

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

ROBERT R. STOUT,)	
)	
Appellant,)	Case Nos. 08A 139, 08A 140, 08A 141 &
)	08A 142
v.)	
)	DECISION AND ORDER
SHERIDAN COUNTY BOARD OF EQUALIZATION,)	AFFIRMING THE DECISIONS OF
)	THE SHERIDAN COUNTY BOARD OF
)	EQUALIZATION
Appellee.)	

The above-captioned cases were called for a hearing on the merits of appeals by Robert R. Stout ("the Taxpayer") to the Tax Equalization and Review Commission ("the Commission"). The hearing was held in the Scottsbluff Hampton Inn, 301 W Hwy 26, Scottsbluff, Nebraska, on August 27, 2009, pursuant to an Order for Hearing and Notice of Hearing issued May 18, 2009 as amended by an Order dated June 26, 2009. Commissioners Wickersham, Warnes and Salmon were present. Commissioner Wickersham was the presiding hearing officer.

Robert R. Stout was present at the hearing. No one appeared as legal counsel for the Taxpayer.

Dennis D. King, County Attorney for Sheridan County, Nebraska, was present as legal counsel for the Sheridan County Board of Equalization ("the County Board").

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

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

**I.
ISSUES**

The Taxpayer has asserted that taxable value of the subject property as of January 1, 2008, 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, 2008.

**II.
FINDINGS OF FACT**

The Commission finds and determines that:

1. The Taxpayer has a sufficient interest in the outcome of the above captioned appeals to maintain them.
2. The parcels of real property to which the above captioned appeals pertain are ("the Subject Property") are described in the tables below.
3. Taxable value of each parcel of the subject property placed on the assessment roll as of January 1, 2008, ("the assessment date") by the Sheridan County Assessor, value as proposed in timely protests, and taxable value as determined by the County Board is shown in the following tables:

Case No. 08A 139

Description: All Section 21, township 35, Range 44, Sheridan County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Special Value	Board Determined Value
Agricultural Land	\$92,952.00	\$54,394.00	\$92,952.00
Total	\$92,952.00	\$54,394.00	\$92,952.00

Case No. 08A 140

Description: SW¼ Section 22, township 35, Range 44, Sheridan County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Special Value	Board Determined Value
Agricultural Land	\$26,551.00	\$16,000.00	\$26,551.00
Total	\$26,551.00	\$16,000.00	\$26,551.00

Case No. 08A 141

Description: NW¼ Section 27, township 35, Range 44, Sheridan County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Special Value	Board Determined Value
Agricultural Land	\$22,525.00	\$16,000.00	\$22,525.00
Total	\$22,525.00	\$16,000.00	\$22,525.00

Case No. 08A 142

Description: NE¼ Section 28, township 35, Range 44, Sheridan County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Special Value	Board Determined Value
Agricultural Land	\$26,400.00	\$16,000.00	\$26,400.00
Total	\$26,400.00	\$16,000.00	\$26,400.00

4. Appeals of the County Board's decisions were filed with the Commission.
5. The County Board was served with Notices in Lieu of Summons and duly answered those Notices.
6. The appeals were consolidated for hearing by order of the Commission.

7. An Order for Hearing and Notice of Hearing issued on May 18, 2009, as amended by an Order issued on June 26, 2009, set a hearing of the appeals for August 27, 2009, at 11:00 a.m. MDST.
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. Taxable value of each parcel for the tax year 2008 is:

Case No. 08A 139

Agricultural land	\$ 92,952.00
Total	<u>\$ 92,952.00</u>

Case No. 08A 140

Agricultural land	\$ 26,551.00
Total	<u>\$ 26,551.00</u>

Case No. 08A 141

Agricultural land	\$ 22,525.00
Total	<u>\$ 22,525.00</u>

Case No. 08A 142

Agricultural land	\$ 26,400.00
Total	<u>\$ 26,400.00.</u>

**III.
APPLICABLE LAW**

1. Subject matter jurisdiction of the Commission in each of the above captioned appeals is over all questions necessary to determine taxable value. Neb. Rev. Stat. §77-5016(7) (Cum. Supp. 2008).
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. 2008).
7. 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) (Cum. Supp. 2008).
8. 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) (Cum. Supp. 2008).
9. "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) (Cum. Supp. 2008).

10. The Legislature may enact laws to provide that the value of land actively devoted to agricultural or horticultural use shall for property tax purposes be that value which such land has for agricultural or horticultural use without regard to any value which such land might have for other purposes or uses. Neb. Const. art. VIII, §1 (5).
11. Agricultural or horticultural land which has an actual value as defined in section 77-112 reflecting purposes or uses other than agricultural or horticultural purposes or uses shall be assessed as provided in subsection (3) of section 77-201 if the land meets the qualifications of this subsection and an application for such special valuation is filed and approved pursuant to section 77-1345. Neb. Rev. Stat. §77-1344 (1) (Cum. Supp. 2008).
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) (Cum. Supp. 2006).

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).
20. "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).
21. 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).
22. 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).

23. 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. *Josten-Wilbert Vault Co. v. Board of Equalization for Buffalo County*, 179 Neb. 415, 138 N.W.2d 641 (1965).

IV. ANALYSIS

The subject property consists of four unimproved parcels of agricultural land and horticultural land. (E29, 30, 31, & 32). Two of the parcels are classified as waste and grassland. The parcel described in Case No. 08A 139 is classified as waste, grassland and dry crop land. An application for valuation for taxation of the subject property pursuant to sections 77-1343 to 77-1348, special valuation or more commonly referred to as greenbelt, was filed and approved for tax year 2006. (E33). Special value is the value agricultural land and horticultural land has for agricultural or horticultural purposes or uses without regard to the actual value the land would have for other uses or purposes. Neb. Rev. Stat. 77-1345 (Supp. 2007). If an application for special valuation is approved, the assessor is required to apply the special valuation assessment whenever appropriate to the land. 442 Neb. Admin. Code ch 11 §004.11 (1/07). Once an application for special valuation is approved the land remains subject to special valuation until disqualified. Neb. Rev. Stat. §77-1347 (Supp. 2007). There is no evidence that the subject property has been disqualified for use of special valuation in tax year 2008.

The Taxpayer asserts that rules and regulations of the Tax Commissioner require development of a valuation for lands subject to special valuation based on capitalized net rent. The Taxpayer also asserts that the County Assessor did not perform the required analysis and that if she had then the resulting value would be lower than taxable value as otherwise determined. The rules and regulations of the Tax Commissioner, concerning valuation of lands for which a special valuation application has been approved, are found in paragraph 5, chapter 11, of title 442 of Nebraska's Administrative Code. A process for determining actual value of agricultural and horticultural lands is prescribed in the rules and regulations. 442 Neb. Admin. Code, ch 11 §005.01 and 005.01A (1/07). Actual value may include value attributed to uses for residential, commercial, recreational or other uses. *Id.* The rules and regulations describe a process for determining the special value of agricultural land and horticultural land based on sales of similar classes or subclasses of agricultural land and horticultural land from agricultural and horticultural area in which actual value is not subject to influences by other purposes or uses. 442 Neb. Admin. Code, ch 11 §005.02 through 005.02B(3) (1/07). The rules and regulations also prescribe a process for determining special valuation based on capitalized net rent. 442 Neb. Admin. Code, ch 11 §005.03 through 005.03AC(4) (1/07). Finally, the rules and regulations detail record keeping and public access to information, used to determine special value. 442 Neb. Admin. Code, ch 11 §005.04 and 005.04H (1/07). The Taxpayer is correct in his contention that the rules and regulations of the Tax Commissioner require development of a special value based on capitalized net rent. Use of special valuation based on earnings is to be used if the value derived from the market comparison approach results in a value that reflects a value

influenced by purposes and uses other than agricultural or horticultural. 442 Neb. Admin. Code, ch 11 §005.03 (1/07).

The Taxpayer contends that values for agricultural land and horticultural land in Sheridan County, as indicated by sales, contain an element of value which is to be attributed to use of the land for investment purposes. The Taxpayer then argues that those values cannot represent the special value of the subject property because they include value attributable to investment use and investment is not an agricultural or horticultural purpose as defined in statute. "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) (Cum. Supp. 2008). A determination of special value is not confined to consideration of value for agricultural or horticultural purposes. A determination of special value also requires consideration of agricultural or horticultural uses. Neb. Rev. Stat. §77-1344(1) (Supp. 2007). A contract appraiser working for the County Assessor ("Appraiser") testified that an anticipation

that the value of agricultural land and horticultural land would increase over time was a common consideration among purchasers of agricultural land and horticultural land. The Appraiser testified in effect that holding land over time for appreciation, while being used for agricultural or horticultural purposes, was an agricultural or horticultural use because in the minds of buyers it was an element of financial return associated with the use of the land for agricultural or horticultural purposes. The fact that sales of agricultural land or horticultural land may have a portion of value that is associated with an expectation of rising value over time, related only to the use of land for agricultural or horticultural purposes, does not disqualify those sales for use in determination of special value based on a market comparison as prescribed by the rules and regulations of the Tax Commissioner. There is no evidence that the market comparison approach used by the County Assessor to determine special value resulted in values influenced by purposes and uses other than agricultural or horticultural therefore, use of capitalized net rent to determine special value of the subject property was not required.

The Appraiser had prepared an estimate of value based on capitalized rental rates. (E36:2). The analysis discusses gross cash rents. The rules of the Tax Commissioner also discuss gross cash rents. 442 Neb. Admin. Code, ch 11 §005.0 (1/07). The rules and regulations of the Tax Commissioner require an estimate of value based on net cash rent. 442 Neb. Admin. Code, ch 11 §005.03 (1/07). The analysis of the Appraiser is not the analysis required by the rules and regulations.

The Taxpayer submitted an analysis with the objective of showing an estimate of value for grassland based on a capitalized net rent. The Taxpayer delineated expenses he thought were appropriate as deductions to be used for a calculation of a net cash rent for grassland. The

Taxpayer then sought to estimate the deductions. The Taxpayer produced no evidence to substantiate a deduction for insurance or fencing cost. The Taxpayer's analysis of costs is by his own standards incomplete. The Taxpayer also acknowledged difficulty in selection of a capitalization rate. The rate finally selected was simply one which the Taxpayer thought produced a rational or acceptable estimate of value. The candor of the Taxpayer is appreciated. A usable capitalization rate would, however have to be determined on other criteria. It is not sufficient to select a rate which gives a desired value when the objective is to discover a value derived from an objective determination of facts in a formula. The Taxpayer's estimate of value based on capitalized net rent for grassland is not persuasive.

The Taxpayer did not submit an estimate of the value of waste land or dry crop land based on net cash rents. Portions of the subject property bear those classifications. It is the value of a parcel which must be determined if a parcel has mixed classifications or uses. The contributions of value of all the classifications or uses must be considered. The Taxpayer has submitted an analysis that was only applicable to grassland. The Taxpayer's analysis for the parcels in Case Nos 08A 139, 08A 140, and 08A 141 is incomplete.

The County Assessor determined that value, as indicated by the market comparison, was both actual value and special value. As noted above the County Assessor's actions do not comply with the rules and regulations of the Tax Commissioner, because an estimate of special value based on net cash rent was not developed. That failure has no effect in this case because of the reasons previously stated; there is no evidence that a value indicated by a capitalized net rent is less than the value indicated by the market comparison developed by the County Assessor. A failure to comply with the rules and regulations of the Tax Commissioner in a manner that does

not affect a required determination does not invalidate the determination. The County Board relied on the determinations of the County Assessor. The decisions of the County Board were not unreasonable or arbitrary.

**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 decisions of the County Board are unreasonable or arbitrary and the decisions of the County Board should be affirmed.

**VI.
ORDER**

IT IS ORDERED THAT:

1. The decisions of the County Board determining taxable values of the parcels comprising subject property as of the assessment date, January 1, 2008, are affirmed.
2. Taxable value, for the tax year 2008, of each parcel described in an appeal as referenced by the Case No. is:

Case No. 08A 139

Agricultural land	\$ 92,952.00
Total	<u>\$ 92,952.00</u>

Case No. 08A 140

Agricultural land	\$ 26,551.00
Total	<u>\$ 26,551.00</u>

Case No. 08A 141

Agricultural land	\$ 22,525.00
Total	<u>\$ 22,525.00</u>

Case No. 08A 142

Agricultural land	\$ 26,400.00
Total	<u>\$ 26,400.00.</u>

3. This decision, if no appeal is timely filed, shall be certified to the Sheridan County Treasurer, and the Sheridan County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Cum. Supp. 2008).
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 2008.
7. This order is effective for purposes of appeal on October 22, 2009.

Signed and Sealed. October 22, 2009.

Nancy J. Salmon, Commissioner

William C. Warnes, Commissioner

SEAL

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

I concur in the result.

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

The Commission is an administrative agency of state government. See *Creighton St. Joseph Regional Hospital v. Nebraska Tax Equalization and Review Commission*, 260 Neb. 905, 620 N.W.2d 90 (2000). As an administrative agency of state government the Commission has only the powers and authority granted to it by statute. *Id.* The Commission is authorized by statute to review appeals from decisions of a county board of equalization, the Tax Commissioner, and the Department of Motor Vehicles. Neb. Rev. Stat. §77-5007 (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 77-5011 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