

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

CRAIG A. WILLOUGHBY,)	
)	
Appellant,)	Case No. 09A 005
)	
v.)	DECISION AND ORDER
)	AFFIRMING THE DECISION OF
THAYER COUNTY BOARD OF)	THE THAYER COUNTY BOARD OF
EQUALIZATION,)	EQUALIZATION
)	
Appellee.)	

The above-captioned case was called for a hearing on the merits of an appeal by Craig A. Willoughby ("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 July 26, 2010, pursuant to an Order for Hearing and Notice of Hearing issued May 25, 2010. Commissioner Wickersham, Chairperson of the Commission, was the presiding hearing officer. Commissioner Warnes was absent. Commissioner Wickersham, as Chairperson, designated Commissioners Wickersham, Salmon, and Hotz as a panel of the Commission to hear the appeal. Commissioner Hotz was excused. Commissioner Salmon was present. The appeal was heard by a quorum of a panel of the Commission.

Craig A. Willoughby was present at the hearing. No one appeared as legal counsel for the Taxpayer.

Daniel L. Werner, County Attorney for Thayer County, Nebraska, was present as legal counsel for the Thayer County Board of Equalization ("the County Board").

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

The Commission is required to state its final decision and order concerning an appeal, with findings of fact and conclusions of law, on the record or in writing. Neb. Rev. Stat. §77-5018 (Reissue 2009). The final decision and order of the Commission in this case is as follows.

**I.
ISSUES**

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

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

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

**II.
FINDINGS OF FACT**

The Commission finds and determines that:

1. The Taxpayer has a sufficient interest in the outcome of the above captioned 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. Taxable value of the subject property placed on the assessment roll as of January 1, 2009, ("the assessment date") by the Thayer County Assessor, value as proposed in a timely

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

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Description: Pt S½ NE¼ and Pt E½ NW¼ Section 12, Township 1, Range 1, 67.064 AC, Thayer County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Agricultural Land	\$76,711.00	\$56,766.00	\$76,711.00
Total	\$76,711.00	\$56,766.00	\$76,711.00

4. An appeal of the County Board's decision was filed with the Commission.
5. An Order for Hearing and Notice of Hearing issued on May 25, 2010, set a hearing of the appeal for July 26, 2010, at 1:00 p.m. CDST.
6. An Affidavit of Service, which appears in the records of the Commission, establishes that a copy of the Order for Hearing and Notice of Hearing was served on all parties.
7. Taxable value of the subject property as of the assessment date for the tax year 2009 is:

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Land	\$76,711.00
Total	<u>\$76,711.00.</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) (Reissue 2009).
2. “Actual value is the most probable price expressed in terms of money that a property will bring if exposed for sale in the open market, or in an arm’s length transaction, between a

- willing buyer and a willing seller, both of whom are knowledgeable concerning all the uses to which the real property is adapted and for which the real property is capable of being used. In analyzing the uses and restrictions applicable to real property the analysis shall include a full description of the physical characteristics of the real property and an identification of the property rights valued.” Neb. Rev. Stat. §77-112 (Reissue 2009).
3. “Actual value may be determined using professionally accepted mass appraisal methods, including, but not limited to, the (1) sales comparison approach using the guidelines in section 77-1371, (2) income approach, and (3) cost approach.” Neb. Rev. Stat. §77-112 (Reissue 2009).
 4. “Actual value, market value, and fair market value mean exactly the same thing.” *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).
 5. Taxable value is the percentage of actual value subject to taxation as directed by section 77-201 of Nebraska Statutes and has the same meaning as assessed value. Neb. Rev. Stat. §77-131 (Reissue 2009).
 6. All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation. Neb. Rev. Stat. §77-201(1) (Reissue 2009).
 7. The Legislature may provide that agricultural land and horticultural land, as defined by the Legislature, shall constitute a separate and distinct class of property for purposes of taxation and may provide for a different method of taxing agricultural land and horticultural land which results in values that are not uniform and proportionate with all

other real property and franchises but which results in values that are uniform and proportionate upon all property within the class of agricultural land and horticultural land. Neb. Const. art. VIII, §1 (4).

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

11. Parcel means a contiguous tract of land determined by its boundaries, under the same ownership, and in the same tax district and section. Parcel also means an improvement on leased land. If all or several lots in the same block are owned by the same person and are contained in the same tax district, they may be included in one parcel. Neb. Rev. Stat. §77-132 (Reissue 2009).
12. 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).
13. 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).
14. The presumption disappears if there is competent evidence to the contrary. *Id.*
15. The order, decision, determination, or action appealed from shall be affirmed unless evidence is adduced establishing that the order, decision, determination, or action was unreasonable or arbitrary. Neb. Rev. Stat. §77-5016 (8) (Reissue 2009).
16. Proof that the order, decision, determination, or action appealed from was unreasonable or arbitrary must be made by clear and convincing evidence. See, e.g., *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb.App. 171, 645 N.W.2d 821 (2002).

17. "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).
18. 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).
19. 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).

IV. ANALYSIS

The subject property is an unimproved 67.064 acre parcel in rural Thayer County, Nebraska. The County Board determined that the subject property should be classified as recreational land taxable at 100% of its actual value. The Taxpayer contends that the subject property should be classified as agricultural land and horticultural land taxable at 75% of its actual value. A parcel is agricultural land and horticultural land if it is primarily used for agricultural or horticultural purposes. Neb. Rev. Stat. §77-1359 (1) (Reissue 2009). "Agricultural or horticultural purposes means used for the commercial production of any plant or animal product in a raw or unprocessed state that is derived from the science and art of agriculture, aquaculture, or horticulture. Agricultural or horticultural purposes includes the following uses of land:

(a) Land retained or protected for future agricultural or horticultural purposes under a conservation easement as provided in the Conservation and Preservation Easements Act except when the parcel or a portion thereof is being used for purposes other than agricultural or horticultural purposes; and (b) Land enrolled in a federal or state program in which payments are received for removing such land from agricultural or horticultural production shall be defined as agricultural land or horticultural land." Neb. Rev. Stat. §77-1359 (2) (Reissue 2009).

There is no evidence that the subject property is land that is retained or protected for future agricultural purposes under a conservation easement as provided in the Conservation Easements Act.

The Taxpayer testified that the subject property was enrolled in a federal program that made payments for conservation practices. The program described by the Taxpayer does not require removal of land from production and is therefore not a program described in section 77-1359 (2)(b), participation in which requires that the enrolled land be defined as agricultural land or horticultural land.

The remaining provision of the definition of agricultural or horticultural purposes requires a finding that the commercial production of any plant or animal product in a raw or unprocessed state that is derived from the science and art of agriculture, aquaculture, or horticulture is occurring on the parcel. 22.72 acres of the subject property are enrolled in a FSA program and produces forage. (E6:1 & 2). The enrolled lands are shown on a aerial photograph in Exhibit 5 at page 3. In 2008, corn was raised on those 22.72 acres. In tax year 2009, Sudex was raised on those 22.72 acres. The Taxpayer leases the 22.72 acres to his brother for cash rent of \$75 or \$100 per acre at total rent of \$1,650 or \$2,200. Commercial production of a plant or animal

product in a raw or unprocessed state that is derived from the science and art of agriculture, aquaculture, or horticulture is occurring on 22.72 acres of the parcel. The balance of the subject property, 44.344 acres ($67.064 - 22.72 = 44.344$), has heavy tree cover or roads and cannot be used for the production of crops or grazing.

During tax year 2009 the Taxpayer entered into a contract with the Natural Resource Conservation Service (NRCS) of the United States Department of Agriculture. NRCS contract payments are tied to the completion of practices. In May 2010, the Taxpayer received \$2,694 after completion of a practice required by the NRCS contract. Future contract payments for various practices are \$2,410, \$3,056, \$2,461 and \$2,013.

The \$2,694 payment was for clearing and thinning of trees. Trees were cleared from the perimeters of two fields and in an area between two fields. The extent of the area cleared is unknown. Thinning of the trees may eventually allow use of portions of the subject property as a winter bull pasture.

The NRCS contract also calls for the planting of walnut and pecan trees in the years 2011, 2012, and 2013. The Taxpayer anticipates planting up to 100 walnut trees and a lesser number of pecan trees pursuant to the NRCS contract. The development period, that is the time from planting to first harvest, for walnut trees is 10 years. The development period for pecan trees is not in evidence.

The subject property contains 67.064 acres. (E2:13). 22.72 of the 67.064 acres are crop land. (E6:1). .359 acres of the subject property is used for a road. (E2:13). Use of remaining 43.985 acres of the subject property by the Taxpayer can be characterized as activity necessary to meet the requirements of a contract for the conduct of conservation practices. The statute

defining agricultural land and horticultural land specifically includes lands subject to certain conservation easements, and land that is removed from production in exchange for payments. The statute defining agricultural land and horticultural land, therefore, recognizes that conservation practices may not be practices that result in the commercial production of a plant or animal product in a raw or unprocessed state that is derived from the science and art of agriculture, aquaculture, or horticulture. Although the Taxpayer was paid by the Federal government for his efforts, tree clearing as described in this case, is not use under section 77-1359 for the commercial production of a plant or animal product in a raw or unprocessed state that is derived from the science and art of agriculture, aquaculture, or horticulture for purposes of section 77-1359.

A portion of the subject property is being used for agricultural or horticultural purposes, however, that is not the only requirement. The use for agricultural or horticultural purposes must be the primary use of the parcel. Primary can be defined as first of all or in the first place. *Webster's Third New International Dictionary*, Merriam-Webster, Inc., 2002, 1800. Primary can be defined as the "first in rank or importance." *Id.* All uses of a parcel are to be considered when determining its primary use. *Agena v. Lancaster County Board of Equalization*, 276 Neb. 851, 758 N.W.2d 363 (2008). (A 21 acre parcel with a residence and 16 to 18 acres rented to an adjoining farmer is not agricultural land or horticultural land; A 20 acre parcel of land with a residence and storage building on 2.3 acres with the balance rented to a farmer is not agricultural land or horticultural land; A 26 acre parcel, 6 acres of which are used for religious purposes with the balance leased to a farmer in a profit sharing arrangement, is not agricultural land or horticultural land.) *Id.* All of the parcels described in the Courts opinion had multiple uses. The

evidence for the subject property is that it has one use for a portion, and no use for most of the parcel.

The initial issue in this appeal is classification. The County Assessor classified the subject property as recreational land and the County Board upheld that determination. Recreational land is defined as real property predominately used or intended to be used for diversion, entertainment, and relaxation on an occasional basis. 350 Neb. Admin. Code, ch. 10, §001.05E (03/09). Some of the uses would include fishing, hunting, camping, boating, hiking, picnicking, and the access or view that simply allows relaxation, diversion and entertainment. *Id.*

The regulation refers to uses, understood to be existing use, and intended uses. Similarly, the regulations defining the terms single family residential, commercial, and industrial for classification of land in the assessment process refer to existing or intended uses. See, 350 Neb. Admin. Code, ch. 10, §001.5A-D (3/09). Existing uses or intended uses are therefore use categories to be considered for classification of a parcel. The classification of a parcel does not, however, determine its value. A parcel classified as agricultural land and horticultural land may be assessed at its actual value or its special value. Neb. Rev. Stat. §77-201(2)(3) (Reissue 2009). Likewise a parcel being used for single family residential purposes may have value for commercial development. See, *The Appraisal of Real Estate* 12th Edition, The Appraisal Institute, 2001, p. 315-316. At its best, the classification system groups together parcels with similar existing uses or intended uses for assessment administration. Existing or intended uses do not, however, determine value. Another category of use appears in the context of valuation and that is highest and best use or potential use. See, 350 Neb. Admin. Code, ch. 10, §001.13 (3/09). As will be

seen, the highest and best use or potential use of the subject property is an important consideration in this appeal.

As it pertains to classification the definition of recreational land found in the rules and regulations of the Property Assessment Division of the Department of Revenue is easily distinguished from the statutory definition of agricultural land and horticultural land. The regulatory definition of recreational land includes consideration of existing and intended uses. The statutory definition for classification of a parcel as agricultural land and horticultural land requires consideration of the land as used. Intended or potential uses do not prevent land from meeting the terms of the statutory definition for classification of agricultural land and horticultural land which considers only existing uses. The Taxpayer used the subject property for personal recreational purposes twice shortly after purchasing it. Thereafter the Taxpayer prohibited recreational use by others and has not personally engaged in recreational use of the subject property again.

The uses of the subject property during the year 2009 were for agricultural or horticultural purposes, conservation practices as required for compliance with an NRCS contract and roads. The agricultural use encompasses 22.72 acres, the contract use encompasses 43.98 acres, and .359 acres are used for roads. Use of the subject property for agricultural or horticultural purposes generated income of between \$1,704 and \$2,272 as cash rent ($22.72 \times \$75 = \$1,704$ or $\$22.72 \times 22.72 \times 100 = \$2,272$). The Taxpayer received \$2,694 for conservation practices related to work in 2009. Compliance with the NRCS contract produced the most income and involved the majority of acres in the subject property. The primary use of the subject property was compliance with the NRCS contract.

Compliance with the NRCS contract does not constitute the commercial production of any plant or animal product in a raw or unprocessed state that is derived from the science and art of agriculture, aquaculture, or horticulture, and is not a use for agricultural or horticultural purposes. The subject property may not be classified as agricultural land or horticultural land for the tax year 2009.

Property other than agricultural land and horticultural land must be assessed based on its actual value. Neb. Rev. Stat. 77-201 (Reissue 2009). 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. Neb. Rev. Stat. §77-112 (Reissue 2009). Actual value is to be determined based on the highest and best use of the parcel. 350 Neb. Admin. Code, ch. 50, §.00204A (01/07). Highest and best use is the most reasonable and probable use of the property that will support the highest present value. 350 Neb. Admin. Code, ch. 10, §001.13 (3/09). It is the recognition of the contribution of that specific use to the community environment or community development goals in addition to wealth maximization of individual property owners. *Id.* Highest and best use can also be defined as "the reasonably probable and legal use of vacant land or an improved property that is physically possible, appropriately supported, and financially feasible and that results in the highest value." *The Appraisal of Real Estate*, 13th Edition, Appraisal Institute, 2008, p. 278. Both definitions require valuation of the use that will maximize value. The subject property may be used for recreational purposes. The County Assessor testified that actual value of recreational land was \$750 per acre if the parcel was 20 acres or less

in size, \$950 per acre if the size of the parcel was between 20 acres and 60 acres, and \$1,150 per acre if the size of the parcel was over 60 acres. The subject property contains over 60 acres and would therefore be valued at \$1,150 per acre of recreational land. The .359 acres of road have no value. (E2:13). Actual value of the remaining 66.705 acres of the subject property for recreational uses is \$76,711 ($66.705 \times \$1,150 = \$76,710.75$).

Actual value of the subject property solely for agricultural or horticultural purposes is not in evidence. The only evidence is that the highest and best use of the subject property is recreational use.

The Taxpayer also contends that the subject property, if taxed on its actual value for recreational purposes, will not be valued and assessed in the same manner as an adjoining 5.004 acre parcel described in Exhibit 14. The County Assessor acknowledged that the comparison parcel described in Exhibit 14 was not properly classified or assessed for tax year 2009. The County Assessor testified that classification and assessment of the parcel were affected by implementation of a GIS system and that a review of all parcels to determine proper classification and assessment was underway. The evidence shows that the incorrect classification and assessment of the comparison parcel for tax year 2009 was due to oversight or error. It is not every incorrect assessment of a comparison parcel that will give rise to an equalization claim. 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 Taxpayer has not shown that either systematic will or a failure of a plain legal duty are at the root of the incorrect assessment of the comparison parcel.

**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 taxable value of the subject property as of the assessment date, January 1, 2009, is affirmed.
2. Taxable value, for the tax year 2009, of the subject property is:

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Land	\$ 76,711.00
Total	<u>\$ 76,711.00.</u>

3. This decision, if no appeal is timely filed, shall be certified to the Thayer County Treasurer, and the Thayer County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Reissue 2009).
4. Any request for relief, by any party, which is not specifically provided for by this order is denied.
5. Each party is to bear its own costs in this proceeding.
6. This decision shall only be applicable to tax year 2009.
7. This order is effective for purposes of appeal on September 29, 2010.

Signed and Sealed. September 29, 2010.

Nancy J. Salmon, Commissioner

SEAL

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

I concur in the result.

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

The Commission is an administrative agency of state government. See, *Creighton St. Joseph Regional Hospital v. Nebraska Tax Equalization and Review Commission*, 260 Neb. 905, 620 N.W.2d 90 (2000). As an administrative agency of state government the Commission has only the powers and authority granted to it by statute. *Id.* The Commission is authorized by statute to review appeals from decisions of a county board of equalization, the Tax Commissioner, and the Department of Motor Vehicles. Neb. Rev. Stat. §77-5007 (Supp. 2007). In general, the Commission may only grant relief on appeal if it is shown that the order, decision, determination, or action appealed from was unreasonable or arbitrary. Neb. Rev. Stat. §77-5016(8) (Cum. Supp. 2008).

The Commission is authorized to review decision of a County Board of Equalization determining taxable values. Neb. Rev. Stat. §77-5007 (Supp. 2007). Review of County Board of Equalization decisions is not new in Nebraska law. As early as 1903, Nebraska Statutes provided for review of County Board assessment decisions by the district courts. Laws 1903, c. 73 §124. The statute providing for review did not state a standard for that review. *Id.* A standard of review stated as a presumption was adopted by Nebraska's Supreme Court. See, *State v. Savage*, 65 Neb. 714, 91 N.W. 716 (1902) (citing *Dixon Co. v. Halstead*, 23 Neb. 697, 37 N.W. 621 (1888) and *State v. County Board of Dodge Co.* 20 Neb. 595, 31 N.W. 117 (1887)). The presumption was that the County Board had faithfully performed its official duties and had acted upon sufficient competent evidence to justify its actions. See, *Id.* In 1959, the legislature provided a statutory standard for review by the district courts of county board of equalization, assessment decisions. 1959 Neb Laws, LB 55, §3. The statutory standard of review required the District Court to affirm the decision of the county board of equalization unless the decision was

arbitrary or unreasonable or the value as established was too low. *Id.* The statutory standard of review was codified in section 77-1511 of the Nebraska Statutes. Neb. Rev. Stat. §77-1511 (Cum. Supp. 1959). After adoption of the statutory standard of review, Nebraska Courts have held that the provisions of section 77-5011 of the Nebraska Statutes created a presumption that the County Board has faithfully performed its official duties and has acted upon sufficient competent evidence to justify its actions. See, e.g. *Ideal Basic Indus. V. Nucholls Cty. Bd. Of Equal.*, 231 Neb. 297, 437 N.W.2d 501 (1989). The presumption stated by the Court was the presumption that had been found before the statute was enacted.

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

The Tax Equalization and Review Commission was created in 1995. 1995 Neb. Laws, LB 490 §153. Section 77-1511 of the Nebraska Statutes was made applicable to review of county board of equalization assessment decisions by the Commission. *Id.* In 2001, section 77-

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

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

is not always evidence that the county board of equalization acted unreasonably or arbitrarily because the statutory standard of review remains even if the presumption is overcome. *City of York*, supra. Clear and convincing evidence that a county board of equalization's determination, action, order, or decision was unreasonable or arbitrary, as those terms have been defined, may, however, overcome the presumption that the county board of equalization faithfully discharged its duties and acted on sufficient competent evidence. In any event, the statutory standard has been met and relief may be granted. Both standards of review are met in the fourth possibility and relief may be granted.

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

Wm. R. Wickersham, Commissioner