The Taxpayer argues generally that the contribution to value of parcels in the subclass should have been determined with additional consideration of location. Specifically the Taxpayer asserted that parcels on the Missouri River were more valuable than parcels on the Platte River because boating was possible on the Missouri River and was not possible on the Platte River. The Taxpayer also noted that few sales occurred in the subclass as defined by the County Assessor. If few sales occur in an area including three rivers, it is reasonable to expect even fewer sales in a portion of that area. It is not necessary for the

County Assessor to define a subclass with such precision that it is even more difficult to obtain sales or other data on which he or she may estimate value. The remedy that each property owner has in a mass appraisal system is to protest the value of his or her parcel and show how the value obtained using a mass appraisal approach is not applicable. The Taxpayer has not shown that the contribution to value of the land as determined by the County Board based on mass appraisal techniques is arbitrary or unreasonable.

The County Board's determination of actual value was based on the County Assessor's estimate of value determined using the cost approach. After inspection, an appraiser employed by the County Assessor determined that the assessment records for the subject property were incorrect and that correction would change the estimate of value produced by use of the cost approach. The County Board produced evidence that its determination of actual value was based on incorrect information. The County Board's evidence is clear and convincing evidence that its determination was unreasonable or arbitrary. The Taxpayer did not offer an opinion of value and did not produce evidence of comparable sales from which actual value could be determined. The County Board's revised estimate of actual value is the most reasonable evidence before the Commission.

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, 2009, is vacated and reversed.
2. Actual value, for the tax year 2009, of the subject property is:

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Land value	\$37,560.00
Improvement value	<u>\$ 8,835.00</u>
Total value	<u>\$46,395.00.</u>

3. This decision, if no appeal is timely filed, shall be certified to the Sarpy County Treasurer, and the Sarpy 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 September 29, 2010.

Signed and Sealed. September 29, 2010.

Robert W. Hotz, 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. 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.

Wm. R. Wickersham, Commissioner