



5018 (Cum. Supp. 2008). The final decision and order of the Commission in this case is as follows.

## **I. ISSUES**

The Taxpayer has asserted that actual value of the subject property as of January 1, 2008, is less than actual value as determined by the County Board. The issues on appeal related to that assertion are:

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

The actual value of the subject property on January 1, 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 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, 2008, ("the assessment date") by the Colfax County Assessor, value as proposed in a timely protest, and actual value as determined by the County Board is shown in the following table:

Case No. 08C 050

Description: Parcel Id 240740 at 590 County Rd 9, Colfax County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$341,400.00	\$339,400.00	\$341,400.00
Improvement	\$25,849,970.00	\$12,430,000.00	\$25,849,970.00
Total	\$26,191,370.00	\$12,769,400.00	\$26,191,370.00

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 March 17, 2009, as amended by an Order issued on June 2, 2009, set a hearing of the appeal for August 18, 2009, at 9:00 a.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 2008 is:

Case No. 08C 050

Land value           \$ 339,190.00  
Improvement value \$14,470,000.00  
Total value           \$14,809,190.00.

### 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) (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. A presumption exists that the County Board has faithfully performed its duties and has acted on competent evidence. *City of York v. York County Bd. Of Equalization*, 266 Neb. 297, 64 N.W.2d 445 (2003).
8. The presumption in favor of the county board may be classified as a principle of procedure involving the burden of proof, namely, a taxpayer has the burden to prove that action by a board of equalization, fixing or determining valuation of real estate for tax purposes, is unauthorized by or contrary to constitutional or statutory provisions governing taxation. *Gordman Properties Company v. Board of Equalization of Hall County*, 225 Neb. 169, 403 N.W.2d 366 (1987).
9. The presumption disappears if there is competent evidence to the contrary. *Id.*
10. The order, decision, determination, or action appealed from shall be affirmed unless evidence is adduced establishing that the order, decision, determination, or action was unreasonable or arbitrary. Neb. Rev. Stat. §77-5016 (8) (Cum. Supp. 2006).
11. Proof that the order, decision, determination, or action 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).
12. "Clear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved." *Castellano v. Bitkower*, 216 Neb. 806, 812, 346 N.W.2d 249, 253 (1984).

13. A decision is "arbitrary" when it is made in disregard of the facts and circumstances and without some basis which could lead a reasonable person to the same conclusion. *Phelps Cty. Bd. of Equal. v. Graf*, 258 Neb 810, 606 N.W.2d 736 (2000).
14. A decision is unreasonable only if the evidence presented leaves no room for differences of opinion among reasonable minds. *Pittman v. Sarpy Cty. Bd. of Equal.*, 258 Neb 390, 603 N.W.2d 447 (1999).
15. A corporate officer or other representative of an entity, must be shown to be familiar with the property in question and have a knowledge of values generally in the vicinity to be qualified to offer an opinion of value. *Kohl's Dept. Stores v. Douglas County Bd. of Equal.*, 10 Neb.App. 809, 638 N.W.2d, 881 (2002).
16. The County Board need not put on any evidence to support its valuation of the property at issue unless the taxpayer establishes the Board's valuation was unreasonable or arbitrary. *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).
17. A Taxpayer, who only produced evidence that was aimed at discrediting valuation methods utilized by 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).
18. 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 is an improved parcel used for commercial purposes. The parcel's improvements are those necessary to operate a slaughtering and meat packing facility capable of handling 5,000 head of cattle per day.

The County Board's determination of actual value was based on use of the cost approach. An Appraiser for the Taxpayer ("Taxpayer's Appraiser") gave an opinion of actual value supported by an appraisal that contained an estimate of value based on use of 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, 128 - 129. "The principle of substitution is basic to the cost approach. This principle affirms that a knowledgeable buyer would pay no more for a property than the cost to acquire a similar site and construct improvements of equivalent

desirability and utility without undue delay.” *The Appraisal of Real Estate*, 13<sup>th</sup> Edition, Appraisal Institute, 2008, 380. “The cost approach may be used to develop an opinion of market value ... and is frequently applied to proposed construction, special-purpose or specialty properties and other properties that are not frequently exchanged in the market such as public buildings.” *The Appraisal of Real Estate*, Supra p. 382.

Application of the cost approach as relied on by the County Board is shown in Exhibit 6 pages 32-100. The application of the cost approach as relied on by the County Board is a cumulative use of the approach. In 2000, an appraiser for the County (“County Appraiser”) prepared an appraisal of the subject property. The sole approach to value developed by the appraiser was the cost approach. (E6:69). For years subsequent to 2000 up to 2008, if additions were added or improvements were remodeled, the cost of the additions or remodeling was added to the replacement cost new determined for the year 2000. (E6:77-100).

For the 2000 appraisal by the County Appraiser, reproduction cost new of the improvements was estimated using a cost manual developed by the Marshall Valuation Service. (E6:54). “Reproduction cost is the estimated cost to construct, as of the effective appraisal date, an exact duplicate or replica of the building being appraised insofar as possible, using the same material, construction standards, design, layout, and quality of workmanship and embodying all the deficiencies, super-adequacies, and obsolescence of the subject improvements.” *The Appraisal of Real Estate*, Supra p. 385. The worksheets of the County Appraiser have a column captioned replacement cost. “Replacement cost is the estimated cost to construct, as of the effective appraisal date, a substitute for the building being appraised using contemporary



material, standards, design and layout. When this cost basis is used, some existing obsolescence in the property may be cured.” *Id.* After cost was estimated, depreciation was deducted.

The first deduction was for physical depreciation. Physical depreciation is the loss in value attributable to regular use, the impact of the elements, or damage. *The Appraisal of Real Estate*, Supra p. 381. The County Appraiser used the age-life method to estimate physical depreciation dividing the effective age of an improvement by its anticipated economic life. (E6:55). Effective age of an improvement is the age indicated by the condition and utility of an improvement and is based on the appraiser’s judgement and interpretation of market perceptions. *The Appraisal of Real Estate*, Supra p. 412. Economic life of an improvement is the period over which the improvement contributes to value. *The Appraisal of Real Estate*, Supra p. 413. Actual age of an improvement is its historical or chronological age. *The Appraisal of Real Estate*, Supra p. 412. A review of the year built column and the effective age column in the cost detail worksheets prepared by the County Appraiser shows that effective age equals actual age in the calculation. The physical depreciation as calculated in the County Appraiser’s worksheets is  $(\text{Life Expectancy (Economic Life)} - \text{Effective Age (Actual Age)}) \div (\text{Life Expectancy (Economic Life)}) = \% \text{ of depreciation}$ . (E6:56- 67). By way of illustration the following data applicable to the calculation of depreciation for a portion of the main plant referred to as the “Combo room, Pack off, Fab Floor is applied in the formula. Year built 1968, Effective Age 32. (E6:56). The year of the appraisal was 2000. The year built was 1968, effective age was 32 years. Life expectancy was 40 years. (E6:64). Remaining life was 8 years. (E6:64). (Life expectancy (Economic Life) 40 - Effective age (Actual Age)32) = 8 Remaining life. Depreciation taken was 80%. (E6:64).  $\text{Effective Age (Actual Age) 32} \div \text{Expectancy (Economic Life) 40} = 80\%$ .

The methodology shown was consistently applied in support of the indication of value developed in the 2000 appraisal and in the additions made in subsequent years.

The methodology was not updated for the year 2008. Using the Combo room, Pack off, Fab Floor as an example as of 2008, its Effective Age (Actual Age) was 40 years. If its Economic Life remained 40 years its depreciation factor would have been 100% ( $40 \div 40 = 1$ ). The Commission has not recalculated physical depreciation for all improvements listed in the County Appraiser's worksheets. No explanation was advanced for the failure to maintain and update depreciation each year in a consistent manner.

Functional depreciation or obsolescence is the reduction in value attributable to a flaw in the structure, material, or design that diminishes the function, utility, and value of an improvement. *The Appraisal of Real Estate*, Supra p. 391. The County Appraiser attributed 30% functional obsolescence to all improvements in the 2000 appraisal. (E6:55). The rationale for the deduction was the ongoing remodeling of the plant to achieve a higher capacity. (E6:55). The County Appraiser had estimated that for the year 2000, newer components had a 30% greater capacity than older components. (E6:55). Functional obsolescence in the amount of 30% was also attributed to remodeling or additions valued for years 2001, 2003, and 2004. (E6: 77-79, 83-85, and 86-88). Functional obsolescence was not attributed to remodeling or additions valued for the years 2002, 2005 or 2007. (E6:80-82, 89-91, and 95-97). No rationale was presented for continuation of the 30% deduction for functional depreciation related to capacity after the remodeling and additions shown for the years 2001, 2002, 2003, 2005, and 2007. Likewise, no rationale was presented for the deduction of 30% functional obsolescence from the costs of remodeling or additions for some years but not others. In addition, if replacement cost was the

cost basis used, it is reasonable to believe that improvements with the functional deficiency noted by the County Appraiser would not be replicated and that a deduction for functional obsolescence would not be appropriate with use of that cost basis.

There is clear and convincing evidence that the County Board's determination of actual value is based on a use of the cost approach that did not consistently apply a method for determining either physical or functional depreciation. A determination of value by the County Board, based on use of the cost approach as shown in Exhibit 6 was unreasonable or arbitrary.

The Taxpayer's Appraiser opined that actual value of the subject property as of January 1, 2008 was \$12,800,000. The basis for the opinion of the Taxpayer's Appraiser is shown in an appraisal received as Exhibit 2. The Taxpayer's Appraiser developed estimates of actual value using the sales comparison approach and the cost approach. (E2:96).

The Taxpayer's Appraiser determined that highest and best use of the subject property was as a special-purpose industrial meat processing facility. (E2:61). "Highest and best use" is defined as "The reasonably probable and legal use of vacant land or an improved property, which is legally permissible, physically possible, appropriately supported, financially feasible, and that results in the highest value." *The Appraisal of Real Estate*, 13<sup>th</sup> Edition, Appraisal Institute, 2008, 278. Four tests are implicit in the definition and are applied in the following order, Is the use : Legally permissible; Physically possible, Financially feasible and Maximally productive." *The Appraisal of Real Estate*, 13<sup>th</sup> Edition, Appraisal Institute, 2008, 278-279. Highest and best use is defined in the rules and regulations of the Tax Commissioner as the most reasonable and probable use of the property that will support the highest present value. 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. 350 Neb. Admin. Code ch10, §001.13 (1/07).

The Taxpayer's Appraiser used the sales comparison approach to develop an estimate of value. (E2:71-90). In the sales comparison approach an opinion of value is developed by analyzing closed sales, listings, or pending sales of properties that are similar to the subject property. *The Appraisal of Real Estate*, 13<sup>th</sup> Edition, Appraisal Institute, 2008, 297. An opinion of value based on use of the sales comparison approach requires use of a systematic procedure:

“1. Research the competitive market for information on sales transactions, listings, and offers to purchase or sell involving properties that are similar to the subject property in terms of characteristics such as property type, date of sale, size, physical condition, location, and land use restraints. ...

2. Verify the information by confirming that the data obtained is factually accurate and that the transactions reflect arm's-length market considerations. ...

3. Select relevant units of comparison (e.g., price per acre, price per square foot, price per front foot) and develop a comparative analysis for each unit. ...

4. Look for differences between the comparable sale properties and the subject property using the elements of comparison. Then adjust the price of each sale to reflect how it differs from the subject property or eliminate that property as a comparable. This step typically involves using the most comparable sale properties and then adjusting for any remaining differences.

5. Reconcile the various value indications produced from the analysis of comparables into a single value indication or a range of values.” *The Appraisal of Real Estate* 13<sup>th</sup> Edition, The Appraisal Institute, 2008, 301-302. The estimate of actual value developed by the

Taxpayer's Appraiser using the sales comparison approach was developed using 8 sales.

(E2:93).

The Taxpayer's Appraiser stated that "All of the comparable improved sales and offerings would require adjustments for various locational and physical characteristics." (E2:94). An adjustment was made for refrigeration. (E2:95). No other adjustments were made. The Taxpayer's Appraiser testified that adjustments were unnecessary because the range of unit value per square foot of building area was narrow. Of greater significance, however, is the failure to adjust the sales for the fact that none of the comparable parcels were sold or offered for sale as a special-purpose industrial meat processing facility, the highest and best use determined for the subject property. The estimate of value developed by the Taxpayer's Appraiser does not include adjustments for location and physical characteristics other than refrigeration and the sales analyzed were for uses other than the highest and best use of the subject property. The estimate of value developed by the Taxpayer's Appraiser based on the sales comparison approach is not persuasive.

The Taxpayer's Appraiser also developed an estimate of actual value using the cost approach. (E2:64-75). The Taxpayer's Appraiser testified that he had not properly determined the age of the kill floor for purposes of his estimate of value. The Taxpayer's Appraiser also testified using the appropriate age did not make a significant difference in his opinion because the contribution to value of the kill floor was only one component of the cost approach estimate. There was also evidence of disagreement between the County Appraiser and the Taxpayer's Appraiser concerning the appropriate cost table to be used from the Marshall Valuation service handbook. The basis for disagreement between the appraisers was whether the facility was built

to heavy (Process) Manufacturing or Light Manufacturing and the class of the facility within either build category. The County Appraiser, for the year 2000, assigned a base cost of \$67.97 per square foot to the main plant. (E6:56). A base cost of \$67.97 per square foot can be found in section 14 at page 15 of Marshall Valuation Service 2/2000, for a heavy (Process) Manufacturing industrial building class B Low Cost. Adjustments increased the square foot cost prior to depreciation used by the County Appraiser to \$80.72. (E6:64). The Taxpayer's Appraiser assigned a base cost of \$59.15 per square foot to the main plant. (E2:71). A base cost of \$59.97 per square foot can be found in section 15 at page 14 of Marshall Valuation Service 2/2008, for Light Manufacturing industrial building class C Good. Adjustments increased the square foot cost prior to depreciation used by the Taxpayer's Appraiser to \$69.20 per square foot. An additional adjustment was made by the Taxpayer's Appraiser for refrigeration. (E2:71). The adjustment was \$16.30 per square foot of refrigerated area. (E2:71). The refrigerated area was estimated by the Taxpayer's Appraiser to be 280,500 square feet. (E2:75). The adjustment for refrigeration prior to depreciation was \$4,572,150. (E2:75). The Taxpayer's Appraiser estimated the area of the main plant at 485,098 square feet. (E2:75). The County Appraiser did not adjust the main plant cost for refrigeration. The adjustment for refrigeration applied by the Taxpayer's Appraiser when considered as a part of the base costs of the main plant is \$9.43 ( $\$4,572,150 \div 485,098 = \$9.4252$ ). Adding the refrigeration adjustment to the main plant per square foot costs, prior to deprecation as determined by the Taxpayer's Appraiser results in an adjusted cost of \$78.63 ( $\$69.20 + \$9.43 = \$78.63$ ). A comparison of square foot values prior to depreciation of components as used by the County Appraiser and the values prior to depreciation used by the Taxpayer's Appraiser does not show a significant difference.

A base cost of \$93.82 per square foot can be found in section 14 at page 15 of Marshall Valuation Service 2/2008, for a heavy (Process) Manufacturing industrial building class B Low Cost. The difference between that base cost and the base cost of \$67.97 as utilized by the County Appraiser is significant, however the appraisal was not updated and the Commission can only evaluate the evidence before it.

The divergent results obtained by the appraiser's using the cost approach are attributable to depreciation. For reasons stated above, depreciation as determined by the Appraiser for the County Board is not reasonable.

The estimate of value based on the cost approach as developed by the Taxpayer's appraisal is not supported in his appraisal with the detail found in the appraisal of the County Appraiser. The detail found in the appraisal of the Taxpayer's Appraiser does, however, meet appraisal standards found in the Uniform Standards of Professional Appraisal Practice.

The determination of the County Board was unreasonable or arbitrary because it was based on an estimate of value using the cost approach that was inconsistent in the determination of physical and functional depreciation. The estimate of actual value as developed by the Taxpayer's Appraiser, based on the sales comparison approach, did show adjustments to sales as necessary to compare with the highest and best use of the subject property. The estimate of value developed by the Taxpayer's Appraiser using the cost approach includes a 10.27 acre parcel. (E2:70). Actual value of the 10.27 acre parcel has been determined in proceedings in Case No. 08C 051. Actual value of the parcel as determined by the Commission is \$30,810. The estimate of value developed by the Taxpayer's Appraiser based on the cost approach for the subject property adjusted for the actual value attributable to the 10.27 acre parcel is, \$14,809,190

(\$14,840,000 - \$30,810 = 14,809,190). \$14,809,190 is the most reasonable estimate of actual value in evidence.

**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 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 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 vacated and reversed.

**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, 2008, is vacated and reversed.
2. Actual value, for the tax year 2008, of the subject property is:

Case No. 08C 050

Land value	\$ 339,190.00
Improvement value	<u>\$14,470,000.00</u>
Total value	<u>\$14,809,190.00.</u>



3. This decision, if no appeal is timely filed, shall be certified to the Colfax County Treasurer, and the Colfax 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 November 19, 2009.
- Signed and Sealed. November 19, 2009.

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Nancy J. Salmon, Commissioner

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Robert W. Hotz, Commissioner

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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 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. Nuckolls Cty. Bd. Of Equal.*, 231 Neb. 653, 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