

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

MARTIN MARIETTA MATERIALS INC.,)	
)	
Appellant,)	Case Nos. 07M-003, 07M-004, 07M-005,
)	07M-006, 07M-007, 07M-008, 07M-009,
v.)	07M-010, 07M-011, 07M-012, 07M-014
)	07A-068, 07A-071 and 07A-079
)	
CASS COUNTY BOARD OF)	DECISION AND ORDER
EQUALIZATION,)	REVERSING AND AFFIRMING
)	DECISIONS OF
Appellee.)	THE CASS COUNTY BOARD OF
)	EQUALIZATION
)	

The above-captioned cases were called for a hearing on the merits of appeals by Martin Marietta Materials Inc. ("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 pursuant to orders of the Commission. Commissioners Wickersham, Warnes, Salmon, and Hotz were present.

Matt Edwards, plant manager, of Martin Marietta Materials Inc., was present at the hearing. Michael L. Schleich appeared as legal counsel for the Taxpayer.

Nathan B. Cox, County Attorney for Cass County, Nebraska, was present as legal counsel for the Cass County Board of Equalization ("the County Board").

The Commission took statutory notice, received exhibits, and heard testimony.

The Commission is required to state its final decision and order concerning an appeal, with findings of fact and conclusions of law, on the record or in writing. Neb. Rev. Stat. §77-5018 (Cum. Supp. 2008). The final decision and order of the Commission in the consolidated cases is as follows.

**I.
ISSUES**

The Taxpayer has asserted that taxable value of the subject property as of January 1, 2007, 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, 2007.

**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 ("the Subject Property") are described in the tables below.
3. Actual value of each parcel of the subject property placed on the assessment roll as of January 1, 2007, ("the assessment date") by the Cass County Assessor, value as proposed

in timely protests, and actual value as determined by the County Board is shown in the following tables:

Case No. 07M-003

Description: Underground Mineral Interest SE $\frac{1}{4}$ Section 3, Township 10, Range 11, Cass County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$1,343,105.00	\$-0-	\$1,343,105.00
Total	\$1,343,105.00	\$-0-	\$1,343,105.00

Case No. 07M-004

Description: Underground Mineral Interest Section S $\frac{1}{2}$ NE $\frac{1}{4}$ Section 10, Township 10, Range 11, (160) Cass County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$455,731.00	\$-0-	\$455,731.00
Total	\$455,731.00	\$-0-	\$455,731.00

Case No. 07M-005

Description: Underground Mineral Interest E 50 A N $\frac{1}{2}$ SE $\frac{1}{4}$ Section 10, Township 10, Range 11, Cass County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$375,238.00	\$-0-	\$375,238.00
Total	\$375,238.00	\$-0-	\$375,238.00

Case No. 07M-006

Description: Underground Mineral Interest W $\frac{1}{2}$ NE $\frac{1}{4}$ Exc N 45A Section 11, Township 10, Range 11, Cass County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$142,370.00	\$-0-	\$142,370.00
Total	\$142,370.00	\$-0-	\$142,370.00

Case No. 07M-007

Description: Underground Mineral Interest Lot 8 SE $\frac{1}{4}$ SE $\frac{1}{4}$ Exc Hwy Section 11, Township 10, Range 11, (34.88) Cass County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$450,570.00	\$-0-	\$450,570.00
Total	\$450,570.00	\$-0-	\$450,570.00

Case No. 07M-008

Description: Underground Mineral Interest W $\frac{1}{2}$ SE $\frac{1}{4}$ EXC Tax Lot 9 Section 11, Township 10, Range 11, (69.52) Cass County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$427,111.00	\$-0-	\$427,111.00
Total	\$427,111.00	\$-0-	\$427,111.00

Case No. 07M-009

Description: Underground Mineral Interest E $\frac{1}{2}$ SW $\frac{1}{4}$ Section 11, Township 10, Range 11, Cass County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$315,397.00	\$-0-	\$315,397.00
Total	\$315,397.00	\$-0-	\$315,397.00

Case No. 07M-010

Description: Underground Mineral Interest W $\frac{1}{2}$ SW $\frac{1}{4}$ Section 11, Township 10, Range 11, Cass County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$866,136.00	\$-0-	\$866,136.00
Total	\$866,136.00	\$-0-	\$866,136.00

Case No. 07M-011

Description: Underground Mineral Interest NE $\frac{1}{4}$ Exc Hwy Section 14, Township 10, Range 11, (154.29) Cass County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$392,386.00	\$-0-	\$392,386.00
Total	\$392,386.00	\$-0-	\$392,386.00

Case No. 07M-012

Description: Underground Mineral Interest E $\frac{1}{2}$ NW $\frac{1}{4}$ Section 14, Township 10, Range 11, (80)Cass County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$566,949.00	\$-0-	\$566,949.00
Total	\$566,949.00	\$-0-	\$566,949.00

Case No. 07M-014

Description: Underground Mineral Interest SW $\frac{1}{4}$, S $\frac{1}{2}$ SE $\frac{1}{4}$, E 30A N $\frac{1}{2}$ SE $\frac{1}{4}$ Section 10, Township 10, Range 11 Cass County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$372,630.00	\$-0-	\$372,630.00
Total	\$372,630.00	\$-0-	\$372,630.00

Case No. 07A-068

Description: SE¼ Section 3, Township 10, Range 11, Cass County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Agricultural Land	\$173,030.00	\$173,030.00	\$173,030.00
Home Site	In Ag Land	In Ag Land	In Ag Land
Residence	\$34,498.00	\$34,345.00	\$40,345.00
Farm Site	In Ag Land	In Ag Land	\$-0-
Outbuilding	\$5,847.00	\$5,847.00	\$-0-
Total	\$213,375.00	\$213,375.00	\$213,375.00

Case No. 07A-071

Description: W½NE¼ Exc N45A Section 11, Township 10, Range 11, (34.53 Cass County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Agricultural Land	\$24,933.00	\$24,933.00	\$24,933.00
Total	\$24,933.00	\$24,933.00	\$24,933.00

Case No. 07A-079

Description: SE¼ Exc Mineral Interest Section 10, Township 10, Range 11, Cass County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Agricultural Land	\$156,665.00	\$156,665.00	\$156,665.00
Home Site	In Ag Land	In Ag Land	In Ag Land
Residence	\$37,245.00	\$37,245.00	\$37,245.00
Farm Site	In Ag Land	In Ag Land	In Ag Land
Outbuilding	\$7,796.00	\$7,796.00	\$7,796.00
Total	\$201,706.00	\$201,706.00	\$201,706.00

4. Appeals of the County Board's decisions were filed with the Commission.
5. The County Board was served with Notices in Lieu of Summons and duly answered those Notices.
6. The appeals were consolidated for hearing by order of the Commission.
7. An Order for Hearing and Notice of Hearing issued on August 25, 2009, set a hearing of the appeals for September 9, 2009, at 9:00 a.m. CDST.
8. 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.
9. Actual value of each parcel for the tax year 2007 is:

Case No. 07M-003

Assessment is void. Taxable value is 0

Case No. 07M-004

Assessment is void. Taxable value is 0

Case No. 07M-005

Assessment is void. Taxable value is 0

Case No. 07M-006

Assessment is void. Taxable value is 0

Case No. 07M-007

Assessment is void. Taxable value is 0

Case No. 07M-008

Assessment is void. Taxable value is 0

Case No. 07M-009

Assessment is void. Taxable value is 0

Case No. 07M-010

Assessment is void. Taxable value is 0

Case No. 07M-011

Assessment is void. Taxable value is 0

Case No. 07M-012

Assessment is void. Taxable value is 0

Case No. 07M-014

Assessment is void. Taxable value is 0

Case No. 07A-068

Agricultural land	\$ 173,030.00
Home Site	\$ In Ag Land
Residence	\$ 40,345.00
Total	<u>\$ 213,375.00</u>

Case No. 07A-071

Agricultural land	\$ 24,933.00
Total	<u>\$ 24,933.00</u>

Case No. 07A-079

Agricultural land	\$ 156,665.00
Home Site	\$ In Ag Land
Residence	\$ 37,245.00
Farm Site	\$ In Ag Land
Outbuilding	\$ 7,796.00
Total	<u>\$ 201,706.00.</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) (Supp. 2007).
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. 2006).
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 to obtain proportionate valuation requires a comparison of the ratio of assessed to actual value for the subject property and comparable property. *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).
9. 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).

10. 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).
11. 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).
12. 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).
13. 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).

14. 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).
15. 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).
16. The presumption disappears if there is competent evidence to the contrary. *Id.*
17. The order, decision, determination, or action appealed from shall be affirmed unless evidence is adduced establishing that the order, decision, determination, or action was unreasonable or arbitrary. Neb. Rev. Stat. §77-5016 (8) (Cum. Supp. 2006).
18. Proof that the order, decision, determination, or action 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).
19. "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).
20. 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).

21. 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).
22. A corporate officer or other representative of an entity, must be shown to be familiar with the property in question and have a knowledge of values generally in the vicinity to be qualified to offer an opinion of value. *Kohl's Dept. Stores v. Douglas County Bd. of Equal.*, 10 Neb.App. 809, 638 N.W.2d 881 (2002).
23. 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).
24. A Taxpayer, who only produced evidence that was aimed at discrediting valuation methods utilized by the county assessor, failed to meet the 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).
25. 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

In 2006, the Cass County Assessor retained the services of a geologist and appraiser (“Appraiser”) to review property in Cass County and determine the value of mineral interests. The Appraiser determined that a mineral with potential value, limestone, lays under much of Cass County. The Appraiser also determined that the area in which limestone had commercial potential for commercial mining of limestone was in the southeast portion of Cass County. The Appraiser then identified 184 parcels which could potentially be subject to mineral interest valuation. (E28:2). Included in the appraisal were lands operating under a Conditional Use Permit for mining purposes, and any lands not operating under a Conditional Use Permit which may have mineral interests which may be taxable under Nebraska property tax law and regulations as described in Nebraska Administrative Code, Title 350, Chapter 13-Mineral Interests regulations. (E28:2). The property rights being appraised were described in the Appraiser’s report as being limited to the mineral interests of parcels which have a Conditional Use Permit for mining associated with them, or on parcels where mineral extraction is occurring and can be seen, or on parcels that the appraiser was informed that mineral extraction was occurring. (E28:5). The Appraiser testified that a Conditional Use Permit was necessary for the lawful mining of limestone in Cass County. The Appraiser also testified that at least two parcels were identified for appraisal even though Conditional Use permits did not exist or were not filed properly.

The Appraiser understood that a part of the appraisal assignment was to identify parcels of land in Cass County which may be undergoing active mining, may be mined within a time

frame of several years in the future, or have been mined out and are unsuitable for mineral extraction purposes. The Appraiser determined that two property parcel types, Minerals Non-Producing and Minerals Producing, should be considered based on rules and regulations of the Property Tax Administrator. (E28:12). Seven classifications of mineral interests were created by the Appraiser. (E28:12). The descriptors, and definitions of the classes extracted from Exhibit 28 pages 12 and 13 are as follows:

Descriptor	Definition
Mineral Future	Parcels that may be mined beyond a five year period based on the assessment year. ¹
Mineral Exhausted	The mineral content of the parcel or portions of a parcel are exhausted
Mineral Active	Those parcels being actively mined or those that may be mined in the next five years. ¹
Mineral Obsolescence	Parcels with true mineral potential but are currently withheld from production due to technical, functional, and/or economic (external) obsolescence. Technical obsolescence issues would include insufficient chemical purity or strength for intended use. Functional obsolescence would include lack of rock strength to maintain safe underground openings, excess water intrusion, too high a waste percentage to allow for economic mining, or too close to the surface for underground mining and too deep for surface mining. Economic, or external, obsolescence would include unusual underground bed thickness, which prevents current equipment from being used, and conditions of marketability of the mineral product due to market conditions.
Mineral Processing	Parcels which appear to have a primary use as the processing (crushing, grinding, screening, stockpiling, etc) and administrative site for the mineral extractions operations.
Minerals Unknown	Potential mineral interest parcels for which the Assessor's office did not have sufficient information to assign the parcel to a more definitive status.
Non-Mineral in Character	Parcels which appear to have a highest and best use as something other than mineral extraction. ²

1. Rules and regulations issued by the Property Tax Administrator define producing mineral interests and non-producing mineral interests. 350 Neb. Admin. Code, ch 13, §001.02A &

001.02B (5/05). “A producing mineral interest shall be the interest created in a mine, quarry mineral spring, or oil or gas well at the time it has come into production and for which production payments are being made or received.” 350 Neb. Admin. Code, ch13, §001.02A (5/05). “A non-producing mineral interest is one in which there is no known activity related to the recovery of a mineral.” 350 Neb. Admin. Code, ch13, §001.02B (5/05). An assessor is required to determine the actual value of all mineral interests whether producing or non-producing. 350 Neb. Admin. Code, ch13, §001.02.04 (5/05). An assessor is also required to consider the likelihood of a mineral to be extracted or to begin extraction within a several year time frame, and whether the present value of a mineral interest that will be extracted diminishes in value the more remote the extraction is likely to be in terms of time or certainty of extraction. 350 Neb. Admin. Code, ch13, §001.02.07 (5/05). The Appraiser determined, in conjunction with the County Assessor and others, that mineral which would not be extracted within the next five years would not be valued.

2. Most of the parcels in this classification are within the city limits of Louisville and Weeping Water. (28:13).

The Appraiser testified that simply having mineral in the ground did not indicate the minerals had value. The Appraiser testified that the value of minerals would be determined based on factors relating to quantity, quality, production costs, when production could begin, and sale price of the extracted mineral. The Appraiser testified that he gathered as much information as he could from limestone mine operators. The Appraiser also testified that the County Assessor prohibited him from contacting property owners other than limestone mine operators. Only those mineral interest parcels designated as Mineral Active were deemed subject to assessment in the appraisal. (E28:13). A list of the 20 parcels for which a mineral value was determined appears as Table 1 attached to the Appraisers’s report. If a mineral interest was determined to have value, a notice of its valuation and assessment was created by the County Assessor. The valuation and assessment of the surface interest of a parcel having assessed minerals was separated from valuation and assessment of the mineral interests.

A map was produced by the Taxpayer showing various parcels for which a mineral value had been assessed. (E41-Exhibit 4). The map shows in yellow those parcels from which limestone mineral was being extracted as of January 1, 2007, and in green parcels from which

minerals were not being produced but were under lease for production. Minerals on both the green and yellow parcels were valued by the Appraiser and assessed by Cass County.

The valuation and assessment process described above produced divergent results for tracts shown on Exhibits 4 to 41. The tracts marked 6 and F have a common owner. Tract 6 is leased for the production of limestone, and minerals on that tract are valued and taxed. Tract F adjoins tract 6. Tract F is not leased for mineral production nor are any minerals on that parcel valued or taxed. A witness for the Taxpayer testified that the Taxpayer holds the mineral lease for tract 6 and attempted to have the lease extend to Tract F as well but the owner refused to lease both tracts. Tract A adjoins tract 4, which is being actively mined by the Taxpayer. The Taxpayer has offered on several occasions to lease Tract A for mineral production. Consideration offered for the lease of the minerals on tract A has exceeded five times its assessed value. A witness for the Taxpayer testified that if a lease were granted, production from Tract A could begin within less than five years. The Appraiser testified that at the time of his appraisal he had no information relating to minerals on Tract A or F. As noted above, the Appraiser was also prohibited from contacting the owners of Tracts A or F to obtain information about the minerals on those parcels. The Appraiser testified that his appraisal was affected by that restriction and had an impact on the result.

The Appraiser's work was also hampered by the refusal of some mining operators to discuss their operations.

This is not the first time that the valuation and taxation of limestone mineral interests has come before the Commission. *See, e.g., Constructors, Inc. v. Cass County Bd. Of Equalization*, 258 Neb. 866, 600 N.W.2d 786 (2000). In *Constructors, Inc.*, the appellants argued that the

uniformity clause found in Article VIII, Sec 1, of Nebraska's Constitution had been violated because they had been taxed on mineral interests beneath their property in Cass County when other similarly situated land owners had not been taxed on minerals beneath their properties. *Id.* at 874, 792-793. The *Constructors, Inc.*, Court found that the assessment practices of the assessor had in effect created two subclasses of agricultural land: (1) Land controlled by someone who does not operate mining operations elsewhere in Cass County, and (2) land controlled by those who own or have entered some type of agreement with companies who operate mining operations elsewhere in Cass County. *Id.* at 874, 793. The de facto classifications found by the Court violated the uniformity clause because they were not based on a substantial difference of situation between the mine operators and others whose minerals were attributed to have no value or a public policy reason that would support differential tax treatment. *Id.* at 875, 793.

It is clear from the evidence that various parcels in Cass County have subsurface mineral, limestone, that contribute to actual value of the fee simple interest and that value is assessed. It is also clear that two parcels, parcels A and F shown on Exhibits 4 to 41, have minerals that contribute to actual value but did not have that value assessed. If the failure to assess the contribution to value made by limestone in, on, or under parcels A and F was an attempt to avoid taxing some mineral interests while taxing others, that is not permitted by the uniformity clause. *See Id.* Absolute uniformity of approach for taxation may not be possible. There must be a reasonable attempt at uniformity. *County of Sarpy v. State Board of Equalization & Assessment*, 185 Neb. 760, 178 N.W.2d 765 (1970). If the failure to assess any mineral interest was inadvertent errors, unobtainable information, or the impossibility of determining a defensible value, then the uniformity clause would not be violated.

The Appraiser was retained to develop “a current actual value appraisal of all real properties in Cass County, Nebraska, operating under conditional use permits for mining purposes, to determine the valuation of mineral interests, mineral leases, and mineral reserves. This appraisal also entailed determining if other parcels not operating under conditional use permits have current market value for mineral interests, mineral leases, and mineral reserves. The appraiser also investigated equalization for all similar properties within Cass County to ensure that all identified mineral interests under Nebraska Administrative Code Title 350 Chapter 13 were valued uniformly and proportionately. (E28:2).

A conditional use permit is necessary to extract limestone in Cass County. It is reasonable to assume that properties for which a conditional use permit had been obtained could have mineral interests that contributed to the actual value of the fee simple. The Appraiser made a further investigation to find parcels with mineral extraction and found two parcels for which conditional use permits had not been obtained or were not filed correctly but were producing limestone. The identification of properties from which production was occurring was, however, only one step in a process and did not constitute an improper classification of properties for taxation.

The Appraiser also examined properties that did not have conditional use permits but might have mineral interests which contributed to actual value of the fee simple. The examination of non-producing properties was made by observation of parcels, geologic information, and general information concerning the extraction of mineral in Cass County. The Appraiser determined that limestone lay under most of the properties in Cass County. The Appraiser testified that generally whether limestone had potential for commercial extraction

depended on the depth, quality, and thickness of the limestone. The Appraiser also determined that in general limestone with commercial potential lay in the southeast portion of Cass County. The Appraiser also testified that if more precise determinations were to be made, it would require drilling holes at set intervals and evaluation of samples from the holes. Relying on the information available to focus the Appraiser's investigation on the southeast portion of Cass County did not create an impermissible classification.

The Appraiser determined that properties from which mineral extraction would not begin within five years would not be considered for valuation. The Appraiser testified that the five year period was determined after consultation with local officials and appraisers employed by the County Assessor. The five year cut off was intended to comply with section 002.07 of chapter 13 of title 350 of Nebraska's Administrative Code. The section requires an assessor to determine the likelihood of commencement of extraction within a several year time frame. 350 Neb. Admin. Code, ch 13, 002.07 (05/05). The section concerns use of the concept of present value to determine value of minerals. *Id.* The present value of something to be realized in the future is less than the value of the something at the present time. The rules and regulations of the property Tax Administrator contemplate occurrences in which extraction of a mineral is so remote that the mineral interest may have little or no measurable contributory value and is considered included in the value of the fee simple interest assessed. *See* 350 Neb. Admin. Code, ch 13, 002.07D (05/05). An impermissible classification is not created by a determination that minerals for which extraction operations would not begin for more than five years because the present value of those minerals would have no measurable contributory value or be speculative in nature.

The Appraiser determined that tracts from which the minerals had been extracted did not have further mineral value. That determination did not create an impermissible classification.

The Appraiser determined that lands used as entrances or other adjuncts of the mining process did not have value for mineral extraction. That determination did not create an impermissible classification.

Discrimination in valuation may be caused by the acts of a taxing officer. *Constructors, Inc. v. Cass County Bd. Of Equalization*, 258 Neb. 866, 600 N.W.2d 786 (2000). The Appraiser testified that the County Assessor prohibited contact with property owners who were not conducting mining operations. That instruction prohibited the Appraiser from contacting the owners of parcels A and F to determine if offers had been made for minerals under their lands. The parcels adjoined tracts for which value was being determined and had ongoing mining operations at their boundaries. A witness for the Taxpayer testified that an offer for mineral under Tract A, that was more than five times the assessed value of the parcel, had been made for the minerals. While an offer doesn't determine value it clearly shows that value is present. Likewise, a witness for the Taxpayer testified that an offer had been made to lease tract F, again indicating that the minerals had commercial potential and value. The Appraiser did obtain information concerning its ongoing operations from the Taxpayer. That information did not, however, include offers made to the owners of Tracts A and F. Whether the Appraiser would have learned of the offers made for mineral under Tracts A or F or other parcels by contacting the owners is unknown, but allowing no contact with those persons made the lack of complete information a certainty. The focus then was only on information that could be obtained from the mine operators, and some refused to provide any information. The constraint imposed by the

County Assessor on the inquiries of the Appraiser affected his appraisal. It is as though the Assessor had directed the Appraiser to travel the roads of the County looking for barns but he could only look on one side of the road. The effect of the Assessor's constraint, coupled with the lack of information from the mining companies, was to focus the Appraiser exclusively on those properties with conditional use permits controlled by the mining companies. That focus is prohibited to the extent it is the result of Assessor actions because it creates a de facto ownership classification that violates the uniformity clause. *Id.* This is to be distinguished from a failure to obtain requested information, which would not create a de facto classification.

The evidence is that there are parcels of land in Cass County for which the minerals contribute to the actual value of the fee simple. Some of the parcels in Cass County for which minerals contribute to actual value of the fee simple have been assessed by virtue of a separate assessment of the mineral interest. Some parcels in Cass County have minerals which would contribute to actual value of the fee simple but that value is not assessed and in effect the value of those minerals is assessed at a 0 value. That differential in assessed values is due to actions of the County Assessor which created de facto classifications favoring one group of Taxpayers over another. 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)

In Case Nos. 07M-003, 07M-004, 07M-005, 07M-006, 07M-007, 07M-008, 07M-009, 07M-010, 07M-011, 07M-012, and 07M-013, the Commission has found that Cass County assessed mineral interests if they were being mined and did not attempt to assess other mineral

interests. In *Constructors, Inc., v. Cass County Board of Equalization*, 258 Neb. 866, 606 N.W.2d 786 (2000), *Lyman-Richey Corporation v. Cass County Board of Equalization*, 258 Neb. 1003, 607 N.W.2d 806 (2000) and *Ash Grove Cement Company, v. Cass County Board of Equalization*, 258 Neb. 990, 607 N.W.2d 810 (2000), relief was granted because the Courts found that Cass County was assessing producing mineral interests while failing to assess other mineral interests. The Taxpayer has demonstrated that it is entitled to relief in Case Nos. 07M-003, 07M-004, 07M-005, 07M-006, 07M-007, 07M-008, 07M-009, 07M-010, 07M-011, 07M-012, and 07M-013. Having shown that it is entitled to relief, the burden remains on the Taxpayer to show the relief to which it is entitled. 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).

The Appellant's property has been assessed and taxed while other similar property with taxable value has not been taxed. Failure to tax property has the same effect as an exemption of that property from taxation. The effect an exemption of property from taxation had on the equalized taxable value of taxed property has been discussed in several decisions of the Nebraska Supreme Court. See *Northern Natural Gas Company v. State Board of Equalization and Assessment*, 232 Neb. 806, 443 N.W.2d 249 (1989), *Trailblazer Pipeline company v. State Board of Equalization and Assessment*, 232 Neb. 823, 442 N.W.2d 386 (1989), *Natural Gas Pipeline Company of America v. State Board of Equalization and Assessment*, 237 Neb. 357, 466 N.W.2d 461 (1991), *Mapco Ammonia Pipeline, Inc., v. State Board of Equalization and Assessment*, 238 Neb. 565, 471 N.W.2d 734 (1991), ("MAPCO I"), and *Mapco Ammonia Pipeline Inc., v. State Board of Equalization*, 242 Neb. 263, N.W.2d 535 (1993), ("MAPCO II"). MAPCO II was the

culmination of several years of litigation by several appellants from actions of the State Board of Equalization. The sole issue in *MAPCO II* was the taxable value of the appellant's property if equalized with other property exempted from taxation with a taxable value of zero. *MAPCO II*, 242 Neb. at 265, N.W.2d at 537. The appellants asserted that the equalized taxable value of their taxed property was zero, the same taxable value of other property that was exempted from taxation. *Id.* at 265-266, N.W.2d at 537.

In *MAPCO II*, the State Board of Equalization did not lower the taxable value of the appellant's property to zero. The State Board of Equalization instead fashioned a ratio to be applied to the unadjusted value of the Appellant's property. The numerator of the ratio was the value of property considered exempt pursuant to law plus the value of railroad rolling stock, and the denominator was the value of all tangible property in Nebraska, including that considered to be exempt. *Id.* at 266, N.W.2d at 537. In *McKesson Corp v. Florida Alcohol & Tobacco Div.* 496 U.S. 18, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990) the Court noted that the state might choose to remedy an unconstitutional deprivation of property through taxation by providing the taxpayer with a full refund of the tax payments, or the state could cure the invalidity by refunding the difference between the tax paid and the tax which would have been paid if all taxpayers had been treated equally. The remedy adopted by the State Board of Equalization and approved by the *MAPCO II* Court cured the discriminatory taxation of appellants' property by lowering its value and making it possible for the appellants to claim a refund for the difference between the tax paid and the tax that would have been paid if all of the taxpayers had been treated equally. Setting the taxable value of the Appellants' property at zero was expressly rejected by the *MAPCO II* Court. *MAPCO II*, 242 Neb. at 265, N.W.2d at 537.

In the context of the equalized taxable value of individual parcels as determined by a county board of equalization, Nebraska's Supreme Court has also applied a ratio remedy lowering the unequalized taxable property to the same ratio of assessed to actual value as was found for other similarly taxable property. *See, e.g., Kearney Convention Center, Inc., v. Buffalo County Board of Equalization*, 216 Neb. 292, 344 N.W.2d 620 (1984).

Application of a ratio remedy requires consideration of ratios of taxable values to actual values. If the comparison should be made between taxed and untaxed minerals perhaps the comparison would be easy. Nebraska Statutes do not provide for the taxation of minerals apart from other valuable interests in land except for mineral interests which have been severed from other interests. *See* Neb. Rev. Stat. 57-236 (Reissue 2004). Rules and Regulations of the Department of Revenue Property Assessment Division recognize that the value of an unsevered mineral interest is a component of the actual value of the fee interest. *See* 350 Neb. Admin Code ch. 13 §§002.04, 002.08 (5/05).

The taxable value of the mineral interests for which equalized taxable value is at issue in Case Nos. 07M-003, 07M-004, 07M-005, 07M-006, 07M-007, 07M-008, 07M-009, 07M-010, 07M-011, 07M-012, and 07M-013 was determined and listed without reference to the fee interest in the real estate. (E1:1, E2:1, E3:1, E4:1 E5:1, E6:1, E7:1, E8:1, E9:1, E10:1, E11:1, E12:1, E13:1, and E14:1). The Taxpayer protested valuation of the mineral interests as a separate interest. (E1:3, E2:3, E3:3, E4:3 E5:3, E6:3, E7:3, E8:3, E9:3, E10:3, E11:3, E12:3, E13:3, and E14:3). The aggregate of the values determined for the mineral interest and the surface interest for those lands subject to appeal may be determined by examining Exhibits 13 through 24.

Exhibits 25, 26, and 27 provide information concerning the ownership of the surface interest, the mineral interest, and the mineral development status for the lands subject to appeal as well as other surrounding lands. Property record files showing the assessed values assigned to the surface interest of parcels A through I are shown on Exhibit 27. Several of the parcels are adjacent to existing mining operations. Other more distant parcels will be mined in the future. Parcels adjacent to the existing mine or with mining potential in the future are shown in Exhibits A through F. No estimates of value were provided for the non-producing minerals lying in, on or under parcels A through F. The value of producing minerals as they are being mined is dependent on a number of factors including price of the mined mineral, cost of recovery, quality of the mineral, and the period of time over which the mineral will be mined. All of the factors noted are subject to uncertainty and change. Valuation of producing minerals as they are being mined is therefore, not an exact science. Valuation of non-producing minerals is subject to an additional valuation factor, and that is discovery.

The Taxpayer offered to purchase Parcel A for over one million dollars in 2000. A higher offer was made in 2006. The assessed value of parcel A for tax year 2007, was \$209,246. (E31). If the offer to purchase made in 2000 is deemed an indication of value, the assessment to actual value ratio of the parcel is roughly 20%. That evidence, however, is insufficient for application of the remedy described in *Kearney Convention Center*.

The Taxpayer asserts that the relief to which it is entitled is a value of zero because, as stated by the *Lyman-Richey* Court and the *Ash Grove* Court, the assessments are void. *Lyman-Richey Corporation v. Cass County Board of Equalization*, 258 Neb. 1003, 607 N.W.2d 806 (2000); *Ash Grove Cement Company, v. Cass County Board of Equalization*, 258 Neb. 990, 607

N.W.2d 810 (2000) The results in *Lyman-Richey* and *Ash Grove* are not the relief provided in prior cases such as *MAPCO II* and *Kearney Convention Center*. In *MAPCO II*, the Court noted that either a ratio adjustment or zero value could be used to correct an unlawful or discriminatory assessment. *Mapco Ammonia Pipeline Inc., v. State Board of Equalization*, 242 Neb. 263, N.W.2d 535 (1993). In *Constructors Inc.*, the Court remanded the proceeding to the Commission for further proceedings consistent with the opinion and in conformity with Neb. Rev. Stat. §77-5017 (Reissue 1996). *Constructors, Inc., v. Cass County Board of Equalization*, 258 Neb. 866, 606 N.W.2d 786 (2000). The *Ash Grove Cement Company* Court declared the mineral assessments void. *Ash Grove*, 258 Neb. at 996, 607 N.W.2d at 813-814. The *Lyman-Richey* Court declared the mineral assessments void. *Lyman-Richey*, 258 Neb. at 1009, 607 N.W.2d 806 at 809. A plain reading of the orders in *Lyman-Richey* and *Ash Grove* is that the mineral interests could not be assessed at any value for the year in question. The equalized value of the mineral interest was zero. On the facts, the current appeals are nearly identical to those on which the *Lyman-Richey* and *Ash Grove* Courts made their decisions. The assessments of mineral interests as shown in Case Nos. 07M-003, 07M-004, 07M-005, 07M-006, 07M-007, 07M-008, 07M-009, 07M-010, 07M-011, 07M-012, and 07M-013 are void.

The sole issue presented concerning the assessment of the parcels described in Case Nos. 07A-068, 07A-071, and 07A-079 was the equalization of taxation of those parcels with parcels being assessed for both producing mineral interests and surface uses. The portion of this order pertaining to Case Nos. 07M-003, 07M-004, 07M-005, 07M-006, 07M-007, 07M-008, 07M-009, 07M-010, 07M-011, 07M-012, and 07M-013 voids taxation of the producing mineral interests

described in those appeals. There is no remaining basis for relief in Case Nos. 07A-068, 07A-071, and 07A

**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. Taxable value of the mineral interests described in the Appeals bearing case file numbers 07M-003, 07M-004, 07M-005, 07M-006, 07M-007, 07M-008, 07M-009, 07M-010, 07M-011, 07M-012, & 07M-014 have not been determined by the County Board uniformly and proportionately with other parcels in Cass County
4. 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 in Case Nos. 07M-003, 07M-004, 07M-005, 07M-006, 07M-007, 07M-008, 07M-009, 07M-010, 07M-011, 07M-012, and 07M-013 .
5. The Taxpayer has adduced sufficient, clear and convincing evidence that the decisions of the County Board in Case Nos. 07M-003, 07M-004, 07M-005, 07M-006, 07M-007, 07M-008, 07M-009, 07M-010, 07M-011, 07M-012, and 07M-013 are unreasonable or arbitrary and the decisions of the County Board should be vacated and reversed.
6. 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 in Case Nos. 07A-068, 07A-071, and 07A-079 .

7. The Taxpayer has not adduced sufficient, clear and convincing evidence that the decisions of the County Board in Case Nos. 07A-068, 07A-071, and 07A-079 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 actual values of the parcels comprising subject property as of the assessment date, January 1, 2007, in Case Nos. 07M-003, 07M-004, 07M-005, 07M-006, 07M-007, 07M-008, 07M-009, 07M-010, 07M-011, 07M-012, and 07M-013 are vacated and reversed.
2. The decisions of the County Board determining actual values of the parcels comprising subject property as of the assessment date, January 1, 2007, in Case Nos. 07A-068, 07A-071, and 07A-079 are affirmed.
3. Actual value, for the tax year 2007, of each parcel described in an appeal as referenced by the Case No. is:

Case No. 07M-003

Assessment is void. Taxable value is 0

Case No. 07M-004

Assessment is void. Taxable value is 0

Case No. 07M-005

Assessment is void. Taxable value is 0

Case No. 07M-006

Assessment is void. Taxable value is 0

Case No. 07M-007

Assessment is void. Taxable value is 0

Case No. 07M-008

Assessment is void. Taxable value is 0

Case No. 07M-009

Assessment is void. Taxable value is 0

Case No. 07M-010

Assessment is void. Taxable value is 0

Case No. 07M-011

Assessment is void. Taxable value is 0

Case No. 07M-012

Assessment is void. Taxable value is 0

Case No. 07M-014

Assessment is void. Taxable value is 0

Case No. 07A-068

Agricultural land	\$ 173,030.00
Home Site	\$ In Ag Land
Residence	\$ 40,345.00
Total	<u>\$ 213,375.00</u>

Case No. 07A-071

Agricultural land	\$ 24,933.00
Total	<u>\$ 24,933.00</u>

Case No. 07A-079

Agricultural land	\$ 156,665.00
Home Site	\$ In Ag Land
Residence	\$ 37,245.00
Farm Site	\$ In Ag Land
Outbuilding	\$ 7,796.00
Total	<u>\$ 201,706.00.</u>

4. This decision, if no appeal is timely filed, shall be certified to the Cass County Treasurer, and the Cass County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Cum. Supp. 2008).
5. Any request for relief, by any party, which is not specifically provided for by this order is denied.
6. Each party is to bear its own costs in this proceeding.
7. This decision shall only be applicable to tax year 2007.
8. This order is effective for purposes of appeal on May 11, 2011.

Signed and Sealed. May 11, 2011.

Nancy J. Salmon, Commissioner

Robert W. Hotz, Commissioner

William C. Warnes, Commissioner

SEAL

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

I concur in the result.

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

The Commission is an administrative agency of state government. *See Creighton St. Joseph Regional Hospital v. Nebraska Tax Equalization and Review Commission*, 260 Neb. 905, 620 N.W.2d 90 (2000). As an administrative agency of state government, the Commission has only the powers and authority granted to it by statute. *Id.* The Commission is authorized by statute to review appeals from decisions of a county board of equalization, the Tax Commissioner, and the Department of Motor Vehicles. Neb. Rev. Stat. §77-5007 (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 v. York County Bd of Equal.*, 266 Neb. 297, 664 N.W.2d 445 (2003). 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