

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

J. KENT & ALMA H. KNOLL,	)	
	)	
Appellant,	)	Case No. 07R-837
	)	
v.	)	DECISION AND ORDER
	)	AFFIRMING THE DECISION OF
DOUGLAS COUNTY BOARD OF	)	THE DOUGLAS COUNTY BOARD OF
EQUALIZATION,	)	EQUALIZATION
	)	
Appellee.	)	

The above-captioned case was called for a hearing on the merits of an appeal by J. Kent & Alma H. Knoll ("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 March 18, 2009, pursuant to an Order for Hearing and Notice of Hearing issued December 4, 2008 as amended by an Order dated February 17, 2009. Commissioners Wickersham and Hotz were present. Commissioner Wickersham was the presiding hearing officer. Commissioner Warnes was excused from participation by the presiding hearing officer. Commissioner Salmon was absent. The appeal was heard by a quorum of a panel of the Commission.

J. Kent Knoll was present at the hearing. No one appeared as legal counsel for the Taxpayer.

Thomas S. Barrett, a Deputy County Attorney for Douglas County, Nebraska, was present as legal counsel for the Douglas County Board of Equalization ("the County Board").

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

The Commission is required to state its final decision and order concerning an appeal, with findings of fact and conclusions of law, on the record or in writing. Neb. Rev. Stat. §77-

5018 (Cum. Supp. 2006). The final decision and order of the Commission in this case is as follows.

## **I. ISSUES**

The Taxpayer has asserted that taxable value of the subject property as of January 1, 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 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, 2007, ("the assessment date") by the Douglas County Assessor, value as proposed in a timely

protest, and actual value as determined by the County Board is shown in the following table:

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Description: Lot 144 Block 0, Indian Creek, Omaha, Douglas County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$26,000.00	In Total	\$26,000.00
Improvement	\$411,900.00	In Total	\$411,900.00
Total	\$437,900.00	\$317,900.00	\$437,900.00

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. An Order for Hearing and Notice of Hearing issued on December 4, 2008, as amended by an Order issued on February 17, 2009, set a hearing of the appeal for March 18, 2009, at 3:00 p.m. CDST.
7. An Affidavit of Service which appears in the records of the Commission establishes that a copy of the Order for Hearing and Notice of Hearing was served on all parties.
8. Actual value of the subject property as of the assessment date for the tax year 2007 is:

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Land value           \$ 26,000.00

Improvement value \$411,900.00

Total value           \$437,900.00.

### 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) (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. "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).
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 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**

The subject property is an improved residential parcel. The two-story residence, constructed in 2005 has 3,024 square feet above ground, a 1,391 square foot basement, a 976 square foot garage, and an in-ground swimming pool. (E3:1).

The Taxpayer contends that the taxable value of the subject property is not equalized with other similar properties. The Taxpayer produced an analysis showing that a \$116,980 adjustment was appropriate for equalization with similar parcels. (E6:2). The Taxpayer produced property record files for four parcels he considered similar to the subject property. The following table summarizes information concerning the physical characteristics, amenities, factors affecting valuation of the subject property, purchase prices, and taxable values for the tax year 2007, for the parcels deemed similar by the Taxpayer.

<b>Descriptor</b>	<b>Subject</b>	<b>Parcel 1</b>	<b>Parcel 2</b>	<b>Parcel 3</b>	<b>Parcel 4</b>
Exhibit	E3	E12	E13	E14	E15
Location	19107 Ames Av	19316 Ruggles Cr	19104 Boyd Cr	19311 Sahler St	4103 N 194 St
Lot Size	12,960	11,326	13,741	10,875	10,875
Condition	Very Good	Very Good	Very Good	Very Good	Very Good
Quality	Very Good	Very Good	Very Good	Very Good	Very Good
Yr Built	2005	2004	2003	2005	2005
Exterior Walls	Frame Siding	Frame Siding	Frame Siding	Frame Siding	Frame Siding
Style	2 Story	2 Story	2 Story	2 Story	2 Story
Area Above Ground	3,024	3,120	3,344	3,422	2,928
Roof Type	Hip/Gable	Hip Gable	Hip	Gable	Gable
Roof Cover	Comp Shingle	Comp Shingle	Comp Shingle	Comp Shingle	Comp shingle
HVAC	Central Air	Central Air	Central Air	Central Air	Central Air
Basement	1,391	1,308	1,334	1,743	1,496
Finished					
Walkout				1	1
Bedrooms	4	4	4	4	4
Bathrooms	3.5	3.5	3.5	3.5	3
Garage Type	Built In	Built In	Built In	Built In	Built In
Garage Area	976	759	1,300	960	924

Descriptor	Subject	Parcel 1	Parcel 2	Parcel 3	Parcel 4
Misc Imp	Gas Fireplace, Wood Deck, Brick Veneer, Swimming Pool In Ground, Sprinkler System	Gas Fireplace, Wood Deck, Brick Veneer, Stone Trim	Gas Fireplace, Brick Veneer, Sprinkler System	Gas Fireplace, Wood Deck, Security System, Brick Veneer	Gas Fireplace, Wood Deck, Brick Veneer, Sprinkler System, Vinyl Fence
Lot Value	\$26,000	\$40,000	\$40,000	\$40,000	\$40,000
Imp Value	\$411,914	\$288,000	\$326,200	\$339,200	\$296,100
Taxable Value	\$437,900	\$328,000	\$366,200	\$379,200	\$336,100
Sale Date <sup>1</sup>	8/26/05	12/19/03	2/2/03	4/8/05	7/22/05
Sale Price <sup>1</sup>	\$473,203	\$329,000	\$36,950 <sup>2</sup>	\$406,754	\$342,740

1. Each parcel has a single sale date in the year of construction. Sale Date and Sale Price appear to be construction costs.
2. This sale appears to be for the lot only.

Equalization of taxable values requires proportionality and uniformity of valuation. *Neb. Const.*, Art. VIII, §1. Proportionality requires the consideration of the ratios of actual value to taxable value for the subject property and similar parcels. *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999). The only evidence of actual value for the subject property or the parcels deemed similar by the Taxpayer are their purchase prices after construction. However, cost does not equal value. *Forney v. Box Butte County Bd. of Equalization*, 7 Neb.App. 417, 424, 582 N.W.2d 631, 637 (1998). The Commission notes that the taxable values of all the parcels are less than their purchase prices, with the possible exception of parcel 3, and that the price to taxable differential is greatest for the subject property.

While there is no evidence in this appeal that the proportion of actual value to taxable value determined for the subject property and the parcels the Taxpayer deemed similar if taxable values were not determined in a uniform manner the Taxpayer could be entitled to relief if the methods used were not correlated to a common standard. The first inquiry is whether taxable values were determined in a uniform manner.

An examination of Exhibits 3 and 12 through 15 shows that the subject property and the parcels the Taxpayer believes are similar were valued using the cost approach. 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*, 2<sup>nd</sup> Ed., International Association of Assessing Officers, 1996, pp. 128 - 129.

The Taxpayer conceded that the contribution to value of the lots was not at issue. The two parcels with residences exhibiting the greatest similarity to the residence on the subject property are parcels 1 and 4 as described above.

	Subject Property (E3)	Parcel 1 (E12)	Parcel 4 (E15)
Replacement Cost New w/o add ons	\$318,101	\$432,645	\$307,779
Add Ons	\$38,855	\$2,075	\$3,830
Total RCN	\$356,956	\$434,720	\$311,609
Physical Depreciation	(\$3,093) <sup>3</sup>	(\$3,698) <sup>3</sup>	(\$2,655) <sup>3</sup>
Design Adjustment	\$49,974		
Functional Obsolescence		(\$26,083)	(\$18,697)
Total after Depr and Adj	\$403,837	\$404,939	\$290,257
Neighborhood Adjustment	1.02	1.02	1.02
Replacement Cost New Less Depreciation	\$411,914	\$413,037 <sup>4</sup>	\$296,062
Lot	\$26,000	\$40,000	\$40,000
Assessed Value	\$437,900	\$328,000	\$336,100

3. The Amount shown as a deduction for physical depreciation cannot be reconciled with the percentage of physical depreciation to be taken. 1% physical depreciation to obtain a deduction of \$3,093 would be calculated on a sum of \$309,300. A sum of \$309,300 cannot be obtained from the items shown for the subject property on page 3 of Exhibit 3. The same problem exists in the calculations of physical depreciation for parcels 1 and 4.
4. The amount shown is the calculated amount. The sum shown on Exhibit 12 at page 6 is \$305,698. The amount shown on Exhibit 8 page 8 as the contribution to value of the improvement is \$288,000. That sum, when the contribution to value of the land is added equals \$328,00 the assessed value. The \$/Unit costs for Building SF Basement Conc 9 ft and Built in are significantly higher for this parcel than the corresponding number used for the subject property or for parcel 4.

The assessed value established for parcel 1 is that \$328,000 is near its acquisition cost of \$329,000 in 2003. Assessed value of parcel 1 was established in 2005 and carried over to tax year 2007. E8:8). Exhibit 13:6 is a cost approach worksheet for parcel 2. The value conclusion on the

worksheet cannot be derived from the numbers on page 6 of Exhibit 13. Exhibit 9 page 9 shows that the County Board determined assessed value of parcel 2 in 2005 and that value was carried over to 2007. The problem noted in the calculation of physical depreciation is pervasive but appears to be consistent and in amounts that have little effects on the final calculations.

The subject property has an amenity, the in-ground swimming pool, that makes it unique. There are differences between the subject property and parcels considered similar by the Taxpayer. Judgements have been made regarding a design adjustment and functional depreciation. There is evidence that any disagreement with those judgements is more than a difference of opinion. 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 record shows clearly and convincingly that errors occurred in the application of the cost approach and the assessment of various parcels. 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). It is necessary to show what the equalized taxable value is.

The Taxpayer has not shown a basis for relief.

**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:

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Land value	\$ 26,000.00
Improvement value	<u>\$411,900.00</u>
Total value	<u>\$437,900.00.</u>

3. This decision, if no appeal is timely filed, shall be certified to the Douglas County Treasurer, and the Douglas County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Cum. Supp. 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 May 21, 2009.
- Signed and Sealed. May 21, 2009.

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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.

I do not believe consideration of two standards of review is 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 decisions 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 77-1511 of the Nebraska Statutes created a presumption that the County Board has faithfully performed its official duties and has acted upon sufficient competent evidence to justify

its actions. See, e.g. *Ideal Basic Indus. v. Nucholls Cty. Bd. Of Equal.*, 231 Neb. 297, 437 N.W.2d 501 (1989). The presumption stated by the Court was the presumption that had been found before the statute was enacted.

Many appeals of decisions made pursuant to section 77-1511 were decided without reference to the statutory standard of review applicable to the district courts review of a county board of equalization's decision. See, e.g. *Grainger Brothers Company v. County Board of Equalization of the County of Lancaster*, 180 Neb. 571, 144 N.W.2d 161 (1966). In *Hastings Building Co., v. Board of Equalization of Adams County*, 190 Neb. 63, 206 N.W.2d 338 (1973), the Nebraska Supreme Court acknowledged that two standards of review existed for reviews by the district court; one statutory requiring a finding that the decision reviewed was unreasonable or arbitrary, and another judicial requiring a finding that a presumption that the county board of equalization faithfully performed its official duties and acted upon sufficient competent evidence was overcome. No attempt was made by the *Hastings* Court to reconcile the two standards of review that were applicable to the District Courts.

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

arose from section 77-1511 is applicable to the decisions of the Commission. *Garvey Elevators, Inc. v. Adams County Bd. of Equalization*, 261 Neb. 130, 621 N.w.2d 518 (2001).

The possible results from application of the presumption as a standard of review and the statutory standard of review are: (1) the presumption is not overcome and the statutory standard is not overcome; (2) the presumption is overcome and the statutory standard is not overcome; (3) the presumption is not overcome and the statutory standard is overcome; (4) and finally the presumption is overcome and the statutory standard is overcome. The first possibility does not allow a grant of relief, neither standard of review has been met. The second possibility does not therefore allow a grant of relief even though the presumption is overcome because the statutory standard remains. See, *City of York v. York County Bd of Equal.*, 266 Neb. 297, 664 N.W.2d 445 (2003). The third possibility requires analysis. The presumption and the statutory standard of review are different legal standards, and the statutory standard remains after the presumption has been overcome. See. *Id.* The burden of proof to overcome the presumption is competent evidence. *Id.* Clear and convincing evidence is required to show that a county board of equalization's decision was unreasonable or arbitrary. See, e.g. *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb.App. 171, 645 N.W.2d 821 (2002). Competent evidence that the county board of equalization failed to perform its duties or act upon sufficient competent evidence is not always evidence that the county board of equalization acted unreasonably or arbitrarily because the statutory standard of review remains even if the presumption is overcome. *City of York*, *supra*. Clear and convincing evidence that a county board of equalization's determination, action, order, or decision was unreasonable or arbitrary, as those terms have been defined, may however overcome the presumption that the county board of equalization faithfully discharged its

duties and acted on sufficient competent evidence. In any event the statutory standard has been met and relief may be granted. Both standards of review are met in the fourth possibility and relief may be granted.

Use of the presumption as a standard of review has been criticized. See, G. Michael Fenner, *About Presumptions in Civil Cases*, 17 Creighton L. Rev. 307 (1984). In the view of that author the presumption should be returned to its roots as a burden of proof. *Id.* Nebraska's Supreme Court acknowledged the difficulty of using two standards of review and classified the presumption in favor of the county board of equalization as a principle of procedure involving the burden of proof, namely, a taxpayer has the burden to prove that action by a board of equalization fixing or determining valuation of real estate for tax purposes is unauthorized by or contrary to constitutional or statutory provisions governing taxation. See, *Gordman Properties Company v. Board of Equalization of Hall County*, 225 Neb. 169, 403 N.W.2d 366 (1987). Use of the *Gordman* analysis allows consideration of both the presumption and the statutory standard of review without the difficulties inherent in the application of two standards of review. It is within that framework that I have analyzed the evidence.

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Wm R. Wickersham, Commissioner