

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

FLOYD C. GOECKE, TRUSTEE, FLOYD )  
C. & MARY JANE GOECKE TRUST, )

Appellant, )

v. )

SARPY COUNTY BOARD OF )  
EQUALIZATION, )

Appellee. )

Case No. 07R-076

DECISION AND ORDER AFFIRMING  
THE DECISION OF THE SARPY  
COUNTY BOARD OF EQUALIZATION

The above-captioned case was called for a hearing on the merits of an appeal by Floyd C. Goecke, Trustee, Floyd C. & Mary Jane Goecke Trust ("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 May 29, 2008, pursuant to an Order for Hearing and Notice of Hearing issued February 22, 2008. Commissioners Wickersham, Salmon, and Hotz were present. Commissioner Warnes was excused from participation by the presiding hearing officer. The appeal was heard by a panel of three commissioners pursuant to 442 Neb. Admin. Code, ch. 4, §11 (10/07). Commissioner Wickersham was the presiding hearing officer.

Floyd C. Goecke, Trustee of Floyd C. & Mary Jane Goecke Trust, was present at the hearing without legal counsel.

Micheal 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 (Cum. Supp. 2006). 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, 2007, 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, 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 appeal to maintain the appeal.
2. The parcel of real property to which this appeal pertains is described as Lot 32, Millard Park Replat 1, Omaha, Sarpy County, Nebraska, ("the subject property").
3. Actual value of the subject property placed on the assessment roll as of January 1, 2007, ("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: Lot 32, Millard Park Replat 1, Omaha, Sarpy County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$21,000.00	\$21,000.00	\$21,000.00
Improvement	\$139,739.00	\$129,739.00	\$139,739.00
Total	\$160,739.00	\$150,739.00	\$160,739.00

4. An appeal of the County Board's decision was filed with the Commission.
5. The County Board was served with a Notice in Lieu of Summons and duly answered that Notice.
6. The Taxpayer was served with a Notice in Lieu of Summons and duly answered that Notice.
7. An Order for Hearing and Notice of Hearing issued on February 22, 2008, set a hearing of the appeal for May 29, 2008, at 1:00 p.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 the subject property as of the assessment date for the tax year 2007 is:

Land value	\$ 21,000.00
Improvement value	<u>\$139,739.00</u>
Total value	<u><u>\$160,739.00.</u></u>

### III. APPLICABLE LAW

1. Subject matter jurisdiction of the Commission in this appeal is over all questions necessary to determine taxable value. Neb. Rev. Stat. 77-5016 (7) (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. A presumption exists that the County Board has faithfully performed its duties and has acted on competent evidence. *City of York v. York County Bd. Of Equalization*, 266 Neb. 297, 64 N.W.2d 445 (2003).
8. The presumption in favor of the county board may be classified as a principle of procedure involving the burden of proof, namely, a taxpayer has the burden to prove that action by a board of equalization fixing or determining valuation of real estate for tax purposes is unauthorized by or contrary to constitutional or statutory provisions governing taxation. *Gordman Properties Company v. Board of Equalization of Hall County*, 225 Neb. 169, 403 N.W.2d 366 (1987).
9. The presumption disappears if there is competent evidence to the contrary. *Id.*
10. The order, decision, determination, or action appealed from shall be affirmed unless evidence is adduced establishing that the order, decision, determination, or action was unreasonable or arbitrary. Neb. Rev. Stat. §77-5016 (8) (Cum. Supp. 2006).
11. 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).
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 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. 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 values); and *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 residential parcel. The residence on the subject property is a 1,368 square foot townhouse constructed in 1998/9. (E24:4). The residence has an unfinished 1,312 square foot basement with 623 square feet of partition finish, and a 417 square foot attached garage. (E24:5).

The Taxpayer testified that notice of the County Board's consideration of his protest was too short. Any doubts about the fairness of the County Board's review may be overcome by the Commission's review of this appeal and if desired subsequent judicial review. *See, Farmers Co-op. Ass'n v. Boone County Bd. of Equalization*, 213 Neb. 763, 332 N.W.2d 32 (1983).

The Taxpayer testified that errors were made in the assessment of the subject property. A review by the county assessor determined that errors had in fact been made. Exhibit 24 shows the effect of those errors on the estimate of value derived from use of the cost approach. The result is an increase in the estimate of value using the cost approach from \$160,739.00 to \$163,463.00. (E24:2 and 4). The County Board has not sought adoption of the higher value.

The Taxpayer testified that actual value of the subject property could be determined with reference to its purchase by him in January of 2007. In support of that position the Taxpayer referred to an information guide published by the Property Tax Administrator. The guide titled "Real Property Assessment and Taxation contains the following definition: "The actual value of a parcel of real property is the most probable price paid for the real property between a willing

buyer and a willing seller who are knowledgeable of the use for which it is adapted or capable of being used.” (E15:8). Regardless of the definition contained in the guide, actual value is defined in Nebraska Statutes as “Actual value of real property for purposes of taxation means the market value of real property in the ordinary course of business. ... 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). It is the statutory definition that the Commission is bound to use. It is true that the purchase price of property may be taken into consideration in determining actual value for assessment purposes, together with all other relevant elements pertaining to such issue; however, standing alone, it is not conclusive of the actual value of property for assessment purposes. Other matters relevant to the actual value must be considered in connection with the sale price to determine actual value. Sale price is not synonymous with actual value or fair market value. *Forney v. Box Butte County Bd. of Equalization*, 7 Neb.App. 417, 582 N.W.2d 631, (1998). If however, the evidence discloses the circumstances surrounding the sale and shows that it was an arm's length transaction between a seller who was not under compulsion to sell and a buyer who was not compelled to buy, it should receive strong consideration.” *Potts v. Board of Equalization of Hamilton County*, 213 Neb. 37, 48, 328 N.W.2d 175, 328 (1982). The evidence in this case is that the subject property was purchased after consideration of various parcels by

the Taxpayer. The seller was not represented by an agent. The subject property had been for sale for several months but there is no evidence of marketing efforts made during that period. The sale and purchase price were determined with reference to the assessed value for the tax year 2006. The 2006 assessed value was \$155,831.00 and the sale price was \$148,250.00. (E5:2).

The County Board asserts that a sale after the assessment date cannot be considered under any circumstances. Actual value is a matter of opinion. A sale of property after the valuation date in question may be considered. The weight to be given to the sale is for the trier of fact. *See, H/K Company v. Board of Equalization of the County of Lancaster*, 175 Neb. 268, 121 N.W.2d 382 (1963).

The sale and purchase price of the subject property in January 1, 2007, does not definitively determine its actual value as of January 1, 2007.

The Taxpayer offered as additional evidence of actual value, sales of parcels he deemed comparable to the subject property. In the sales comparison approach an opinion of value is developed by analyzing similar properties and comparing those properties with the subject property. *The Appraisal of Real Estate*, 12th Edition, Appraisal Institute, 2001, pg. 418. Comparative analysis of properties focuses on similarities and differences that affect value. *Id.* The following table describes various attributes of those parcels sold in 2006 or 2007. Parcels sold in 2005 have not been included in the analysis.

<b>Descriptor</b>	<b>Subject</b>	<b>Parcel 1</b>	<b>Parcel 2</b>	<b>Parcel 3</b>
Exhibit	E24	E10	E9	E13
Location	15605 Edna Circle	15607 Edna Circle	15609 Edna Circle	15605 Gertrude St
Condition	Average	Average	Average	Average
Quality	Average +	Average +	Average +	Average +
Yr Built	1998/9	1998	1998	1999
Ext Wall 1	90% siding 10% masonry veneer			
Base Area	1,368	1,288	1,380	1,404
Total Area	1,368	1,288	1,380	1,404
Style	One story townhouse	One story townhouse	One story townhouse	One story townhouse
Roof	comp shingles	comp shingles	comp shingles	comp shingles
HVAC	100%	100%	100%	100%
Basement	1,312	1,236	1,350	1,352
Part Finish	623		80	
Fixtures	10	10	12	9
Bedrooms	2	2	2	2
Bathrooms	2	2	2	1.5
Garage Type	attached	attached	attached	attached
Garage Area	417	416	416	650
Misc Imp	porch, deck, fireplace	porch, deck, fireplace	porch, deck, fireplace	porch, deck, fireplace
Sale Date		1/20/06	4/27/06	5/7/2007
Sale Price		\$152,000.00	\$156,600.00	\$153,600.00

“Comparable properties” share similar quality, architectural attractiveness (style), age, size, amenities, functional utility, and physical condition. *Property Assessment Valuation*, 2<sup>nd</sup> Ed., International Association of Assessing Officers, 1996, p. 98. When using “comparables” to determine value, similarities and differences between the subject property and the comparables must be recognized. *Property Assessment Valuation*, 2<sup>nd</sup> Ed., 1996, p.103. Most adjustments are for physical characteristics. *Property Assessment Valuation*, 2<sup>nd</sup> Ed., 1996, p.105. The primary differences between the subject property and parcels 1 and 2 are size of the main floor and basement as well as the finish in the basement. The Subject property differs from parcel 4 primarily in the amount of partition finished basement and garage size. The only evidence of adjustments that might be made for those differences are the adjustments shown in the county records for implementation of the cost approach. Based on use of that approach the adjustments support actual value as determined by the County Board. While not adopting those adjustments for purposes of this analysis based on the sales comparison approach, it is necessary to note that those adjustments are the only evidence of adjustments presented to the Commission. The evidence is insufficient to support the Taxpayer’s estimate of actual value based on the sales comparison approach.

The Taxpayer also asserted that taxable value of the subject property was not properly determined based on the taxable value determined for the adjacent parcel. An appraiser for the County inspected both the subject property and the adjacent property. After that inspection, changes were made to the records for both properties and those changes affected estimates of value based on the cost approach. The following table shows the changes made.

<b>Descriptor</b>	<b>Subject</b>	<b>Subject post inspection</b>	<b>Adjacent Parcel</b>	<b>Adjacent Parcel post inspection</b>
Exhibit	E24:2 & 3	E24: 4 & 5	E21: 2 & 3	E21: 4 & 5
Location	15605 Edna Circle		15603 Edna Circle	
Condition	Average		Average	
Quality	Average +		Average +	
Yr Built	1999/8	1998/9	1998/9	
Ext Wall 1	90% siding 10% masonry veneer		90% siding 10% masonry veneer	
Base Area	1,404	1,368	1,288	1,368
Total Area	1,404	1,368	1,288	1,368
Style	One story townhouse		One story townhouse	
Roof	comp shingles		comp shingles	
HVAC	100%		100%	
Basement	1,352	1,312	1,235	1,312
Part Finish	380	623		
Fixtures	10		10	
Bedrooms	2		2	
Bathrooms	2		2	
Garage Type	attached		attached	
Garage Area	400	417	416	417
Misc Imp	porch, deck, fireplace		porch, deck, fireplace	porch, deck, fireplace
Estimate of Value	\$160,739.00	\$163,463.00	\$141,697.00	\$146,787.00

The evidence is that both parcels were under assessed as of the assessment date. The percentages of under assessment are not excessive: 1.695% for the subject ( $\$163,463.00 - \$160,739.00 = \$2,724.00 \div \$160,739.00 = 1.695\%$ ); and 3.592% for the adjacent parcel ( $\$146,787.00 - \$141,697.00 = \$5,090.00 \div \$141,697.00 = 3.592\%$ ). The only evidence of actual values for the parcels are the estimates derived from the cost approach as developed by the county. 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). The evidence presented to the Commission does not meet that standard.

For reasons noted above the evidence presented does not demonstrate that the decision of the County Board was unreasonable or arbitrary. Nor is that evidence sufficient to determine that the County Board did not faithfully perform its duties or act on sufficient competent evidence to justify its actions.

## **V. CONCLUSIONS OF LAW**

1. The Commission has subject matter jurisdiction in this appeal.
2. The Commission has jurisdiction over the parties to this appeal.

3. The Taxpayer has not produced competent evidence that the County Board failed to faithfully perform its official duties and to act on sufficient competent evidence to justify its actions.
4. The Taxpayer has not adduced sufficient, clear and convincing evidence that the decision of the County Board is unreasonable or arbitrary and the decision of the County Board should be affirmed.

**VI.  
ORDER**

**IT IS ORDERED THAT:**

1. The decision of the County Board determining actual value of the subject property as of the assessment date, January 1, 2007, is affirmed.
2. Actual value, for the tax year 2007, of the subject property is:

Land value	\$ 21,000.00
Improvement value	<u>\$139,739.00</u>
Total value	<u><u>\$160,739.00.</u></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 (Cum. Supp. 2006).
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 2007.

7. This order is effective for purposes of appeal on June 12, 2008.

**Signed and Sealed.** June 12, 2008.

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Nancy J. Salmon, Commissioner

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Robert W. Hotz, Commissioner

**SEAL**

**APPEALS FROM DECISIONS OF THE COMMISSION MUST SATISFY THE REQUIREMENTS OF NEB. REV. STAT. §77-5019 (CUM. SUPP. 2006), OTHER PROVISIONS OF NEBRASKA STATUTES, AND COURT RULES.**

I concur in the result.

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) (Supp. 2007).

Nebraska courts have held that the provisions of section 77-5016(8) of the Nebraska Statutes create a presumption that the County Board has faithfully performed its official duties and has acted upon sufficient competent evidence to justify its actions. *City of York v. York*

*County Board of Equalization*, 266 Neb. 297, 664 N.W.2d 445 (2003). The presumption cited in *York* has roots in the early jurisprudence of Nebraska. 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)). 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.*

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). Review of district court decisions made pursuant to section 77-1511 was de novo. *Future Motels, Inc. v. Custer County Board of Equalization*, 252 Neb. 565, 563 N.W.2d 785 (1997). The presumption functioned as a standard of review. See, e.g. *Gamboni v. County of Otoe*, 159 Neb. 417, 67 N.W.2d 492 (1954).

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 requires a finding that the decision being reviewed was unreasonable or arbitrary. The basis for that determination is the evidence

presented to the Commission in a new record. See, Neb. Rev. Stat. §77-5016 (Cum. Supp. 2006). Commission decisions are reviewed for error on the record. See, Neb. Rev. Stat. 77-5019(5) (Cum. Supp. 2006). The statutory basis for Commission review and the review of its decisions is analogous to district courts review of decisions made by administrative agencies. The basis for district court review of decisions made by administrative agencies is de novo on the record. *Tyson Fresh Meats v. State*, 270 Neb. 535, 704 N.W.2d 788 (2005). The decisions of the district court examining the administrative decision are reviewed for error on the record. *Thorson v. Nebraska Dept. of Health & Human Servs.*, 274 Neb. 322, 740 N.W.2d 27 (2007). The similarities are enough to suggest that the framework for review applied to district court decisions could be made applicable to decisions of the Commission.

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. 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). As noted however review was de novo and the reviewing court was not bound by the standard of review imposed on district court. *Loskill v. Board of Equalization of Adams County*, 186 Neb. 707, 185 N.W.2d 852 (1971). 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 the district courts; one statutory, and the other judicial stated as a presumption that the county board of equalization faithfully performed its official duties and acted upon sufficient competent evidence. No attempt was made by the *Hastings* Court to reconcile the two standards of review that were applicable to the district courts.

The possible results from application of the presumption and the statutory standard of review by the Commission 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. If the presumption is overcome the statutory standard remains. See, *City of York v. York County Bd of Equal.*, 266 Neb. 297, 664 N.W.2d 445 (2003). The second possibility does not therefore allow a grant of relief even though the presumption is overcome. The third possibility requires analysis. The presumption and the statutory standard of review are different legal standards, one remaining after the other has been met. See. *City of York v. York County Bd of Equal.*, 266 Neb. 297, 664 N.W.2d 445 (2003). The burden of proof to overcome the presumption is competent evidence. *City of York*, Supra. 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. Each analyses of the standards of review allowing a grant of relief requires a finding that the statutory standard has been met.

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 possible conflict or difficulties inherent in the application of two standards of review. The *Gordman* analysis requires the Commission to consider all of the evidence produced in order to determine whether there is clear and convincing evidence that the decision, action, order, or determination being reviewed was unreasonable or arbitrary. It is within that framework that I have analyzed the evidence.

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Wm R. Wickersham, Commissioner