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***McLaughlin v. Jefferson County Bd. of Equal.*, 5 Neb. App. 781, 567 N.W.2d 794 (1997).**

This case resulted from the protest of value by an individual taxpayer before the county board of equalization. After the protest was denied, the taxpayer appealed to the Nebraska Tax Equalization and Review Commission. After a hearing, the Commission reduced the value placed on the property by the county board. The taxpayer sought further reduction and filed an appeal with the Nebraska Court of Appeals. However, the taxpayer did not file a praecipe with the Court of Appeals within thirty days of filing the appeal, as required by the Administrative Procedure Act. The Court noted that although appeals from decisions of the Commission are to the Court of Appeals rather than to the District Court, as is the case in appeals from state agencies under the APA, the language of the statute creating the Commission, like the APA, requires that the parties of record shall be made parties to the proceedings and that summons shall be served within thirty days of filing the petition. Therefore, in reviewing cases interpreting the APA, the Court noted that courts acquire jurisdiction to hear appeals from decisions of administrative agencies only if the review is sought in the manner and time provided for by statute. Since serving summons within thirty days of filing the appeal is a prerequisite for the court to obtain jurisdiction to hear the appeal, failing to file a praecipe for service within thirty days of the appeal and failing to serve summons within the necessary time frame meant that the Court did not have subject matter jurisdiction to hear the appeal and the Court dismissed the appeal.

***Bottorf v. Clay County Bd. of Equalization*, 7 Neb. App. 162, 580 N.W.2d 561 (1998).**

This case involved a residential property that was purchased for \$130,000 (\$5,000 allocated for personal property) in 1995. Subsequently, the taxpayer made improvements to the property. In 1996, the county assessor proposed a value for the property of \$162,715. The taxpayer protested to the county board, requesting a value of \$86,980. The board reduced the value to \$144,160. The taxpayer then appealed to the Nebraska Tax Equalization and Review Commission, who issued an order affirming the county board. He then appealed to the Nebraska Court of Appeals, who affirmed the order of the Commission.

At hearing before the Commission, the taxpayer offered documents relating to his purchase of the property and the affidavit of a realtor appraising the property at \$125,000 based on the purchase price and a comparable sale. That property was located close to the subject property and had sold several years earlier for \$135,000. The taxpayer also offered the property record cards for two properties which were appraised significantly lower than the subject property. However, those properties were only one story, as opposed to the subject property's two stories and one of them had no basement even though the subject property had a basement. The board called no witnesses and offered the residential property worksheet for the subject property. The Commission found that the purchase price of the property was not conclusive evidence of the value of the property, the taxpayer's comparable properties were not truly comparable to the subject property, and the record did not support the taxpayer's contention that property in the county was not equalized. The Commission concluded that the taxpayer's evidence failed to demonstrate that the decision of the board was arbitrary and unreasonable.

The Court of Appeals, in reviewing the record made at the Commission hearing, noted that the property was custom built, had distinctive features and that the property was unique for that community. Furthermore, the taxpayer's evidence relating to sale price was not dispositive of actual value. The record showed that the taxpayer had made improvements to the property since it was purchased. The record before the Commission also showed that the taxpayer's comparable properties were not similar or comparable to the subject property. With respect to the realtor that testified on behalf of the taxpayer, the Court noted that an expert's opinion is only as useful as the facts upon which it is based. In this case, the realtor's opinion of the value of the property was based on the purchase price and one of the properties offered by the taxpayer as a comparable property. Therefore, the Commission was justified in failing to accept the realtor's opinion as persuasive.

Finally, even though the county board did not put on any evidence at the hearing in front of the Commission, the taxpayer did not provide sufficient evidence to demonstrate that the board's decision was unreasonable or arbitrary. As a result, the Commission was required to affirm the board's ruling under Section 77-1511. The Court noted that the Commission, as permitted by statute, applied its experience, technical competence, and specialized knowledge in evaluating the evidence in this case and its determination was supported by competent evidence and was supported by law. Therefore, the Court affirmed the Commission's decision.

DeBruce Grain, Inc. v. Otoe County Bd. of Equalization, 7 Neb. App. 688, 584 N.W.2d 837 (1998).

The property involved in this case was a grain elevator facility consisting of a concrete grain elevator and other buildings. The land was assessed at \$25,070 and for 1997, the county assessor's office raised the assessed value of the improvements by 5 percent from the previous year, to \$1,088,825. The price per bushel at that assessed value is \$1.12. The taxpayer protested to the county board of equalization but was unsuccessful. The taxpayer appealed the decision of the county board to the Nebraska Tax Equalization and Review Commission which upheld the decision of the county board. The taxpayer then appealed to the Nebraska Court of Appeals, who affirmed the decision of the Commission.

At the hearing before the Commission, the owner of the taxpayer, who had been in the grain elevator business for many years, testified. He testified that the market for grain elevators was marginal and that other elevators price per bushel capacity ranged from 40 to 5.8 cents per bushel. Further, other elevators in Otoe County were appraised with significantly lower values than the subject property. However, the capacities of those facilities were significantly less than the subject property. Other properties used as comparables by the taxpayer turned out to have significant differences from the subject property.

The assessor testified about the method of valuing the subject property. The work was actually done by an appraiser using the cost approach from the Marshall-Swift manual. The subject property's assessed value was increased five percent from the previous year because all commercial improvements in the county were increased by that amount. The assessor also testified that the most comparable properties to the subject property were elevators with a higher value per bushel than the properties suggested by the taxpayer as comparable.

The Court began its opinion with a discussion of the applicable burdens of proof and persuasion (see Procedure section) both of which were on the taxpayer. The Court felt that after several readings of the record, it could not find any opinion that the subject property had a

certain actual value or any other opinion which would establish a basis for changing the assessed value of the property. Although the Court was "not impressed with the Board's evidence", the taxpayer never rendered an opinion on what the value of his property should be. Further, the taxpayer's comparable properties were not truly comparable. Because the taxpayer did not render his own opinion of the value of the subject property, the comparables were being used as independent proof of value. There did not seem to be sufficient testimony in the record to indicate that the property was similar enough to the subject property to independently show its value. Further, the taxpayer was using assessed values for those properties, not sales price. Again, if the properties were not truly comparable, the assessed values of those properties would not be useful to showing the actual value of the subject property. Because the taxpayer did not put on sufficient evidence to meet its burdens, the Court of Appeals affirmed the Commission order upholding the county board order denying the taxpayer's protest.

Forney v. Box Butte County Bd. of Equalization, 7 Neb. App. 417, 582 N.W.2d 631 (1998).

This case involved the appeal of the valuation of a unique residential property. The house was on two lots in a newly developed neighborhood in Alliance. In tax year 1996, the county assessor valued the property at \$434,666 (\$26,870 for the land and \$407,796 for the house). The taxpayer protested to the county board, another appraisal was conducted and the board reduced the total value to \$325,534 (house reduced to \$298,664). That reduction was not enough for the taxpayer, who appealed to the Nebraska Tax Equalization and Review Commission. After a hearing, the Commission affirmed the decision of the county board. The taxpayer appealed to the Nebraska Court of Appeals, who affirmed the decision of the Commission.

The taxpayer's argument was that a comparable sales analysis was inappropriate, as was a construction cost valuation. At hearing before the Commission, the taxpayer called a real estate broker from the area as a witness. He generally uses a comparable sales approach when he does a market analysis but there was only one other comparable property sold in Alliance in recent years but that property had some significant differences with the subject property. He used the sales price per square foot for this property to determine that the subject property should be valued at \$295,400. The witness also testified that there might not be a market for this kind of home in that community because there would be very few qualified buyers and that the value of the highest priced house ever sold in town was \$207,000 and that the taxpayer would be hard pressed to sell the house for more than \$200,000. The witness was not an appraiser, did not know anything about replacement cost and did not consider the fact that the house was on two lots. Further, values and sale prices are increasing in the community as is the number of larger homes on the market.

A banker also testified for the taxpayer and indicated that the taxpayer's mortgage loan was \$350,000 and that the cost of construction was \$375,000. It was his opinion that several homes in town had sold for less than their construction costs.

The taxpayer also testified, at the request of the board. The contract price for the home was \$250,000 and was overrun by \$100,000. He had a \$350,000 loan but may have used additional funds in construction. The taxpayer felt the home should be valued at \$265,000 because there was no market to sell it. He also offered an appraisal report that used a sales comparison approach which valued the property at between \$265,000 and \$290,000.

The county assessor testified that the county uses an outside appraiser. The subject property was initially assessed at \$434,000 using pictures and measurements of the property and applying the Marshall-Swift pricing system. All other residential properties in the county are valued in the same manner. The appraiser then testified that when sales comparison data is limited, he uses replacement cost to help determine an accurate fair market valuation. He determined value in this case by determining replacement cost new and subtracting for physical and economic depreciation to reach a total replacement value. He then adjusted the value upward to account for two percentage increases in previous years ordered by the State Board of Equalization. Adding the land value, he reached the \$325,534 figure adopted by the board.

After discussing the burden of proof and persuasion issues contained in the procedural portion of this summary, the Court noted the three approaches to value that Nebraska law permits in trying to determine the actual value of property. While it was true that the purchase price of property may be considered, along with other relevant factors in determining actual value, it is not conclusive of the actual value of the property. Sale price is not synonymous with actual value or fair market value. In this case the taxpayer argued that the value of his property was not properly determined by the cost of construction or on the basis of sales prices in other communities. However, the taxpayer's evidence indicated a replacement cost value that would have been higher than that adopted by the board. The taxpayer's sales comparison evidence consisted of only one home. The taxpayer's appraiser did not consider replacement cost or the second lot in arriving at his opinion of value. The banker's testimony did not offer evidence of the appraised value of the home and merely talked about the mortgage amount. It did not rebut the testimony of the county's appraiser who considered replacement cost reduced by factors of physical depreciation and location. Further, the appraisal offered by the taxpayer departed from standard appraisal techniques according to the appraiser.

The Court also dealt with the argument that because the property was expensive, unique, and there were few potential buyers in the community that its value ought to be reduced. The Court did not feel that these factors led to the conclusion that the home had no market value or that actual value could not be determined. Nebraska law, in Section 77-112 requires the use of applicable statutory factors in determining value. The county's appraiser in this case, used reproduction or replacement cost in combination with comparable sales of other properties in the area. The method of determining value used by the county was appropriate. Further, the lack of a current buyer is not the determining guidepost for measuring value. However, the whole concept of determining value must *assume* both a willing buyer and seller.

After reviewing the record, the Court concluded that the taxpayer did not offer sufficient evidence to overcome the presumption of correctness in favor of the board and did not satisfy the burden of proving that the board's value was arbitrary, capricious, or unreasonable and affirmed the Commission's order.

Finally, the Court noted a number of "breaks" the taxpayer got throughout the process that were not provided to other taxpayers. While not suggesting that the taxpayer was not entitled to the consideration he received, the Court did feel that these breaks further indicated that the taxpayer did not prove by clear and convincing evidence that the valuation of his property was grossly excessive when compared to other properties.

***Harrison Square Partnership v. Sarpy County Bd. of Equalization*, 6 Neb. App. 454, 574 N.W.2d 180 (1998).**

This case involved a neighborhood shopping center that was half vacant when it was purchased at a foreclosure sale in 1995 for \$565,000. It was assessed in 1996 for \$1,478,260. The taxpayer protested the assessment to the county board, who accepted the recommendation of the county's appraiser. The taxpayer then appealed to the Nebraska Tax Equalization and Review Commission, who reduced the value of the property to \$1,322,755. The taxpayer then appealed to the Nebraska Court of Appeals who affirmed the order of the Commission. At the hearing in front of the Commission, the county's appraiser testified that he used an income approach to determine the value of the property. He assumed gross operating income of \$312,000, a capitalization rate of 12.25, and a 5 percent vacancy rate. Since then, the appraiser learned the property had a higher vacancy rate of 10-15 percent. If the actual income and expenses of the property were used, the valuation would be \$1,035,330. The taxpayer testified that the actual income of the property in 1995 was \$177,486. He pointed out that a similar shopping center which was newer and had a better location had a higher capitalization rate, resulting in a lower valuation. However, he had not provided the board with the different rate or information to justify a different rate when the board heard the protest. The Commission issued an order determined that when actual income and expense figures and mass appraisal techniques are mixed, the resulting valuation is incorrect and skewed. The Commission also upheld the income approach figures used by the board, with the exception of the vacancy rate. Using a different vacancy rate resulted in the Commission valuing the property at \$1,322,755.

The Court noted the applicable standards of review in cases before the Commission and then turned to two factual, issues. The first was the economic rent for the property. The taxpayer argued that actual rent should have been used in the calculation of the income approach for the property. However, the Nebraska Assessor's Reference Manual and IAAO materials indicate that "economic rent" should be used to calculate the income approach and that it is the annual rent that is justified for the property on the basis of a careful study of comparable properties in the area. Since Nebraska law permits the determination of actual value based on the mass appraisal techniques of the Assessor's Reference Manual and IAAO, the income approach used by the county's appraiser was authorized by law. The record indicates that sufficient facts were presented to support the finding by the Commission that the income approach was properly applied by the county. Therefore, the Court concluded that the Commission's decision on the issue of economic rent was correct.

The Court also dealt with the taxpayer's argument that the incorrect capitalization rate was applied by the board. However, the whole issue of capitalization rate was not presented to the county board. The statutes creating the Commission give it jurisdiction over questions raised before the county board. Since the capitalization rate question was not raised before the county board, it was not properly before the Commission and the Court affirmed the order of the board.

***J.C. Penney Co., Inc. v. Lancaster County Bd. of Equalization*, 6 Neb. App. 838, 578 N.W.2d 465 (1998).**

This case involved the assessment of a retail department store. The land on which the store was located was purchased in 1994 for \$2,267,000. The store was built during 1994 and

1995. For 1996 tax year, the county assessor proposed to value the property at \$9,007,973 using the cost method of valuation. This involved a computer program which takes into consideration the characteristics of the subject property. The computer then uses electronic modeling and tables that estimate the cost of construction of a building with those features. In order to confirm the value, the county also uses the income valuation approach. This uses a computer program which estimates the income value of the property based upon averages for retail rental rates, less the estimated average for expenses that would be expected to be charged against a building. This method reached a value of \$10,315,500.

The taxpayer protested to the county board and requested a valuation of \$5,285,910. A referee was assigned to review the value of the property and a hearing was scheduled. The taxpayer did not appear at the hearing, but the referee recommended reduction of the value to \$6,815,860. Initially, the referee coordinator agreed with the recommendation of the referee but then became concerned with the lack of equalization in value of other properties within the shopping center where the subject property was located. The coordinator then changed his mind and put a note on the referee's report, valuing the property at \$8,685,000. Meanwhile, the referee's report with the lower recommendation had been mailed to the taxpayer. It gave the taxpayer notice of a day and time the county board would take final action on the recommendation. Because notice was short, the taxpayer was unable to appear but an appraiser for the taxpayer appeared by telephone. A few minutes before the hearing, the taxpayer's appraiser learned that the referee's recommendation had been overruled and the property was now appraised at \$8,685,000. The county board asked the taxpayer to supply some cost materials. The appraiser faxed an objection to the short notice, but the board ruled on the property and accepted the coordinator's recommendation of value that day.

The taxpayer appealed to the Nebraska Tax Equalization and Review Commission. At that hearing, the taxpayer offered lease data from other stores located in the Midwest, assessments for other stores located in other states and evidence of the board's hearing procedures. The board offered the appraisal of the property. The appraiser employed the cost, income and sales comparison approaches. The cost approach began with an estimate of land value based on six recent sales of vacant land in the county. He then estimated the value of the improvements using the Marshall Valuation Service. The depreciation was subtracted from the value of the improvements and the cost of the building was added to the land value to reach a figure of \$10,121,210. The income approach used data from large retail facilities and estimated what rents the subject property would generate, its expenses and an expected net operating income. That was multiplied by a capitalization rate to reach a value of \$8,307,420. Finally, the appraiser used a sales comparison approach and attempted to use a comparison between the subject property and similar properties sold in the past. However, only one department store had been sold in recent years and so the appraiser used the sales price for that sale, plus the cost of its rehabilitation to reach a value per square foot. That amount was multiplied by the square footage of the subject property to reach a value of \$9,045,018.

The Commission issued an order affirming the decision of the board appraising the property at \$8,685,000. In doing so, the Commission felt that the taxpayer's evidence was not helpful in establishing a proper valuation. In reviewing the board's evidence, it rejected the income approach because of the lack of comparability of the other rental properties. The sales approach was rejected because there was only one sale. The Commission felt that the cost approach was valid.

The taxpayer appealed to the Nebraska Court of Appeals. After some discussion of the standard of review (see Procedure section), the Court took up the taxpayer's arguments. The Commission was critical of the evidence presented by the taxpayer because of a lack of underlying data about the evidence. For example, the Commission pointed out that the information provided about taxpayer's stores in other states was lacking in information about the size and quality of the store and did not provide any information about the property tax laws of those states. The Court agreed with the Commission's analysis. The taxpayer also argued that the Commission had a duty to compel the production of evidence to order the submission of information and documentation regarding the shortcomings of the taxpayer's proof. In doing so, it pointed to the provisions of the Commission's enabling statutes which provide for broad powers to offer and make part of the record in Commission cases. The Court characterized this argument as seeking to compel the Commission to be a "litigation advisor" to the parties and compel the production of evidence it wants at the hearing. In the Court's view, this was a tortured reading of the Commission's statutes and that it was the duty of the litigants to develop the evidence to be presented to the Commission.

In turning to the board's valuation, the taxpayer challenged the evidence supporting the Commission's decision. The Court noted that if the taxpayer could present competent evidence that the board has not acted upon competent evidence, then the action of the board would not be presumed correct. If such evidence was presented, then the presumption would disappear and the question would become the reasonableness of the valuation with the burden on the taxpayer to show the value was unreasonable. Against this backdrop, the Court viewed the decision of the board to overrule the referee based solely on the coordinator's recommendation was unreasonable because it was based on insufficient evidence and improper consideration of other properties which had not yet been valued. However, having determined that the board acted in an arbitrary manner in valuing the property at \$8,685,000, the presumption of correctness disappears and the question of the value of the property becomes one of fact based on the evidence presented to the Commission. The burden still remains on the taxpayer to show the board's value was unreasonable. Here, the county's computer system generated value estimates for both the cost approach and income approach to value. The cost approach was also verified by the county's appraiser. On the other hand, the taxpayer failed to introduce any probative evidence as to value. Therefore, it failed to meet its burden of persuasion to show that the board's appraisal was wrong. The taxpayer offered no appraisal information of its own and the county's cost approach was competent evidence to *uphold* the Commission's decision to value the property at \$8,685,000. Therefore, the Court affirmed the decision of the Commission.

***Kawasaki Motors v. Lancaster County Bd. of Equalization*, 7 Neb. App. 655, 584 N.W.2d 63 (1998).**

This case involved the valuation of a manufacturing plant consisting of land and a number of buildings. The county assessor valued the property at approximately \$13.9 million. The taxpayer protested to the county board who adopted the assessor's proposed value. The taxpayer then appealed to the Nebraska Tax Equalization and Review Commission which upheld the valuation of the county board. The taxpayer appealed the decision of the Commission to the Nebraska Court of Appeals which affirmed the Commission's order.

The basis for the taxpayer's appeal to the Commission was that the income and market data approaches to value supported a much lower value, approximately 8.475 million dollars. At the hearing before the Commission, the taxpayer offered the testimony of an appraiser as well as his report. The appraiser used the sales comparison approach in valuing the property. He used neither a cost nor an income approach, it being his opinion that neither approach would be appropriate. The appraiser used sales of large industrial properties located throughout the Midwest for his sales comparisons.

The county also called an appraiser to testify. He prepared a cost approach, using replacement cost from the Marshall and Swift valuation service and arrived at a reproduction cost new of approximately \$26.96 million. He then determined depreciation and subtracted that amount, as well as the cost to cure some functional obsolescence and added back the land value to reach a valuation figure of \$16,700,000. He recognized that the cost approach represented the high end of value for the property. The county's appraiser disagreed with the taxpayer's appraiser about the applicability of the cost approach and cited the property assessment handbook which indicated that the cost approach is especially useful for special use and industrial facilities. The county's appraiser also used the market approach to show that the board's value was reasonable. He found that the overall average value for these properties was \$14.69 per square foot as compared to the \$15 per square foot value used by the board. The county's appraiser also disagreed with the appraiser for the taxpayer in terms of the quality of the property, the amount of functional obsolescence, and conclusions about clutter in the plant or the ability to convert it to a distribution warehouse. Finally, the county's appraiser testified that the taxpayer spent \$8.5 million improving the property and that one would not make such improvements on a property that was obsolete.

In reviewing the Commission's order upholding the decision of the county board, the Court discussed the burdens of proof and persuasion, noting that a county board's - decision in disregard of facts and circumstances without some basis which would lead a reasonable person to the same conclusion would be arbitrary and would be subject to reversal by the Commission. The Court then reviewed the evidence adduced at hearing before the Commission. In doing so, the Court noted that the property was valued on the basis of an agreement between the parties in previous tax years and was increased to reflect new construction and that the Commission erred in finding the board did not act in an arbitrary and capricious manner by relying on an agreement for previous tax years in setting value. Had the Commission found that the board acted in an arbitrary and capricious manner, the value of the property would become a question of fact to be determined based on all the evidence presented. In this case, the Court felt that the Commission considered all of the evidence presented and determined the reasonableness of the valuation based on the evidence presented and determined the value adopted by the board to be reasonable. In other words, the Commission reached the correct conclusion regarding the value of the property, even though it erred in its determination of whether the board's method was unreasonable and arbitrary.

Finally, the Court determined that where the Commission determines that the value adopted by a county board is reasonable, it does not need to make an independent determination of the value of the property.

***Lancaster County Bd. of Equalization v. Condev West, Inc.*, 7 Neb. App. 319, 581 N.W.2d 452 (1998).**

This case involved a department store purchased by the taxpayer for \$6 million in 1994. The property was then renovated at a cost of \$5.2 million. For the 1996 tax year, the county assessor sought to value the property at \$11,335,800. This figure was reached through the use of the income approach to value based on the county's computerized mass appraisal system. The taxpayer protested to the county board of equalization and requested a valuation of \$7,008,000. A hearing before a referee was scheduled and no one representing the taxpayer appeared at the hearing. The referee issued a report recommending a reduction in value to \$7,475,000. The recommendation was based on data from the assessor, market sales data used by the assessor, income data used by the assessor and the referee's personal inspection. The referee coordinator for the county initially agreed with the report by the referee. However, the coordinator began valuing other properties in the taxpayer's shopping center and became concerned with the lack of equalization among properties. Therefore, the coordinator changed his mind and overruled the referee's recommendation. The coordinator, in a handwritten note, recommended a valuation of \$10,200,000.

The referee's initial report was sent to the taxpayer. The report indicated that the county board would take final action on the recommendation on a particular date. No one for the taxpayer appeared on that day, but the following day, counsel for the taxpayer appeared and presented documentation supporting taxpayer's proposed valuation of \$7 million. The referee coordinator explained his valuation figure, and the county board accepted the coordinator's proposed valuation.

The taxpayer then appealed to the Commission. At the Commission hearing, the taxpayer presented its own appraiser who employed all three approaches to value: cost, income and market data. Using cost (replacement less depreciation for the building plus land value), the appraiser reached a valuation figure of \$7,350,000. Income data came from thirty leases of anchor stores in regional shopping centers, the appraiser reached a range of value from \$7,075,000 to \$7,450,000. For the market data approach, the appraiser used five sales (out of thirty-two) which he deemed most comparable to the subject property, found a likely selling price per square foot and multiplied it by the square footage of the property. He reached a valuation figure of \$6,750,000 to \$7.2 million. The appraiser settled on a value of \$7.1 million and took the view that the income approach was the most meaningful measuring stick for value with the market data approach worthy of secondary consideration.

The county's evidence consisted of testimony from the referee coordinator and an appraiser. The appraiser used all three approaches and concluded the subject property should be valued at between \$10,377,000 and \$12,865,000. The appraiser differed from the taxpayer on cost approach in his determination of the quality of the improvements, a number of additional costs not accounted for by the taxpayer and less depreciation with no deduction for external obsolescence. The appraiser valued the land higher than the taxpayer did. For income approach, the county's appraiser had a different capitalization rate than the taxpayer and estimated value at \$10,376,868. Finally, for the market data approach, the county's appraiser reached a much higher sale price per square foot (although some sales used included discount stores not in super regional malls) and determined a range of value between \$10,377,000 and \$12,865,000. The county's appraiser believed that the best indicator of value was the cost approach.

The Commission reversed the order of the county board and set the value at \$7,502,508. It ruled that the land value of \$2,822,508, set by the county was supported by the evidence and was consistent with the land values placed on other mall anchors. It also found the taxpayer's cost approach value for the building and parking structure of \$4,680,000 was supported by the evidence. The Commission found that the county's market data approach without credibility because the sales used was not sufficiently comparable to the subject property. Similarly, the taxpayer's market data was not seen as credible because the sales were from outside the state. The county board appealed to the Nebraska Court of Appeals. It dealt with burden of proof and persuasion issues, directing the Commission to cases adopting pre-Commission standards for those items. The Court noted that the taxpayer must demonstrate to the Commission that the assessment is grossly excessive and is a result of arbitrary or unlawful action and not a mere error of judgment.

The Court noted that a taxpayer has the right to have its property assessed at actual value. In reviewing the Commission's determination, the Court pointed out that the Commission disregarded the referee coordinator's valuation method by saying that cost, price, and value are not always synonymous. In previous cases, the Nebraska Supreme Court has said that purchase price, standing alone, is not conclusive of the actual value of property, but must be considered with other matters relevant to the actual value. The record before the Commission indicated that the referee's recommendation was based on his own inspection and data at the assessor's office and that he recommended a value of \$7,475,000. It also appeared that the board relied on the referee coordinator's value of \$10.2 million exclusively. Therefore, the taxpayer adduced competent evidence before the Commission to rebut the presumption of correctness in favor of the board. Therefore the Commission was correct in concluding that the decision denying the taxpayer's request for a reduction of the value of its property was unreasonable and arbitrary. Once the presumption of correctness was rebutted, the reasonableness of the valuation placed on the property by the board becomes one of fact based upon all of the evidence presented before the Commission. The burden remains on the taxpayer to show that the board's value was unreasonable. In reviewing the Commission's decision, the Court determined that the evidence offered by the taxpayer's appraiser relating to the cost approach and the value of the land was competent and supported the Commission's decision.

Omaha Nebraska Hotel Ltd. Partnership v. Douglas County Bd. of Equalization, 6 Neb. App. 860, 577 N.W.2d 570 (1998).

This case involved the valuation of a full service hotel which was purchased in 1994 for \$3 million, of which \$2,215,675 was attributed to land and buildings, the rest representing personal property, business value and good will. In 1996, the property assessment was \$4,220,300, which was largely unchanged from -1988. The taxpayer protested the valuation to the county board and, after two field inspections, a county appraiser recommended no change in value. The board adopted the recommendation and denied the taxpayer's protest. The taxpayer appealed to the Nebraska Tax Equalization and Review Commission, who, after a hearing reversed the order of the board and ordered that the property be valued at \$2,215,675. The county board appealed to the Nebraska Court of Appeals, who affirmed the decision of the Commission.

At the hearing before the Commission, the taxpayer offered the testimony of an appraiser who prepared a market value analysis of the property. In his opinion, the value of the land and building was \$2,215,675. He provided reasons why the use of the assessed values of other hotel properties by the county to value the subject property was improper. The taxpayer also offered the testimony of a general partner in the hotel who testified regarding the 1994 sale and the condition of the property. The county's appraiser testified regarding the reasons for his recommendation of value to the county board. The Commission, in rendering its decision, concluded that the county board's comparable properties were inadequate because only one of them was similar to the subject property and that comparable was valued significantly lower than the subject property despite a significant renovation. It was the Commission's view that one comparable property did not provide a sound basis to determine value. The Commission also found that there had been a decline in the hotel and motel business since the last time the value of the subject property was adjusted. Therefore, the Commission found that the board's decision was not supported by the evidence and the taxpayer had proved the board's decision was unreasonable and arbitrary.

The county raised a number of issues on appeal. The first, that the Commission failed to apply the proper standard of review and disregarded the rebuttable presumption of correctness on behalf of the decision of the county board was dealt with by the Court by pointing out that the taxpayer presented evidence showing the manner by which the board determined the property's assessed value was deficient. This rebutted the presumption and the reasonableness of the board's valuation became a question of fact. This correct application of the standard of review by the Commission was indicated in its order.

The Court also noted that the burden of proof rests on the taxpayer to show that the valuation placed on his property has been arbitrarily or unlawfully fixed by the board in an amount greater than its actual value. The Commission, in its order, did not shift the burden to the county. Instead, it correctly determined the reasonableness of the valuation based on the evidence before it after the presumption of correctness was rebutted by the taxpayer. Finally, the board challenged the Commission's factual determination regarding value. It argued that the market value analysis by the taxpayer's appraiser was flawed and the Commission disregarded the testimony of the county's appraiser. The evidence before the Commission seemed to indicate that the sale of the property in 1994 was the only offer for it, that it was an arm's length transaction and that the value assigned to the property was based on a review of the income generated by it. Further, the taxpayer offered evidence to show that the county's comparables were not really comparable properties. They were, for the most part, limited service rather than full service hotels. The one full service hotel compared to the subject property was assessed at twenty cents per square foot less than the subject property. Finally, the analysis of the taxpayer's appraiser used several different appraisal approaches in reaching his estimate of value. Based on these facts and the Commission's expertise, the Court found that the Commission's order was supported by the evidence when it arrived at its valuation of the property and, therefore, should be affirmed.

***Cabela's, Inc. v. Cheyenne County Board of Equalization*, 8 Neb. App. 582, 597 N.W.2d 623 (1999).**

This case involved a retail store built in 1991 for approximately \$5 million with many unusual features that attracts approximately one million visitors a year. Between 1992 and 1996, the property was valued at approximately \$5 million. In 1997, the property was valued by the county assessor at approximately \$4,775,000 (\$204,000 for land, \$4,775,000 for improvements). The taxpayer protested to the county board who reduced the value of the improvements to approximately \$3,900,000 by subtracting the value of an aquarium and a "mountain", both of which were determined to be personal property. The county in setting the value used Marshall and Swift valuation materials to reach a value of approximately \$6 million and subtracted approximately \$2 million for depreciation.

The taxpayer appealed to the Nebraska Tax Equalization and Review Commission where its case consisted primarily of the testimony of an appraiser it had hired. He likened the property to a K Mart or Walmart retail store, thought the subject property had been "overbuilt" to project the company's image, and that the taxpayer would take a loss if the property were sold. It was the appraiser's opinion that the property's fair market value was approximately 2.85 million dollars. In reaching that opinion, the appraiser used all three approaches to value. His replacement cost figures differed from those of the county assessor, for sales comparison, he used other retail sales and for income capitalization, he used the operating income of other retail locations in the area. However, the appraiser used properties in his analysis that differed from the subject property and he made adjustments to value that were not contained in his appraisal report.

The county used the cost approach in valuing the property. This was largely because there were no comparable sales due to the quality of the subject property. Further, little or no data was available for a capitalization analysis. The county did use comparable sales to come up with a depreciation rate for the property.

The Commission accepted the approach of the county assessor and county board as professionally accepted mass appraisal techniques which were most appropriate in this case because of the uniqueness of the property. The Commission found the taxpayer's appraiser unpersuasive because he made adjustments to value that were not in his appraisal report and only used one sale in his analysis. The Commission found that the value of the elevator in the property was overstated and reduced the overall value to approximately 3.98 million dollars. The taxpayer appealed to the Nebraska Court of Appeals.

The Court of Appeals noted that Nebraska law requires the use of applicable valuation methods to determine the actual value of property. Actual value is not what an individual buyer may pay for a property but instead is the market value of the property in the ordinary course of trade. In this case, the county assessor was unable to find comparable sales to the subject property and therefore relied on the cost approach, less depreciation. The cost approach is typically best for newer improvements and properties where sales and income data are scarce according to the International Association of Assessing Officers (IAAO). Therefore, the county's use of the cost approach was supported by competent evidence, especially in light of the lack of truly comparable sales offered by the taxpayer.

The taxpayer argued that the amount of depreciation applied to the property for physical depreciation, functional depreciation and economic depreciation was not applied to the property. The Court noted that the assessor considered the application of economic depreciation (external

market forces depressing a property's value) but found it inappropriate based on growth in the county's economy. The assessor applied a depreciation rate to the subject property that was applied to all businesses in the county. The taxpayer's appraiser admitted that calculating depreciation was difficult and that he had omitted items from his calculation. In reviewing the record, before the Commission, the Court could not say the county board acted arbitrarily or unreasonably.

The taxpayer also made the argument that since the assessor did not physically inspect the property, the presumption of correctness does not attach to the county's decision and therefore, the question of the value of the property is simply one of the reasonableness of the value placed on the property. However, the taxpayer still had the burden to show the unreasonableness of the valuation and in the Court's view, the Commission had competent evidence to conclude that the taxpayer had not met that burden. In mass appraisal, physical inspection may not necessarily be done for individual properties. Further, the square footage used by the assessor in calculating value was identical to the square footage used by the taxpayer's appraiser. Additionally, although the taxpayer had an expert witness, expert's opinions are only as reliable as the data underlying the opinion. In this instance, the opinion of the appraiser testifying for the taxpayer was unpersuasive due to the flaws in his underlying data.

Finally, the taxpayer made the argument that the property was not equalized for valuation purposes with other similar properties in the county. However, the burden is on the taxpayer to show the lack of equalization and the evidence indicated that the taxpayer had not met that burden. For example, the county showed that the taxpayer's property had no equal in the county. Further, there was a local bank of "excellent" quality, like the subject property, which was assessed at a much higher level than the subject property. The Court found that the taxpayer had not met its burden on this point and that the Commission's order, setting value at \$204,240 for the land and \$3,785,665 for the improvements was supported by the evidence.

***Scribante v. Douglas County Bd. of Equalization*, 8 Neb. App. 25, 588 N.W.2d 190 (1999).**

This case was the result of a several year history between the taxpayer, the county assessor and the county board of equalization. In 1991, the taxpayer purchased a residential property for approximately 1.3 million dollars. In 1996, the county valued the property at approximately 1.1 million dollars. The taxpayer protested to the county board alleging that his property was valued in excess of the valuation of other similar properties in the neighborhood. The county board denied the protest and the taxpayer appealed to the Nebraska Tax Equalization and Review Commission. After the hearing, during which the county asserted that the taxpayer's neighborhood was going to be reappraised in its entirety in the next year, the Commission ruled for the taxpayer due to the lack of uniformity and proportionality in valuing the taxpayer's subdivision. The Commission indicated that the lack of uniformity and proportionality in the neighborhood was due to the fact that property was reappraised only when the property was sold, a building permit was issued or the state intervened. As a result, the Commission reduced the value of the property to approximately \$875,000.

The next year, the taxpayer's property was assessed at approximately \$1.3 million, a 49% increase from the value the Commission placed on the property in its order. The taxpayer protested to the county board, based again on equalization within the subdivision. Once again, the county board denied the protest and the taxpayer appealed to the Commission. At hearing,

the taxpayer put on evidence to indicate that for thirty-two properties within the neighborhood, the average increase in value from the previous year, excluding the taxpayer's property and one other recently sold property, was 11%. Further, an appraiser testifying on behalf of the taxpayer indicated that based on five methods of calculating the value of the taxpayer's home, the equalized value of the home was approximately half the value placed on the home by the county.

The county's position at hearing was that the value of the taxpayer's property accurately reflected its actual value. Further, the county's expert witness criticized the taxpayer's analysis of the value of comparable properties for using properties which, in his estimation, were more dissimilar than similar.

The Commission rendered an opinion in favor of the taxpayer and set the total valuation of the property at \$741,000. The county appealed to the Nebraska Court of Appeals. The Court affirmed the decision of the Commission.

In evaluating the record made in front of the Commission, the Court noted that the taxpayer's position was not that the property was not valued at market value but that the taxpayer's property was not equalized with other properties in the subdivision, which were significantly undervalued. The year before, the Commission in its order had put the county on notice that the assessment practice of only revaluing property when a sale occurred, a building permit was issued, or the state intervened resulted in the property in that subdivision being significantly undervalued. The issue in the case, therefore, was not whether the value placed on the subject property reflected market value but whether the property was uniformly and proportionately valued when compared to similarly situated residential property. The Court pointed out that Article III, section 1 of the Nebraska Constitution requires that taxes shall be levied *by* valuation uniformly and proportionately upon all real property. Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value.

The Court went on to analyze the evidence regarding equalization presented by the taxpayer regarding comparable properties and their values. The Court found that the taxpayer had presented sufficient evidence to show that the value placed on his property by the county was sufficient for the Commission to conclude that the value placed on the property was unreasonable and arbitrary, especially in light of the lack of evidence presented by the county on the equalization question. Further, the Court held that to set the valuation of similarly situated property at materially different levels is by definition unreasonable and arbitrary under the Nebraska Constitution.

Finally, the Court dealt with the reduction in the value of the property ordered by the Commission. In doing so, it cited the case of *Kearney Convention Center v. Board of Equalization*, 216 Neb. 292, 344 N.W.2d 620 (1984) where the Nebraska Supreme Court concluded that the appropriate remedy where properties are assessed at vastly different levels was to equalize the value of the property assessed at the higher level of value to the level of the lower valued property. "[W]here it is impossible to secure both the standard of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law." *Kearney Convention Center*, 216 Neb. At 304, 344 N.W.2d at 626. Here, the court concluded that there was disproportionate valuation in the taxpayer's subdivision. Whether the taxpayer's property was assessed too high, or the rest of the property was assessed too low, discriminatory treatment of the taxpayer's property was

established and he was entitled too relief Therefore, since the appropriate remedy was to reduce the value of the taxpayer to reflect the value of their similarly situated neighbors, the Commission acted correctly in reducing the taxpayer's property to \$741,400.

Boone County Bd. of Equalization v. Nebraska Tax Equalization and Review Commission, 9 Neb.App. 298, 611 N.W.2d 119 (2000).

The Boone County board of equalization petitioned for adjustment to certain agricultural property value assessments in county. The Tax Equalization and Review Commission (the Commission) denied petition, finding that the Boone County Board had failed to meet its burden of proof in justifying an adjustment. The board appealed. The Nebraska Court of Appeals held that appellate jurisdiction was lacking to allow review of Commission's decision and dismissed the appeal.

On or before April 5 of each year, the Property Tax Administrator (PTA) is required to “prepare statistical and narrative reports informing the commission of the level of value and the quality of assessment of the classes and subclasses of real property in the state.” Neb.Rev.Stat. § 77-5027 (Cum.Supp.1998). According to § 77-5027, “[t]he commission shall, pursuant to section 77-5026, raise or lower the valuation of any class or subclass of property in a county when it is necessary to achieve equalization.” On April 5, 1999, the commission received into evidence the PTA's assessment. The PTA's report explained that it “appeared that a new [third] market area had developed” in Boone County and that for the class of agricultural land, the county “recognized three market areas.” Using three market areas for the county, the PTA opined that the level of value for agricultural land in Boone County was within the acceptable range provided in § 77-5023. On July 22, 1999, the Boone County Board then filed a petition with the commission pursuant to Neb.Rev.Stat. § 77-1504.01 (Supp.1999), which provides that a county board of equalization may petition the commission to consider an adjustment to a class or subclass of real property within the county after the county board hears protests from county residents. The commission heard the Boone County Board's petition on August 3, 1999, and issued its “Findings and Orders” that same day. In its order, the commission recognized that the Boone County Board's petition was filed pursuant to § 77-1504.01 and that the commission had jurisdiction under the same. Having found that the Boone County Board had failed to meet the appropriate burden of proof for an adjustment, the commission denied the relief requested and dismissed the petition. The Boone County Board then appealed that decision.

Under § 77-5019(1), two instances exist under which a party may appeal a decision of the commission to this court. The first occurs when the commission renders a final decision in a case which originated elsewhere and was appealed to the commission through the proper procedures. The second occurs when a person, county, or other political subdivision is aggrieved by an order of the commission rendered pursuant to § 77-5028. The Nebraska Court of Appeals considered the availability of each avenue.

With regards to a decision appealed to the Commission, the court found that The Boone County Board was clearly not appealing to the commission from a lower tribunal; rather, it sought an adjustment of the commission's own April 13, 1999, order. The Boone County Board sought that adjustment through a petition made directly to the commission. Therefore, this case did not present a situation where the commission was reviewing any of the decisions listed in § 77-5007. Accordingly, the court found that it did not have the jurisdiction to review the

commission's August 3 order under the first avenue of appellate jurisdiction described in § 77-5019(1).

To determine whether the court had jurisdiction under the second avenue of § 77-5019(1), the court had to determine whether the Boone County Board was appealing an order by the commission entered pursuant to § 77-5028. § 77-5028 required that the commission enter an order by May 15 on hearings conducted pursuant to Neb.Rev.Stat. § 77-5024 or § 77-5026. § 77-5024 pertained to review and changes by the agricultural and horticultural land valuation board. § 77-5026 empowered the commission to increase or decrease the value of a class or subclass of any real property after a hearing when the commission found that a just, equitable, and legal assessment of the property in the state could not be made without the increase or decrease. The court found that this case did not pertain to any actions by the agricultural and horticultural land valuation board, nor was any hearing under § 77-5026 held with respect to Boone County. Rather, the commission's April 13, 1999, order determined that no such adjustments as allowed under that section were necessary for Boone County in tax year 1999. Therefore, neither situation provided for in §§ 77-5024 and 77-5026 occurred in this case. Under the procedural system set up by these statutes, the commission's August 3, 1999, order could not be pursuant to § 77-5028. Thus, the court found that appellate jurisdiction was lacking in this case, and therefore dismissed the Boone County Board's appeal.

***Krusemark v. Thurston County Bd. of Equalization*, 10 Neb.App. 35, 624 N.W.2d 328 (2001).**

Property owner Dale Krusemark brought challenge to the assessed value of his property as determined by the county board of equalization. The Tax Equalization and Review Commission (the Commission) affirmed determination. Krusemark appealed. The Nebraska Court of Appeals, held that: (1) procedural due process issue was properly preserved; (2) property owner was entitled to procedural due process; (3) hearing officer that conducted hearing on property owner's challenge to valuation of property acted in judicial capacity; (4) hearing officer's comments regarding potential disciplinary action against real estate appraiser, who was expert witness for property owner, had chilling effect and amounted to improper testimony; and (5) property owner was entitled to opportunity to supplement record of proceedings to determine whether issue of equalization was properly presented to county board.

In 1997, Krusemark bought a lot for \$20,000 in Pender, Thurston County, Nebraska, in an older part of town. He demolished an old house on the lot and began building a new house, which was completed in 1999. The value of the improvements were at issue in this case. Krusemark protested to the Board the valuations assigned to the property for the tax years 1998 and 1999. Krusemark appealed both the 1998 and 1999 valuation of his property to the Commission, although the Commission did not consolidate the appeals. In addition to numerous exhibits introduced as evidence by both the Board and Krusemark, testimony was received from Krusemark; Leon Blomendahl, who was a real estate appraiser; and the Thurston County assessor. Krusemark argued before the Commission that the valuation was excessive and incorrect because his house was only 75 percent complete on the assessment date, that the area of the basement classified as "finished" was incorrect, and that the determination that the "quality" of the house construction was "very good" was incorrect and not in accordance with standard appraisal techniques. In the Commission's findings and order of March 14, 2000, deciding the case, it stated that the testimony of Blomendahl "was withdrawn and therefore the Commission gave no weight to it," and thus found that Krusemark had not adduced clear and convincing

evidence to establish that the valuation of the Board was unreasonable or arbitrary, and affirmed the decision of the Board valuing the house for both years. Krusemark appealed.

First, Krusemark argued that the actions of the Commission intimidated his expert witness. The court found that the record reflected that while Blomendahl did testify at some length without interruption or objection, the record also reflects that the hearing officer made several comments directed toward Blomendahl, implying that the witness was going to end up in front of the Real Estate Appraisal Board because of his testimony. After this occurred a few times, Krusemark's attorney removed Blomendahl from the stand, and he was not recalled. The Board argued that Blomendahl was not prevented from testifying, but that Krusemark voluntarily withdrew the testimony of his expert opinion. After determining that the Krusemark was entitled to procedural due process in the presentation of his evidence to the Commission, the court then analyzed the effect of the hearing officer's comments made during the course of proceedings, and whether Krusemark's right to due process was violated because of them. From the context of the record, the court found that the hearing officer was acting in a judicial capacity because he swore in the witnesses, controlled the presentation of evidence, ruled on objections, and with the two other hearing officers, assisted in the decision-making process. Because the hearing officer was acting in a judicial capacity, the court found that the hearing officer's comments during the course of the proceedings had a chilling effect upon Blomendahl and amounted to improper testimony by the hearing officer regarding facts not in the record such that Krusemark was effectively denied his right to procedural due process. Therefore, the actions of the Commission in this regard were unreasonable, and the court thus reversed the decision and remanded the matter for further proceedings consistent with the decision.

Krusemark also argued that the Commission's determination that the issue of equalization was not raised by Krusemark before the Board, and therefore could not be considered by the Commission was in error. During the Commission hearing, the Commission correctly noted that it had subject matter jurisdiction over only those issues presented to the Board. "Property Valuation Protest" (Form 422) is the standard form used in filing a protest to the Board and provides a section whereby the protesting taxpayer states the reasons for the protest. Krusemark handwrote: "Since the house was not completed, \$345,845 is only 3/4 of the valuation. I also wish you would consider removing the sales multiplier of 1.35%. I'm also attaching papers giving my reasons for making this protest." The Commission had no attachments to Form 422 in the record before it and was of the opinion that Krusemark's statement in Form 422 indicated that the house should not be valued at full market value. However, on Form 422 Krusemark filled out the following: Dale Krusemark appeared to give testimony. Presented comparables to County Board of Equalization. My home valued at 144.00 per square foot. These other homes average 66.60 per sq. ft. Showed neighboring counties comparable homes. Waynes valuation and Dakota valuations are not rising. Madison, Dixon and Dakota County value these homes at what they would bring on the market. Krusemark argued before the Commission, and now the court, that the reference to "comparable" in the statement indicated that equalization was an issue before the Board. The Board asserted that although Krusemark offered purported comparables at the protest hearing before the Board, there was no evidence that the comparables were offered for the purpose of raising the issue of equalization. The court found that in reviewing the Form 422 in the 1998 protest, it indicated Krusemark presented "comparables" to the Board, although the form does not specifically reference the issue of equalization. However, in reviewing the Form 422 in the 1999 protest, there was

likewise no specific reference to equalization; rather, reference to “comparables” is contained therein, and that was enough for the Commission to address the equalization issue there. The court found that in order to properly resolve the issue of whether equalization was presented to the Board in the 1998 protest, and consequently, the Commission’s jurisdiction over the issue, the Commission, on remand, should allow Krusemark to supplement the record with the proceedings before the Board in the 1998 protest.

Therefore, because Krusemark was denied the right to procedural due process in the hearings before the Commission, the court reversed the Commission's decisions of March 14, 2000, which affirmed the Board's determinations and valuations of Krusemark's property for the tax years 1998 and 1999, and remanded the cause to the Commission for further proceedings consistent with the opinion.

***Schmidt v. Thayer County Bd. of Equalization*, 10 Neb.App. 10, 624 N.W.2d 63 (2001).**

Taxpayers, the Schmidt’s, sought review of a determination by the Thayer county board of equalization regarding the valuation of a quarter section of their agricultural property. The Tax Equalization and Review Commission (the Commission) affirmed the board's determination, and the taxpayers appealed. The Nebraska Court of Appeals held that: (1) the taxpayer and professional appraiser were competent to offer opinion testimony as to the value of property, and (2) the Commission’s approval of the valuation of taxpayers' property based upon its location in higher-valued market area, without relation to soil classification, was not supported by competent evidence and was arbitrary. The court therefore reversed and remanded for further proceedings.

This appeal from the Commission involved a quarter section of agricultural real property in Thayer County, Nebraska, owned by Dennis G. Schmidt (Schmidt) and Joyce E. Schmidt. For the year 1999, the county assessed the property, approximately 160 acres, at \$126,750. The prior valuation had been \$88,350. The Schmidts protested to the Board for the reason that the valuation was above market value for the land classes and soil types contained on the parcel and requested a valuation of \$99,840. The Board made no change to the valuation. The Schmidts appealed the Board's decision to the Commission. In the Commission’s findings and order affirming the decision of the Board, it determined that Schmidt's testimony as to the soil types in Thayer County and the productivity of that soil was based on the Thayer County soil survey. The Commission found that Schmidt's opinion of value based on soil types had no foundation and therefore accorded it little or no weight. The Commission further determined that five out of eight of Schmidt's comparable sales were not comparable and further found that Schmidt's opinion as to the value of the property was competent but not credible. The Commission ordered that the decision of the Board which denied the Schmidt’s' protest be affirmed and that the property be valued for the tax year 1999 at \$126,750. The Schmidts appealed for the reasons that the valuation of the property was above the market value for the land classes and soil types and that the Commission failed to properly consider the evidence.

The property contained soils of class 1D (45 percent of the total property) and class 3D1 (49 percent). On the property, the 1D soil is very good producing soil. The 3D1 soil can be good producing soil, but is generally of moderately low fertility, is difficult to farm because it has a tendency to be sticky and to ball up when wet, is very hard when dry, and can only be farmed when it has dried out. Schmidt asserted that because of the small percentage of 3D1 soil in the county and a relatively large percentage of 3D1 soil on the property, the property was unique for

valuation purposes. With regards to the assessment, Schmidt felt the Board did not take into consideration the negative effect that the 3D1 soil had on the other soil on the Schmidt's farm. The court also noted that Thayer County had been divided into two market areas for assessment purposes. A map of the county indicated that the market areas were divided by a southwest to northeast stair-step line drawn on township boundaries. Market area 1 consisted of 10 townships, and market area 2 consisted of 6 townships. Market area 1 was generally of higher valuations than market area 2, except for grassland classes.

In its analysis, the court noted that there was a presumption that a county board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action. That presumption remains until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence adduced on appeal to the contrary. The burden of showing such valuation to be unreasonable rests upon the taxpayer on appeal from the action of the board. The Commission accorded little or no weight to Schmidt's opinion of the value of the property, even though a resident owner who is familiar with his or her property and knows its worth was permitted to testify as to its value without further foundation; this principle rested upon the owner's familiarity with the property's characteristics, its actual and potential uses, and the owner's experience in dealing with it. The court found that the Commission erred in determining that Schmidt's opinion testimony as to the value of the property should be accorded little or no weight. Schmidt testified to the basis of his opinion, and his testimony was received generally without objection. There was sufficient foundation establishing his familiarity with the property, yet the Commission determined that there was no foundation for Schmidt's opinion because the soil survey for Thayer County was not in evidence. However, a review of the record revealed that Schmidt's testimony regarding the soil types was based primarily upon his personal knowledge and that very little information from the soil survey itself was discussed.

The court also found that the Commission erred in according no weight to the opinion of the appraisal by Bruning. The Board objected to Bruning's appraisal report on the grounds that it was produced in May 1999 and that the assessment date of the property was January 1, 1999, thus, in the Board's opinion, rendering the report irrelevant. The objection was overruled, and the appraisal report was received as part of the record, although the Board's standing objection was noted. Bruning certified in his appraisal report that he had personally inspected the property and that the report had been made in conformity with the "Professional Standards of the Nebraska Real Estate Appraisers." The court found that precedent dictated that the appraiser's opinion was entitled to some weight. The court therefore determined that both Schmidt's testimony and the appraiser's report were incorrectly disregarded by the Commission.

The Schmidts also argued that the Commission erred when it equalized real property in the county by arbitrarily creating and utilizing market areas in assessing taxes, in violation of article VIII of the Nebraska Constitution, in accepting the market areas as valid without supporting evidence, and in using the market areas when analyzing the comparable properties presented by Schmidt and in finding that market areas were "subclasses" of property. The Schmidts asserted that the property is only one-half mile from market area 2, which was valued at \$200 less per acre than in market area 1. The court found that the evidence in this case indicated that the market areas established by the assessor were not, in fact, based on soil classification, but, instead, were based on assessment-to-sales ratios. Subclasses of agricultural land must be based on soil classification, not upon where the land is located. Thus the market

areas did not constitute subclasses of agricultural land as defined by the statutes. There was little evidence presented by the Board to explain its basis for arriving at the market area divisions. The boundaries separating market areas 1 and 2 appeared to have been arbitrarily drawn, and there was no evidence to the contrary. It was clear to the court that the market areas were not based on soil types, but, rather, on location of property within the county. The court therefore concluded that the Commission's approval of the valuation of the Schmidt's property based upon its location in market area 1, without relation to soil classification, was not supported by competent evidence and was arbitrary. Thus the court reversed the Commission's decision affirming the Board's denial of the Schmidt's protest, and remanded the cause to the Commission for further proceedings consistent with the opinion.

72nd Property, L.L.C. v. Douglas County Bd. of Equalization, 10 Neb.App. 826, 638 N.W.2d 872 (2002).

Owner of retail properties protested assessed values to the Douglas county board of equalization. The Board reduced assessments by 7% percent, but denied the owner's other objections. The Owner appealed. The Tax Equalization and Review Commission (the Commission) affirmed the board's decisions, and the owner appealed. On consolidated appeals, the Nebraska Court of Appeals held that: (1) the Commission's decision to take judicial notice of testimony and exhibits from tax assessment proceedings involving two other retail stores did not rise to the level of plain error; (2) the owner failed to offer competent evidence to rebut statutory presumption that board acted upon sufficient competent evidence in making assessment; and (3) the determination that properties introduced by owner were not comparable to two properties at issue was supported by competent evidence.

The two cases at issue here were the proper valuations for the 2000 tax year of two Kohl's Department Stores (Kohl's) located at 909 South 72d Street (72nd Property, hereinafter referred to as the "72nd Street Property") and 13550 West Maple Road (Maple Joint Venture, hereinafter referred to as the "Maple Road Property"), in Omaha, Douglas County. The 72nd Street Property was built in 1998. In 2000, the 72nd Street Property was assessed at \$6,627,600. Kohl's protested this amount to the Board. The Board reduced the assessment by 7 percent. The Board denied Kohl's other objections, and Kohl's appealed this decision to the Commission. The Maple Road Property was built in 1999. In 2000, the Maple Road Property was assessed at \$5,910,700. Kohl's also protested this amount to the Board. The Board reduced the entire assessment by 7 percent and also reduced the land value further to equalize it with other land values in the area. Kohl's appealed the assessed value of the improvements of the Maple Road Property to the Commission. At the hearing on each property before the Commission, Kohl's offered the testimony of Daniel Campbell, director of real estate expense at Kohl's, and Mark Kriglstein, real estate appraiser for the Douglas County assessor's office. The Board did not produce any witnesses to testify on its behalf. In each case, at the conclusion of Kohl's presentation of evidence, the Board moved to dismiss the appeal. The Board argued that Kohl's failed to rebut the statutory presumption that states that the Commission shall affirm the Board's decision unless it is arbitrary or unreasonable. In each case, the Commission denied the Board's motion to dismiss after Kohl's rested. The Board then rested its case and again moved the Commission to dismiss Kohl's appeal. In written rulings filed by the Commission, the Board's motions to dismiss were granted, and the decisions of the Board were affirmed. Kohl's then appealed to the Nebraska Court of Appeals.

Kohl's argued that the Board overvalued the 72nd Street and Maple Road Properties. Kohl's asserted it presented competent evidence to rebut the statutory presumption and prove the Board overvalued the properties. Kohl's appealed the value of the improvements and land at the 72nd Street Property. Kohl's also appealed the value of the improvements at the Maple Road Property. Neb.Rev.Stat. § 77-1511 (Reissue 1996) states that the Commission "shall affirm the action taken by the board unless evidence is adduced establishing that the action of the board was unreasonable or arbitrary." The Supreme Court has held this to mean that there is a presumption that a board of equalization has properly performed its official duties and that in making an assessment; it has acted upon sufficient competent evidence to justify its action.

In presenting its case, Kohl's witness Campbell testified that he used a cost approach and an income approach to value the 72nd Street and Maple Road Properties. Campbell stated that the county overvalued the improvements and land with respect to the 72nd Street Property and overvalued the improvements on the Maple Road Property. The Commission found the cost approach used by Campbell unpersuasive. The Commission found Kohl's evidence insufficient to overcome the statutory presumption, and the court found that the Commission's decisions conformed to the law, were supported by competent evidence, and therefore were not arbitrary, capricious, or unreasonable.

Campbell had also testified that he used an income approach to value the 72nd Street and Maple Road Properties. Campbell stated that the market rent used to value the 72nd Street and Maple Road Properties in this approach was based solely on that particular property and not surrounding properties. The Commission found that the income approach used by Kohl's was flawed, as nothing in the record established that that 'formula' was commonly or ordinarily used to determine actual or fair market value." The Commission found that Campbell had limited knowledge about the Omaha area and that nothing in the record supported his testimony about what the market rent should be for the 72nd Street and Maple Road Properties. Therefore, the Commission found that Campbell's testimony was not clear and convincing to rebut the statutory presumption. Therefore, the court concluded that the Commission did not err, as the Commission's decisions conformed to the law, were supported by competent evidence, and were not arbitrary, capricious, or unreasonable.

Kohl's also argued that its evidence regarding the assessed value of comparable properties established that the Board's valuations of the 72nd Street and Maple Road Properties were in error. Kohl's was appealing the assessed value of the improvements and land at the 72nd Street Property and only the improvements at the Maple Road Property. The Commission concluded that the comparable properties set forth by Kohl's were not similar or comparable in light of the location of these properties, the improvements to the properties, the age of the properties, and the size of the properties. At the 72nd Street Property hearing, Kohl's introduced five properties as proposed comparables. The proposed comparable properties were parking lots, located in a flood plain, or in different "field books" or assessment areas. The record from the Maple Road Property hearing revealed that the two comparable properties offered by Kohl's were several years older than the Maple Road Property or "considerably" larger than that property. Additionally, there was no evidence in the record that Campbell took these differences into consideration when discussing these "comparable" properties. Based on its review of the record, the court concluded that the Commission's determination that the properties introduced by Kohl's were not comparable to the properties at issue was supported by competent evidence and thus was not arbitrary, capricious, or unreasonable. Therefore, the court concluded that the

Commission did not act arbitrarily or capriciously in affirming its decision of the Board, as the Commission's determination was supported by competent evidence and conformed to the law. The court thus affirmed the decision of the Commission.

***Dodge County Bd. of Equalization v. NE Tax Equalization and Review Commission*, 10 Neb.App. 927, 639 N.W.2d 683 (2002).**

The Tax Equalization and Review Commission (the Commission) issued an order to the Dodge county board of equalization to show cause why the value of agricultural land in Douglas County should not be corrected or adjusted. After a hearing, the Commission ordered that the value of all unimproved agricultural property in county be increased by five percent. The Board appealed. The Nebraska Court of Appeals held that: (1) interest of justice would not be served by remanding case to the Commission for further proceedings; (2) the Commission could not create a new market area; (3) a proposal for new market area was not supported by competent evidence; (4) the decision of the Commission to increase the value of all unimproved agricultural property in county was proper; and (5) the hearing reconvened by the Commission did not deprive the board of due process.

In 2000, the agricultural property in Dodge County was divided into four market areas. In April 2001, the Commission issued an order to show cause, ordering the Board to appear and show cause as to why the value of agricultural land in Dodge County or its subclasses should not be corrected or adjusted as follows: Increase by 6% the entire Agricultural Class of property, or increase by 15% the subclass Market Area 3 of the Agricultural Class of property, or such other adjustment as may promote uniform and proportionate assessments consistent with the Constitution and the laws of the State of Nebraska. The Commission stated that according to filings by the property tax administrator, Dodge County was currently outside the statutory range of value for agricultural land at 73 percent. The acceptable range of assessment for agricultural land is from 74 to 80 percent of the actual value.

At that hearing, Kathleen Reeves, the state assessing officer in Dodge County, acknowledged that some adjustment to the agricultural land values in Dodge County was required. Reeves testified that after reviewing the valuation information for all four market areas of Dodge County, she noticed that the median level of value for agricultural property in market area 3, at 65.9 percent, was significantly lower than the other three market areas. Reeves testified that she identified 9 sales out of the 24 in which she believed the land purchased was being used for recreational, not agricultural, purposes. Reeves testified that within these nine parcels, the land was valued at \$150 per acre, but had sold for an average of \$770 per acre. At the hearing, Reeves requested that the Commission carve out an area in which these nine sales occurred and designate this area as market area 3A, and increase this market-area value by 214-percent. At the hearing, the Dodge County Attorney advocated that the Commission not order an adjustment to the entire class of unimproved agricultural land in Dodge County, but, rather, either increase agricultural land values in market area 3 by 16 percent or create a new market area, 3A, and increase the value in that area by 214 percent. The Commission ordered that the value of all unimproved agricultural property in Dodge County be increased by 5 percent, bringing the median level of value to 77 percent, the midpoint of the acceptable range under the applicable statutes. The Board appealed.

First, the Board argued that the Commission erred in relying upon statistics prepared by the property tax assessor, which included sales that should not be considered as "comparable

sales” for the purpose of determining current market values. The Board argued that the evidence presented to the Commission demonstrated that there were nine sales in Market Area 3A that were unique and thus should not have been considered in the valuation because the land was acquired for recreational rather than agricultural purposes. The Commission argued that the court should not consider the issue of the nine sales as comparable sales because this issue was not presented at the hearing. The record showed that the Board did not object when evidence of the nine sales was entered into evidence as comparable sales. The court determined that the interest of justice would not be served by remanding the cause to the Commission for further proceedings. The court found that although the exact issue of the nine sales as comparable sales was not addressed at the hearing, there was a tremendous amount of evidence presented at the hearing regarding those nine sales and their effect on the valuation of agricultural land in Dodge County. Therefore, the Commission clearly considered this issue, and it was unnecessary to remand the issue for further consideration.

Next, the Board argued that the Commission erred in adjusting the entire agricultural class of property in Dodge County by 5 percent, instead of adopting Reeve’s recommendation to designate a special market area as “market area 3A” and increase the value of this market area by 214 percent. The court disagreed with the Board. It was uncontested on appeal that the agricultural land in Dodge County did not fall within the acceptable statutory range and that a change had to be made to bring Dodge County in accordance with § 77-5023. The Commission argued that it lacked the authority to create the new market area 3A as requested by Reeves and the Board. As noted in § 77-5023(1), the Commission had the power to “increase or decrease the value of a class or subclass of real property.” The Commission argued, and the court agreed, that the Commission’s authority did not extend to granting the Commission the power to create market areas in exercising its statewide equalization function. Additionally, even if the Commission had the authority to create market area 3A and increase land values by 214 percent within this area, the court determined that the proposal was not supported by competent evidence. Instead of creating a new area within a market area, and increasing land values within the new area by 214 percent, the Commission instead increased agricultural property values in Dodge County across the board by 5 percent. This 5-percent across-the-board increase resulted in a median level countywide of 77 percent. The adjustment ordered by the Commission conformed to law, as it fell at the midpoint of the acceptable range as required by § 77-5023(2). Therefore, the court concluded that the Commission did not err in adjusting the entire agricultural class of property in Dodge County by 5 percent. The Commission’s decision conformed to law, was supported by competent evidence, and was not arbitrary, capricious, or unreasonable.

Finally, the Board argued that its due process rights were violated, and that the Commission erred in conducting a further hearing on April 25, 2001 and admitting further evidence into the record, where the Board was not present as a party and was given no opportunity to review or object to the admitted evidence. The court found that while the Board failed to appear, the attorney for Reeves, who in effect represented the Board’s position at the original hearing, was present at the April 25 hearing, and that attorney did not object when the Commission entered into evidence two documents, forming the basis of its decision. Therefore the Commission’s proceedings did not deprive the Board of due process as that attorney was present and didn’t object to the evidence being admitted. Additionally, the court noted that the Nebraska Supreme Court had previously held that a county cannot invoke the protection of the 14th amendment against the State.

Therefore, the court concluded that the Commission did not err in relying upon statistics prepared by the property tax administrator, which included nine sales in which the land appeared to be used for recreational and not agricultural purposes, in adjusting the entire agricultural class of property in Dodge County by 5 percent, or by conducting a further hearing on April 25, 2001, and admitting further evidence into the record. The Commission's decision conformed to the law, was supported by competent evidence, and was not arbitrary, capricious, or unreasonable. Thus the order of the Commission was affirmed.

***Kohl's Dept. Stores v. Douglas County Bd. of Equalization*, 10 Neb.App. 809, 638 N.W.2d 877 (2002).**

Property owner Kohl's protested the assessed value of its retail building and land to the Douglas county board of equalization. The Board reduced assessment by 7%, but denied Kohl's remaining objections. Kohl's appealed. The Tax Equalization and Review Commission (the Commission) affirmed the Board's decision, and Kohl's appealed. The Nebraska Court of Appeals, held that: (1) the statutory presumption of correctness applied to the Board's findings; (2) Kohl's director of real estate expense was not competent to testify as to land value; and (3) prior assessments of other properties was not relevant to current year's valuation of Kohl's land and building.

In 2000, Douglas County assessed the Kohl's Oakview Property at \$7,054,500. Kohl's protested this amount to the Board. The record revealed that Kohl's objections to the Board included the assessed value for the building and the land. The Board denied Kohl's other objection, and Kohl's appealed the Board's decision to the Commission. At the Commission hearing, Kohl's asked the Commission to take judicial notice of four cases, which included proposed comparable properties, that were decided in late 2000 or early 2001. Kohl's argued that these cases from the tax year 1999 were relevant to Oakview Property's current valuation. The Commission denied Kohl's request, stating that these four cases were not relevant to the valuation of the Oakview Property. In support of its appeal, Kohl's offered the testimony of Daniel Campbell, director of real estate expense at Kohl's, and Mark Kriglstein, real estate appraiser for the Douglas County assessor's office. Campbell generally testified that the county's assessment overvalued the land and the building. On cross-examination, Campbell testified that he was not familiar with the area surrounding the Oakview Property or the Omaha area. Kriglstein testified that he valued the Oakview Property using a cost approach. This valuation is what the Board based its decision on. Kriglstein stated that he later valued the Oakview Property using an "income and sales comparison approach" to test the information provided by Campbell. The Board moved to dismiss the appeal. The Board argued that Kohl's had failed to rebut the statutory presumption that states the Commission should affirm the Board's decision unless it is arbitrary or unreasonable. The Commission granted the Board's motion to dismiss at the conclusion of Kohl's presentation of evidence. Kohl's then appealed.

Kohl's first argued that the Commission erred in applying the presumption that the Commission should affirm the Board's decision unless it is arbitrary or unreasonable, because the assessor did not personally inspect the Oakview Property. The court noted that the Nebraska Supreme Court had held this to mean that there is a presumption that a board of equalization has properly performed its official duties and that in making an assessment; it has acted upon sufficient competent evidence to justify its action. Kriglstein testified that the property had been inspected when the building was new and that they had gotten all of the characteristics from an

appraiser from the Douglas County assessor's office. Case law had established that it was not unreasonable to rely on another appraiser's physical measurements. Therefore, the court found that the Commission decision to apply the presumption conformed to the law, was supported by competent evidence, and was not arbitrary, capricious or unreasonable.

Kohl's also argued that Campbell's testimony valuing the property was competent evidence to rebut the statutory presumption. Kohl's argued that Campbell's testimony should have been credited because he was an "owner who was familiar with his property and knew its worth. The Nebraska Supreme Court had previously held in *US Ecology v. Boyd Cty. Bd. of Equal.*, 256 Neb. 7, 588 N.W.2d 575 (1999), that an owner may testify to the worth of his or her property if the owner was familiar with the property and knew the worth. A corporate officer or president was not, as such, qualified to testify as to value of corporate property. Campbell was the director of real estate expense at Kohl's, not the owner. Therefore the Commission found, and the court agreed that Campbell was not competent, in the legal sense, to testify as to the value of the land or the change, if any, in construction costs in Omaha, Nebraska, between 1996 and 2000. The court found that the evidence presented to the Commission established that Campbell did not have the requisite knowledge to testify about land values in the Omaha area. Therefore the Commission did not err in granting the motion to dismiss because there was no competent evidence before the Commission to rebut the statutory presumption.

Finally, Kohl's asserted that the Commission erred when it refused to take judicial notice of its findings in four other cases. The assessments Kohl's asked the Commission to take judicial notice of were for the tax year 1999. Kohl's argued that the case law only prohibits looking at prior assessments of the *same* property to prove a subsequent year's value, and thus the case law allowed the Commission to use prior assessments of other property to prove that the Oakview Property was overvalued. The Board objected to the Commission taking judicial notice of these findings, stating that it would be speculative for the Commission to assume the property values of these four cases would not change in the year 2000. The court did not find Kohl's argument compelling. The court thought that Kohl's argument that a prior assessment of the Oakview Property is not relevant to the current assessment, but prior assessments of other properties are relevant to the current assessment, was illogical. Thus, the court found that the Commission's decision was supported by competent evidence, conformed to the law, and was not arbitrary or capricious. Therefore, the court determined that the Commission did not err when it found the statutory presumption applied to the findings of the Board, and when it found Kohl's did not present competent evidence to rebut the statutory presumption. Additionally, the Commission properly refused to take judicial notice of four prior decisions because they were not relevant to the Oakview Property's valuation. Therefore the court affirmed the Commission's decision.

***Livingston v. Jefferson County Bd. of Equalization*, 10 Neb.App. 934, 640 N.W.2d 426 (2002).**

In this property tax appeal, the taxpayer, Bruce D. Livingston, contended that the taxing authorities overvalued his house for tax year 2000 by failing to consider that the house was located in a remote area of Jefferson County, Nebraska, and less than 1 mile from a hog farrowing facility housing 5,200 hogs. Livingston unsuccessfully appealed the valuation of the Jefferson County Board of Equalization (the Board) to the Tax Equalization and Review Commission (the Commission). Livingston appealed. The Nebraska Court of Appeals held that: (1) Livingston's contested evidence regarding house value did not require reversal, but (2) the

Commission was required to specifically consider external depreciation due to a nearby hog facility, a nearby manure easement and the house's remote location.

Livingston started a hog farrowing facility, State Line Swine, in 1990. In 1999, Livingston built a house near the facility so that he and his family could live nearby and participate in the business. The house was located in Jefferson County. In 2000, the Jefferson County assessor valued the house at \$540,205. Livingston filed a property valuation protest on August 24, 2000, claiming that an appraiser he had hired valued the house and land at \$325,000. In response, the Board corrected an error in the measurement of the square footage on the house's second story, reapplied its cost approach analysis, and reduced the valuation of the house to \$399,321. Livingston appealed the Board's decision to the Commission, which held a hearing on June 6, 2001. At the hearing, Livingston, representing himself, presented the testimony of Ray Shinn, a general appraiser certified in Kansas and Nebraska. Shinn has been an appraiser since 1987 and worked as a county assessor for 3 years in Kansas. Shinn valued the property at \$325,000 using comparables (although none were 2 story, as Livingston's house was), and taking into account that the hog farrowing facility and manure easement would require at least a 30-percent reduction and the rural location a 10-percent reduction in value.

The Commission found that Shinn had failed to make adjustments to account for the differences in architectural style and cost of construction between ranch-style and two-story houses. The Commission rejected Shinn's comparables as not truly comparable under professionally accepted mass appraisal methods. Additionally, the Commission further noted that Shinn's 30-percent external depreciation factor for the hog facility and 10 percent for the rural location were subjective and that Shinn had offered no documentation to support those external depreciation factors. The Commission rejected any external depreciation because it found that "the hog farrowing facility complained of is owned by the Taxpayer, and existed prior to the construction of the improvements" and that "the 'manure' easement was negotiated by the Taxpayer and was also in existence prior to the construction of the residential improvements." The Commission seemed to find it important that Shinn had not considered "ownership of the operation, as required by the *Uniform Standards of Professional Appraisal Practice*." In addition, the Commission found it relevant that Shinn had not mentioned in his appraisal that Livingston sells the offspring of sows when they are between 11 and 14 pounds in weight and between 14 and 21 days in age. The Commission ultimately found that the house was not overvalued, that nothing in the record demonstrates that the Board failed to faithfully perform its official duties or act upon sufficient competent evidence, and that there was no indication that the house's assessed value was grossly excessive or a systematic exercise of intentional will. According to the Commission, Livingston failed to adduce clear and convincing evidence to overcome the statutory presumption in favor of the Board, and the Commission found that the Board's valuation was neither unreasonable nor arbitrary and was supported by the evidence. The Commission affirmed the Board's assessed value. Livingston appealed.

Livingston's first argued that the Commission failed to give proper weight to his uncontroverted evidence regarding the value of his house and that the Commission's decision was not supported by competent evidence. However, the court found Livingston's evidence of value was disputed. His appraiser's valuation was disputed, as the Commission noted that Shinn and the Board used different ratings for construction quality and different dates of valuation, and that Shinn failed to consider the cost of finishing the basement. The Commission found that Shinn's errors of omission and mathematical inconsistencies resulted in an opinion of value

which was misleading. The court therefore found that the Commission's decision was not arbitrary, capricious, or unreasonable, as the record supported the Commission's observations about Shinn's appraisal.

However, the court found that the Commission erred in its decision to completely disregard the proximity of the house to the hog facility. The Commission's written decision did not explain why Livingston's ownership of the adjoining hog facility and manure easement or the fact that he built the house after the hog facility was operational were valid reasons (factually, legally, or logically) to reject the proposition that the value of Livingston's house is affected by being very close to a large hog operation in a rural location. The court found this to be fundamentally illogical, particularly why the Commission considered the age and weight at which Livingston sold his pigs. This was unexplained by the Commission's decision, and troubling to the court as to why it mattered. The court found that the property being valued in this case was separate and distinct from the properties where the hog facility and the manure easement are located, and thus the mere fact that Livingston owned the hog facility and did so when he built his house had nothing to do with whether external depreciation should be used because the house was very close to a hog facility, a separately valued and taxed piece of property. The Board introduced no evidence to dispute Livingston's evidence that the hog facility would affect its value. An administrative agency's decision is "arbitrary" when it is made in disregard of the facts or circumstances and without some basis which would lead a reasonable person to the same conclusion. The court found that to the extent that the Board and the Commission refused to consider the impact of the hog facility and the house's remote and difficult-to-access location on the value of the house because Livingston owned both, that that decision was unreasonable and arbitrary. Neither the Board nor the Commission realistically considered the effect of the house's location next to a hog facility, the manure easement, nor its isolated location. The court held that for the Board and the Commission to conclude that such facts were not important was arbitrary and unreasonable. No reasonable fact finder could conclude that in the real estate marketplace, a potential buyer would not notice, and react economically, to having a large hog facility very nearby while living in a remote location. Thus, the Board's valuation, and the Commission's decision upholding that valuation, was arbitrary and capricious.

The court therefore found that Livingston's evidence overcame the presumption that the Board acted on competent evidence. Once the presumption is overcome, as here, from that point forward, the reasonableness of the valuation fixed by the Board becomes one of fact based upon all the evidence presented. Therefore, the court reversed, and remanded with directions for the Commission to consider Livingston's appeal from the Board anew on the record already created, but with the specific consideration of the impact on the fair market value of the house because of the nearby hog facility, manure easement, and isolated location, irrespective of the fact that Livingston also owned the hog facility and irrespective of the fact that he chose to build in this location.

***Omaha Country Club v. Douglas County Bd. of Equalization*, 11 Neb.App. 171, 645 N.W.2d 821 (2002).**

Omaha Country Club (OCC) owned or leased several adjoining parcels of land for use as 18-hole golf course. OCC sought reduction of assessed value of the properties. The County Board of Equalization denied request, and the taxpayer appealed. The State Tax Equalization and NE Dept. of Revenue Property Assessment Division Legal Case Summaries May 4, 2011

Review Commission (the Commission) affirmed the denial, and the taxpayer appealed. The Nebraska Court of Appeals, held that: (1) the sale price of one parcel to taxpayer could not be used to determine actual value of entire property, since it only reflected value of leased fee estate; (2) a letter regarding valuation that was not made under oath was not credible evidence of proper valuation; (3) a restricted appraisal report was not credible evidence of proper valuation; (4) mere difference of opinion was insufficient to establish that valuation was grossly excessive; and (5) actual value of real property for tax purposes was value which willing buyer would be willing to pay for the fee simple interest.

OCC was the owner or lessee of seven adjoining parcels of land which make up its 18 hole golf course, clubhouse and other structures, parking lot, green space, and some farmland. OCC was the taxpayer for the parcel of land which it now owns, and under the terms of the leases, OCC was responsible for paying the real property taxes on the five parcels of leased property. For the 2000 tax year, the Board assessed the value of the properties at \$2,062,900, which was approximately \$8,550 per acre. OCC filed protests with the Board, alleging that the owned and leased properties were overvalued, and requested a reduction of the assessed values. The Board denied OCC's request. OCC appealed to the Commission, and the Commission considered whether the subject properties should have been assessed as if they were fee simple or whether the effect of long-term leases affecting the privileges pertaining to the properties should have been considered by the Board. The Commission upheld the Board's decision and denied the OCC's request for a reduction in values. The Commission determined that the actual or fair market value of the real property could only be ascertained by determining the value of the fee simple estate, including the Leasehold Estate, the Leased Fee Estate, and any severed estates. The Commission also determined that the evidence presented by OCC, namely the appraisal by Patrick Morrissey and letter from John Elliott, were not credible evidence because both failed to adhere to the requirements of the Uniform Standards of Professional Appraisal Practice (USPAP) and valued only the leased fee estate. Thus, the Commission concluded that although OCC presented evidence that the rents due under the lease are below market and constitute evidence by which the leased fee estate value can be determined, OCC did not present any evidence of the value of the leasehold estate. Therefore, the actual or fair market value of the subject properties could not be determined. As a result, the Commission found that OCC, by failing to produce clear and convincing evidence, did not overcome the presumption in favor of the Board. OCC appealed to the Nebraska Court of Appeals.

The court noted that there is a presumption that a county board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action. That presumption remains until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence adduced on appeal to the contrary. The only evidence presented regarding the valuation of the subject properties was the 1997 sale of subject property; the letter of Elliott, a certified public accountant; the appraisal report of Morrissey, a certified general appraiser; and the affidavit of Len Buckwalter, Douglas County chief deputy assessor. The court affirmed the decision of the Commission to disregard OCC's contention that the sale price of parcel 4020-0000-01 represented the actual or fair market value of the real property, since the sale price only represented the value of the leased fee estate because that was all the seller had to sell. As a result, the court held that the Commission did not err in holding that the 1997 sale could not be

used as a comparable sale to determine the actual value of the entire property, including the entire bundle of rights associated with fee simple ownership.

With regards to Elliott's letter, the court agreed with the Commission that Elliott's letter was not in compliance with the Nebraska Administrative Code, and therefore, it was not credible. Further, the court also agreed that Elliott's letter estimated only the value of the income stream to the owner of the leased fee estate and never estimated the value of the leasehold estate. Therefore, it was not error for the Commission to determine that Elliott's letter was not credible evidence of the actual value of the subject properties. The court also found that the Commission did not err in finding Morrissy's Appraisal Report to be non-credible evidence. The Commission first determined that it would not be proper to review the appraisal report in the proceedings because it was a restricted appraisal report which was intended to be used only by the client for whom it was prepared. Because the Commission was not the client, the Commission determined that the restricted appraisal report was not appropriate for use in these proceedings. Additionally, Morrissy stated that the report could not be fully understood without additional information contained in his work file. This additional information was not included in the evidence before the Commission, which meant that his report cannot be fully understood. Because of this on this, the court found that the Commission did not err in determining that Morrissy's report was not credible evidence. Based upon the courts review of the record, it found that the Commission did not err in determining that OCC failed to overcome the presumption that the Board had faithfully performed its official duties in making an assessment and had acted upon sufficient competent evidence to justify its action.

With regards to the effect of a long-term lease on the property value, the court looked to other jurisdictions, and found that in many states, the assessed value of the land must represent all the interests in the land. This meant that despite the mortgage, lease, or sublease of the property, the landowner should still be taxed as though he possessed the property in fee simple. Thus, the courts had held that the valuation of property must represent the value of all interests in the property, i.e., the fair market value of the unencumbered fee. The cases required that the income attributed to the leased fee estate under a long-term lease be considered as one of the factors used to determine the actual or fair market value of the real property. However, the cases demonstrated that the actual or fair market value of the real property could only be ascertained by first determining the fee simple value, including the value of the leasehold estate, the leased fee estate, and any other severed estate. Therefore, based upon its examination of Nebraska law and jurisprudence from other states, the court held that the actual value of real property for tax purposes should be the value which a willing buyer would be willing to pay for the fee simple interest. Thus the court found that the Commission did not err in finding that OCC failed to overcome the presumption that the Board had faithfully performed its duties and had acted upon sufficient evidence to justify its action. The court also held that for tax purposes, the actual value of real property should be the value which a willing buyer would be willing to pay for the fee simple interest. Therefore, the decision of the Commission was affirmed.

***Washington County Bd. of Equalization v. Rushmore Borglum Ministries*, 11 Neb.App. 377, 650 N.W.2d 504 (2002).**

Rushmore Borglum Ministries, Inc. (Rushmore), applied for tax-exempt status with the Washington County Board of Equalization (the Board), claiming that status as a religious organization under Neb.Rev.Stat. § 77-202(d) (Cum.Supp.1998). Rushmore's application was

denied by the Board. Taxpayer appealed the Board's decision. The Tax Equalization and Review Commission (the Commission) reversed, and the Board appealed. The Nebraska Court of Appeals, held that the court had no jurisdiction to hear appeal of the Commission's decision where the Commission had no jurisdiction to hear an appeal from the Board's order due to taxpayer's untimely filing of the notice of appeal. Therefore, the appeal was dismissed.

The property at issue was a residence and a partially completed garage built on approximately 10 acres located in Fort Calhoun, Nebraska. Rushmore purchased the property in 1998. Rushmore applied for tax-exempt status in 1998 for tax year 1999. This application was granted. Rushmore then reapplied in 1999 for tax year 2000. On May 23, 2000, the Board denied Rushmore's application. It was undisputed that Rushmore was not given notice prior to May 23 that the Board was reviewing Rushmore's application, and as such, Rushmore was not present on May 23 when the Board denied its application. Rushmore was informed of the Board's decision by letter dated May 26, 2000 (the record contained a certified mail receipt signed by the minister's wife on May 27 indicating she received the May 26 letter). In this letter, the Board notified Rushmore that its application was denied and that Rushmore had 30 days from the final order to appeal the matter to the Commission. The matter was "reconsidered" on June 27, and the Board again denied Rushmore's application. On July 25, Rushmore appealed the determination resulting from the June 27 proceedings of the Board to the Commission. A hearing was held before the Commission on January 11, 2001. At the hearing, the Commission questioned whether it had subject matter jurisdiction to decide this matter. The Commission's concern involved the timeliness of the appeal. However, in its March 14 order, the Commission determined that it had subject matter jurisdiction and allowed the case to proceed. Thus, the Commission held a hearing on June 6, 2001, to decide the merits of the case, and in a written order, the Commission reversed the determination of the Board and vacated its order. The Board then filed a petition on appeal with the Nebraska Court of Appeals.

The court addressed the issue of whether the appeal was properly before it. The court had to determine whether the Board had jurisdiction to reconsider its May 23, 2000, order on June 27, and subsequently whether the Commission had jurisdiction to hear Rushmore's appeal. The court noted that it did not condone the actions of the Board in not giving Rushmore notice of the May 23, 2000 hearing. Neb.Rev.Stat. § 77-1510 (Cum.Supp.2000), states that to perfect an appeal to the Commission, one must file his or her notice of appeal within 30 days of the Board's final order. That means Rushmore should have filed its notice of appeal by June 22, 2000. However, Rushmore did not file its notice of appeal by June 22, within 30 days of the May 23 decision. The Board had jurisdiction only until that day to reconsider its decision. Therefore, the Board did not have jurisdiction to reconsider its May 23 order on June 27. Even so, the Board held a hearing and entered a decision on June 27. The court found that the only valid order that existed was the May 23, 2000, order, and that Rushmore's notice of appeal was filed on July 25, well beyond the 30-day time limit set out in § 77-1510. Therefore, the Commission did not have jurisdiction to hear Rushmore's appeal, since the appeal was untimely. And because the Commission was without jurisdiction, the court likewise did not have jurisdiction to decide the merits of this case. Therefore, because Rushmore did not comply with the jurisdictional requirements, the appeal had to be dismissed for lack of jurisdiction.

In a dissent, Judge Carlson argued that the Board's failure to comply with the notice requirements to Rushmore violated Rushmore's due process rights. Additionally, when the Board agreed to reconsider Rushmore's application, it implicitly vacated its May 23, 2000, order,

and as such, there was no order in effect and the Board thus retained jurisdiction to reconsider the matter on June 27 and subsequently enter its order, giving the Commission, and therefore the court jurisdiction to hear the appeal(s).

Brown County Agricultural Soc., Inc. v. Brown County Bd. of Equalization, 11 Neb. App. 642, 660 N.W.2d 518 (2003).

The taxpayer, the Brown County Agricultural Society, appealed the decision of the Brown county board of equalization (the Board) which denied tax-exempt status for a portion of a community hall on the ground that the portion was not being used for public purpose, and thus, was subject to real property taxation. The Tax Equalization and Review Commission (the Commission) affirmed the decision the Board. Taxpayer appealed. The Nebraska Court of Appeals held that the taxpayer was entitled to a property tax exemption with regard to use of the portion of the community hall.

The Agricultural Society is a county agricultural society, whose primary function was to provide Brown County with a fair. Located on the fairgrounds was the Community Hall, which was at issue in this case. When the fair was not being conducted, the Agricultural Society allowed the Community Hall to be used occasionally for certain other activities. In February 2000, the Agricultural Society applied for a class M liquor license, which was issued on May 1. The Agricultural Society had decided to apply for a liquor license so that it would have greater control over the consumption of alcoholic liquors during the annual county fair and to provide additional revenue to support the fair. The license covered the entirety of the Community Hall.

On February 28, 2001, a notice of taxable status was sent to the Agricultural Society by Charlene Fox, the Brown County assessor, advising the Agricultural Society that her office had determined that the Community Hall was not being used or developed for use for a public purpose and was therefore subject to property taxation for the tax year 2001. On March 26, the Agricultural Society filed a timely protest with Brown County. Brown County denied the Agricultural Society tax-exempt status, finding that the sale of alcohol in the Community Hall is not a proprietary function of an agricultural society and that the use of the area in which alcohol was sold was more than incidental. Brown County further found that “the balance of the Community Hall and portions of the real estate outside the Community Hall were used for the consumption of ... alcohol.” Brown County determined that an area measuring 24 by 60 feet within the Community Hall, comprising the storage area and kitchen area, would be taxable. The Agricultural Society filed an appeal with the Commission. The Commission issued findings and an order on April 15, 2002, affirming the decision of Brown County to deny tax exemption of the contested space. It concluded that the contested space was not used to carry out the duties or responsibilities imposed by law on the Agricultural Society and was not used for a qualifying public purpose. The Commission also determined that the contested space was utilized for nonpublic purposes for 78 out of the 850 days considered. The Commission concluded that the use of the contested space for nongovernmental purposes was not an “ ‘incidental’ ” use, but was, instead, the predominant use of the contested space. With regard to the class M liquor license obtained by the Agricultural Society, the Commission disregarded the emphasis placed by Brown County on the sale or consumption of alcohol, finding that if the liquor license defeated the tax exemption, then the entire Community Hall should be subject to taxation, instead of just a portion of it, since the license applied to the entire structure.

The first issue presented was whether the use of the contested space within the Community Hall constituted a public use of the premises entitling the Agricultural Society to a

property tax exemption for the contested space. In its order, the Commission found that the walk-in cooler, kitchen, and food preparation and service area in the contested space were used for cold food and liquor storage and for the cooking and other preparation and service of food. The Commission found that while this was consistent with the Agricultural Society's stated goal of providing barbecues to those attending the annual fair, there was ... nothing in the statutes which compelled the Agricultural Society to provide a free meal to those attending the fair. The Commission concluded that there was no evidence to support the contention that the use of the contested space was necessary to perform the duties imposed on the Agricultural Society by law. The court found that it was not necessary that an entity be statutorily mandated to perform an activity in order for the property to be considered necessary to carry out duties imposed by law. There was nothing in the statutes that specifically set forth the activities an agricultural society was required to offer at a county fair, and the court found that the consumption of food and beverages was a common activity at a county fair. Thus the provision of facilities to accomplish this activity was consistent with an agricultural society's conducting a county fair. The court therefore concluded that it was arbitrary and unreasonable to carve out a portion of the Community Hall and determine that it is not necessary for the holding of a county fair. If the balance of the Community Hall served the purpose of a county fair, then the contested space did as well, as the Community Hall would be of little benefit during the fair without the kitchen, food service, and storage areas.

The court found that making the contested space available to the public for reasonable private recreational uses fit within the duties conferred by law upon the Agricultural Society and was a use designed to promote recreation and community development within Johnstown. Given the broad language of the mandate given to the Agricultural Society in § 2-251, the court found that the Commission's decision that the use of the contested space did not constitute a public use did not conform to the law, was not supported by competent evidence, and was therefore arbitrary, capricious, and unreasonable.

With regards to the incidental use of contested space, Section 77-202(1)(c) provided that property owned by and used exclusively for agricultural and horticultural societies should be exempt from property taxes. The concept of exclusive use had been defined in the Nebraska Administrative Code as the predominant use of the property, to such an extent that an occasional or incidental use of the property for other purposes would not disqualify the property for an exemption. However, even if the use of the contested space for events such as wedding and graduation receptions was not considered a public use of the space, the contested space could still be treated as tax-exempt property if use of the space for those purposes was incidental to the primary use of the contested space for the annual county fair. The court found that during the days of "non-use," the property was still being held by the Agricultural Society for its primary purpose of conducting an annual county fair. Based upon foregoing authority which stated that so long as the property was actually used exclusively for educational, religious, or charitable purposes, the exemption was not lost because the use was for less than full time (on a continuous or daily basis), the court concluded that it was arbitrary for the Commission to disregard the days when the Community Hall property was not actually used in determining its primary purpose. The record indicated that the primary use of the contested space was for the annual county fair, and the Community Hall property had never been unavailable for use during the county fair because of the other uses, and thus the other uses had not detracted from the property's primary use. The court therefore concluded that the use of the contested space for wedding and

graduation receptions and similar events, if not considered use for a public purpose, was use that was incidental to use of the property for its main purpose in conjunction with conducting the annual county fair. Thus the decision of the Commission was contrary to the law, was not supported by the evidence, and was arbitrary, capricious, and unreasonable.

The Commission also found that the record demonstrated that the use of the Community Hall was leasing for non-public purposes, a use specifically prohibited by § 77-202. That statute specifically provided in subsection (1)(a)(ii) that “public purpose does not include leasing of property to a private party unless the lease of the property is at fair market value for a public purpose.” The Agricultural Society argued that the premises in question were not “leased” to private parties as the term “lease” is used in the above-quoted statutory provision. The court agreed, and found that the agreements entered into with the community to use the Community Hall for private occasions were more in the nature of licenses than leases. Thus the court concluded that the Commission’s finding that the contested space was being leased for nonpublic purposes in violation of the prohibition found in § 77-202(1)(a)(ii) was contrary to the law, was not supported by the evidence, and was arbitrary, capricious, and unreasonable.

Finally, in its findings and orders, the Commission concluded that the Agricultural Society had failed to demonstrate by clear and convincing evidence that the decision of Brown County was unreasonable or arbitrary. However, the court concluded that the Agricultural Society satisfied its burden of showing entitlement to a tax exemption for the contested space. The Commission again erred in finding that the Agricultural Society had not demonstrated that the decision of Brown County was unreasonable or arbitrary and in finding that the Agricultural Society was not entitled to a tax exemption for the contested space. Therefore the court concluded that the contested space was owned by the Agricultural Society and used exclusively for agricultural society purposes within the meaning of § 77-202 in that the primary or dominant use of the property was for agricultural society purposes, and thus the Commission’s order was reversed, and the cause was remanded to the Commission with directions to instruct Brown County to grant the exemption to the Agricultural Society for the contested space.

Widtfeldt v. Holt County Bd. of Equalization, 12 Neb.App. 499, 677 N.W.2d 521 (2004).

Trustee, James Widtfeldt, individually and on behalf of a trust, petitioned for judicial review of the decision by the Tax Equalization and Review Commission (the Commission) dismissing the appeal by trustee of the Holt County Board of Equalization's denial of property valuation protests. The Nebraska Court of Appeals held that: (1) an order staying hearing on 2003 tax protests was not final appealable order, and (2) the failure to name the Board as party and make timely service of summons deprived the reviewing court of jurisdiction.

Widtfeldt filed valuation protests regarding 26 separate tracts of land for tax year 2002. Widtfeldt filed the protests either individually or individually and on behalf of “James Widtfeldt Trust.” All 26 tracts were located in Holt County, Nebraska. The Holt County Board of Equalization (the Board) denied each protest. Widtfeldt then filed separate appeals with the Commission, challenging the decisions of the Board. The Commission served notices in lieu of summonses to the Board on September 4, 2002, and the Board filed timely answers on September 25. On November 17, 2003, the Commission ordered the 26 appeals consolidated for hearing and set the hearing for December 17. On December 17, no one appeared on behalf of either Widtfeldt or “James Widtfeldt Trust” and the Commission filed its written decision dismissing each appeal with prejudice and determining the final valuations for each tract for tax

year 2002 as previously determined by the Board. On December 22, Widtfeldt filed a motion for rehearing, which the Commission denied in its order dated December 23, 2003.

Widtfeldt's petition for review criticized the Commission's final order regarding tax year 2002 cases, asserting inadequate notice of hearing. The petition for review did not identify the parties in the body of the petition. The caption of the petition for review identified the appellant as "James Widtfeldt" and identifies the "Nebraska Tax Equalization and Review Commission" as the sole appellee. At the time of the filing of the petition for review on January 15, 2004, Widtfeldt requested the issuance of a summons to the Attorney General on behalf of the Commission. Our clerk issued a summons to the Attorney General on January 16. A copy of the summons with a certified mail return receipt showing service by the Attorney General's office on January 21 also appears in our file. The court issued an order to show cause on February 3, 2004, directing Widtfeldt to show cause why the appeal should not be dismissed for lack of jurisdiction, because service was made on the Attorney General rather than upon the Commission. Widtfeldt submitted a timely response, asserting that he properly served the Commission by service upon the Attorney General. However, the Board was not identified as a party in Widtfeldt's petition for review, nor was any summons issued or served upon the Board in the review proceeding.

Regarding the proceedings concerning tax year 2002, Widtfeldt's petition failed to name the Board as a party and Widtfeldt failed to have summons served upon the Board within 30 days after the filing of the petition, as required by statute. The court noted that the character of a pleading is determined by its content, not by its caption. Thus, the mere fact that the caption of Widtfeldt's petition named the Commission as the sole appellee did not control. However, the body of Widtfeldt's petition similarly failed to name or otherwise identify any party, thus violating the statutory mandate of § 77-5019(2)(b) regarding content of the petition. The court agreed that if the Commission had been properly named as a party in this court, the Commission would have been properly served by the issuance of a summons to the Attorney General. However, Widtfeldt's petition for review failed to name the Board as a party, and Widtfeldt failed to accomplish service of summons upon the Board within 30 days after filing the petition for review. Section 77-5019(2)(a) required the filing of the petition for review within 30 days after the final, appealable order was entered by the Commission. That time had expired. It was no longer possible for Widtfeldt to file a complying petition for review naming the Board as the proper party. Additionally, § 77-5019(2)(a) required service of summons within 30 days after the filing of the petition, and the petition was filed on January 15, 2004, and thus it was no longer possible for Widtfeldt to accomplish timely service of a summons upon the Board. Consequently, the court found that it lacked subject matter jurisdiction to consider Widtfeldt's issues regarding the tax year 2002 protests. The court therefore dismissed Widtfeldt's appeal.

Widtfeldt v. Tax Equalization and Review, Com'n 15 Neb.App. 410, 728 N.W.2d 295 (2007).

Taxpayer Widtfeldt sought review of decisions by the Tax Equalization and Review Commission (the Commission), in finding that his applications, in at least 75 separate appeals of property tax determinations by the Holt County Board of Equalization, were incomplete because they lacked \$25 filing fee, seeking to proceed on all appeals with one filing fee. The Nebraska Court of Appeals held that the court had no jurisdiction over the appeal because the lack of filing fee deprived the Commission of jurisdiction, and therefore the appeal was dismissed.

On June 30, 2006, Widtfeldt filed at least 75 separate property valuation protests with the Holt County Board of Equalization (the Board) regarding tax year 2006 values placed on his properties. On July 24, the Board denied his protests. On August 21, Widtfeldt appealed the Board's denials to the Commission. Widtfeldt filed a separate appeal form for each decision he appealed; he consequently filed at least 75 separate appeals—one for each parcel of property at issue. On October 17, 2006, the Commission's legal counsel sent a letter to Widtfeldt explaining that the Commission had received Widtfeldt's appeals, but that 75 of the appeals were incomplete because they were missing the required \$25 filing fee. The letter informed Widtfeldt that because 75 of his appeals were incomplete, the Commission was returning the incomplete appeals to him and the Commission would be unable to process the appeals because the time for filing them had expired. The letter explained that the dead-line for filing appeals was August 24, and that the initial documents sent by Widtfeldt were postmarked August 22 and received by the Commission on August 23. On November 17, 2006, Widtfeldt filed a petition for review in the Nebraska Court of Appeals pursuant to Neb.Rev.Stat. § 77-5019 (Cum.Supp.2006). He alleged in his petition that the Commission should have allowed him to proceed on all of his appeals with one filing fee instead of requiring a filing fee for each appeal. He requested that the court enter an order granting him permission to proceed on all of his appeals to the Commission with one filing fee.

The court began by noting that when an administrative agency lacks subject matter jurisdiction over a claim, the courts also lack subject matter jurisdiction on appeal. The court therefore examined the jurisdictional basis for Widtfeldt's 75 appeals before the Commission, which examination required the court to review the particular statutes establishing the procedures before the Board and governing the right to appeal to the Commission. Widtfeldt's petition for review asserted that he should be allowed to proceed on all of his appeals although he submitted only one filing fee, because he owned all of the parcels of land at issue, all of the parcels were located in the same county, and there were similar grounds to appeal the Board's decision in each case. The court concluded that Widtfeldt's position was not supported by the law.

The law required a protesting taxpayer to submit a separate protest for each parcel of real estate. The record showed 75 instances of such protests. In each instance, Widtfeldt submitted a separate protest form to the Board. A county board of equalization was then required to render a decision on the protest. Each of the protest forms provided a place for the decision of the county board of equalization to be recorded. In this case, the Board recorded its decision regarding each parcel in the designated place on the form submitted for that particular parcel. The statutes governing appeals from a county board of equalization to the Commission then contemplate a separate appeal from each decision of the county board of equalization and require a separate filing fee for each appeal. The court found that in giving effect to the purpose and intent of the Legislature as ascertained from the entire language of the statutes considered in their plain, ordinary, and popular sense, it was determined that a separate filing fee must accompany each appeal to the Commission, and if a fee was not timely submitted with the appeal, the Commission would not have jurisdiction over the appeal. The relevant statutes required a separate tax valuation protest for each parcel of real estate and a separate filing fee for each appeal from a county board of equalization decision to the Commission. Because the Commission did not timely receive the required filing fee in each of the 75 appeals, it lacked jurisdiction over the appeals. It necessarily followed that the court then lacked jurisdiction over the appeal from the Commission. The court therefore dismissed Widtfeldt's appeal.

***Community Redevelopment Authority of City of Hastings v. Gizinski*, 16 Neb.App. 504, 745 N.W.2d 616 (2008).**

Redevelopment authority and city filed complaint against county, county assessor, and county treasurer for declaratory judgment and writ of mandamus, alleging that county assessor had failed to make a correct certification of redevelopment project valuation. Following a trial, the District Court of Adams County entered a declaratory judgment setting the value of the property at \$32,500 and issued a writ of mandamus, requiring county assessor to transmit such value in accordance with the Community Development Law. The county, assessor, and treasurer appealed, and authority and city cross-appealed. The Nebraska Court of Appeals held that: (1) a mandamus action was appropriate remedy, and thus court had jurisdiction, and (2) the district court did not commit plain error.

The Legislature enacted the Community Development Law, Neb.Rev.Stat. §§ 18-2101 et seq. (Reissue 1991). That Act provided in substance that upon approval of a redevelopment plan, the developer's cost of reconstruction and redevelopment of the specific property may be financed by the issuance of bonds by the particular city involved. Upon request, the county assessor was to transmit a redevelopment valuation of the property equal to the assessed valuation for the year immediately preceding the effective date of the redevelopment plan. On or about January 8, 2001, the Hastings City Council passed and approved a resolution which authorized the Authority to take the actions necessary to implement a redevelopment project known as the Crosier Redevelopment Project. In May 2001, the Authority notified the county assessor's office concerning the Crosier Redevelopment Project and requested that the county assessor certify the redevelopment project valuation in accordance with § 18-2148. On May 3, 2002, the county assessor acknowledged that the taxable value for the property in question for 2000 was \$0 because it was tax exempt property belonging to Crosier's, a nonprofit entity. On May 2, the county assessor issued a certificate as to the redevelopment project valuation for January 1, 2000, in the amount of \$614,440. On June 1, 2002, the county assessor's office changed the redevelopment project valuation to \$900,475.

On October 15, 2003, the Authority filed a complaint for declaratory judgment and writ of mandamus. The Authority alleged, among other things, that without the correct certification of the redevelopment project valuation by the county assessor, the Authority would not be able to collect tax increment funds as allowed under the Community Development Law. The Authority alleged that despite demand upon the county assessor that the redevelopment project valuation be properly set at \$0, the county assessor had failed to make the proper certification as required by law. The Authority sought an order declaring what the redevelopment project valuation properly should be and a writ of mandamus compelling the county assessor to show cause why she had not properly certified the valuation on or before a date to be set by the court. Trial was held before the district court on April 13, 2005. Evidence at trial showed that the property in question, known as the Crosier Monastery, was purchased in January 2001 for \$32,500, by an entity in which Thomas Lauvetz was the general partner. Evidence was presented to indicate that at the time of purchase, the property had no value on the real estate market. Other evidence was presented to indicate that the price of \$32,500 for the real estate was an appropriate and fair price, based upon an arm's-length transaction. The district court entered a declaratory judgment setting the value of the property at \$32,500 and issued a writ of mandamus, requiring the county assessor to transmit such value in accordance with Nebraska's Community Development Law. With respect to the valuation, the district court noted that it did not have evidence before it at the

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time of its summary judgment order as to the true condition of the building and that based upon the trial evidence, the correct redevelopment project valuation as of January 1, 2000, was \$32,500. The court stated that \$32,500 was the only value that actually made sense and has any relation to true market value at the time. The court rejected the Authority's requested valuation of \$0, relying on the Nebraska Supreme Court's analysis in *State ex rel. Scoular Prop. v. Bemis*, 242 Neb. 659, 496 N.W.2d 488 (1993), and concluded that the property could not have a value of \$0 based solely on its previous exempt status. The district court addressed the County's argument that it did not have subject matter jurisdiction and that the case should have been brought first to the Adams County Board of Equalization and subsequently appealed to the Tax Equalization and Review Commission (the Commission). The court concluded that because there is no appeal process included in the statutory scheme for Nebraska's Community Development Law, a mandamus action was an appropriate remedy. Finally, the district court noted the requirements of a writ of mandamus and found that the requirements had been met in this case. The County filed a motion for new trial, which was overruled by the district court on December 14, 2005. Subsequently, the County perfected its appeal to the Nebraska Court of Appeals, and the Authority perfected its cross-appeal.

The court addressed the issue of jurisdiction first. The County argued that the matter of the redevelopment property valuation should have been brought first before the Adams County Board of Equalization and then appealed to the Commission. The County noted that the Nebraska Supreme Court had stated that a property owner's exclusive remedy for relief from overvaluation of property for tax purposes is by protest to the county board of equalization. However, the court found that in this case, the valuation was not for tax purposes, but, rather, for purposes of obtaining tax increment financing under the Community Development Law. Furthermore, the Authority was not the property owner. In a similar case, *State ex rel. Scoular Prop. v. Bemis*, 242 Neb. 659, 496 N.W.2d 488 (1993), a mandamus action was appropriate where the Nebraska Supreme Court found that a previous \$0 valuation resulted from the fact that the property had been exempt and the realtor should have been alerted that it was not entitled to rely on that valuation. The court found nothing in the statutes relating to the Commission or in the Community Development Law itself to indicate that a mandamus action was no longer an appropriate remedy for an authority that believes that a county assessor has not complied with his or her duty under § 18-2148 to transmit a redevelopment project valuation. There was also no provision in the Community Development Law requiring a hearing before a board of equalization and then an appeal to the Commission when a county assessor has allegedly failed in that duty. Thus the court found no error in the district court's conclusion that a mandamus action was an appropriate remedy in this case.

The court also determined that the district court did not commit plain error in the issuance of a writ of mandamus, directing the county assessor to comply with her statutory duty and to transmit a value of \$32,500 in accordance with Nebraska's Community Development Law. Plain error was error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process. The property at issue in this case was very unique, and based upon the facts of this case and the court's review for plain error, the court found no error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.

Finally, on cross-appeal, the Authority asserted that the district court erred when it failed to amend its final order to show that the county assessor was required to transmit a value of \$5,735 upon receipt of exhibit 16, an affidavit of Lauvetz, during the hearing on the motion for new trial. Yet there was nothing in the record to show that the Authority actually sought such a decision from the district court. An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court. Because the issue of whether the assessor should have transmitted a redevelopment project valuation of \$5,735 was not presented to the district court for decision, it was not appropriate for the court to resolve that issue on appeal. Thus the Authority's cross-appeal was without merit. Therefore, the court found no plain error in the district court's declaratory judgment and writ of mandamus entered in favor of the Authority, and the court made no determination with regard to the Authority's cross-appeal, because the issue raised was not presented to the district court for determination. The court thus affirmed the order of the district court.

***Curtis v. Giff*, 17 Neb.App. 149, 757 N.W.2d 139 (2008).**

Charles and Sandra Curtis, landowners of property in Iowa, brought action to quiet title to an adjoining parcel in their backyard which, unknown to them, was in Nebraska and had been sold in tax foreclosure proceedings. The District Court of Douglas County quieted title in them. Megan Giff, who claimed to own the disputed property pursuant to a sheriff's deed after the property was sold in tax foreclosure proceedings in 2002, appealed. The Nebraska Court of Appeals held that: (1) the owners were in open and visible actual possession of backyard; (2) the owners were entitled to actual notice of tax foreclosure proceedings; and (3) the action to quiet title in equity was appropriate method of attacking tax foreclosure sale.

The Curtis's purchased property located on Sand Point Drive in Carter Lake, Iowa, on November 21, 1994, from Chase Home Finance, LLC (Chase), which acquired the property from the prior owner of the property, Troy & Nichols, Inc. The property was actually made up of land in Pottawattamie County, Iowa, which contained the house and front yard, and Douglas County, Nebraska, which contained the backyard and lakefront. The Curtis's received a deed to the Iowa parcel from Chase on December 5, 1994, but did not receive a deed to the Nebraska parcel at that time. The Curtis's were the legal owners of the Iowa parcel, and that parcel was not in dispute, but the Nebraska parcel was in dispute. From 1994 until the time of the case, the Curtis's had maintained both the Iowa and Nebraska parcels and made repairs and improvements on each parcel. The Curtis's, and the broker they purchased the land from were unaware that the Nebraska-Iowa state line bisected the property at the time of the Curtis's' purchase or that any part of the property was located in Nebraska. The Curtis's did not pay any property taxes on the Nebraska parcel to Douglas County before 2005. Sometime in 1999 or 2000, Sandra learned from a neighbor that part of the property may be in Nebraska, because a former owner had paid some Nebraska property taxes. Sandra contacted the Douglas County register of deeds and the assessor, but was unable to obtain any information. Sandra stated in her affidavit that she and Charles were never visited by Douglas County assessors, but were visited by Pottawattamie County assessors at least three times during the years they owned the property.

Apparently no one had been paying the property taxes on the Nebraska parcel between 1993 and 1998, because in November 2001, Douglas County instituted proceedings for a tax foreclosure sale. Notice of the tax foreclosure was mailed in December 2001 to Troy & Nichols, which was listed as the owner of record at that time. In addition, notice of the tax foreclosure

sale was published in an Omaha legal newspaper for 3 consecutive weeks in December 2001 and again in February and March 2002. The notice was published a total of seven times. The tax sale occurred on March 20, 2002, and Giff's father purchased the Nebraska parcel for \$335.64 as an investment property for Giff, who was under the age of majority at the time of the sale. Notice of a hearing to confirm the sale was sent to Troy & Nichols. The sale was confirmed by the district court for Douglas County on May 13, 2004. Subsequently, a sheriff's deed was issued for the parcel on June 17, and Giff recorded the sheriff's deed on June 28. Giff's father paid the property taxes due on the Nebraska parcel from 1999 to 2004 on Giff's behalf. On January 31, 2005, Giff's father sent a letter to the owner of a commercial marina next to the Curtis's, asking him whether he was interested in purchasing the Nebraska parcel. The owner of the marina showed the letter to Sandra, who then called Giff's father. Through subsequent telephone calls between Sandra and Giff's father, Giff's father offered to sell the Nebraska parcel to Sandra for \$20,000, an offer Sandra refused.

On January 24, 2006, the Curtis's filed suit against Giff to quiet title to the Nebraska parcel. The Curtis's alleged that they had adversely possessed the Nebraska parcel; that the tax foreclosure sale and subsequent sheriff's deed were not binding upon them, because they were not served with notice of the tax foreclosure action; and that they had intended to purchase the Nebraska parcel along with the Iowa parcel in 1994. Giff counterclaimed to quiet title against the Curtis's, to eject the Curtis's from the Nebraska parcel, and for slander of title. The district court for Douglas County sustained the summary judgment motions of the Curtis's and Chase and denied that of Giff. The court found that the tax foreclosure sale was void ab initio because the Curtis's did not receive notice of the sale and were entitled to such notice because they were in possession of the property; that Giff had no property interest in the Nebraska parcel because the sheriff's deed was void ab initio and that therefore she could not maintain quiet title, ejectment, or slander of title claims; and that because Giff has no property interest, Chase is entitled to judgment as a matter of law. The Curtis's then made a motion for default judgment quieting their title in the Nebraska parcel, was granted by the district court. Giff timely appeals to the Nebraska Court of Appeals.

Giff argued that under Nebraska law, one must have title to the disputed property to challenge a tax foreclosure sale, and that because the Curtis's did not have title via a deed or adverse possession at the time of the tax foreclosure in 2002, the Curtis's could not challenge the tax foreclosure sale whereby Giff purchased the Nebraska parcel. The court deemed this to be incorrect. A decree of foreclosure of a tax lien is of no effect as against the persons who were at the time in actual possession of the land and who were not made parties defendant in the action and had no notice or knowledge thereof. The Curtis's were entitled to notice of the tax sale, because possession is sufficient to be entitled to notice of tax foreclosure proceedings. The key inquiry was whether the Curtis's were in possession in 2002 when the tax foreclosure sale took place, thereby entitling them to actual notice of the proceedings. The court then looked at whether the Curtis's were in possession of the Nebraska parcel in 2002 and whether the Curtis's received or had notice of the tax foreclosure proceedings.

Actual possession, defined by the Nebraska Supreme Court, means “ ‘actual, open, visible possession or occupancy in fact, exactly that and nothing less, as distinguished from constructive possession. Giff claimed that the Curtis's were nonresident trespassers because they did not occupy, improve, or reside on the Nebraska parcel. However, Giff gave no evidence to support this argument. The Curtis's, on the other hand, put forth evidence that they were in

possession at the time of the tax sale. Pictures were offered by the Curtis's of the Nebraska and Iowa parcels dating from 2000 and 2001. Remembering that the two parcels form a single residential lakefront lot, irrespective of the legal nuances, the pictures showed that the properties were being maintained and that a chain link fence was common to both parcels. From these pictures, the fence does not appear to be on the state line, but, rather, on the edges of the yard. Additionally, they put forth evidence that they had maintained and improved the property by putting on a new roof, decking, and door panels on the boat house, repairing the boat lift, and repairing and rebuilding the railroad tie retaining wall on the west side of the property which extended into the lake. The court found this to be evidence of actual possession. The way that the backyard was fenced and the repairs done to improvements on the Nebraska parcel clearly made the Curtis's' possession open and visible to any reasonable person. The court therefore found that the Curtis's were in actual possession of the Nebraska parcel at the time of the tax foreclosure sale.

With regards to whether the Curtis's had notice of the tax foreclosure proceedings, the court noted that the law was well settled that there was no presumption of valid service contained in the statutes governing sheriff's deeds that follow a tax foreclosure sale. Giff argued that constructive notice by publication was sufficient because the Curtis's were nonresidents of the State of Nebraska and, therefore, could not have been served in Nebraska. There was clear evidence that anyone, upon inquiry, could have discovered the Curtis's had an interest in the Nebraska parcel because of the close proximity of their house and the appearance of the yard and fence. Thus, service could have been made in Nebraska, as the Curtis's were clearly in possession of their backyard, which is in Nebraska.

Because the Curtis's were in actual possession of the Nebraska parcel, they were entitled to actual notice of the tax foreclosure proceedings. Because they did not receive notice, the tax sale and subsequent sheriff's deed to Giff were void. As a result, Giff never acquired valid title to the Nebraska parcel. A void judgment is not binding upon the person against whom it is rendered, gives no new rights or better position to a person in whose favor it professes to be, and cannot be a source of title. As such, Giff could not maintain an action for quiet title or ejectment or slander of title against the Curtis's or Chase, and such parties were entitled to judgment as a matter of law.

Giff further attacked the method in which the Curtis's voided the tax sale by arguing that the Curtis's should have reopened the judgment and defended the foreclosure action pursuant to Neb.Rev.Stat. § 25-525 (Cum. Supp. 2006) or pursuant to an action for redemption. However, the court found this argument to have no merit, as an action to quiet title in equity was an appropriate method of attacking a tax foreclosure sale. Therefore the court found that the district court had properly granted the Curtis's' motion to quiet title in them because they had actual possession of the Nebraska parcel and did not receive notice of the tax foreclosure proceedings. The quitclaim deed, recorded on November 21, 2005, effectively transferred title from Chase to the Curtis's; Giff's sheriff's deed was void and unenforceable, and such cloud upon the Curtis's' title should be, and was hereby, removed. The district court's decision was affirmed.

Vanderheiden v. Cedar County Bd. of Equalization, 16 Neb.App. 578, 746 N.W.2d 717 (2008).

Property owners, including Vanderheiden, protested the assessed valuation of their properties, challenging the 2005 assessed valuation of their property. Upon denial of the protests, the taxpayers appealed to the Nebraska Tax Equalization Review Commission (the NE Dept. of Revenue Property Assessment Division Legal Case Summaries May 4, 2011

Commission), which consolidated their appeals for purposes of a hearing. Following presentation of evidence by the taxpayers and the county, the Commission determined that the taxpayers had not overcome the presumption that the challenged valuations were correct and therefore affirmed the decisions of the County Board. The taxpayers perfected this timely appeal. The Nebraska Court of Appeals held that the market areas of the county that the assessments were based on were created using professionally accepted methodology, and therefore affirmed the decision.

This case involved the valuation of agricultural land in Cedar County, Nebraska, for the tax year 2005. For the tax year 2005, the county assessor divided the county into two market areas for the assessment of agricultural and horticultural land, described as “Market Area 1” and “Market Area 2.” All but one of the 48 pieces of real property involved in this appeal were located in Market Area 2. Township lines were used as the boundaries for Market Area 2 on the north and west sides. The east and south boundary lines of Market Area 2 were the county's boundaries with adjacent counties. The assessment in question resulted in different valuations' being placed on land of the same soil type depending on the market area in which the land was located. A hearing was held before the Commission. At the hearing before the Commission, the taxpayers' position was that the County Board did not uniformly or proportionately order the correct taxable value for the taxpayers' agricultural property for the tax year 2005. The taxpayers presented an equalization argument only. The taxpayers alleged before the Commission that the market areas should not have been used and further alleged that the market areas in question were not properly created through professionally accepted methodology. The Commission issued a decision and order dated March 14, 2007, and affirmed the decisions of the County Board.

The Commission found from its review of the evidence that the taxpayers had not met their burden to show that the County Board was incorrect in its decision. The Commission further found that the taxpayers had not shown by clear and convincing evidence that the decision of the County Board was arbitrary or unreasonable. The Commission found that the taxpayers had failed to provide proof that their property was not valued uniformly and proportionately with respect to other property of similar type within the same market area and had failed to provide any evidence of actual value of the subject properties or any other evidence concerning the characteristics of the subject properties or the comparable properties, other than soil type. Thus the Commission found that the County Board had shown by reasonable evidence that the taxable valuation of agricultural and horticultural lands for 2005 in Cedar County was uniform and proportionate within each market area. The taxpayers appealed. The taxpayers asserted that the Commission erred in finding that the market areas as drawn by the county assessor complied with professionally accepted methodology. Previously, the Nebraska Supreme Court addressed the use of market areas in *Bartlett v. Dawes Cty. Bd. of Equal.*, 259 Neb. 954, 613 N.W.2d 810 (2000). In *Bartlett*, the Dawes County assessor had divided the county into four agricultural “market areas” for property tax purposes. The court found that the evidence in that case indicated that the market areas established by the assessor were not, in fact, based on soil classification, but, instead, were based on assessment-to-sales ratios. Subclasses of agricultural land must be based on soil classification, not upon where the land is located. Thus the market areas did not constitute subclasses of agricultural land as defined by the statutes.

For purposes this present case, the critical statute was § 77-103.01, the requirement that “[a] class or subclass based on market characteristics shall be based on characteristics that affect the actual value in a different manner than [they affect] the actual value of properties not within the market characteristic class or subclass.” The evidence adduced in this case showed that the market areas in question were drawn in compliance with this requirement. The evidence showed that the market areas in this case were established based upon an examination of the land for soil types, productivity, availability of water, relation to market distribution points, land use, geography, and sales history. Although the market area boundaries were drawn on township and county lines and did not follow soil classifications, the record showed that the topography varies throughout the county, that there are smaller farms in the north than in the south part of the county, and that the larger properties tended to sell for a higher value. The record showed that the use of market areas in valuing agricultural land in the county gave a more accurate picture of the market than would have resulted from not using market areas.

Additionally, the statutes governing the Commission created a presumption that the County Board had faithfully performed its official duties and has acted upon sufficient competent evidence to justify its actions. This presumption remains until there is competent evidence to the contrary presented. Once the presumption has been rebutted, the burden shifts to the party requesting the exemption to prove its entitlement thereto. The Commission found that the taxpayers had not presented evidence to overcome this presumption, and the court reviewed the Commission decision for errors on the record and found that the Commission’s decision conformed to the law, was supported by competent evidence, and was neither arbitrary, capricious, or unreasonable. Therefore, the Commission did not err in finding that the market areas as drawn by the county assessor complied with professionally accepted methodology, and thus affirmed the decision.

***Zabawa v. Douglas County Bd. of Equalization*, 17 Neb. App. 221, 757 N.W.2d 522 (2008).**

Michael R. Zabawa appealed the order of the Nebraska Tax Equalization and Review Commission (the Commission) which upheld the decision of the Douglas County Board of Equalization (the Board) denying his property tax protest. Despite finding Zabawa's property “highly comparable” to one afforded a substantial reduction in value through the protest process, the Commission concluded that the Board had no duty to equalize the valuations of comparable properties where both valuations were protested. This resulted in Zabawa's property's being taxed at market value even though the Commission determined the comparable property was taxed at only 75.8 percent of market value. The Nebraska Court of Appeals found both a constitutional and a statutory duty to equalize such valuations. The court therefore reversed the decision, and remanded with directions to reduce Zabawa's value accordingly.

Zabawa owned the property at issue, 668 Dillon Drive, which was located in Omaha, Douglas County, Nebraska. It included a one-story, brick, ranch-style house that was built in 1963 and has 2,871 square feet. The Douglas County assessor valued the property at \$396,000 in 2006. The property was previously valued at \$263,800 in 2005. Zabawa filed a protest of the 2006 valuation with the Board. A referee then recommended that the property's valuation be reduced to \$360,000 because he believed that Zabawa's house, assessed at \$137.94 per square foot, was most similar to a comparable property that had been assessed at \$113.97 per square foot.

During the same period, the owner of 676 Dillon Drive protested the valuation of his property with the Board. A different referee heard his initial protest. Zabawa testified that he and the owner of 676 Dillon Drive both made the same argument—that the property valuation should be decreased because the property on the other side of Zabawa, 660 Dillon Drive, was comparable and because there had been a sanitary sewer backup in 2004 in that area. The taxable value of 676 Dillon Drive was reduced to a “reconciled” value of \$275,000, but the “market” value was \$362,547. Zabawa then appealed the Board's decision to the Commission. On December 3, 2007, the Commission heard Zabawa's appeal. Zabawa introduced evidence regarding the comparability of 660 Dillon Drive and 676 Dillon Drive, the comparability of 11 other properties in the neighborhood, and the differing valuations of his property and 676 Dillon Drive subsequent to similar valuation protests. The Commission upheld the Board's valuation. However, in doing so, the Commission also determined that Zabawa's property and 676 Dillon Drive were “highly comparable” and noted that the Board had ultimately assessed the similar properties at “greatly disparate taxable values.” The Commission noted that the “reconciled” post protest value of 676 Dillon Drive was 75.8 percent of its total listed market value in the county records. The Commission also considered “whether the ... Board has a duty to review and reconcile the results in all protests” and determined that the Board had no such duty. The Commission also found that the valuation of Zabawa's property was not the result of “intentional ill will.” Zabawa timely appealed.

Zabawa asserted that the Commission used an incorrect standard of review in deciding his case. The court noted that The Nebraska Supreme Court had construed statutory standard of review in cases like this to mean that there is a presumption that a board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action. That presumption remains until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence adduced on appeal to the contrary.

Zabawa argued that the Commission defined the “plain duty” portion of the standard of review incorrectly. The Commission had concluded that the Board had no plain duty to equalize the disparate valuations of comparable real properties provided that the differences were the result of separate valuation protests. The court disagreed. Nebraska law required that comparable properties be valued similarly and does not provide an exception merely because both owners exercised their right to contest the valuations. The court noted that in the record, it was observed that the Commission found Zabawa's property and 676 Dillon Drive to be highly comparable. In his appeal, Zabawa relied on this determination, which had substantial support in the evidence. However, despite all the similarities between the two properties, after the tax protests were concluded in 2006, Zabawa's property was valued at 144 percent of the taxable value of 676 Dillon Drive. The Commission's conclusion that these comparable properties need not be valued similarly directly contradicted Nebraska law. The Nebraska Constitution provided that “[t]axes shall be levied by valuation uniformly and proportionately upon all real property....” Neb. Const. art. VIII, § 1. Neb.Rev.Stat. § 77-1501 (Cum. Supp. 2006) mandates that “[t]he county board of equalization shall fairly and impartially equalize the values of all items of real property in the county so that all real property is assessed uniformly and proportionately.” The court found that Nebraska law also made it clear that when properties were comparable to the extent that Zabawa's property was comparable with 676 Dillon Drive, the Board had the plain duty to value them similarly. The Board's failure to do so is sufficient to rebut the presumption

that its decision was correct. Because the Commission found that Zabawa's property was highly comparable to 676 Dillon Drive, and because the Commission found that the properties had “greatly disparate taxable values,” the Commission was incorrect to conclude that Zabawa had not rebutted the presumption that the Board's decision was correct. The Board had the plain duty under § 77-1501 to value these comparable properties at similar amounts. By adjudicating tax protests in greatly disparate amounts-676 Dillon Drive at 75.8 percent of its market value and Zabawa's comparable property at full market value-the Board failed to fulfill its “plain duty” to equalize property valuations. Therefore Zabawa rebutted the presumption that the Board's decision was correct.

The Commission stated that the Board had no duty to equalize in this context, because Nebraska statutes do not expressly provide for a procedure to rectify dissimilar protest results for comparable real properties. The court disagreed with this statement, as Section 77-1501 implements the constitutional mandate to value all real property uniformly and proportionately. As a matter of law, the Board's valuation of Zabawa's property was unreasonable and arbitrary because it assigned substantially different values to comparable properties. Therefore, the Commission erred in failing to reduce the taxable value of Zabawa's property. Thus, Zabawa was entitled to have his property taxed at the same percentage of market value as are other properties. Therefore, Zabawa was entitled to relief as a matter of law. Zabawa requested a valuation of \$290,000 before this Commission, and in this case, Zabawa was entitled to have his property taxed at the same rate as 676 Dillon Drive, or 75.8 percent of market value. In order to value Zabawa's property at a rate that is not unreasonable or arbitrary, the Commission had to reduce the tax valuation of Zabawa's property to \$300,168.

The court concluded that the Commission incorrectly applied the standard of review. Therefore, the court reversed the Commission’s determination that Zabawa failed to overcome the presumption that the Board faithfully performed its official duties. In light of the Commission's factual findings that Zabawa's property was “highly comparable” to the other property and that the properties had ultimately been assessed at “greatly disparate taxable values,” the court determined that as a matter of law that the Board had failed to perform a plain duty when it failed to equalize Zabawa's property valuation and that its valuation of Zabawa's property was unreasonable and arbitrary. Thus the court found that Zabawa was entitled to relief as a matter of law and remanded the matter to the Commission with directions to reduce the tax valuation of Zabawa's property to \$300,168.

***Wolf v. Grubbs*, 17 Neb.App. 292, 759 N.W.2d 199 (2009).**

*This case has only one part of the decision that deals with Property Taxes, therefore, that is the only part summarized.

Taxpayers brought action for Open Meetings Act violations against county board of commissioners (BOC) and county board of equalization (BOE). After a bench trial, the District Court for Banner County entered judgment for taxpayers. Defendants appealed, and plaintiffs cross-appealed. The Nebraska Court of Appeals held that: (1) BOC and BOE were two separate bodies, though their membership overlapped; and (2) a combined agenda and minutes for both BOC and BOE could pass muster under the Open Meetings Act, provided the agenda and minutes clearly separated BOC items from BOE items.

The first issue the court decided was whether the BOC and the BOE were the same body or separate and distinct governmental bodies. The court found that while the BOC and the BOE

have the same membership, they have entirely different functions and duties, and clearly the powers of the BOC are far more expansive, whereas the powers of the BOE are rather strictly limited. The court held that the duties and functions of the boards, rather than their membership, determined whether the BOC and the BOE were the same body or separate and distinct bodies. Again, the court determined that the BOC and the BOE were separate and distinct bodies, and thus each is required to comply with the Open Meetings Act.

However, the court found that separate pieces of paper were not required. Pursuant to the Open Meetings Act, every meeting of a public body shall be open to the public. § 84-1408, and public bodies were required to give advance publicized notice of their meetings. The court found that the BOC and the BOE did not have to post separate notices under the circumstances of the case, (in the sense of two pieces of paper) because the notice contained only the time and place that the boards meet and directed an interested citizen to where the agendas for each board can be found. Additionally, the court found while a separate agenda for each board would be a better practice, the court nonetheless concluded that a “combined” agenda for both boards could pass muster under the Open Meetings Act, provided that the agenda made it clear which items were to be addressed by the BOC and which items were to be addressed by the BOE. In this case, the combined agendas and minutes of the BOC and the BOE were valid because they clearly stated which items and issues each board would or did address.

NE Supreme Court Cases

Ahem v. Board of Equalization, 160 Neb. 709, 71 N.W.2d 307 (1955).

This case involved an appeal by a taxpayer concerning the assessment and valuation of her real property by the county assessor which was affirmed by the board of equalization. The taxpayer appealed to the District Court which found in her favor and reduced the valuation of her property. The Supreme Court affirmed the decision with modifications.

The Court recognized two presumptions: first, that ordinarily the valuation by the assessor presumed to be correct unless he accepts the valuation by professional appraiser, in which case the presumption does not obtain and the burden is upon the protesting party to prove that the assessment is excessive. Second, the presumption obtains that a board of equalization has faithfully performed its official duties and in making an assessment is acted upon sufficient competent evidence to justify its action. The presumption disappears when there is competent evidence on appeal to the contrary. The reasonableness of the valuation fixed by the board becomes one of fact based upon evidence, unaided by presumption, with the burden of showing such value to be unreasonable resting upon the party complaining.

In this case, neither presumption prevailed. The valuation was not based upon personal inspection of the property by the assessor and so his valuation could not be presumed to be correct. This fact disabled the presumption that the board of equalization in making the assessment acted upon sufficient competent evidence to justify its action. Plaintiff's evidence on the issue of the value of her property was uncontradicted and unimpeached. The Court further lowered the valuation of the property beyond the value set by the District Court.

Babin v. County of Madison, 161 Neb. 536, 73 N.W.2d 807 (1955).

This case involved a complaint by the taxpayer as to the increased valuation placed upon her property. She sought to enjoin the collection of taxes resulting from the increase in

valuation. The trial court rendered a judgment for Plaintiff, and the Defendants appealed. The Supreme Court affirmed.

The main issue was whether or not the Plaintiff has a cause of action for injunctive relief against the collection of the taxes when Plaintiff had not be properly notified of the increase in valuation of her property as required by section 77-1315, R.R.S. 1953. The Court held that the provisions of section 77-1315 requiring notice to the land owner of any increase in assessed value of his realty over the last previous assessment is mandatory. A tax levied on such increase, made without notice to the owner, is void, and its collection may be enjoined. Failure to comply with the provisions of section 77-1315 is not a mere irregularity from which a voidable tax results.

The Court also stated that individual discrepancies and inequalities must be corrected and equalized by the County Board of Equalization. The duties of the State Board of Equalization are unrelated thereto and have no direct relationship to a county board of equalization.

Ewert Implement Co. v. Board of Equalization, 160 Neb. 445, 70 N.W.2d 397 (1955).

In this case the taxpayer appealed the increase in valuation of his business inventory by the county board of equalization. Plaintiff contended that the Board did not have the power to increase valuation of his business inventory once the assessor's abstract had been certified to the State Tax Commissioner. The District Court found in favor of the county board of equalization and the Supreme Court affirmed.

The Court stated that, by the 1947 amendment to section 77-1502, R.R.S. 1943, the rule limiting the exercise of the powers of the county board of equalization to the period prescribed for its annual meeting is no longer controlling. By section 77-1502, R.R.S. 1943, a county board of equalization is authorized to meet in special session at any time after the close of the annual meeting for the purpose of equalizing assessments of omitted and undervalued property.

Offutt Housing Co. v. County of Sarpy, 160 Neb. 320, 70 N.W.2d 382 (1955).

This case involved an action by the Offutt Housing Co. which leased U.S. government land on an air force base for the purpose of establishing a housing project thereon to provide housing for base personnel. Plaintiff filed an injunction against the county to enjoin the levy and assessment of taxes on his personal property located on the leased land. The Supreme Court reversed, sustaining the appeal. The Court held that Congress, through its legislative acts, had consented to the taxation of the lessee's interest in the project erected on Government land. This consent waived any immunity or exemption thereof from taxation appearing in the Enabling Act and ceding statutes of this state. Plaintiffs interest in the lease, as well as the housing units and fixtures as owner thereof, were taxable as personal property. The Court also stated that the remedy of injunction is available to restrain a void tax, but not a tax that is simply irregular or erroneous.

Peter Kiewit Sons Co. v. County of Douglas, 161 Neb. 93, 72 N.W.2d 415 (1955).

The county appealed from an order of the District Court authorizing Appellee to deduct from the value of its intangible Class "B" personal property \$5,000,000 of U.S. governmental

obligations in order to determine the value of its shares of stock for taxation purposes. The Supreme Court affirmed.

Appellee raised two questions in regard to the jurisdiction of the county board of equalization. First, Appellee contended no notice was given to the stockholders of the corporation of any proposed increase on their tax returns as required by section 77-1506, R.R.S. 1943. The Court held that under section 77-706, R.R.S. 1943, (subsequently repealed) domestic corporations are the agents of their stockholders for the purpose of assessing their stock in such corporation for taxation and paying the tax assessed thereon.

Appellee's second contention was that the board of equalization had no jurisdiction to act when it did because more than 40 days had elapsed since it first met. See section 77-1502, R.R.S. 1943. The Court has interpreted this statute to mean one session is to begin and end as provided in the act. Once started, the time continues to run. The time limited in the act constitutes the term during which the county board can act for the purposes stated. However, a county board is authorized to meet in special session at any time after the close of the annual meeting for the purpose of equalizing assessments of omitted and undervalued property.

The Court held that the method authorized for valuing the shares of stock of domestic corporations under section 77-706, R.R.S. 1943, (subsequently repealed) results in discrimination against U.S. obligations.

Note: Missouri Valley Constr. Co. v. County of Douglas, 161 Neb. 109, 72 N.W.2d 425 (1955). See Peter Kiewitt Sons Co. v. County of Douglas, 161 Neb. 93, 72 N.W.2d 415 (1955).

Boettcher v. County of Holt, 163 Neb. 231, 79 N.W.2d 183 (1956).

This was an action in equity to secure an injunction against the collection of taxes based upon the valuation of real estate for 1955 which was in excess of the valuation for 1954. The trial court sustained the demurrer by the Defendant and the Supreme Court affirmed.

The county entered into a contract with a private firm to appraise and revalue the real estate in the county. Appellants made numerous complaints about the contract between the county and the firm, as well as the procedures used by the firm, but at no point in the petition was it alleged that any of the Plaintiffs ever protested or attempted to protest to the board of equalization the value placed upon his property by the county assessor.

The Court made the following holdings: If a county assessor performs the duties in fixing the value of property in the manner required of him by law, the fact that in the performance of the duties he resorted to recommendations and evidence furnished by an appraisal committee does not affect the validity of the assessment. If a county assessor fails to make an inspection of real estate and relies upon and accepts for assessment purposes the valuation of an appraiser, the assessment is not void and thereby no ground is afforded for injunctive relief. Where the complaint of a taxpayer is based upon irregularities as distinguished from incidents rendering the tax void, the remedy of the taxpayer is not by injunction but by resort in the first instance to the board of equalization.

LeDioyt v. County of Keith, 161 Neb. 615, 74 N.W.2d 455 (1956).

This case involved five taxpayers who complained to the county board of equalization that: (1) their property had been overvalued; (2) there existed a gross inequality between the value placed upon their properties and the values placed on other classes of real property assessed

in the county. The trial court found for Plaintiffs and lowered the valuation. The Supreme Court reversed.

The Court's opinion is extensive, composed of several observations and holdings. First, approximation both as to value and uniformity is all that can be accomplished, because absolute mathematical equality in the valuation of properties for tax purposes is unattainable. Substantial compliance with the requirements of equalization and uniformity in taxation laid down by the federal and state constitutions is all that is required.

The burden of proof is upon the taxpayer to establish that the value of his property has been arbitrarily or unlawfully fixed by the county board of equalization at an amount greater than its actual value, or that its value has not been fairly or properly equalized when considered in connection with the assessment of all other property, so that this disparity and lack of uniformity result in a discriminatory, unjust, and unfair assessment.

The complaining taxpayer's burden is not met merely by showing a difference of opinion between his witness and the county assessor or county board of equalization with regard to value unless it is established by clear and convincing evidence that the value unless it is established by clear and convincing evidence that the valuation placed upon his property, when compared with valuations placed on similar property, is grossly excessive and is the result of a systematic exercise of intentional will or failure of plain legal duty and not mere errors of judgment. Mere errors of judgment by tax officials will not support a claim of discrimination. There must be something which, in effect, amounts to an intentional violation of the essential principle of practical uniformity. The good faith of such officers and the validity of their actions are ordinarily presumed, and, when assailed, the burden of proof is upon the complaining party.

Finally, the Court stated that courts should not usurp the functions of tribunals created by law for ascertaining the actual value of property for tax purposes or constitute themselves a taxing board or board of equalization.

***Iota Benefit Assn. v. County of Douglas*, 165 Neb. 330, 85 N.W.2d 726 (1957).**

This was a tax exemption case involving a fraternity house for medical students. The District Court denied exemption and the Supreme Court affirmed.

The Court held that a property being used by members of a university or college fraternity as a home while attending such university or college is not being used exclusively for charitable or educational purposes within the intent and meaning of Art. VIII, section 2, Constitution of Nebraska and section 77-202, R.R.S. 1943. College fraternity houses are generally not exempt from taxation. In determining whether or not property falls within a tax exemption provision, the primary or dominant use, and not an incidental use, will control. The essential question here was whether the property was owned and used exclusively for educational purposes. For a discussion of what is meant by education purposes see *Ancient and Accepted Scottish Rite v. Board of County Commissioners*, 122 Neb. 586, 241 N.W. 93 (1932).

***K-K Appliance Co. v. Board of Tax Equalization*, 165 Neb. 547, 86 N.W.2d 381 (1957).**

Plaintiff protested the valuation of his inventory property for taxation purposes. The method employed by the county assessor increasing the valuation of the property consisted of counting appliances and fixing an arbitrary valuation as determined by newspaper advertisements. The District Court affirmed this method of valuation. The Supreme Court reversed.

The Court stated that a county assessor may not act arbitrarily in raising an assessment, and the yardstick employed in fixing the valuation of property for tax purposes must be one which reasonably tends to accomplish the purpose of the taxing statutes. A method of assessment having no real relation to the value of property being assessed will not be sustained and is entirely void.

The value of stock or merchandise is some evidence of its actual value for tax purposes. In the absence of other competent evidence of actual value it is sufficient to sustain a finding that cost value is actual value. Where the only competent evidence of the actual value of merchandise are the cost prices established by taxpayer, a court is required to hold the cost price is the only evidence of actual value shown by the record.

By questioning the valuation of Plaintiff's inventory, the question of the correctness of the inventory also arises. Obsolete property must be listed for taxation purposes unless expressly exempted by statute from taxation.

Lucas v. Board of Equalization, 165 Neb. 315 85 N.W.2d 638 (1957).

This case relates to the valuation placed on real estate for taxation purposes and a claim of partial exemption of the property from liability to local taxation to the extent of \$10,000 of the cost of the property which was paid with money received from the U.S. government by and for the use of Appellant, a disabled veteran. The District Court denied Appellant's claims and the Supreme Court affirmed.

When this case was litigated, assessment was based on basic value, which was 70 percent of actual value. Appellant claimed that the basic value set on his house by the county assessor was too high.

The assessor did not inspect the property, but based the assessment upon his years of experience and upon information gathered and reported to him by the tax appraisal board of the previous year. The Court held that if the assessor accepted the valuation of the property as determined and reported by the tax appraisal board, the presumption that he properly assessed the property would not exist, but the burden would nevertheless be on the property owner to establish that the assessment was excessive.

The Court further held that the burden imposed on the complaining taxpayer is not met merely by showing a difference of opinion between his witnesses and the county assessors or county board of equalization with regard to value unless it is established by clear and convincing evidence that the valuation placed upon his property when compared with valuations placed on other similar property is grossly excessive and is the result of a systematic exercise of the intentional will or failure of plain legal duty, and not mere errors of judgment. Generally, the valuation of property for tax purposes by the proper assessing officers should not be overthrown by the testimony of one or more interested witnesses that the values fixed by such officers were excessive or discriminatory when compared with values placed thereon by such witnesses. Otherwise, no assessment could ever be sustained.

Lynch v. Howell, 165 Neb. 525, 86 N.W.2d 364 (1957).

This was a suit brought to have taxes levied on the real and personal property of plaintiffs by the City of Omaha, as well as others, declared null and void because the property was not within the territorial limits of the city on the assessment date, nor within the city limits prior to

the date the county assessor was required to complete the assessment and make his return to the county clerk. The trial court found the taxes levied to be valid and the Supreme Court affirmed.

The Court commented that the purpose of an assessment is to determine the ownership, quantity and value of property for tax purposes as of the date fixed by statute. It involves no question of the power to tax. The power to tax is determinable as of the date the tax is levied. Where a valid assessment of property has been made and the property is within the limits of the municipal corporation imposing the tax on the date the tax is levied, the power to tax is generally held to exist.

Nebraska Conf. Assn. of Seventh Day Adventists v. County of Hall, 166 Neb. 588, 90 N.W.2d (1958).

This case involved an appeal by the plaintiffs from a denial of an exemption from taxation of farm property owned by the plaintiffs which was used in connection with a private school run by the plaintiffs. The denial from exemption was reversed by the District Court and its finding was affirmed by the Supreme Court.

The Court held that property is exempt from taxation if owned and used exclusively by a religious or educational institution in carrying on its educational work, if all the income from the property is used exclusively for the support of its educational endeavors, and if no financial gain or profit inures to the owner of the property. In this case, the farm was used exclusively for purposes of education and thus was exempt from taxation.

Ace Constr. Co. v. Board of Equalization, 169 Neb. 77, 98 N.W.2d 367 (1959).

This case involved a general contractor who owned construction equipment which he moved from location to location as he completed a job. The question was whether this equipment, which was located outside the state, was subject to taxation. The District Court found for the defendant and the Supreme Court affirmed.

The Court held that tangible personal property belonging to a corporation is assessed in the taxing area of the principal place of business of the corporation unless otherwise provided by statute unless it has acquired an actual situs elsewhere. The state which is the domicile of the owner of intangibles is the situs of tangible personal property temporarily in another state but not permanently located there. See also *Ainsworth v. County of Fillmore*, 166 Neb. 779, 90 N.W.2d 360 (1958).

Note: *Ainsworth v. County of Fillmore*, 166 Neb. 779, 90 N.W.2d 360 (1958). The state which is the domicile of the owner of tangibles is the situs of tangible personal property temporarily in another state but not permanently located there. A fact necessary to entitle the plaintiffs to an injunction against the assessment made on their wheat, which was located outside the state on the date of taxation, was the permanent absence of the wheat from the state.

Adams v. Board of Equalization, 168 Neb. 286, 95 N.W.2d 627 (1959).

This case concerned the value of two lots in the City of Aurora. The District Court affirmed the valuation given to the property and the Supreme Court reversed. Generally the valuation by the assessor is presumed to be correct. However, if the assessor does not make a personal inspection of the property but accepts a valuation thereof fixed by a professional appraiser, the presumption does not obtain and in such case the burden is upon

the protesting party to prove the assessment is excessive. The presumption that a board of equalization in making an assessment acted upon sufficient evidence to justify its action disappears when there is competent evidence on appeal to the contrary and thereafter the reasonableness of the valuation fixed by the board is one of fact to be determined from the evidence, unaided by presumption, and the burden of showing such valuation to be unreasonable is upon the complaining party. See also Ahern v. Board of Equalization, 160 Neb. 709, 71 N.W.2d 307 (1955); Omaha Paxton hotel Co. v. Board of Equalization, 167 Neb. 231, 92 N.W.2d 537 (1958); Matzke v. Board of Equalization, 167 Neb. 876, 95 N.W.2d 61 (1959).

***Matzke v. Board of Equalization*, 167, Neb. 875, 95 N.W.2d 61 (1959).**

This case is a continuation of the principles applied in Newman v. County of Dawson, 167 Neb. 666, 94 N.W.2d 47 (1959). The trial court affirmed the valuation placed on the property and the Supreme Court reversed.

The Court recognized that a building which has completed its use expectancy may be of considerable actual value. Reproduction cost less depreciation is but one element of the statutory formula for determining actual value. But the physical depreciation of a building on account of age may not be exclusively asserted in the evidence on the basis of its age as compared with its use expectancy, and then allowed on an arbitrary basis not shown by the evidence to have any relation to its age or the depreciation resulting therefrom. A formula for determining the value of tangible property for taxation purposes must tend to produce the result required by section 77-112, R.R.S. 1943, when applied uniformly and impartially. Where it appears that an arbitrary basis is used which is not uniformly applied to all tangible property, the result is an arbitrary one. It will not sustain a valuation for tax purposes.

Note: Newman v. County of Dawson, 167 Neb. 666, 94 N.W.2d 47 (1959). This case reaffirms the principles of LeDioyt v. County of Keith, 161 Neb. 615, 74 N.W.2d 455 (1956).

Note: Omaha Paxton Hotel Co. v. Board of Equalization, 167 Neb. 231, 92 N.W.2d 537 (1958). Ordinarily the valuation of a county assessor for tax purposes will be presumed to be correct. The burden of proof rests upon the taxpayer to prove that an assessment is excessive. But where the evidence shows that an assessment by a county assessor was arbitrarily made, the assessment cannot be sustained. In such a situation, the valuation becomes one of fact to be determined from the evidence, unaided by presumption.

***State ex rel. School Dist. of Scottsbluff v. Ellis*, 168 Neb. 166, 95 N.W.2d 538 (1959).**

This case involved the issue of the distribution of motor vehicle taxes to the school district. The school district protested the defendant County Treasurer's formulation for distribution of these taxes. The Court found for the School District.

The Court found that section 77-1240.01, R.R.S. 1943, does not violate Art. VIII, section 1 of the Constitution and that under the provisions of this statute, the proceeds from the taxation of motor vehicles shall be allocated to the taxing units levying taxes on tangible property in which the motor vehicle had a tax situs in the same proportion that the mill levy on the tangible personal property of each such taxing unit bears to the total mill levy on tangible personal property of all the taxing units in which the motor vehicle has its tax situs.

***Thomas v. Flynn*, 169 Neb. 458, 100 N.W.2d 37 (1959).**

This case was an adverse possession case in which the Plaintiff brought an action to have a Treasurer's Tax Deed from the county treasurer to the defendant declared null and void because the notice required by sections 77-1831-32, R.R.S. 1943, had not been properly served. The Court stated that the words "in actual possession or occupancy" as contained in section 77-1832 mean such occupancy or possession by a person as would put an ordinarily prudent man on notice of that fact by observation of the premises involved.

***United States Cold Storage Corp. v. Stolinski*, 168 Neb. 513, 96 N.W.2d 408 (1959).**

This case declared that section 77-1226, R.R.S. 1943, was unconstitutional. This section required that all goods stored in warehouses be listed and reported to the county assessor for the purpose of uncovering taxable property stored in warehouses. The Court held that the statute was unconstitutional because it created an arbitrary classification of warehouse owners since those who stored used household goods were exempt from the requirements of the Act.

Note: Peterson v. Hancock, 166 Neb. 637, 90 N.W.2d 298 (1958). This case upholds the constitutionality of the motor vehicle tax, section 77-1240.01, R.R.S. (1976) and states that there is no conflict between it and section 77-1211, R.R.S. (1976) which exempts from taxation property already taxed by some other county, state, or territory.

***Chicago, B. & Q. R.R. v. State Bd. of Equalization & Assessment*, 170 Neb. 77, 101 N.W.2d 856 (1960).**

This was an appeal from the assessment of railroad property. The Supreme Court reversed the assessment made by the Board.

The Court stated that the Legislature has not defined a specific method by which railroad property in the State shall be valued for taxation by the State Board. The Board may, within legal limitations and restrictions, resort to any appropriate method by which a reasonable and just determination of actual value of such property can be ascertained. The presumption that an assessing authority values property fairly and according to law disappeared in this case because no evidence was presented by the State Board. The only evidence as to valuation of the property was that presented by the railroad and this left the issue to be decided a one of fact unaided by the normal presumption and burden of establishing an illegal assessment. It was the duty of the State Board to value the property at its actual value and assess it as 35 percent thereof. Any departure therefrom was in disregard of the legislative mandate and constituted an arbitrary valuation and assessment. It is unlawful discrimination to value property at more than 35 percent of its actual value, when all other tangible property is valued at the 35 percent rate.

***Chicago & N.W. Ry. Co. v. State Bd. of Equalization & Assessment*, 170 Neb. 106, 101 N.W.2d 873 (1960).**

Decided the same day as the above case, this case expressed the same principles. The Court also noted that it is generally permissible for assessment authorities in fixing the value of the interstate operating property of a railroad for tax purposes to consider its investment in transportation property determined according to the rules of the Interstate Commerce Commission, in conjunction with the average value of its stocks and bonds during a reasonable

period antecedent to the time of the valuation of the property and the capitalization at a reasonable rate of the average net operating income of the railroad during a like period. Such a valuation is not arbitrary or unreasonable. The assessing authorities may also determine the proportion of the value of the entire operating property of an interstate railroad allocable to its interstate property in a single state by considering the percentage that the interstate traffic units, gross earnings, car locomotive mileage, and current mileage bear to the total railroad system. A computation of system value based upon average market price of stocks and bonds and a computation based upon a capitalization of net earnings reflect the effect upon actual value, of obsolescence, of the competition of other means of transportation, and of all factors affecting earnings. The capitalization of the average net income of a railroad for a five-year period immediately antecedent to the time of the assessment of the property of the railroad at the rate of 6 percent as one factor in ascertaining the value of the entire property of the railroad for taxation is not arbitrary or unreasonable.

Creigh v. Larsen, 171 Neb. 317, 106 N.W.2d 187 (1960).

This was a class action brought by a taxpayer to have sections 77-413, 77-616, and 77-318, which impose a penalty for failure to report intangible personal property for taxation declared unconstitutional. These sections were found to be unconstitutional by the District Court and the Supreme Court affirmed. The Court held that these statutes were not uniform as to class and were discriminatory among members of the class, thereby violating M . III, section 18, and M . I, section 25, Constitution of Nebraska.

Johnson Fruit Co. v. Storey, 171 Neb. 310, 106 N.W.2d 182 (1960).

This was an action by the Plaintiff requesting an injunction preventing the collection of a penalty for filing a late personal property tax a return. The statute penalizing a taxpayer for failing to make a return, section 77-413, was in Creigh v. Larsen, 171 Neb. 317, 106 N.W.2d 187 (1960), declared unconstitutional. The Court held that the penalty would not apply where the personal property tax return was filed late.

Scudder v. County of Buffalo, 170 Neb. 293, 102 N.W.2d 447 (1960).

This is an action for a declaratory judgment in which the Plaintiff prayed for an adjudication of the rights of the parties growing out of an alleged mistake in the assessment of Plaintiff's property. The trial court found for the Plaintiff and the Supreme Court reversed.

The Court stated that relief from the over assessment of property for tax purposes is by appeal to the District Court from the order of the county board of equalization fixing the assessed value of the property. This remedy is full adequate and exclusive. See section 77-1510-13, R.R.S. 1943. The claim that property is assessed too high for taxation purposes cannot be made, in the first instance, by direct application to any other body or by a collateral attack in law or equity, in the event of failure to bring the matter before the county board of equalization and to appeal therefrom in case of an adverse determination. A collateral attack may be made upon an assessment of property for tax purposes only if the assessment, or some part thereof, is wholly void. An over assessment is an erroneous assessment, but not a void one. The Uniform Declaratory Judgments Act does not create a new cause of action where one did not previously exist. Where an exclusive remedy is provided, the declaratory judgment act does not provide an additional remedy.

Note: Baum Realty Co. v. Board of Equalization, 169 Neb. 682, 100 N.W.2d 730 (1960). Real estate valuation cases: Matzke, Adams, Omaha Paxton Hotel Co.

***County of Douglas v. OEA Senior Citizens, Inc.*, 172 Neb. 696, 111 N.W.2d 719 (1961).**

Property owned and used primarily for the purpose of furnishing low-rent housing is not property owned and used exclusively for charitable purposes. This was a declaratory judgment action brought by a board of county commissioners to determine whether the property owned by the defendants was exempt from taxation. The lower court found that the property was not exempt and the Supreme Court affirmed.

Under Art. VIII, section 2, of the Constitution of Nebraska, the Legislature may exempt from taxation property owned and used exclusively for educational, religious, or charitable purposes, when such property is not owned or used for financial gain or profit to the owner or user. The Legislature implemented this grant of power in section 77-202, R.R.S. 1943. The question of taxability of property is a subject of yearly inquiry. An adjudication that property is exempt from taxation in one year is not res judicata of the question of whether it is exempt in *any* succeeding year. An independent action is proper in which to determine whether property which has been placed upon the assessment rolls is exempt from taxation, and this is true notwithstanding the availability of a statutory remedy.

***Doane College v. County of Saline*, 173 Neb. 8, 112 N.W.2d 248 (1961).**

This case was an appeal by the college from a determination by the county board of equalization that the house of the president of the college, as well as the faculty housing units were not exempt from taxation. The District Court held that the president's house was exempt but that the faculty housing units were not. The Supreme Court affirmed the decision. The evidence in this case established that the president of the college lived in the house provided him, not as a matter of personal convenience and advantage, but because it was necessary in the discharge of his duties. While the faculty housing units were not owned or used for financial gain or profit, that alone did not entitle them to exemption from taxation. Also, the primary or dominant use of the property was not for educational purposes.

***Goebel v. County of Holt*, 172 Neb. 81, 108 N.W.2d 406 (1961).**

This case involved a determination of the proper place of listing livestock and machinery for taxation as between two taxing districts in Holt County. The trial court found for the plaintiffs and the Supreme Court affirmed.

Section 77-1216, R.R.S. 1943, makes it the duty of the county board to determine where within the county personal property shall be assessed when questions arise, and its decision will not be disturbed unless an abuse of discretion is shown. The term "farm" as used in Chapter 77 means a tract of land used for cultivation or production of crops of any nature, or the raising of any type of animal embraced within the term "livestock." Where the owner of cattle resides in one taxing district and his cattle are kept on a farm in another taxing district, which farm is entirely disconnected from the home of the owner, the cattle are properly taxed in the taxing district where kept.

***Peter Kiewit Sons', Inc. v. County of Douglas*, 172 Neb. 710, 111 N.W.2d 734 (1961).**

This is an appeal from a District Court decision fixing the value of Plaintiff's intangible property for taxation purposes. The District court sustained in part the increase in valuation. The Supreme Court affirmed with modifications.

Plaintiff contended that the board of equalization was without authority to raise Plaintiff's intangible property valuations because the increase in value was not the result of omitted or undervalued property within section 77-1502, R.R.S. 1943. The Court held that the contention was without merit because while Plaintiff disclosed the ownership of the intangibles in question, it did not return them for taxation purposes.

The primary contention made by Plaintiff was that shares of stock in corporations foreign to Nebraska, bank deposits outside of Nebraska, and bills and accounts receivable arising from business transactions outside of Nebraska, are not taxable in this state. The Court stated that under section 77-201.01, R.R.S. 1943, all intangible property in the state not expressly exempt, is subject to taxation and shall be valued and assessed at its actual value.

A presumption exists that the intangible property of a corporation is taxable in the state of its incorporation. But where it is shown that the domicile of the corporation is actually in a state other than the incorporating state, the situs of intangible property follows the domicile of the corporation and it is taxable in the domiciliary state. The evidence showed that the company was actually domiciled in Nebraska, although it had a legal domicile in Delaware.

As to the stock, the Court stated that the inference was plain that it was kept in Iowa to avoid taxation in Nebraska. The stock was in the possession and control of the principal officers of the corporation and the corporation itself, all of whom were domiciled in Nebraska. Plaintiff's stock in its subsidiary and affiliated corporations outside of Nebraska was an integral part of Plaintiff's business in Nebraska and has a taxable situs in this state under the rule that the situs of the intangible property follows the owner's domicile for purposes of taxation. The placing of the stock certificates in a safety deposit box, without any expressed reason for doing so, is not sufficient reason for departing from the general rule. The general rule is that the situs of intangible personal property for the purposes of taxation is the domicile of the owner. No exceptions to this general rule apply to this case.

As to the bank account, the Court held that the situs of a bank account is the domicile of the owner for purposes of taxation. As to the bills and accounts receivable, the Court held that they were owned by Plaintiff and their situs for tax purposes was the domicile of the owner in the absence of a showing that they are within any recognized exception.

The situs of intangible property is the domicile of its owner. Thus intangible property may be taxed at the domicile of the owner.

***Misle v. Miller*, 176 Neb. 113, 125 N.W.2d 512 (1963).**

This was an action brought by taxpayers to recover penalties added to taxes paid by them which were alleged to be illegally levied and therefore void. The District Court dismissed the action and the Supreme Court reversed.

See previous tax penalty cases: Johnson Fruit Co. v. Storey, 171 Neb. 310, 106 N.W.2d 182 (1960); Creigh v. Larsen, 171 Neb. 317, 106 N.W.2d 187 (1960). The defendants claimed that the plaintiffs were without remedy, while the plaintiffs claimed that section 77-1735, R.R.S. 1943, applied to their case and allowed the recovering of a penalty. The Court concluded that

section 77-1735 provides a remedy for the recovering of penalties as well as taxes which have been illegally imposed on property.

***Young Women's Christian Assn. v. City of Lincoln*, 177 Neb. 136, 128 N.W.2d 600 (1964).**

This was an action for a declaratory judgment finding that the plaintiff's property was exempt from taxation and enjoining the defendants from taxing the property. The trial court found for the plaintiffs and the Supreme Court affirmed.

The essential question was whether Plaintiffs property had been used and was being used for charitable purposes and not for financial gain. See previous exemption cases: Doane College v. County of Saline, 173 Neb. 8, 112 N.W.2d 248 (1961); County of Douglas v. OEA Senior Citizens, Inc., 172 Neb. 696, 111 N.W.2d 719 (1961). See also Young Men's Christian Assn. v. Lancaster County, 106 Neb. 105, 182 N.W. 593, 34 A.L.R. 1060 (1921). While individuals living at the institution were charged for the privilege, the Court held that this did not defeat the charitable purposes of the organization. Whether or not a use of property is charitable must in each instance be determined by its own facts.

***Carpenter v. State Board of Equalization & Assessment*, 178 Neb. 611, 134 N.W.2d 272 (1965).**

This case is an appeal from the decision of the State Board of Equalization and Assessment accepting the assessment of real and personal property submitted by the counties of Nebraska to the State Tax Commissioner. The appellant claimed that the Board acted arbitrarily and capriciously by rejecting the sales assessment ratios prepared in a study by the Department of Revenue. The Supreme Court affirmed the actions of the Board.

The primary duty of the State Board of Equalization and Assessment is to establish uniformity in taxation between the various counties. The Court may not substitute its judgment for that of the Board. It is only where the record is clear and conclusive that the Board's action was illegal, contrary to law, arbitrary, and capricious that the court has any power to reverse the findings of the Board. When a taxpayer appeals from an action of the Board, the presumption is that the Board faithfully performed its duties and the burden is on the Appellant to prove that the action of the Board was erroneous, arbitrary, capricious, and contrary to the law. Substantial compliance with the requirements of equality and uniformity is all that is required and such provisions are satisfied when designed and manifest departures from the rule are avoided.

The sales assessment ratio as compiled in this case does not reflect the truth and could not be used for the basis of any calculation as to disproportionate valuations between the counties. It was not arbitrary and unreasonable on the part of the Board to reject the sales assessment ratio as a proper standard for performing its duty. See H/K Company v. Board of Equalization, 175 Neb. 268, 121 N.W.2d 382 (1963).

Note: Union P. R. R. Co. v. State Board of Equalization & Assessment, 170 Neb. 139, 101 N.W.2d (1960). The holdings of the Court in this case are identical to the ones expressed in Chicago, B. & Q. R. R. v. State Bd. of Equalization & Assessment, 170 Neb. 77, 101 N.W.2d 856 (1960).

Lincoln Woman's Club v. City of Lincoln, 178 Neb. 357, 133 N.W.2d 455 (1965).

This action was brought by Plaintiffs to enjoin collection of taxes on real estate constituting the headquarters building of the club. The District Court entered judgment finding such taxes void except as to the portion of the basement used as a caretaker's apartment, and enjoin the enforcement of taxes against the real estate except for the portion properly attributable to the apartment. The Supreme Court affirmed.

See previous exemption cases: Doane College v. County of Saline, 173 Neb. 8, 112 N.W.2d 248 (1961); Young Men's Christian Assn. v. Lancaster County, 106 Neb. 105, 182 N.W.593 (1921). The Court held that within the guidelines previously established, the facts of this case established the aims and purposes of the Lincoln Women's Club as religious, educational, and charitable. It is not essential that the use of property be exclusively for one of the three purposes. See Ancient and Accepted Scottish Rite v. Board of County Commissioners, 122 Neb. 586, 241 N.W. 93, 81 A.L.R. 1166 (1932). Here the primary and dominant use of the building was for religious, educational, and charitable purposes. An incidental use of property which produces some funds from members does not make the use any less an incidental use where the funds are devoted to the primary and dominant purposes of the organization. That a portion of the charitable work was done by the members off the premises involved did not affect the primary or dominant use of the premises. So long as the property is actually used exclusively for education, religious, or charitable purposes, the exemption is not lost because the use is for less than full time

Nebraska Conf. Assn. Seventh Day Adventists v. Board of Equalization, 179 Neb. 326, 138 N.W.2d 455 (1965).

This was an appeal by the board of equalization and county assessor exempting from taxation property owned by appellee. The land was purchased by appellee in 1963 after the decision of the Court in Nebraska Conf Assn. Seventh Day Adventists v. County of Hall, 166 Neb. 588, 90 N.W.2d 50 (1958). The Court held that the use of land to increase the income to a school for the sole purpose of providing compensable work for students is an incidental use of property that does not entitle it for exemption from taxation as property owned and used exclusively for educational, religious, charitable, or cemetery purposes, even though such property is not used for private financial gain or profit. To be exempt it must be shown that the lands were reasonably needed and predominately used for educational purposes. The Court also held that residence buildings located on real estate which is exempt from taxation because of its predominate use for education purposes, and which are occupied by teaching personnel and other employees of the school located thereon, are exempt from taxation when used for the primary purpose of carrying out the educational program of the school.

Richards v. Board of Equalization, 178 Neb. 537, 134 N.W.2d 56 (1965).

In this property valuation protest case the trial court lowered the valuation of the property and the Supreme Court affirmed. The value of the property was determined using the reproduction cost less depreciation formula. The Court stated that the cost of reproduction less depreciation is but one element to be considered in determining actual value. All available evidence of actual value is competent at all hearings on the issue. In commenting on the Plaintiff's evidence the Court stated that the want of any market for any period of time does not necessarily mean an excessive reduction of actual value.

Note: Leech, Inc. v. Board of Equalization, 176 Neb. 841, 127 N.W.2d 917 (1964). This litigation involved a controversy as to actual value for tax purposes of two tracts of land in Imperial, Nebraska. See previous property valuation protest cases: Matzke v. Board of Equalization, 167 Neb. 875, 95 N.W.2d 61; Adams v. Board of Equalization, 168 Neb. 286, 95 N.W.2d 627 (1959).

Note: HIK Company v. Board of Equalization, 175 Neb. 268, 121 N.W.2d 382 (1963). See previous property valuation protest cases: LeDioyt v. County of Keith, 161 Neb. 615, 74 N.W.2d 455 (1956); Newman v. County of Dawson, 167 Neb. 666, 94 N.W.2d 47 (1959); Baum Realty Co. v. Board of Equalization, 169 Neb. 682, 100 N.W.2d 730 (1960).

***County of Blaine v. State Board of Equalization & Assessment*, 180 Neb. 471, 143 N.W.2d 880 (1966).**

This is an appeal by Blaine County from the order of the State Board increasing the valuation of rural land and improvements as shown by the abstract of assessment for the county. The county complained about the procedure of the State Board in that it did not comply with the Administrative Procedures Act. The Supreme Court reversed the order of the State Board.

The provisions of the Administrative Procedures Act appear in sections 84-901 --84-919. The Court held that a notice issued by the State Board pursuant to sections 77-508 and 77-509 should specify the percentage adjustment which the Board proposes to make in that county. But since the county appeared and participated in the hearing without objections, it could not complain about the notice which was given. The Court stated that the Board may adopt any reasonable method of procedure in equalizing the assessment of property between the various counties. The next issue was whether the order of the Board was unreasonable and arbitrary. The Court determined that from its examination of the record it was unable to discover any basis upon which the order directing a 90 percent increase in the valuation of rural land and improvements in Blaine County could be sustained. Thus, the order of the Board was arbitrary and capricious.

***County of Kimball v. State Board of Equalization & Assessment*, 180 Neb. 482, 143 N.W.2d 893 (1966).**

This was an appeal by Kimball county from an increase in the valuation of both urban and rural land and improvements as shown by the abstract of assessment for the county. The Supreme Court affirmed the order of the Board. See previous State Board cases: County of Blaine v. State Board of Equalization & Assessment, 180 Neb. 471, 143 N.W.2d 880 (1966); County of Loup v. State Board of Equalization & Assessment, 180 Neb. 478, 143 N.W.2d 890 (1966).

The justification for the increase in valuation was the sales-assessment ratio. The court stated that equalization based upon a comparison of sale-assessment ratios must include both land and improvements since, usually, there is no way to apportion consideration between land and improvements.

County of Loup v. State Board of Equalization & Assessment, 180 Neb. 478, 143 N.W.2d 890 (1966).

This is an appeal by Loup County from the order of the State Board of Equalization and Assessment increasing the valuation of rural land and improvements as shown by the abstract of assessment for the county. The Supreme Court affirmed.

The county claimed that the State Board placed too much emphasis upon sales-assessment ratios and sales prices and did not give proper consideration to section 77-112, R.R.S. 1943, which defines actual value of property for taxation. The Court held that the record of proceedings before the Board did not show that the order of the Board was unreasonable, arbitrary, or prejudicial. The order of the Board therefore had to be affirmed.

Grainger Brothers Co. v. Board of Equalization, 180 Neb. 571, 144 N.W.2d 161 (1966).

The law imposes the duty of valuing and equalizing property for taxation purposes upon the county assessor and the county board of equalization. In reviewing the actions of tribunals created by law for ascertaining the valuation of equalization of property for taxation purposes, courts will not usurp the functions of such tribunals. It is only where such assessed valuations are not in accordance with law, or it is made to appear that they were made arbitrarily or capriciously, that the courts will interfere.

Lariat Boys Ranch v. Board of Equalization, 181 Neb. 198, 147 N.W.2d 515 (1966).

In this case, both appellant and appellee appealed from the decision of the District Court granting a tax exemption for 200 acres of a 1,000 acre ranch because of its use for educational purposes. The Supreme Court modified the decision of the District Court.

See previous tax exemption cases: Nebraska Conf. Assn. Seventh Day Adventists v. Board of Equalization, 179 Neb. 326, 138 N.W.2d 455 (1965); Doane College v. County of Saline, 173 Neb. 8, 112 N.W.2d 248 (1961); Lincoln Woman's Club v. City of Lincoln, 178 Neb. 357, 133 N.W.2d 455 (1965). The board contended that only the five acres upon which the educational and housing facilities were located should be exempt. The Court stated that this premise was too limited because the ranch was not only an educational institution but also a charitable institution. The Court allowed the judgment of the corporate organizers that 1,000 acres were required to constitute a ranch home and thus held all of the land to be exempt from taxation.

Satterfield v. Britton, 163 Neb. 161, 78 N.W.2d 817 (1966).

This was an action by a taxpayer against the board of commissioners and county clerk for an injunction to prevent them from making a contract for the construction of a courthouse and from using any money raised by taxation for that purpose. The Court held that a taxpayer who voluntarily pays an unauthorized and illegal tax and who makes no demand for its return within 30 days of the time of the payment of tax (see section 77-1735, R.R.S. 1943) is forever barred and has no capacity to contest the validity of the tax by any legal proceedings.

Svoboda & Hanna v. Board of Equalization, 180 Neb. 215, 142 N.W.2d 328 (1966).

This was an appeal from the judgment of the district Court sustaining the decision of the county board of equalization assessing the taxpayer's tangible personal property in three different taxing districts in the county rather than in the single taxing district in which the taxpayer had

originally listed all of the property. The Supreme Court affirmed the judgment of the District Court.

Section 77-1216, R.R.S. 1943, makes it the duty of the county board to determine where within the county personal property shall be assessed when questions arise, and its decision will not be disturbed unless an abuse of discretion is shown. For taxation purposes a partnership is a distinct entity, and neither the residence of the partners for their abstract intent is material in determining taxation situs. Partnership property is taxable as an entity at the domicile of the firm rather than at the residences of the several owners, and the domicile of a partnership, for the purposes of taxation, is its place of business.

Sections 77-1204 and 77-1205, R.R.S. 1943, establish specific statutory exceptions to the general rule that personal property shall be listed and assessed where the owner resides, as provided in section 77-1202, R.R.S. 1943. The residence of the taxpayers is determinative of the place where livestock and other personal property connected with a farm will be taxed only if such property does not come under sections 77-1204 or 77-1205.

The next issue was whether the partnership was operating one integrated farm, or multiple operations, consisting of a wheat farm and a ranch. The Court concluded that the partnership was conducting a multiple operation. The court also stated that the business of the partnership was transacted by each of the partners at their several places of residence. Thus, the partnership had no principal place of business.

Note: Ramm v. County of Holt, 172 Neb. 88, 108 N.W.2d 808 (1961). This case reaffirms the principles set forth in Goebel v. County of Holt, 172 Neb. 81, 108 N.W.2d 406 (1961). In this case, the county board did not abuse its discretion when it held contiguous tracts of land in two different school districts constituted one farm rather than two where taxpayers had different parts of a cattle operation in each of the districts.

Brandeis Inv. Co. v. State Board of Equalization & Assessment, 181 Neb. 750, 150 N.W.2d 893 (1967).

This was an appeal from an order of the State Board increasing the valuation of industrial and commercial property within incorporated municipalities in Douglas County. The Supreme Court reversed the actions of the State Board.

This case is an elaboration of the same proceedings discussed in City of Omaha v. State Board of Equalization & Assessment, 181 Neb. 734, 150 N.W.2d 888 (1967). The Court observed that only sales for the last 5 months of 1965 were reviewed for the sales-assessment ratio study for Douglas County, whereas sales for the entire 12 months were reviewed in all other counties in which the sales-assessment ratio study was used. There was no satisfactory explanation or correlation in the record for this difference nor was there any showing to indicate that the sales used were representative samples for the entire year. The record contained no proof of any nature to justify an increase for Douglas County. See County of Lancaster v. State Board of Equalization & Assessment, 181 Neb. 738, 150 N.W.2d 886 (1967). The State Board is bound by its record, and where the record of the proceedings before the State Board contains no evidence to justify an order, the action must be held unreasonable and arbitrary.

The Court also observed that contrary to the State Board's findings with respect to irregularities in the Douglas County Abstract, the sales-assessment ratio for urban residential property was used for urban industrial and commercial property. This resulted in a 24 percent increase on all commercial and industrial lands and improvements within the boundaries of all

municipalities in Douglas County. The action of the State Board produced inequality rather than equality and must be held to be arbitrary, unreasonable, and capricious.

Note: Northwestern Bell Tel. Co. v. St. Bd. of Equalization & Assessment, 181 Neb. 748, 150 N.W.2d 899 (1967). See Brandeis Investment Co. v. State Board of Equalization & Assessment, 181 Neb. 750, 150 N.W.2d 893 (1967).

Note: County of Perkins v. State Board of Equalization & Assessment, 181 Neb. 747, 150 N.W.2d 883 (1967). See Hanna v. State Board of Equalization & Assessment, 181 Neb. 725, 150 N.W.2d 878 (1967).

***City of Omaha v. State Board of Equalization & Assessment*, 181 Neb. 734, 150 N.W.2d 888 (1967).**

This was an appeal by Douglas County and the City of Omaha from an order of the State Board increasing the valuation of suburban residential lands and improvements. The Supreme Court reversed the order of the Board.

The Court held that a county is entitled to reasonable notice and hearing when a proposed decrease in valuation suddenly becomes a substantial increase, and the entire thrust of the hearing reversed direction after the original hearing has been concluded. Less than one day's notice was given to Douglas County for this substantial change in position by the State Board. The requirements of due process are not lessened by the imminence of a statutory deadline for Board action. The overnight notice that a hearing based on new evidence which the county had no reasonable opportunity to challenge or even to examine, did not meet the requirements of due process.

The Court also stated that the evidence upon which the State Board relied and the method by which it equalized assessments of property must be shown. Upon consideration of the entire record here, the Court held that the order of the State Board was arbitrary and capricious. Compare County of Blaine v. State Board of Equalization & Assessment, 180 Neb. 471, 143 N.W.2d 880 (1966); County of Lancaster v. State Board of Equalization & Assessment, 181 Neb. 738, 150 N.W.2d 886 (1967).

***County of Box Butte v. State Board of Equalization & Assessment*, 181 Neb. 742, 150 N.W.2d 892 (1967).**

Appellant appealed from the equalization order entered by the State Board. The Supreme Court reversed the order of the board.

Administrative findings, express and implied, that failed to disclose a clear basis for an order were inadequate. If findings by the State Board are inadequate, the resulting order is arbitrary. See County of Lancaster v. State Board of Equalization & Assessment, 181 Neb. 738, 150 N.W.2d 886 (1967).

Note: Novak v. State Board of Equalization & Assessment, 181 Neb. 741, 150 N.W.2d 892 (1967). See Brandeis Investment Co. v. State Board of Equalization & Assessment, 181 Neb. 750, 150 N.W.2d 893 (1967).

County of Lancaster v. State Board of Equalization & Assessment, 181 Neb. 738, 150 N.W.2d 886 (1967). The issue here was whether the order of the State Board increasing valuations of certain real estate should be reversed because the findings were inadequate. The Supreme Court reversed the actions of the State Board.

The Court found that in ordering an increase in the valuations of certain subclasses of property that no finding of a mathematical relation among subclasses or of other explanatory facts was made. The ratios and the increases were not correlated. The Court held that there must be a clear basis for the administrative agency's action. See Ostler v. City of Omaha, 179 Neb. 515, 138 N.W.2d 826 (1965); Yellow Cab Co. v. Nebraska State Railway Commission, 176 Neb. 711, 127 N.W.2d 211 (1964). If the findings by the Board are inadequate, the resulting order is arbitrary.

***County of Keith v. State Board of Equalization & Assessment*, 181 Neb. 754, 150 N.W.2d 895 (1967).**

This is an appeal from the order of the State Board increasing the assessed value of rural lands. The Supreme Court reversed the actions of the State Board.

The Court found that there was no direct evidence in the record or any finding of fact supporting the sales-assessment ratio used by the Board. However, the order of the State Board was reversed on more basic grounds. Absolute uniformity of approach in equalizing is impossible. But the record must sustain the action of the State Board and in the absence of an explanation of the divergences and discrepancies in the application of the different methods used and relied upon, and of a satisfactory explanation of the correlation between the different methods, the Court cannot determine if the constitutionally required equalization or uniformity has been attained between counties. See Hanna v. State Board of Equalization & Assessment, 181 Neb. 725, 150 N.W.2d 878 (1967).

***County of Lincoln v. State Board of Equalization & Assessment*, 181 Neb. 744, 150 N.W.2d 884 (1967).**

Lincoln County appealed from the order of the State Board increasing the valuation of agricultural land in the county. The Supreme Court reversed the order of the State Board.

The Court found that the record did not show that the county was afforded the hearing to which it was entitled. The Court also found that the record failed to disclose a basis upon which the action of the State Board could be supported. An order of the State Board which is not sustained by the record of the proceedings before the Board is arbitrary and will be reversed. The Court also noted the importance of including only representative sales in the computation of a sales-assessment ratio.

***County of Lancaster v. State Board of Equalization & Assessment*, 181 Neb. 738, 150 N.W.2d 886 (1967).**

The issue here was whether the order of the State Board increasing valuations of certain real estate should be reversed because the findings were inadequate. The Supreme Court reversed the actions of the State Board.

The Court found that in ordering an increase in the valuations of certain subclasses of property that no finding of a mathematical relation among subclasses or of other explanatory facts was made. The ratios and the increases were not correlated. The Court held that there must be a clear basis for the administrative agency's action. See Ostler v. City of Omaha, 179 Neb. 515, 138 N.W.2d 826 (1965); Yellow Cab Co. v. Nebraska State Railway Commission,

176 Neb. 711, 127 N.W.2d 211 (1964). If the findings by the Board are inadequate, the resulting order is arbitrary.

***Equity Union Grain Co. v. Board of Equalization*, 182 Neb. 182, 153 N.W.2d 741 (1967).**

This is an action involving the taxation of certificates of indebtedness owned by a Missouri corporation. The District Court ruled that they were not subject to taxation in Nebraska and the Supreme Court affirmed.

The corporation had offices in Kansas City, Missouri, Lincoln, and Denver. Each company operated independently of the other. The certificates of indebtedness in question were issued by the Kansas City company and used as a method of ownership and as collateral for a loan to the elevator company.

Ordinarily, a corporation is domiciled for tax purposes in the state of its incorporation. In the absence of a statute to the contrary, its intangible personal property has its tax situs in that state, unless a business situs elsewhere has been established. . Before a state where a corporation has been domesticated or has established a business situs may tax the corporation's intangible property, it must appear to have a reasonable connection with the business of the company in the state in that it has a localized use, is primarily an asset of the local business, and under local management and control. A state has no authority to tax the property of a foreign corporation which is clearly outside the state and forming no part of its domestic business. When a foreign corporation is domesticated, there is a domestic resident corporation within each state insofar as the corporation has been created by and exists under its laws and a foreign corporation insofar as it exists and exercises franchises under the laws of another state. Domesticating a foreign corporation in Nebraska, for purposes of taxation, has much the same effect as establishing "a business situs" in Nebraska and its intangible property may have a situs, for taxation purposes, apart from the state of its original incorporation.

***Evangelical Lutheran Good Samaritan Soc. v. County of Gage*, 181 Neb. 831, 151 N.W.2d 446 (1967).**

The Nebraska Supreme Court determined that a nursing home was entitled to tax exemption with facts similar to those in the present case. In that case, the Court concluded that nursing homes were charitable institutions, noting that the concept of charity was broad enough to include practical enterprises for the good of humanity operated at a moderate cost to those who receive benefits. The Court found that nursing homes are analogous to hospitals which are universally classed as charitable institutions.

Appellant attempted to distinguish this case from Good Samaritan on the grounds that Bethesda had been involved in profit-making ventures and had used revenue from its nursing homes for the financial gain or profit to officers of Bethesda. The evidence showed, however, that no money was ever made from the two "profit-making" ventures and that the businesses were not used to siphon off funds from Bethesda. The association with the companies was for the purpose of minimizing Bethesda's cost and did not result in financial gain or profit to either Bethesda or its officers.

***Frye v. Haas*, 182 Neb. 73, 152 N.W.2d 121 (1967).**

Educational service units (See sections 79-2201-2212) were authorized by the Legislature to certify a tax levy of not to exceed one mill directly to the county treasurers for collection, thus bypassing the county boards of equalization. The primary question involved is whether this procedure deprived plaintiffs of due process of law in that they were not given their constitutional right to suitable notice and an opportunity to be heard before the county board.

Involved here was a general, not a special tax. Within the meaning of the Due Process Clause, laws for the levy and collection of general taxes stand upon a different footing than laws for the levy and collection of special taxes and are to be construed with the utmost liberality. In some cases, no notice whatever is required.

Tax proceedings are necessarily summary in character. They may not be impeded by a due process requirement of notice and opportunity to be heard at any particular stage of the proceedings. Tax proceedings are not judicial in character, personal notice is not necessary, and notice by statute itself is sufficient. The statutes specifically provide that collection shall not be stayed. See section 77-1606-1610. There is no constitutional requirement that notice of the assessment of a tax and an opportunity to contest it, must be given in advance of the assessment. It is enough that all available defenses may be presented to a competent tribunal before exaction of the tax and before the command of the state to pay it becomes final and irrevocable.

If taxes are levied without authority of law, their collection may be enjoined. Section 77-1735 creates a direct cause of action in the tax proceedings by which a taxpayer may tax the validity, for any reason, of the tax or any part thereof. Another remedy is section 77-1736. This gives the taxpayer an administrative remedy as the treasurers of the different districts are required to refund the taxes if "it appears to the satisfaction of such authorities that tax, or a part thereof, was clearly invalid." A third remedy would be a suit to enforce and collect the lien of taxes. *This* would afford the taxpayer notice and process and a judicial hearing as to *his* tax liability.

An alternative answer to the establishment of a deviation from customary statutory levying procedures is that fixing levies through cities and other political subdivisions, the county board of equalization is restricted to the powers granted under the statutes and has a mandatory ministerial duty conferred by legislative power to fix the number of mills certified to it. The county board of equalization has no standing to question those matters lying within the discretionary legislative power of a city or political subdivision nor to determine as a quasi-judicial body the legality or illegality of a tax levy made by a political subdivision to whom the Legislature has entrusted the legislative power.

***Hanna v. State Board of Equalization & Assessment*, 181 Neb. 725, 150 N.W.2d 878 (1967).**

This case involved an appeal by eight counties relation to the proposition of assessment and equalization of rural or agricultural lands. The question was whether the counties were properly equalized in relation to each other and to the other counties within the state. The Supreme Court reversed the actions of the State Board.

The Court held that for the purpose of determining sales-assessment ratios, sales occurring in recent years adjusted to allow for any fluctuations in actual value occurring subsequent to such sales may be considered. Here, a wide divergence in the sales-assessment ratios as between counties resulted. It is the duty of the State Board to give effect to the

requirement that taxes be levied uniformly and proportionately upon all tangible property and to properly equalize between counties to that end. Here no uniform approach was adopted for the purpose of equalization among the various counties of the state. The record must sustain the action taken by the State Board and, in the absence of a uniform approach to equalization, or the rationalizing of the relationship existing between the various factors on which the State Board has acted, it was impossible for the Court to ascertain that the constitutionally required uniformity between counties had been attained. Sales-assessment ratios revealed by the record indicate varying discrepancies in the assessed values adopted for the various counties and in the absence of a reasonable explanation of such discrepancies, the actions of the State Board cannot be sustained.

Note: County of Lancaster v. State Board of Equalization & Assessment, 180 Neb. 497, 143 N.W.2d 885 (1966). The Court held that in the absence of a specific statute the State Board is not required to notify taxpayers of a hearing to be held for the purpose of equalizing assessed valuations of property among counties. On review the question concerning the issues before the State Board is not the adequacy of the original notification but the fairness of the whole procedure.

Note: County of Keith v. State Board of Equalization & Assessment, ISO Neb. 494, 143 N.W.2d 902 (1966). The Court held that on appeal from an order of the State Board for equalization of assessed valuations of property among counties, the Court considers the entire record for the purpose of deciding whether the order was made arbitrarily. In the absence of a statute, the State Board may adopt any reasonable method of equalization including reasonably reliable assessment-sales ratios.

Note: County of Box Butte v. State Board of Equalization & Assessment, 180 Neb. 492, 143 N.W.2d 900 (1966). If a record on appeal from an order in a proceeding for equalization of assessed property valuations establishes an arbitrary adjustment, arbitrariness is not dispelled by speculation that extra-record information sufficient to support the adjustment may have been used. At a minimum extra-record information in come from ought to have been incorporated into the transcript or bill of exceptions.

Note: County of Garfield v. State Board of Equalization & Assessment, 180 Neb. 491, 143 N.W.2d 899 (1966). The final decision of the State Board ordering Garfield County to increase its assessed valuation of rural land 39 percent was arbitrary. See County of Blaine v. State Board of Equalization & Assessment, 180 Neb. 471, 143 N.W.2d 880 (1966).

Note: County of Brown v. State Board of Equalization & Assessment, 180 Neb. 487, 143 N.W.2d 896 (1966). This case reaffirms the principles set forth in previous State Board cases. See County of Blaine v. State Board of Equalization & Assessment, 180 Neb. 471, 143 N.W.2d 880 (1966); County of Loup v. State Board of Equalization & Assessment, 180 Neb. 478, 143 N.W.2d 890 (1966); County of Kimball v. State Board of Equalization & Assessment, 180 Neb. 482, 143 N.W.2d 893 (1966).

Municipal University of Omaha v. County Board, 181 Neb. 881, 151 N.W.2d 924 (1967).

The issue in this case was whether a county board of equalization could reduce a mill levy certified to it because the levy would produce revenue in excess of University's requirements.

The Court repeated principles expressed in State ex rel. City of Omaha av. Lynch, 181 Neb. 810, 151 N.W.2d 278 (1967). In Ratigan v. Davis, 175 Neb. 416, 122 N.W.2d 12, the

Court determined that the authority to levy a tax for university purposes was deemed to flow directly from the Legislature, and that the board of regents of the University was authorized to certify the amount of the levy to the city council of the City of Omaha to be levied upon all tangible property within the district.

The relation of revenue to be produced, and the amount of levy duly certified by the board of regents of University is of no concern to Board if within the statutory limit. By virtue of section 14-1317, *R. R. S.* 1943, University may levy and collect taxes for purposes other than its day-to-day operation.

Note: Podewiz v. Gering Nat. Bank, 171 Neb. 380, 106 N.W.2d 497 (1960). A tax deed issued under section 77-1839, *R. R. S.* 1943, is not only required to state that the land has been offered at public sale. The only requirement is a statement therein as to whether the sale, pursuant to which it is being issued, was public or private.

***Rodeo Tel. Membership Corp. v. County of Greeley*, 181 Neb. 492, 149 N.W.2d 357 (1967).**

This case involved a protest by the telephone company as to the valuation of its tangible personal property. The issue was whether the valuation can be determined by a formula, not specified by statute, based upon valuations reported by the taxpayer to the Nebraska State Railway Commission for rate-making purposes. The District Court dismissed Plaintiff's petition and the Supreme Court affirmed.

Plaintiff contended that only the Legislature can prescribe standards and methods for determination of value. But the Court stated that formulas or standards, whether set by the Legislature or used by others, are merely methods for determining the ultimate fact of valuation for purposes of taxation. There are no settled and infallible rules for determining actual value. The use of a formula or standard in determining actual value of the tangible personal property of a telephone of a company is not improper in the absence of evidence that it was arbitrary, capricious, or unreasonable. The taxpayer must establish that the application of the formula resulted in the assessment of its property at more than its actual value, or violated the constitutional requirement that taxes on tangible property be levied uniformly and proportionately.

***S. S. Kresge Co. v. Jensen*, 169 Neb. 833, 83 N.W.2d 569 (1967).**

This case involved a controversy concerning the amount of personal property taxes owned by the Plaintiff on its two stores. The District Court found for the Defendant tax collectors, and the Supreme Court affirmed.

The Court first stated that the state is not a necessary party in an action by a taxpayer for a declaratory judgment attacking the validity of an assessment brought against the county treasurer and the county in which the property is assessed. Second, the cost of the stock inventory is not its actual value. Actual value is the value in the market in the ordinary course of trade.

The remedy of a taxpayer for overvaluation or a failure to receive uniform and proportionate valuation of its property by the county board of equalization is by direct appeal to the District Court, not by collateral attack. A collateral attack may only be made where the assessment is valid, willfully discriminatory, or the result of fraud. A taxpayer who fails to pursue such remedy is precluded from objecting to the valuation of the separate property for taxation

purposes. The right of a taxpayer whose property alone is taxed at 100 percent of its actual value is to apply to the county board of equalization to have his assessment reduced to the percentage of that value at which others are assessed, even though this is a departure from the requirements of the statute. Uniform and proportionate taxation is a constitutional requirement and consequently the prime consideration.

State ex rel. City of Omaha v. Lynch, 181 Neb. 810, 151 N.W.2d 278 (1967).

This is an action against the County Board of Equalization of Douglas County seeking a writ of mandamus requiring the county board to levy the number of mills for 1967 taxes certified and directed by the city. The District Court dismissed the action and the Supreme Court reversed.

The county board of equalization can exercise only such powers as are expressly granted to it by statute and statutes conferring power and authority upon the county board of equalization in these circumstances are strictly construed. The levy of a tax is a legislative function to be exercised only by the state or some inferior political division to which the state has delegated the power. The Legislature did not intend to grant to a county board of equalization any legislative power with respect to a city tax levy nor to divide such power, or permit a dual exercise of it. Nor did the Legislature intend that the county board act as a quasi judicial body to review and determine questions of legality or procedural budgetary requirements of a home rule city. The levying body has considerable discretion in fixing the tax amount, and the exercise of this discretion will not be disturbed in the absence of an abuse thereof.

County of Hall v. Engleman, 182 Neb. 676, 156 N.W.2d 801 (1968).

In this case the County of Hall sought to foreclosure of 10 tax sale certificates on 10 separate pieces of real estate owned by 10 separate owners. The trial court held that the tax liens were void and overruled the motion for a new trial. The Supreme Court dismissed the appeals by the county.

A plaintiff who brings suit on multiple tax sale certificates or tax liens in a single action in accordance with section 77-1904, R.R.S., 1943, may appeal from a decree resolving the issues in one or more of his causes of action by filing a single notice of appeal and depositing a single docket fee as required by section 25-1912, R.R.S. 1943. The Supreme Court then acquires jurisdiction of the appeal. Where a party appealing from the District Court to the Supreme Court fails to file a cost bond in accordance with section 25-1914, R.R.S. 1943, within 1 month after the rendition of the judgment or final order appeal from or within time extended by this Court on a showing of good cause, the appeal will be dismissed.

County of Kearney v. State Board of Equalization & Assessment, 183 Neb. 329, 160 N.W.2d 179 (1968).

This is an appeal by the County that it is entitled to a reduction of the valuations expressed in its own abstract of assessment furnished the State Board. The Board fixed the values without change. The Supreme Court affirmed the order of the Board.

The County argued that the State Tax Commissioner's sales assessment ratio showed a higher rural ratio for Kearney County than surrounding counties and so it is entitled to a reduction. The Court held that it was not arbitrary for the Board to conclude that the proposed

State Tax Commissioner's sales assessment ratio did not properly reflect a disparity sufficient to command a reduction.

The State Tax Commissioner's recommendations were based almost exclusively on the sales assessment ratio. The Board found that the present sales-assessment data were insufficient and inadequate to serve as a basis for valuation adjustments. The data thus could not be used as an adequate basis to change the county's valuation.

The Court also held that equalization between adjoining counties cannot be ordered. The only power of the Board is to equalize on a statewide basis; district or intracounty equalization is not authorized. The Court noted that the county assessor of Kearney County requested that a no change decision be granted Kearney County. This position by the county was considered binding, especially with relation to the reasonableness of the action of the Board. A party may not complain of error which he has invited.

***Union College v. Board of Equalization*, 183 Neb. 549, 162 N.W.2d 772 (1968).**

This case involved an appeal by Union College from a decision holding that real property owned by it was not exempt from taxation under the educational exemption. The Trial court held that the property was not exempt and the Supreme Court affirmed.

Appellant claimed that property used for the operation by it of industries which provided employment for students should be exempt. The industries, however, were not operated to provide vocational education as such. The students received no scholastic credit for the work which they performed.

Property owned and used exclusively for educational purposes, and not owned or used for financial gain or profit, is exempt from taxes. See section 77-202, R.R.S. 1943. The primary or dominant use, and not an incidental use, is controlling in determining whether property is exempt from taxation. A use which is not direct, but remote, will not qualify for exemption. See Doane College v. County of Saline, 173 Neb. 8, 112 N.W.2d 248 (1961). Property used primarily for the purpose of providing student employment is not exempt as property used exclusively for educational purposes. See Nebraska Conf. Assn. Seventh Day Adventists v. Board of Equalization, 179 Neb. 326, 138 N.W.2d 455 (1965).

***Christian Retirement Homes, Inc. v. Board of Equalization*, 186 Neb. 11, 180 N.W.2d 136 (1970).**

This was an appeal from a District Court ruling that only a part of appellant's retirement home (the medi-center and the chapel) was exempt from taxation. The Supreme Court affirmed.

Property owned and used exclusively for religious or charitable purposes and not owned or used for financial gain or profit is exempt from taxation. Art. VIII, section 2, Constitution of Nebraska; section 77-202, R.R.S. 1943; Evangelical Lutheran Good Samaritan Soc. V. County of Gage, 181 Neb. 831, 151 N.W.2d 446 (1967). It is the primary or dominant use, and not an incidental use, which is controlling in determining whether property is exempt from taxation.

While there was some evidence of religious use of the property, the Court held that this use was an incidental rather than a primary or dominant use. The preliminary or dominant use of the property was to provide housing for elderly persons. The Court stated that the home was best described as a retirement home rather than a nursing home furnishing daily care similar to hospital care to the occupants. Property owned and used primarily for the purpose of furnishing

low-rent housing is not entitled to exemption from taxation as property that is owned and used exclusively for charitable purposes. County of Douglas v. OEA Senior Citizens, Inc., 172 Neb. 696, 111 N.W.2d 719 (1961).

The plan was to operate the home at cost, with the residents providing the funds necessary to operate the home and retire its debt. Although the operation of the home included many charitable aspects, the ownership and use of the property was not exclusively charitable.

***County of Gage v. State Board of Equalization & Assessment*, 185 Neb. 749, 178 N.W.2d 759 (1970).**

This is an appeal by eight counties from the action of the State Board ordering increases in the assessed valuations of the counties. The Supreme Court affirmed in part the findings of the District Court and in part reversed.

The Board applied assessment sales ratios on the one hand, and recent reappraisals approved by the Tax Commissioner on the other, as precisely equal methods of measuring and applying uniform value. But the record demonstrated that these two methods, as applied here, did not produce an equal uniform level of value. Necessary correlation could have been made, but it would not have supported the percentages of increase ordered.

The Court where the record on appeal from an order of the State Board establishes an arbitrary adjustment, the order must be reversed. See County of Keith v. State Board of Equalization & Assessment, 180 Neb. 494, 143 N.W.2d 902 (1966). The record here could not support the orders entered.

***County of Hooker v. State Board of Equalization & Assessment*, 185 Neb. 772, 178 N.W.2d 785 (1970).**

The State Board ordered 8 counties to increase the value of their agricultural land by 33 percent for 1969. The orders were made following notice and a hearing before the Board. The orders as to 6 of the counties were affirmed, while the orders as to 2 others were reversed. All of the counties were located in the area generally known as the Sandhills. Between 75 and 90 percent of the land in these counties is grassland and was generally described in the record as Class VI-land. The controversy centered around the valuation of such land.

Two appraisal studies were before the Board for its consideration, the Brandt and Walters studies. Brandt defined Class VI land as requiring 20 acres to support one animal unit per year. J Walters defined Class VI land as requiring 10 acres per animal unit. The record was convincing that the Board based its orders in these cases on the Brandt Study. The Walters Study tended to support the Board's conclusions that the valuation of agricultural land in these counties was low, but did not fully sustain the action of the Board.

When the record is considered as a whole, it appears that the Board raised Thomas, Grant, Cherry, Blaine, Arthur, and Logan Counties to the approximate level of Hooker and McPherson Counties before any increase was applied. The Board then applied the same percentage increase to Hooker and McPherson Counties without making any adjustment for the difference in the indicated ratios. The order on its face showed that the Board disregarded its own finding. The action of the Board as to Hooker and McPherson Counties was clearly arbitrary and had to be reversed. The action of the Board in regard to Thomas, Grant, Cherry, Blaine, Arthur, and Logan Counties did not appear to be prejudicial since after the increase had been applied, these counties remained well below the average or media ratios for the other counties.

See County of Loup v. State Board of Equalization & Assessment, 180 Neb. 478, 143 N.W.2d 890 (1966).

***County of Lancaster v. State Board of Equalization & Assessment*, 185 Neb. 757, 178 N.W.2d 772 (1970).**

Lancaster County appealed from an order of the State Board increasing the valuation of agricultural land in the county. The order was based on the sales assessment ratio. The record showed that the Board made no change in the valuation of many counties which had sales assessment ratios equal to or lower than Lancaster County. These counties had been equalized on the basis of reappraisals. The Board made no effort to correlate the reappraisals with the sales-assessment ratios or any other uniform standard of value. Nothing in the record sustained or justified the disparity of treatment.

***County of Sarpy v. State Board of Equalization & Assessment*, 185 Neb. 760, 178 N.W.2d 765 (1970).**

This was an appeal from the action of the State Board ordering increases in the assessed valuations of 8 counties. The Supreme Court reversed the order of the Board.

For all of the counties, except one, the rural increases were predicated upon a 3-year old sales assessment ratio, agricultural statistics, and the testimony of the county officials. In addition, in two counties, appraisal studies were made. In one of these 2 counties, a 2-year sales assessment ratio and agricultural statistics were used.

See County of Sioux v. State Board of Equalization & Assessment, 185 Neb. 741, 178 N.W.2d 754 (1970). Reference is made to the opinion for the holding that the consideration of agricultural statistics is a clear violation of the Nebraska Administrative Procedures Act, section 84-914 R.R.S. 1943. Reference is also made to the opinion for the fact that the sales assessment ratio covered both the land and the improvements thereon. The rural increases made here were for the land only and not the improvements. This created a disparity between agricultural lands with improvements and put an undue share of the tax burden on the latter.

The increase in valuation of Wheeler County was based on the sales-assessment ratio, instead of a reappraisal, made three years previously. There was no showing in the record as to why the reappraisal was used for approximately 30 other counties where made within the last 2 or 3 years, and ignored in Wheeler.

A reappraisal for Sarpy County was accepted in 1966, and was continually updated. To apply an increase to this county, based on a sales assessment ratio for sales where the valuations had already been corrected on the county's records, would double the increase as to these properties. A comparison was made between comparable farm land along the border between Douglas and Sarpy Counties. The highest value for Douglas County was \$374 per acre and the lowest was \$167 per acre. The comparable land across the road in Sarpy County was assessed at considerably higher figures, so that any increase for Sarpy County would increase the value disparity between Sarpy and Douglas Counties. Because of overlapping school districts between the two counties, this would result in Sarpy County rural taxpayers bearing an undue portion of school taxes compared with the Douglas County taxpayers in those same school districts.

One county had overlapping school districts with two other counties, yet the proposed increase for the county was much greater than the proposed increase for the other two counties. Despite the fact that the State Board order recited consideration of a 3-year sales assessment

ratio based upon its conclusion as to the indicated ratio, only the year 1968 was considered. The same was true with respect to two other counties.

For Loup County, only 2 sales were used to compute the sales assessment ratio. The Court stated that two sales were too few for sales assessment ratio purposes. What was said as to agricultural statistics is pertinent here, because with the appraisal study, it was a factor in the assessment of the increase.

The Court held that it was impossible to reconcile the discrepancies in the way counties were dealt with from the record. The Court concluded that the State Board used completely different and uncorrelated methods to support its ultimate conclusions, and that no reasonable approach was made to achieve uniformity among the counties. It is the primary duty of the State Board to equalize or establish uniformity among the various counties, and, while absolute uniformity of approach may not be possible, there must be a reasonable attempt at uniformity. See County of Sioux v. State Board of Equalization & Assessment, 185 Neb. 741, 178 N.W.2d 745 (1970). Where the record of the proceedings before the State Board contains no evidence to justify an order, the action must be held to be unreasonable and arbitrary.

County of Sioux v. State Board of Equalization & Assessment, 185 Neb. 741, 178 N.W.2d 754 (1970).

This is an appeal from the action of the State Board ordering increases in the assessed valuations of three counties. The Supreme Court affirmed in part the orders of the District Court and in part reversed.

Previous to the hearings by the State Board, the Tax Commissioner held regional hearings to gather information for use in the equalization of value among the 93 counties. The Court held that the State Tax Commissioner can hold only an administrative hearing, and not a discretionary or a quasi-judicial one, because the power of the State Board cannot be delegated to the State Tax Commissioner. The order for the increase in valuation of agricultural lands was based largely in consideration of a 3-year sales assessment ratio. The record was void of any explanation as to why the valuations of some counties were increased while others were not. The record also disclosed an absence of any state-federal agricultural statistics, though these were supposedly considered in determining the increase for agricultural lands. None of the evidence presented could be used to sustain the action of the State Board, because to do so would be a violation of the Nebraska Administrative Procedures Act.

The Court held that the record made before the State Board must sustain the action of the Board, and in the absence of some satisfactory explanation of divergence and discrepancy in the application of the different methods used and relied upon to achieve uniformity, and of a satisfactory explanation of the correlation between those methods, the County could not determine if the constitutionally required equalization or uniformity for taxation was attained between counties. Where the record of the proceedings before the State Board contains no evidence to justify an order, the action must be held to be unreasonable and arbitrary.

State ex rel. Meyer v. McNeil, 185 Neb. 586, 177 N.W.2d 596 (1970).

This was an action to test the constitutionality of a bill which created a separate class for taxation purposes of agricultural income producing machinery and equipment which is required to report taxable income pursuant to the Internal Revenue Code. This method would provide a

different value of personal property specified in the act from that applied to all other tangible property in the same class. The Supreme Court held the bill to be unconstitutional. The Court held that it is the province of the Legislature to make a reasonable classification of persons, corporations, and property for purposes of legislation concerning them, but the classification must rest on real differences of situation and circumstances surrounding the members of the class, relevant to the subject of legislation which render appropriate its enactment. The establishment of two methods of valuation of property in the same class for taxation purposes results in a want of uniformity within the constitutional prohibition of Art. VIII, section 1. There can be no difference in the method of determining valuation or the rate of tax to be imposed unless the separate classification rests on some reason of public policy, some substantial difference of situation or circumstances that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified.

The Internal Revenue Code does not purport to determine the value of agricultural income-producing machinery and equipment. It is wholly unrelated to actual value for taxation purposes required by the law of this state. Thus, it cannot support a classification for tax purposes based thereon.

Note: State ex rel. Meyer v. Story, 173 Neb. 741, 144 N.W.2d 769 (1962). This case found an amendment to section 77-1242, R.R.S. 1943, which relieved motor vehicle dealers from proportionate share of their taxes on automobiles, to be unconstitutional. The rule of uniformity prescribed by M . VIII, section 1, of the Constitution of Nebraska, inhibits the Legislature from discriminating between taxpayers in any matter whatever.

***Berean Fundamental Church Council, Inc. v. Board of Equalization*, 186 Neb. 431, 183 N.W.2d 750 (1971).**

This was an appeal from an order denying the request of the church that the inventory and fixtures of its bookstore be declared tax exempt. The Supreme Court affirmed. Appellant predicated its claim for exemption on its contention that the bookstore was an essential part of the literature ministry of the church. The Court held that the statutes exempting property from taxation should be strictly construed, and one contending that his property is exempt must clearly show that he is within the exemption provided by statute. Todd v. County of Box Butte, 169 Neb. 311, 99 N.W.2d 455 (1959).

The bookstore was run the same as any other bookstore would be. It sold to all who would buy, put out catalogues and advertised. The mere fact that the bookstore handled materials of an educational or religious character did not entitle it to exemption. If that were so, every religious bookstore would be entitled to exemption. The bookstore was operated at a profit in direct competition with other bookstores handling educational and religious supplies. The Court declared that the bookstore would have to be considered profit-making no matter how the profit was used. It is the use of property as distinguished from the use of income from the property that determines whether it is exempt from taxation. See Nebraska Conf. Assn. Seventh Day Adventists v. Board of Equalization, 179 Neb. 326, 138 N.W.2d 455 (1965). The Court defined the dominant purpose of the bookstore as being to merchandise religious materials for profit. The making available of material embracing its theological doctrine was incidental to that dominant purpose.

***Chudomelka v. Board of Equalization*, 187 Neb. 542, 192 N.W.2d 403 (1971).**

Plaintiff appealed from the District Court valuation of his land and the Supreme Court affirmed.

Upon an appeal from a county board of equalization to a District Court on the ground that property has been valued in excess of its actual value, the sole issue to be determined is the actual value of the property. For the purposes of taxation, the terms actual value, market value, and fair market value mean exactly the same thing. Richards v. Board of Equalization, 178 Neb. 537, 134 N.W.2d 56 (1965). Actual value is to be determined by using the applicable elements including those specified in section 77-112, R.R.S. 1943.

Either lay or expert witnesses may testify as to the value of property if it is shown that they have an acquaintance with the property and are informed as to the state of the market. Lansman v. State, 177 Neb. 119, 128 N.W.2d 569 (1964). The competency of a witness to testify as to value is a matter within the discretion of the trial court.

***Lexington Building Co., Inc. v. Board of Equalization*, 186 Neb. 821, 187 N.W.2d 94 (1971).**

The Court held that the rezoning of the property and issuance of the conditional use permit were sufficient to justify the reappraisal of the property and, when coupled with other factors (desirability and functional use of, as well as location of the property) could serve to form a reasonable basis for the higher valuation. The property in question was compared with similar property in the area. Appellant attacked the comparison by pointing out the disparity in the purchase price of the property as well as the fact that most of the property to which his was compared was zoned commercial, while his was zoned residential (but a conditional use permit could be issued to allow for parking on the premises). The Court found the argument unconvincing. It stated that once Appellant's property became related to the property with which it was compared as an economic unit, the value of Appellant's property would arguably be greater than it would have been had it retained its purely residential character. To appraise the land based upon the comparison made was not reasonable.

***Loskill v. Board of Equalization*, 186 Neb. 707, 185 N.W.2d 852 (1971).**

The value of Plaintiff's land was ordered increased by the county board. On appeal the District Court upheld the board and the Supreme Court affirmed.

The issue was whether Plaintiff's land should be valued as dry land or irrigated land. Plaintiff irrigated his tract of land, but did so under a revocable license to draw water from a well located on the south half of the quarter section. Plaintiff argued that the basis of the marketability was dry, not irrigated land, and should be valued accordingly.

The Court held that the action of the county board of equalization with respect to actual value of property will be affirmed on appeal to the District Court unless: (1) the action of the board is unreasonable or arbitrary, or (2) the property of the appellant is assessed too low. See section 774511, R.R.S. 1943. The Court also stated that, with respect to the relationship between the parties, that a county board of equalization in a valuation proceeding out to look through form to substance to prevent unconscionable avoidance of taxation of property.

Note: Boss Hotel Co. v. County of Hall, 183 Neb. 19, 157 N.W.2d 868 (1968). There is a presumption that a board of equalization has properly performed its official duties and in making an assessment acted upon sufficient competent evidence to justify its action. The presumption of correctness disappears when there is competent evidence to the

contrary and thereafter the reasonableness of the valuation is one of fact to be determined by the evidence.

***OEA Senior Citizens, Inc. v. County of Douglas*, 186 Neb 593, 185 N.W.2d. 464 (1971).**

This was an appeal from the denial of tax exempt status to appellant for a retirement home for the aged. The District Court denied the exemption and the Supreme Court affirmed.

The case was essentially a retrial of the same issues presented in a 1961 case between the same parties. County of Douglas v. OEA Senior Citizens, Inc., 172 Neb. 696, 111 N.W.2d. 719 (1961). Appellant urged that the previous decision was no longer controlling because of the material changes in the use of the property as well as changes in the Court's construction of the applicable law in other cases subsequent to that decision. One new development since the previous case was the establishment by appellant of a health center which provided hospital-type nursing care for residents.

Charges were made by Appellant for all services rendered to its residents. Appellant did not knowingly take anyone who was not fully able to meet the charges. Retired teachers without sufficient funds to pay all charges were aided through the OEA foundation. But the Foundation was not part of Appellant's operation.

The Court held that the nursing home was not used exclusively for educational or charitable purposes. Statutes exempting property from taxation should be strictly construed and one contending that his property is exempt must clearly show that he is within the exemption provided by the statute. Berean Fundamental Church Council, Inc. v. Board of Equalization, 186 Neb. 431, 183 N.W.2d 750 (1971). The law requires a finding that the property be used exclusively for charitable purposes. That some of the residents could not pay all the charges assessed did not make the nursing home a charitable institution. The establishment of a health center by the appellant was held by the Court to provide nursing home service or medical service akin to a hospital, but to provide housing facilities for the aged. The addition of the health center did nothing to change the dominant purpose of the nursing home. With the exception of the health center the same essential facts were presented as were in 1961.

***Sioux City & New Orleans Barge Lines, Inc. v. Board of Equalization*, 186 Neb. 690, 185 N.W.2d 866 (1971).**

This was an appeal from the decision of the District Court declaring that the value of improvements located on the Missouri River port and terminal area owned by the City of Omaha, but leased to Plaintiff, were exempt from taxation. The Supreme Court affirmed. In the agreement, the barge line agreed to provide warehouse space, together with an office building. Title, ownership, and equity in any improvements were vested and remained in the City of Omaha under the agreement.

Article VIII, section 2, of the Constitution of Nebraska, provides in part: "The property of the state and its governmental subdivisions shall be exempt from taxation." The county board of equalization based its claim to tax here upon section 77-1209, R.R.S. 1943, which provides in part: "All improvements put on leased public lands shall be assessed to the owner of such improvements as personal property, together with the value of the lease, and listed and assessed as such in the place where the land is situated." The attempt to apply that statute to taxation of the property here rested upon an interpretation of Offutt Housing Co. v. County of Sarpy; 160 Neb. 320, 70 N.W.2d 382 (1955). The Court distinguished in the case by stating that no

constitutional exemption process was involved in Offutt. The United States had waived any immunity or exemption from taxation granted under the Enabling Act and ceding statutes, and had specifically granted to the state the right to tax the interests of the lessee. There was an estimated useful life of the improvements and the interest of the lessee in the real estate was mortgaged.

In this case, the agreement was clear and undisputed that title and ownership of all of the land and improvements was and would remain at all times in the City of Omaha, and there was no showing as to the estimated life of any of the improvements. No distinction was made between improvements constructed and paid for by the dock board and those constructed and paid for the barge line. Nor did the agreement make any distinctions in fixing title and ownership. The land and improvements were not used solely for the private benefit of the barge line. The improvements here involved were under the control and supervision of the Dock Board of the City of Omaha and were the property of the city. As such property it was exempt from taxation under the provisions of Article VIII, section 2, Constitution of the state of Nebraska.

***Hansen v. County of Lincoln*, 188 Neb. 462, 197 N.W.2d 651 (1972).**

This was a class action by a taxpayer to have declared null and void a portion of the tax levied against rural lands in Lincoln County, and to have the allegedly illegal portion of the tax refunded to those who paid it. The trial court declared void the portion of the tax as prayed for and retained jurisdiction for the apparent purpose of supervising refunds. The Supreme Court affirmed the part of the decree declaring the portion of the tax increase void and reversed the remainder of the decree.

This case is a sequel to County of Sioux v. State Board of Equalization & Assessment, 185 Neb. 741, 178 N.W.2d 754 (1070). In 1969 the State Board ordered a 50 percent increase in the valuation of rural lands in Lincoln County. One taxpayer appealed and this Court voided the increase in valuations on "rural lands." Plaintiff complained that he was not given proper notice of the increase in valuation as required by section 77-1315, R.R.S. 1943. The Court held that the provisions did not apply to increases ordered by the State Board under section 77-508.01, R.R.S. 1943. Also, the county assessor has the authority to correct valuations which have become erroneous because of a judicial declaration of invalidity of an increase ordered by the State Board.

The Court further held that a taxpayer cannot bring a class action on behalf of himself and others similarly situated to recover back taxes alleged to have been illegally assessed. Each taxpayer must bring an action on his own behalf. State ex rel. Sampson v. Kenny, 185 Neb. 230, 175 N.W.2d 5 (1970). The reason is that generally an action cannot be maintained as a class action by a Plaintiff on behalf of himself and others unless he has the power as a member of the class to satisfy judgment on behalf of all members of the class. This the Plaintiff here could not do insofar as refunds or tax credits were concerned.

***School Dist. of Minatare v. County of Scotts Bluff*, 189 Neb. 395, 202 N.W.2d 325 (1972).**

The plaintiff school district brought this action to recover personal property taxes refunded to a taxpayer. The refund was paid in part from the tax funds held for the credit of the school district. The District Court dismissed the action and the Supreme Court affirmed.

Through a clerical error, the Scotts Bluff County taxpayer paid too much personal property tax. He was granted a refund several months later pursuant to section 77-1734.01, R.R.S. 1943, by the county board. Section 77-1735, R.R.S. 1943, is the other refund statute, but with a much shorter time limit for filing than section 77-1734.01.

Plaintiff contended that the defendants had no authority or jurisdiction to refund taxes under either of the two refund statutes. The Court held that the only requirement of section 77-1734.01 is that some portion of the tax was paid as a result of the "clerical error." The term "clerical error" is not restricted to a clerical error made by a taxpayer on the face of a personal property tax return. The Court also held that the county board is the authority" whose approval is required for payment of a tax refund claim under section 77-1734.01. The failure to transmit a copy of the claim to other taxing entities does not deprive the county board of jurisdiction and authority to determine and approve a proper claim.

Other holdings by the Court were as follows: section 77-1737, R.R.S. 1943, providing that a county board does not have power to remit taxes for any reason, does not prevent the proper authority from refunding taxes as authorized by any specific tax refund statute. Second, the allowance of a tax refund claim where the county board acts quasi judicially and within the scope of its jurisdiction and authority, is not open to collateral attack in the absence of fraud.

State ex rel. Meyer v. Peters, 188 Neb. 817, 199 N.W.2d 738 (1972).

The main issue in this case was the authority of the Attorney General to sue on his own relation and whether there existed a present controversy and justiciable issue within the meaning of the Declaratory Judgments Act. The Court held that the Attorney General may, on his own relation, in the name of the state of Nebraska, bring an action for a declaratory judgment challenging the constitutionality of a statute which the State Tax Commissioner of the state proposes to implement by enforcement and regulation pursuant to the duties imposed upon that officer by statute and the Constitution. The fact that the State Tax Commissioner was charged constitutionally and statutorily with the duty of implementing an act by enforcement and the adoption of regulations, absent a declaration of unconstitutionality, created a sufficient justiciable issue and present controversy within the meaning of the Declaratory Judgments Act. The Court further held that the rule that a person may not attack the constitutionality of a statute where his rights are not affected thereby applies to private persons and not to the Attorney General, who is acting in the public interest.

Note: State ex rel. Sampson v. Kenny, 185 Neb. 230, 175 N.W.2d 5 (1970). A taxpayer cannot maintain a class action to recover back void taxes. Each taxpayer must bring action on his own behalf. Section 77-1736.04 provides for a determination and certification by the county board individually of the legality and validity of a refund. This is an individual determination that could not be effectively maintained as a class action.

Note: County of Lincoln v. Evans, 185 Neb. 19, 173 N.W.2d 365 (1969). Resolution of a county board of commissioners directing foreclosure of tax sales certificates need not identify each tax sales certificate individually. The affixing of a county treasurer's seal to a tax sale certificate is not essential to its validity.

County of Sioux v. State Board of Equalization and Assessment, 190 Neb. 198, 207 N.W.2d 219 (1973).

This was an appeal from an order of the State Board increasing the assessed value of all real estate in the county for local property tax purposes by restoring values established by a professional appraiser. The Supreme Court affirmed the order of the Board.

The Court held that professional reappraisals conducted in accordance with statutory requirements, as well as the applicable rules and regulations of the State Tax Commissioner, and approved by him, constitute an adequate basis upon which the State Board may rely in the absence of clear evidence that such appraisals or reappraisals are erroneous or that they fail to establish the equality and uniformity required by law. The Court noted that professional appraisals have consistently been approved as a reasonable and proper basis of valuation of real estate for tax purposes. Such appraisals have been the traditional method of valuation in this State.

Other issues considered by the Court were the adequacy of notice given to the county of the State Board meeting, as well as the use of improper evidence before the State Board. Sioux County charged that the notice of the meeting before the State Board was defective and that in the absence of valid notice, the Board has no jurisdiction to order an increase in value. But while the county did object as to sufficiency of notice at the commencement of the hearing, it made no request for a continuance or for a specification of proposed adjustments. The county participated fully in the proceedings before the Board without further objection as to notice, and with no apparent confusion as to the exact purpose of the hearing. The notice met all essential requirements of the statutes and the decisions of this Court. See County of Blaine v. State Board of Equalization & Assessment, 180 Neb. 471, 143 N.W.2d 885 (1966); County of Lancaster v. State Board of Equalization & Assessment, 180 Neb. 497, 143 N.W.2d 885 (1966).

The county also complained that hearsay evidence was received and some documents received in evidence without proper foundation, and other documents received or considered without formal admission and inclusion in the record, but the Court held that proceedings at a hearing before the State Board are not bound by the strict technical rules of evidence demanded in a court of law.

Hastings Building Co. v. Board of Equalization, 190 Neb. 63, 206 N.W.2d 338 (1973).

In an appeal to the county board of equalization or to the district Court, and from the District Court to this Court, the burden of persuasion imposed on the complaining taxpayer is not met by showing a mere difference of opinion unless it is established by clear and convincing evidence that the valuation placed upon his property, when compared with valuations placed on other similar property, is grossly excessive and is the result of a systematic exercise of intentional will or failure of plan duty, and not mere errors of judgment.

Neb. Conf. Assn. of Seventh Day Adventists v. Board of Equalization, 190 Neb. 658, 211 N.W.2d 613 (1973).

If property is partly exempt and partly nonexempt, the value of the nonexempt portion is subject to taxation and the value of the exempt portion is not subject to taxation. The District

Court found all the property of Platte Valley Academy, a coeducational boarding high school, to be tax exempt, with the exception of the property occupied and used for profit by 2 privately owned and operated industries, and a residence rented to one of the owners of the industries. The Supreme Court affirmed. The sole issue was whether the location and operation of the 2 factories upon the academy campus destroyed the tax exempt status of all the remaining property of the school which would otherwise be tax exempt. The general facts involving the ownership and operation of the Platte Valley Academy are set out in Nebraska Conference Association of Seventh Day Adventists v. Board of Equalization, 179 Neb. 326, 138 N.W.2d 455 (1965). The Court stated that there was no evidence that the basic operation of the academy had been altered or changed in any way by the addition of the two private factories except to provide additional student work.

***Norden Laboratories, Inc. v. County Board of Equalization*, 189 Neb. 437, 203 N.W.2d 152 (1973).**

The issue in this case was whether goods manufactured and stored by the owner in its licensed, bonded warehouse were exempt from taxation under free port laws (section 77-2116.01, R.R.S. 1943). The District Court found for the taxpayer and the Supreme Court reversed. While plaintiff was granted a public storage warehouse license, it owned all products in its warehouse. At no time did it solicit or accept goods of others for storage. The Court held that because plaintiff did not make available and use its facilities for public storage for compensation, it therefore did not gain an exemption.

***Rien v. Board of Equalization*, 190 Neb. 481, 209 N.W.2d 144 (1973).**

This was a property valuation protest case. Involved were apartment buildings built primarily with the labor of Plaintiffs. In figuring costs of construction Plaintiffs allowed \$3.00 per hour for their services. The trial court sustained the increase in valuation of the property and the Supreme Court affirmed.

The property was appraised by a professional appraiser. The firm made studies of construction costs and rental values in the area, as well as of recent sales of various types of property. The evidence tended to support the assessments made. The court held that the burden of proof is upon a taxpayer to establish that the value of his property has been arbitrarily or unlawfully fixed in an amount greater than its actual value. See Lexington Building Co., Inc. v. Board of Equalization, 186 Neb. 821, 187 N.W.2d 94 (1971). The Court must affirm the action taken by the board of equalization unless it is established that its action was arbitrary or unreasonable. See section 77-1511, R.R.S. 1943.

Plaintiff's evidence as to construction costs failed to take into account the high costs of skilled labor and their estimate of value based on cost failed to include the value of the land. Their estimate of expenses of operation was conclusionary in nature without verification by the production books or bank accounts. Their expert witness was impeached when he admitted ignorance of comparative sales in the city and relied largely on figures as to net income and construction costs supplied by Plaintiffs.

***Nash Finch Co. v. County Board of Equalization*, 191 Neb. 645, 217 N.W.2d 170 (1974).**

Here property was rezoned and a reappraisal was ordered as a result. The reappraisal

resulted in an increase valuation in the property by the county board of equalization. The District Court sustained the valuation and the Supreme Court affirmed.

The Court stated that the burden of proof is upon a taxpayer to establish his contention that the value of his property has not been fairly and proportionately equalized with all other property, resulting in a discriminatory, unjust, and unfair assessment.

***Stahmer v. State*, 192 Neb. 63, 218 N.W.2d 893 (1974).**

Plaintiff sought a declaratory judgment ruling sections 77-202.25 to 77-202.33 to be unconstitutional. These statutes exempted from taxation a portion of the actual value of agricultural income-producing machinery and equipment, business inventories, livestock, fee, etc. The action was dismissed by the District Court and the Supreme Court affirmed. Because of the exemptions, the State Treasurer was directed to place sufficient revenue from sales and income taxes each year in a Personal Property Tax Relief Fund to reimburse tax agencies in all counties for tax revenue lost by reason of the exemptions. On certification by the counties of revenue lost, the State Treasurer was directed to transfer the fund from the Relief Fund to the county treasurers each year. The county treasurers were directed to retain one percent of the money each received and to distribute the rest among the various taxing agencies in each county.

Plaintiff complained that the act provided for a continuing appropriation of state funds and was in violation of Article III, section 22, Constitution of Nebraska, as worded prior to its 1972 amendment, in that the appropriations extended beyond the end of the first fiscal quarter after the adjournment of the next regular legislative session. Also that it violated Article III, section 25, in that it permitted the withdrawal of state funds without specific appropriations.

The Court stated that in construing a statute it is the duty of the Court to give it an interpretation which meets constitutional requirements if it can reasonably be done. The Court also said that legislative construction of a statutory or constitutional provision, although not conclusive on the courts, when deliberately made is entitled to great weight. The Court held that the Legislature did not intend or consider the statutes here to be an appropriation measure. Thus the act was not in violation of the constitutional provisions above mentioned.

The 1970 amendment of Article VIII, section 2, represented a special constitutional provision adopted later than, and with full knowledge of, the constitutional provisions relied on by plaintiffs. The Court held that where general and special provisions of a Constitution are in conflict, the special provisions of a Constitution are in conflict, the special provisions should be given effect to the extent of their scope, leaving the general provisions to control in cases where the special provisions do not apply.

The Court did not find the classifications set forth in the act to be unreasonable. The Legislature may classify for purposes of legislation if the classification rests on some reason of public policy, or some substantial differences of situations or circumstance, that would naturally suggest justice or expediency of diverse legislation with respect to the objects to be classified.

***State ex rel. Meyer v. Peters*, 191 Neb. 330, 215 N.W.2d 520 (1974).**

This is a continuation of the earlier case of State ex rel. Meyer v. Peters, 188 Neb. 817, 199 N.W.2d 738 (1972). Here the Attorney General brought a declaratory judgment action seeking a judicial determination of the constitutional validity of laws making changes in property tax statutes as regards exemption of household goods, as well as inter-county

equalization where a taxation district overlaps two or more counties. The District Court upheld the laws and the Supreme Court reversed.

The Court held that a statute defining those household goods constitutionally subject to exemption from taxation as including major appliance either attached or detached to real property was unconstitutional. The power of the Legislature to define household goods does not authorize the Legislature to define any and all property in the state as household goods and personal effects.

With respect to intercounty equalization where a taxation district overlaps two or more counties, the statutes in question provided for apportionment between the counties wherein the taxation district lies by application of the respective county assessment ratio developed by the Tax Commissioner. The Court held that the statutes were defective in the following respects: first, taxpayers living in the taxing district were entitled to notice of an intention to adjust the mill levies and an opportunity to be heard. Second, the Court also held that the counties themselves were entitled to notice and an opportunity to be heard since the activities mandated by the statutes were equivalent to increasing assessed valuations. Third, the procedures contemplated by the statutes would result in nonuniform taxation in violation of Article VIII, section 1, Constitution of Nebraska.

State ex rel. Western Nebraska Technical Coll. Area v. Tallon, 192 Neb. 201, 219 N.W.2d 454 (1974).

This was an action in mandamus in which respondents challenged the constitutionality of section 79-2626, R.S.Supp., 1973, which provided for the raising of funds by a property tax levy in partial support of the system of technical community colleges. The District Court found the statute to be constitutional and issued the writ of mandamus compelling the treasurer and commissioners of Sheridan County to remit the tax. The Supreme Court reversed.

The Court stated that where state and local purposes are commingled in a statutory enactment creating a new, independent, statewide system of technical community college areas, the crucial issue of the use of property tax levies to support the system turns on a determination of whether the controlling and predominant purposes are state purposes or local purposes. The application of the constitutional amendment prohibiting the state from levying a property tax for state purposes hinges on that determination. Where the state assumes the control and the primary burden of financial support of a statewide system of technical community college areas, the property tax levy provided for in section 79-2626, is for a state purpose within the meaning of Art. VIII, section IA of the Nebraska Constitution.

Note: R-R Realty Company v. Metropolitan Utilities District, 184 Neb. 237, 166 N.W.2d 746 (1969). A statute authorizing or requiring a city or county to levy a property tax for local fire protection purposes does not contravene the constitutional prohibition against a state levy of a property tax for state purposes. The levy of a property tax by a local governmental unit should not be treated as a state levy for state purposes merely because the Legislature has authorized or required the local government to make the levy. Neither should the fact that the tax is for a governmental purpose make it automatically for state purposes rather than for local.

Note: Craig v. Board of Equalization, 183 Neb. 779, 164 N.W.2d 445 (1969). This case involved a complaint that the statutory revisions requiring the County to pay funds to the state home based on the number of county residents in the home, from local property taxes, was

unconstitutional as a use of property taxes for state purposes. The Court held that this purpose was a substantially local one and not a state purpose and therefore the statutes were not unconstitutional.

***Knoefler Honey Farms v. County of Sherman*, 193 Neb. 95, 225 N.W.2d 855 (1975).**

Method of appeal to a District Court from a decision of the county board of equalization. In order to perfect an appeal to the District Court from a decision of a county board of equalization, pursuant to 77-1510, R.R.S. 1943, all activities necessary to perfect such appeal, including the filing of notice of appeal, are required to be carried out within 45 days of the adjournment of the board. The 45 day period specified in section 77-1510 overrides the 20 day period provided for in section 23-135, R.R.S. 1943. The District Court acquires jurisdiction by appeal from a decision of a county board of equalization where the taxpayer gives notice of appeal, furnishes an appeal bond, and files in the office of the clerk of the District Court a transcript of the proceedings and order of the county board of equalization within the time allowed by law.

***Sealtest Cent. Div. - Omaha, Kraftco Corp. v. Douglas County Bd. of Equal.*, 193 Neb. 809, 229 N.W.2d 545 (1975).**

This was an action wherein defendant's alleged that the plaintiff failed to list part of its personal property for 1970, 1971, and 1972. Defendant's increased assessments and assessed penalties for these years. Plaintiff won a summary judgment setting aside the additional assessments and penalties, and the Supreme Court affirmed.

The Court held that in order to sustain an addition of property by tax assessors to a return as omitted property, it must appear that specific items were added which were not assessed in the original assessment. The taxing authorities here failed to point out any specific items of property which were omitted from plaintiffs tax returns.

***Bemis v. Board of Equalization of Douglas County*, 197, Neb 175, 247 N.W.2d 477 (1976).**

The District Court held that a county assessor does not have legal capacity to maintain an appeal to the District Court from a tax exemption determination by the county board of equalization. Under sections 77-202.01 through 77-202.07, a county assessor may make a recommendation on whether or not to grant a tax exemption to the county board of equalization, which decides whether to grant the exemption. The taxpayer has the right to appeal an adverse decision to the District Court. The Tax Commissioner may review and reverse any decision of the county board of equalization which grants the tax exemption.

The Court held that a tax exemption determination can no longer be taken pursuant to the provisions of sections 77-1510 and 77-1511. It must be brought under section 77-202.04. The assessor's course of action is not to prosecute an appeal, but to call the ruling to the attention of the State Tax Commissioner who may exempt it.

***Knoefler Honey Farms v. County of Sherman*, 196 Neb. 435, 243 N.W.2d 760 (1976).**

This action involves the assessment of a personal property tax by Sherman County on colonies of honey bees brought into the state after January 1, but before July 1 of 1972. The

progenitors of these colonies of honey bees had been previously taxed for the year 1972 in the state of California. Plaintiff appealed to the District Court from the action of the board of equalization of Sherman County adding these colonies to the plaintiff's assessment. The District court found that the assessment was illegal and directed the county assessor to remove the colonies of honey bees from the tax rolls. The Supreme Court affirmed.

The county relied on section 77-1211, R.R.S. 1943, in making its argument for taxation. That section provides in part:

... when any person shall bring personal property into the state . . . after 12:01 a.m. on January 1 and prior to July 1 in any year, it shall be the duty of the owner to list and return such property for taxation that year, unless he shall show to the county assessor ... under oath and by producing a copy of the assessment duly certified to . . . that the property has been listed for taxation for that year . . . in some other state or territory of the United States, . . .

The county argued that the copy of the California assessment was not duly certified, nor was it under oath. But the Court held that there had been substantial compliance with the statutes.

The Court noted that it was the custom and practice in Nebraska that no livestock born within Nebraska after the first day of January is subject to assessment for tax purposes for that year. Also, livestock born after January 1, and brought into the state before July 1 are not assessed. The Court further noted that Plaintiff was the only taxpayer against whom the county was attempting to enforce its interpretation of section 77-1211. The Court held that the equal protection clause of the 14th Amendment protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class.

State ex rel. Western Technical Com. Col. Area v. Tallon, 196 Neb. 603, 244 N.W.2d 183 (1976).

In this action respondents challenge the constitutionality of the Technical Community College Area Act of 1975 set forth in sections 77-2637 through 79-2662, R.R.S. 1943. The District Court upheld the constitutionality of the act and the Supreme Court affirmed.

See the earlier case of State ex rel. Western Technical Corn. Col. Area v. Tallon, 172 Neb. 201, 219 N.W.2d 454 (1974), wherein the Court held the former act to be unconstitutional on the grounds that it provided for a property tax to support a state purpose and was in violation of Art. VIII, section 1(A), of the Constitution of Nebraska, which prohibits the levy of a property tax for state purposes.

The Court held that the present act did away with the objectionable features noted in the previous decision. The Court further commented that state aid to schools necessarily involves a commingling of state and local purposes. But in every instance where schools are locally controlled and supported, no objection has been found to a provision for state aid. The mere granting of state aid does not render a school operation a state function.

Note: State ex rel. Meyer v. County of Banner, 196 Neb. 565, 244 N.W.2d 179 (1976). Statutory provisions requiring the counties to pay the costs and expenses of maintaining a county court, a District Court, prosecuting criminal law violations, and conducting state and national elections to not contravene Art. VIII, section 1(A), Constitution of Nebraska, prohibiting the state from levying a property tax for state purposes.

***Svoboda v. Hahn*, 196 Neb. 21, 241 N.W.2d 499 (1976).**

This is an action for a declaratory judgment to determine the validity of a resolution of the County Board of Keith County relating to a refund of taxes. Plaintiff contended that the refund was invalid under section 77-1737, R.R.S. 1943. The District Court refused to grant the declaratory relief and the Supreme Court affirmed.

The intervenor in this case had voluntarily paid taxes under a statute that the Attorney General had ruled unconstitutional. It was assured that it could get a refund by the county treasurer. The county board later met and passed a resolution granting the refund.

The Court stated that the authority of public officials to refund taxes is very limited. Section 77-1237 forbids a county board from making any refunds for any reason whatever. The right of a taxpayer to recover taxes that have been paid is also very limited. In the absence of statute, taxes voluntarily paid cannot be recovered. When a tax imposed is illegal and unauthorized for any purpose, an original action may be brought to recover the tax only by virtue of statutory or constitutional authority. Misle v. Miller, 176 Neb. 113, 125 N.W.2d 512 (1963). Generally, a tax is paid voluntarily when it is paid not under compulsion or without threat of seizure or sale of the property of the taxpayer to satisfy the tax in question. Mere protest along with payment is not enough to make the payment involuntary. Here the intervenor paid the tax on the day that it became due, and for any part of the tax that was delinquent, the payment was clearly voluntary as a matter of law and the intervenor had no right to recover the tax independent of the remedies provided by statute.

The two remedies the intervenor could have pursued are granted by section 77-1735, R.R.S. 1943, as well as section 77-1734.01, R.R.S. 1943. Section 77-1735 permits a taxpayer who claims a tax, or any part thereof, to be invalid for any reason to demand the same in writing from the county treasurer within 30 days after payment. If not refunded within 90 days thereafter, the taxpayer may sue the county treasurer for the amount demanded. Section 77-1734.01 permits a taxpayer to file with the county treasurer within 9 months after payment of the tax a written claim for refund of any taxes paid as a result of a clerical error on the part of the taxpayer or the taxing official. Before a taxpayer can recover taxes under a statutory procedure, he must substantially comply with the requirements of the statute. The plaintiff in this case failed to carry his burden of proof and so was denied declaratory relief.

***Reed v. County of Hall*, 199 Neb. 134, 256 N.W.2d 861 (1977).**

In this action Plaintiffs sought to enjoin Defendants from collecting taxes on certain real estate resulting from increases in assessed valuation for the years 1974 and 1975. Plaintiffs alleged that the taxes were void because the county failed to follow statutory procedures for giving notices of the increases in assessments for the two years. The Supreme Court supported Plaintiffs' contentions with respect to the 1974 tax.

The Court held that section 77-1315, R.R.S. 1943, requires that a notice be given by first-class mail, addressed to the record-owner's last known address, on every piece of real estate which has been assessed at higher figure than at the last previous assessment. Here the notice was sent to one of the Plaintiffs, who was not the record owner, at the last-known address of the corporation's registered agent. Also, the old assessed value was not included in the notice, but this was held to be a mere technical error. The Court also held that section 77-1315 is the only statute applicable to the taxing of improvements.

***Ross v. The Governors of Knights of Ak-Su-Ben*, 199 Neb. 513, 260 N.W.2d 202 (1977).**

The defendants in this case applied for exemption from property tax. On recommendation of the county assessor, the Board of Equalization of Douglas granted the exemption. Appellant, a citizen and taxpayer of Douglas County, filed a petition in error in District Court alleging that the commercial uses of the property for profit disallowed an exemption. The District Court held appellant had no standing to object and the Supreme Court affirmed.

***Berkshire & Anderson v. Douglas County Board of Equalization*, 200 Neb. 113, 262 N.W.2d 499 (1978).**

These actions stemmed from taxpayers' appeals challenging determinations made by the board of equalization as to the situs of personal property. The District Court upheld the decision of the board and the Supreme Court upheld.

Defendants in the case were IBM and Xerox. Xerox reported its leased personal property for property tax purposes at its principal place of business, which is in School District No. 1, instead of at the actual physical situs of each item. It leased personal property at the physical situs of each item, instead of its place of business, located in School District No. 66. Plaintiffs alleged that the approval by the board of the different reporting methods resulted in a lack of consistency which was incorrect as a matter of law.

The Court held that a corporation's tangible personal property is assessed in the taxing area of the corporation's principal place of business, unless otherwise provided by statute or unless it has acquired an actual situs elsewhere. Ace Constr. Co. v. Board of Equalization, 169 Neb. 77, 98 N.W.2d 367 (1959). The test of what characteristics such property must have to be removed from inclusion at the principal place of business was stated in the above case as follows:

Permanency of tangible personal property in a taxing area is determined by the ownership and use for which the property is designed and does not embrace the idea of a forever-fixed location or the thought that the owner bringing personal property in the area has no present intention of ever removing it; but it excludes the idea of mobile personal property which happens to be in the taxing area at the moment of the assessment of property which, for some definite purpose of the owner, has come to rest within the area for a limited time.

The rule is broad in scope and its application must take into account the practices of a business, type of equipment it utilizes, and the mobility of that equipment if situated elsewhere than the principal place of business. The leasing of large equipment to other businesses for extended periods of time could conceptually allow such equipment to acquire a new situs for taxing purposes.

The burden of proof is upon a taxpayer to establish his contention that the assessor's valuation, as affirmed by the board of equalization, is discriminatory, unjust, or unfair. See Hastings Building Co. v. Board of Equalization, 190 Neb. 63, 206 N.W.2d 338 (1973). This same rule applies to a determination by the board of the taxing situs. The plaintiffs contend the differences in the types of machinery leased and the leases used by IBM and Xerox are not material enough to justify the different reporting of the sites of personal property. But the plaintiffs' complaint failed to sustain their burden of proof.

***Bethesda Foundation v. County of Saunders*, 200 Neb. 574, 264 N.W.2d 664 (1978).**

The issue in this case was whether the nursing home operated by appellant was entitled to tax exempt status. The District Court overturned the ruling that the nursing home was not entitled to a tax exemption and the Supreme Court reaffirmed.

The Bethesda Foundation is a Nebraska nonprofit corporation organized exclusively for charitable and religious purposes, and its specific purpose is to own and operate nonprofit homes for the physical, psychological and spiritual care of elderly persons. It operates more than 20 nursing homes in 7 state. If revenue at a particular nursing home exceeds expenses, then that gain is used elsewhere in the foundation to offset net losses of homes where expenses exceed revenues. As an entity, its expenses exceeded its revenue in past years.

The home in question here accepted applicants on a "first come, first serve" basis, and ability to pay was not a consideration for admission. Those who were able to pay were charged. No patient was ever removed from the home for refusal or inability to pay, and no lawsuit was ever commenced to collect payment from a patient. The evidence showed that religion played an important role at the home. An interdenominational religious service was held every week, and there were daily Bible study sessions. Pastors from local churches agreed that there was a religious atmosphere at the home.

Under Art. VIII, section 2, Constitution of Nebraska, as well as section 77-202, R.R.S. 1943, property owned and used exclusively for religious, educational, or charitable purposes is exempt from taxation. It is the primary or dominant use, and not an incidental use, of the property which is controlling and determining whether property is exempt from taxation under section 77-202. If the property in question is used for no other purposes than those which are educational, religious, and charitable, the conditions of exemption have been complied with, irrespective of the proportion which any of these distinctive purposes may bear to the others. Lincoln Women's Club v. City of Lincoln, 178 Neb. 357, 133 N.W.2d 455 (1965); Ancient and Accepted Scottish Rite v. Board of County Commissioners, 122 Neb. 586, 241 N.W.2d 93 (1932).

***Gates v. Howell*, 204 Neb. 256, 282 N.W.2d 22 (1979).**

The issue in this case was whether a mobile home could be assessed and taxed as a motor vehicle. The District Court upheld the constitutionality of taxing mobile homes as motor vehicles. The Supreme Court reversed.

The Court held that a mobile home is not a motor vehicle within the exception provided in Article VIII, section 1, of the Nebraska Constitution and that therefore such structure could not be taxed as a motor vehicle because such a method of taxation results in the mobile home being taxed non-uniformly and disproportionately to all other personal property.

In each instance of review of Article VIII, section 1, the Court has found that not only the valuation of property for taxation must be uniform, but the rate as well. It was in 1952 that the constitution was amended to provide the exception with regard to motor vehicles in authorizing the Legislature to provide for a different method of taxing motor vehicles. The Court stated that it was clear that in amending the constitution the people did not intend for mobile homes to be considered as motor vehicles.

The evidence disclosed that the mobile homes in question resembled in all respects a residence. Mobile homes are not in any stretch of the imagination a motor vehicle.

The Legislature itself has recognized that mobile homes are in fact residences and not motor vehicles. Under section 77-202.12, R.S.Supp. 1978, homesteads are defined as including mobile homes. If a mobile home is eligible for the homestead exemption then it cannot be classified as a motor vehicle.

The Court further stated that a mobile home is not a motor vehicle because it is initially titled through a manufacturer's certificate of title and ultimately registered to the owner through a certificate of title, much like a motor vehicle. The manner in which proof of ownership is established does not permit the Legislature to make any item of personal property what it is not and thereby avoid the requirements of the constitution with respect to uniformity.

Requiring the owner of a mobile home to pay a fee of \$2.50 to obtain a permit for a mobile home does not violate Article VIII, section 1, and Article III, section 18, since under Article VIII, section 2, the Legislature may establish a reasonable class of personal property. The requirement of obtaining a permit is an exercise of the police power and not the taxing power of the state.

State Ex. Rel. Svoboda v. Weiler, 205 Neb. 799, 290 N.W.2d 456 (1980).

In this case the Plaintiff filed suit for a peremptory writ of mandamus directing the Keith County Assessor to add to the real estate tax rolls of the county, as well as place a value on, all severed mineral interests in which plaintiff was the owner of the surface rights be added to the tax rolls of Keith County so that they could be assessed for tax purposes as required by section 77-1301, R.R.S. 1943. The Supreme Court affirmed the decision of the trial court.

The Court stated that under sections 77-201 and 77-103, R.R.S. 1943, mineral interests are real property subject to taxation. Under section 77-1317, R.R.S. 1943, county assessors are under a duty to place upon or have escaped taxation for any former year.

The Court made no finding with respect to value. The question of value is one to be determined initially by the assessors.

J.C. Penney Co. v. Lancaster County Bd. of Equalization, 6 Neb. App. 838, 578 N.W.2d 465 (1998).

This case dealt with the procedures of county boards of equalization in dealing with a protest of a property's valuation. In that case, the taxpayer took issue with the county's valuation of a department store and protested to the county board of equalization. The protest was scheduled for review by a referee and no one from the taxpayer attended the hearing before the referee. The referee's report recommended that the value of the property be reduced from the value placed on the property by the county assessor, although the value would remain higher than that advocated by the taxpayer. The report of the referee was initially agreed to by the county's referee coordinator and was sent to the taxpayer's home office and indicated the date and time the county board was scheduled to take final action on the referee's recommendation. However, the coordinator changed his mind and decided to override the referee's recommendation and value the property at significantly closer to the assessor's initial valuation than was the recommendation of the referee. The taxpayer was only given one day's notice of the county board hearing and only learned that the recommendation of the referee had been overridden minutes before the hearing. An appraiser employed by the taxpayer participated in the county board hearing by telephone and also faxed an objection to the short

notice of the hearing and recommended value of the property given to the taxpayer. The county board accepted the referee coordinator's recommendation of value and the taxpayer appealed to the Nebraska Tax Equalization and Review Commission.

The Commission, while affirming the county board's order relating to the value of the property, also found that the board's procedures were unreasonable and arbitrary when the taxpayer was asked for cost data for the property but set its final valuation without waiting for the information it had requested. The Court of Appeals characterized the Commission's order not as finding the county board's hearing procedures as arbitrary and unreasonable but rather, the Commission found that certain actions in this case were arbitrary and unreasonable. These were providing only 1 day's notice to the taxpayer of the county board's final hearing, approximately 5 minute's notice that the property had been revalued to the taxpayer's detriment, and giving the taxpayer only 3 to 4 hours to collect and fax information on improvement costs to the county board that was requested by the board. However, even though the Court agreed with the Commission that there were flaws in the manner in which this appeal was handled by the county, the result with respect to value would not change the result before the Commission. In other words, even if a county's procedures were inadequate, the ultimate question before the Commission is the correctness of the value placed upon the subject property.

Note: United Way of the Midlands v. Douglas County Board of Equalization, 199 Neb. 323, 259 N.W.2d 270 (1977). In appeals under section 77-202.04, R.R.S. 1943, the giving of the notice of appeal and the furnishing of an appeal bond are the only jurisdictional requirements which must be completed within the 20 day period. Insofar as there may be language in Knoefler Honey Farms v. County of Sherman, 193 Neb. 95, 225 N.W.2d 855 (1975), which conflicts with this opinion on the construction of section 77-202.04, it is overruled.

Note: Ryan v. Douglas County Board of Equalization, 199 Neb. 291, 258 N.W.2d 626 (1977). A declaratory judgment action is not an appropriate remedy to attack an act of the county board of equalization where the Plaintiff has an adequate remedy at law by direct appeal from the act of the board of equalization by virtue of section 77-1510.

U.S. Ecology v. Boyd County Board of Equalization, 256 Neb. 7, 588 N.W.2d 575 (1999).

This case involved property purchased for a potential radioactive waste facility for \$320,000 in 1990. From 1990 through 1995, the property was assessed at no more than \$113,875. In 1996, the county board increased the value to \$320,000. The taxpayer appealed the county board's determination to the Nebraska Tax Equalization and Review Commission. The Commission upheld the county board's decision. The taxpayer appealed to the Nebraska Court of Appeals which reversed the Commission. The county board sought review by the Nebraska Supreme Court.

The facts seemed to indicate that the taxpayer paid a premium for the property because of its suitability for use as a waste site. The appropriate licenses had been applied for but not yet obtained and so the property was not being used for that purpose. The property was still grassland although the taxpayer had spent significant money to develop it as a waste site and was conducting a variety of tests on the site.

At hearing in front of the Commission, the taxpayer offered the testimony of its manager who testified about the value of the property. Additionally, the taxpayer called on an appraiser to testify. The appraiser had used a comparative value approach in determining the value of the

property and reached the conclusion that the total value of the property should be \$135,000 for land (80% of actual value for agricultural land) and improvements. At the close of the taxpayer's evidence, the Commission dismissed the case, determining that the taxpayer failed to present credible evidence to support its claim that the property was valued in an unreasonable or arbitrary manner. It found that the manager's testimony opinion of the property's value was not supported by the evidence and the appraisal was not credible because it determined that the highest and best use of the property was for agricultural land and that taxpayer could not use the property for agriculture under the constitutional provision prohibiting corporate farming. Further, the Commission felt that the appraisal was not credible because it considered only the sales comparison approach and not the income approach even though standard appraisal practices dictate that a second approach to value is essential to support the opinion and that the taxpayer had spent over 80 million dollars to make it suitable for use as a waste site.

The Court of Appeals, in reversing the Commission, determined the Commission erred in disregarding the testimony of the manager and the appraiser. Further, the Court held that the Commission improperly considered the prohibition on corporate farming because the issue was not raised before the county board. The Court of Appeals determined that the subject property was agricultural land not being used for agricultural purposes and was to be valued at one hundred percent of actual value.

The Supreme Court pointed out that the actual value of real property for purposes of taxation is the market value of the property in the ordinary course of trade. The Court agreed with the Court of Appeals that it was error to disregard the manager's testimony regarding value. An owner who knows the worth of his property may testify as to its value. The Court also felt that the Commission erred in disregarding the testimony of the appraiser. Nebraska law, in section 77-112(1) provides that actual value may be determined by sales comparison, income approach and reproduction cost. However, the statute does not require the use of all the factors, only the applicable ones. The appraiser had testified that he used sales comparison but not income because buyers and sellers of farmland do not attach great significance to the net income produced. The Court felt that the appraiser had used one applicable approach and articulated a reason why another did not apply. Therefore, the appraisal was competent evidence. The Court noted that actual value is without a precise yardstick for determination and that in this case, the testimony of the manager and appraiser was the only competent evidence of value in the record.

The county board argued that the appellate court could give the appropriate weight to the hearing tribunal's having heard and observed the witnesses and that it could accept one version of the facts over another. The Court pointed out, however, that the county put on very little evidence which would support the value placed on the property or contradict the taxpayer's evidence. (This may not be entirely fair; the case was dismissed at the close of the taxpayer's case and the county did not have to go forward with any evidence before the Commission.) The Court also agreed with the determination of the Court of Appeals that the question of the constitutional provision dealing with corporate farming was not raised before the county board and therefore could not be considered by the Commission under Section 77-1511. (The Court also questioned whether a county board, as an administrative agency and not a court, could ever adjudicate such a constitutional question.)

The Court also pointed out that the purchase price of property, by itself, is not conclusive of the actual value of property for assessment purposes; it is only one factor to be considered in

determining actual value. It felt that there was no evidence contradicting that of the taxpayer and on the record before the Commission, the purchase price of \$320,000 was not determinative of market value. The Court therefore affirmed the Court of Appeals in its determination that the appropriate value of the property was \$166,000, representing 100 percent of actual value.

***Ash Grove Cement Co. v. Cass County Bd. of Equalization*, 258 Neb. 990, 607 N.W.2d 810 (2000).**

Mining company sought review of valuations of its real property for tax purposes by county board of equalization, which were made under scheme in which mineral interests were assessed only on properties owned or under lease to mining companies. The Tax Equalization and Review Commission affirmed the decisions. Mining company appealed, and the Supreme Court held that classification scheme in which only those minerals contained in lands owned by or under control of mining companies were given value for tax purposes, and other mineral interests in other lands were ignored, violated uniformity provisions of the State Constitution.

In connection with its 1998 real property tax assessment, Cass County hired an outside appraiser to evaluate the mineral interests of certain real property in Cass County. The Cass County assessor gave the appraiser a list of approximately 85 parcels of land on which he was to appraise the mineral interest. The properties were all either owned by or under lease to mining companies. When Cass County mailed out its 1998 real property tax assessments, for those properties appraised as having a mineral interest value, Cass County sent out two separate tax billing statements; one which assessed the value of the surface component of the parcel and the other which assessed the value of the mineral interest component of the parcel. Therefore, the assessed value for each parcel at issue was a total of the two assessments assigned to each of the tax parcels.

Ash Grove timely filed a protest as to each valuation, claiming that the Cass County 1998 real property tax mineral assessment violated Ash Grove's rights under the Nebraska Constitution's uniformity clause which provides that "taxes shall be levied by valuation uniformly and proportionately upon all real property and franchises as defined by the Legislature except as otherwise provided in or permitted by this Constitution..." Neb. Const. art. VIII, §1. The Supreme Court found that because only the minerals contained in lands owned or leased by mining companies were evaluated for tax purposes, while other properties with known or likely mineral interests were ignored for evaluation purposes, the uniformity provision of the Nebraska Constitution was violated. Therefore, the Supreme Court reversed the decision of the Tax Equalization and Review Commission with respect to the valuation of Ash Grove's mineral interests.

***Bartlett v. Dawes County Bd. of Equalization*, 259 Neb. 954, 613 N.W.2d 810 (2000).**

Taxpayers brought property valuation protests to county board of equalization, which denied the protests, and taxpayers appealed. The Tax Equalization and Review Commission (the Commission) found that procedure utilized by board in addressing protests was arbitrary and unreasonable, but affirmed the board's denial of the protests. Taxpayers appealed, and the board

cross-appeals. After granting taxpayers' petition to bypass the Court of Appeals, the Supreme Court, held that: (1) taxpayers' use of protest procedure to challenge to adjustments by market area was not an impermissible collateral attack on the Commission's prior orders; (2) the Commission's adjustments to agricultural land by market area, rather than by class or subclass of property, was unlawful and void; and (3) board's decision to take no action on taxpayers' protests, pending the Commission's decision to its own petition, was arbitrary and unreasonable.

The taxpayers in this case were farmers and ranchers who own agricultural land divided by the lines between agricultural market area one (Area 1) and market area four (Area 4). The adjustments by market area implemented by the assessor in compliance with the Commission's May 14, 1998, order caused the valuation of taxpayers' properties in Area 4 to increase to nearly double the amount at which it was previously valued, while adjoining property located in Area 1 did not increase. Taxpayers filed property valuation protests with the board to protest the valuation of their property in Area 4.

The Supreme Court found that the Commission had erred in determining that the taxpayer's challenge to the 1998 adjustment was a collateral attack, as the taxpayers did not have the opportunity to challenge the increase in the valuation of their property outside of the protest procedure that they followed. Thus the taxpayer's challenge did not constitute a collateral attack on the Commission's prior orders as this was the taxpayers' first and only opportunity to challenge any of the issues.

With regards to the issue of the adjustments to valuation by "market area," the Court found that Neb. Const. art. VIII requires uniform and proportionate assessment within the class of agricultural land. Agricultural land is then divided into "categories" such as irrigated cropland, dry cropland, and grassland. Neb.Rev.Stat. § 77-1363 (Cum.Supp.1998). These categories are further divided into subclasses based on soil classification. *Id.* The Commission's order of May 14, 1998, in which it ordered adjustments to agricultural land assessments (Area 1, no adjustment; area two, 62-percent increase; area three, 18-percent decrease; and Area 4, 92-percent increase), was not an adjustment to the value of a subclass of property as authorized by & sect; § 77-5026 and 77-5027. In this case, the Commission ordered increases and decreases by various percentages based on where the land was located within the "market areas" and not by a percentage the value of a class or subclass of property as the statute authorized them to do. Although the Commission's order claims to be adjusting subclasses of agricultural land, a "market area" is not a subclass of agricultural land recognized by our statutes. Subclasses of agricultural property must be based on soil classification for purposes of taxation and although the assessor claims to have used soil maps in establishing the market areas, the market areas bear little resemblance to the soil map of Dawes County. Thus, the Commission was without authority to order adjustments to agricultural land by market area, and such adjustments were in violation of the statutory scheme set out by the Legislature. Therefore, the Supreme Court determined that the adjustments to agricultural land valuations implemented by the assessor pursuant to the Commission's May 14, 1998, order must be reversed.

Finally, the Supreme Court found that the Commission was correct in determining that the action by the board in failing to address the merits of the taxpayer's protests was arbitrary and capricious. A notation by the board on the protest forms indicated that the board essentially took no action on the taxpayer's protests and instead simply decided to await the outcome of its own petition to the Commission. The board had a duty to address the equalization issue, which it failed to do, and so the Commission was correct in determining that that action by the board was

arbitrary and capricious. Thus the Supreme Court reversed the Commission's decision affirming the board's denial of taxpayers' protests, and remanded this cause to the Commission with orders to remand the consolidated protests to the board for further proceedings regarding the 1998 tax year, consistent with this opinion and in conformity with Neb. Const. art. VIII, requiring uniform and proportionate assessment within the class of agricultural land.

Creighton St. Joseph Regional Hosp. v. Nebraska Tax Equalization and Review Commission, 260 Neb. 905, 620 N.W.2d 90 (2000).

Property owner sent petition to review unfavorable determination from county board of equalization on a valuation protest without required filing fee. After owner paid fee, the Tax Equalization and Review Commission (the Commission) dismissed owner's appeal for want of jurisdiction, and owner appealed. The Supreme Court held that: (1) as a matter of first impression, payment of the filing fee was not a prerequisite to conferring jurisdiction upon the Commission; (2) The Commission rule making the payment of filing fee a jurisdictional prerequisite was void and of no effect; (3) The Commission "mailbox rule" allowing appeals to be considered so long as they were postmarked within statutory filing period was void as being beyond the Commission's authority; (4) The Commission did not have power to apply equitable principles in jurisdictional matters; and (5) because the Commission did not have subject matter jurisdiction to hear property owner's appeal, Supreme Court lacked subject matter jurisdiction to consider appeal.

With regards to the filing fee, the Supreme Court found that the statute the Commission determined to be jurisdictional did not resemble the statutes in which the Legislature has made filing fees explicitly jurisdictional. If the Legislature had intended the \$25 filing fee in § 77-5013 to be jurisdictional, it could have clearly included jurisdictional language as it has done in other appeal statutes and that it is not within the province of the courts to read a meaning into a statute that is not there. The court therefore found that in the absence of clear legislative expression, the failure to pay a filing fee of \$25 at the time of filing an appeal pursuant to § 77-5013 is not a jurisdictional flaw that subjects the appeal to an automatic dismissal by the Commission. The Commission erred when it determined that the payment of the \$25 filing fee was a jurisdictional prerequisite.

The court also determined that the Commission has not been delegated the power, by virtue of any specific statute which it is to administer, to adopt a rule which excludes appeals to the Commission that are not accompanied by the filing fee provided for by § 77-5013. The Commission's power to adopt rules and regulations to carry out a set of statutes is limited to the powers delegated to the Commission by the particular statute which the agency is to administer. The statute regarding filing fees would be the most logical place for the Legislature to grant the Commission the specific power to promulgate a rule regarding filing fees. The Legislature has not done so. Again, § 77-5013 states, in relevant part, that "[t]he person filing an appeal with the commission shall pay a filing fee of twenty-five dollars...." Thus the court concluded that the statute does not, in itself, require the filing fee to accompany the appeal and the Commission exceeded its statutory grant of power by promulgating such a rule. Because the Commission exceeded its rulemaking power, the rule is without statutory authorization and of no effect in the instant case. Therefore, it was error for the Commission to dismiss St. Joseph's appeal on the

ground that St. Joseph did not submit a filing fee with its appeal. Payment of the filing fee is not a prerequisite to conferring jurisdiction upon the Commission either by statute or by rule adopted by the Commission.

With regards to the Commission's "mailbox rule" the court found that statutes and prior rulings made it clear that the Legislature was fully aware of how to make postmarking equivalent to filing and yet the Legislature did not make postmarking equivalent to filing with respect to an appeal to the Commission. As Jurisdictional statutes are to be strictly construed the court refused to read language into § 77-1510 which would make the postmarking of an appeal equivalent to filing an appeal. If the Legislature had intended as much, it would have done so in § 77-1510. Therefore the Commission exceeded its statutory authority when it adopted a rule which allowed appeals to be considered so long as they were postmarked within the statutory filing period. As a result, St. Joseph's appeal must have been received by the Commission on or before the final date for filing appeals under § 77-1510. The statute provides that an appeal must be filed within 30 days of July 25 of any particular year. Therefore, because August 24, 1998, was a Monday, and was 30 days after July 25, St. Joseph's appeal must have been in the Commission's possession on or before August 24 in order to be considered timely. Because St. Joseph did not file on or before August 24, the appeal was not timely filed and the Commission did not have subject matter jurisdiction to hear the appeal.

The Commission also did not have the authority to adopt a doctrine of unique circumstances. The Commission's equitable power is confined to its review of the specific actions of the county boards of equalization and therefore, the Commission did not have the power to apply equitable principles in jurisdictional matters, much less borrow equitable doctrines from other states in order to expand its own jurisdiction. The Commission erred in adopting and applying the "doctrine of unique circumstances," as the Legislature has not given the Commission the power to use equitable powers in jurisdictional matters. Finally, when an administrative agency lacks subject matter jurisdiction over a claim, the court also lacks subject matter jurisdiction on appeal. Because the Commission did not have subject matter jurisdiction to hear St. Joseph's appeal, because they missed the statutory filing deadline, the Supreme Court also lacked subject matter jurisdiction to consider St. Joseph's appeal. Thus St. Joseph's appeal was dismissed for lack of jurisdiction.

Constructors, Inc. v. Cass County Bd. of Equalization, 258 Neb. 866, 606 N.W.2d 786 (2000).

Taxpayers, whose properties were assessed at a higher value because of mineral interests lying beneath their land, sought review of county board of equalization's decision affirming increased assessments. The Tax Equalization and Review Commission affirmed, dismissing the appeal as a matter of law, and taxpayers petitioned for further review. The Supreme Court held that: (1) evidence was sufficient to justify review of county board's action, and (2) valuation scheme which created differential tax treatment between farmland controlled by mining companies and similar farmland not controlled by mining companies violated uniformity clause.

Constructors, Inc was a landowner in Cass County. In 1998, its respective properties were assessed at a higher value because of mineral interests lying beneath their land, and consequently, their property taxes increased. This was the first time their mineral interests were separately assessed and valued for tax purposes. The only landowners in Cass County who received additional mineral interest notices were mining companies or those who had property under lease to the mining companies. These landowners include Constructors, Inc. because they

are a mining company. Although under the mining companies' control, the subject land was not being currently mined at the time of the appraisal; rather, it was being farmed. However, the Cass County assessor testified that the fact that these properties received an increased value was not because of the mining companies' control, but, rather, because the past sales and use of the property justified an increased value. It was undisputed that there were other properties in Cass County with subsurface mineral interests that did not receive tax statements for their minerals. The court found that the Commission committed error on the record in finding that there was no evidence of the unreasonableness of Cass County's action, as there was clearly evidence in the record of some evidence which called into question the reasonableness of the action, particularly the admission that there were other Cass County properties with mineral interests which were not valued.

With regards to the taxpayer's claim that the valuation violated the uniformity clause, the taxpayer's contested the valuation method applied because the mineral interests in their property were valued differently than other similarly situated property owners' interests. The court found that the classification scheme used by Cass County in creating two subclasses of agricultural land based on whether the land was controlled by a mining company violated the uniformity clause. The court found that the classification scheme created by the selective valuation of mineral interests in Cass County must rest on a substantial difference of situation between the appellants and others whose minerals were attributed to have no value but the record revealed no substantial difference. Therefore, it was concluded that there was no substantial difference or public policy reason that justified differential tax treatment between farmland controlled by mining companies and similar farmland not controlled by mining companies. Therefore, the classification scheme created in which only those minerals contained in lands owned by mining companies were given value for tax purposes, whereas other mineral interests were ignored, violated the uniformity provisions of article VIII, § 1, of the Nebraska Constitution. The court then reversed the order of dismissal by the Commission and remanded the case to the Commission for further proceedings regarding the 1998 tax year, consistent with this opinion.

Gage County Bd. of Equalization v. Nebraska Tax Equalization and Review Commission, 260 Neb. 750, 619 N.W.2d 451 (2000).

County board of equalization filed petition for an adjustment to certain property value assessments in the county. Tax Equalization and Review Commission (the Commission) found that the board had not met its statutory burden of showing that failing to make an adjustment would result in values that were not equitable and in accordance with the law. Board appealed. On its own motion to move matter from docket of the Court of Appeals, the Supreme Court held that judicial review of the Commission's order was not authorized by statutes existing at the time the board filed its notice of appeal.

On July 26, 1999, the Gage County Board of Equalization (Board) petitioned the Commission, pursuant to § 77-1504.01, for an adjustment to certain property value assessments in Gage County. The Board submitted an amended petition on August 5. On August 6, the Commission entered its "Findings and Order Denying Petition." The Commission found that the Board had not met its statutory burden of showing that failing to make an adjustment would result in values that were not equitable and in accordance with the law. The Board perfected this appeal to the Court of Appeals, which the Supreme Court moved to their docket by a motion, pursuant to their authority to regulate the caseloads of the appellate courts. The issue was

whether, at the time the appeal was filed on September 3, 1999, there was a statutory right of appeal from an order of the Commission denying a petition filed by a county board of equalization pursuant to Neb. Rev. Stat. § 77-1504.01 (Supp.1999). In a previous decision by the Nebraska Court of Appeals, *Boone Cty. Bd. v. Nebraska Tax Equal. & Rev. Comm.*, 9 Neb.App. 298, 611 N.W.2d 119 (2000) (*Boone County*), the Court of Appeals determined that no such right existed. Operative April 7, 2000, several weeks before the release of the opinion in *Boone County*, the Legislature amended Neb.Rev.Stat. § 77-5019 (Supp.1999) to specifically authorize judicial review at the request of a party aggrieved by an order issued by the Commission “pursuant to section 77-1504.01 or 77-5028.” In the present case, the appeal was filed under the same statutes in effect on the operative dates in *Boone County* and prior to the amendment of § 77-5019.

In determining whether there was a statutory right of appeal, the court looked to § 77-5019(1), which establishes a right of judicial review of certain final decisions by the Commission. In *Boone County*, the Court of Appeals reasoned that § 77-5019(1) provided two instances in which a party could appeal a decision by the Commission: (1) “when the commission renders a final decision in a case which originated elsewhere and was appealed to the commission through the proper procedures” and (2) “when a person, county, or other political subdivision is aggrieved by an order of the commission rendered pursuant to § 77-5028.” The Court of Appeals held that an appeal from a disposition by the Commission of a petition filed pursuant to § 77-1504.01 did not fit into the first category of appeals permitted by § 77-5019(1) because it did not involve a decision of a lower tribunal which was appealed to the Commission in the first instance pursuant to Neb.Rev.Stat. § 77-5007 (Supp.1999). It further held that the dismissal of a petition filed pursuant to § 77-1504.01 could not be considered an order issued pursuant to § 77-5028 because the two statutes were separate and distinct.

The parties disagree as to whether § 77-5019(1), as it was worded and in effect in September 1999, conferred a right of appeal in this case. The Board argues that the Commission’s order denying the relief it sought pursuant to § 77-1504.01 is in reality an order pursuant to § 77-5028 and thus is reviewable on that basis. The Board argues that § 77-5026 provides the statutory authority for the Commission to adjust a class or subclass of property and that because § 77-5028 requires the Commission to enter an order based on proceedings pursuant to § 77-5026, the denial of relief requested in a petition pursuant to § 77-1501.04 is in reality an order pursuant to § 77-5028 for which § 77-5019(1) provides a right to judicial review.

The Supreme Court noted that in reading a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. Thus they agreed with the reasoning of the Court of Appeals that §§ 77-1504 .01 and 77-5028 refer to separate and distinct procedures occurring at different times during the annual process of equalizing property values. This reasoning was reinforced, by the recent amendment to § 77-5019 which authorized judicial review of orders entered by the Commission “pursuant to section 77-1504.01 or 77-5028.” If an order denying a county board’s petition pursuant to § 77-1504 .01 were in fact a species of order issued pursuant to § 77-5028, this amendment would have been unnecessary. The fact that § 77-5019(1) now makes a disjunctive reference to orders pursuant to the two statutes is a clear indication that the Legislature regards the two statutory procedures as separate and distinct and that an order by the Commission pursuant to § 77-1504.01 was not subsumed within the legislative classification of orders “pursuant to section 77-5028” under the prior version of § 77-

5019(1) which governs this appeal. Therefore, based upon the court's review of the relevant statutes existing at the time the Board filed its notice of appeal in this action, and the subsequent action by the Legislature in amending § 77-5019(1) to specifically provide for judicial review of orders entered by the Commission pursuant to § 77-1504.01, the court concludes that the review was not authorized by § 77-5019(1) prior to its amendment when this appeal was initiated. The Nebraska Supreme Court therefore lacked jurisdiction to review the Commission order of August 6, 1999, and thus dismissed the appeal.

Lyman-Richey Corp. v. Cass County Bd. of Equalization, 258 Neb. 1003, 607 N.W.2d 806 (2000).

Mining company sought review of valuations of its real property for tax purposes by county board of equalization, which were made under scheme in which mineral interests were assessed only on properties owned or under lease to mining companies. The Tax Equalization and Review Commission affirmed decisions. Mining company appealed, and the Supreme Court, held that classification scheme in which only those minerals contained in lands owned by or under control of mining companies were given value for tax purposes, and other mineral interests in other lands were ignored, violated uniformity provisions of the State Constitution.

Lyman-Richey Corporation and Lyman-Richey Sand & Gravel Corporation (collectively Lyman-Richey) appeal the orders of the Nebraska Tax Equalization and Review Commission (Commission) which affirmed the decisions of the Cass County Board of Equalization (Board) regarding the valuation of certain real property in Cass County owned by Lyman-Richey. In connection with its 1998 real property tax assessment, Cass County hired an outside appraiser, Patrick Schulte, to appraise the mineral interests of certain real property in Cass County. Veda Copenhaver, the Cass County assessor, gave Schulte a list of approximately 85 parcels of land on which he was to appraise the mineral interests, together with copies of the assessment records for each of the parcels. All of the properties identified by the assessor, including those of Lyman-Richey, were either owned by or under lease to mining companies.

Following receipt of Schulte's report, Cass County mailed out its 1998 real property tax assessments. The assessed value for each parcel at issue was a total of the two assessments assigned to each of the tax parcels, one for the surface component of the parcel, and one for the mineral interest component of the parcel. Lyman-Richey timely filed a protest as to each valuation, and at the hearing before the Board, the assessor's valuation was adopted. After, Lyman-Richey appealed the Board's decision to the Commission. During the hearing, the appraiser testified that there were properties in Cass County containing mineral interests that were not included in his appraisal report, including properties neighboring the appraised properties, if those neighboring properties were not owned or leased by mining companies. The appraiser admitted that it was likely that the mineral reserves under the appraised properties did not stop at the property lines but continued into adjacent lands, the latter of which were not appraised for mineral interests. The Cass County assessor confirmed that only the mineral interest of properties owned or under lease to mining companies had been assessed, but justified this disparate treatment on the basis that there had been no indication in the sale prices of properties not owned or under lease to mining companies that such other properties had a greater value than that assessed. The Commission affirmed the Board's decisions and, with minor adjustments to the valuations of certain surface components, adopted the assessor's valuations. In

its decisions, the Commission ruled that Lyman-Richey had failed to satisfy its burden of proof of demonstrating that the assessed values were unreasonable. Lyman-Richey appealed the Commission's decisions.

The Nebraska Supreme court agreed with Lyman-Richey that the Cass County 1998 real property tax mineral assessment violated Lyman-Richey's rights under the Nebraska Constitution's uniformity clause by virtue of its separate assessment of the mineral component based on ownership or control. In *Constructors, Inc.*, a previous decision by the Nebraska Supreme Court, the court held that "the classification scheme created in which only those minerals contained in lands owned by the appellants were given value for tax purposes, whereas other mineral interests were ignored, violated the uniformity provisions of article VIII, § 1, of the Nebraska Constitution." The court then reversed the Commission's decisions in the mineral interest cases.

***Mid City Bank, Inc. v. Douglas County Bd. of Equalization*, 260 Neb. 282, 616 N.W.2d 341 (2000).**

Mid City Bank appealed a decision from the Nebraska Tax Equalization and Review Commission affirming a determination by the Douglas County Board of Equalization regarding the valuation of certain items of tangible personal property acquired by Mid City Bank, Inc., through the purchase of stock of Western Security Bank of Omaha and the merger of the two banks. The Nebraska Supreme Court found no error in the Commission's decision and affirmed.

On April 18, 1996, Mid City Bank, Inc. (Mid City), and Western Security Holding Company, Ltd., entered into a purchase agreement whereby Mid City was to acquire at least 93.75 percent of the stock in Western Security Bank of Omaha (Western Security Bank), which stock was owned by Western Security Holding Company as of that date. The purchase price of the stock was \$11.5 million. On or about May 14, 1996, Mid City submitted an application to the Nebraska Department of Banking and Finance to acquire Western Security Bank by merger. In an order dated August 16, 1996, the Department of Banking and Finance approved the merger with certain conditions which were subsequently met. Mid City elected under I.R.C. § 338 (1994) of the Internal Revenue Code to treat the purchase of Western Security Bank's stock as an asset acquisition. On March 17, 1998, the Douglas County assessor notified Mid City that changes in valuation had been made on its personal property return for the year 1997. An attached description provided that the value of three items had been decreased, while the value of seven other items had been increased, for a net increase in value of \$1,768,035. On April 13, Mid City filed a letter of protest with the Douglas County Board of Equalization, arguing that its election under I.R.C. § 338 was not controlling under Nebraska law and that the transaction at issue was not a purchase, so that the assets should be deemed acquired on the date originally acquired by Western Security Holding Company and should retain Western Security Holding Company's original basis. The Douglas County Board of Equalization denied this protest on April 28. Mid City appealed the Board's denial of its protest to the Tax Equalization and Review Commission (the Commission). The Commission determined that as a result of Mid City's I.R.C. § 338 election, the adjusted basis of the personal property acquired as a result of its merger with Western Security Bank increased for federal tax purposes and that Nebraska personal property tax laws are based upon federal law. The commission also found that the acquisition of stock and the subsequent merger was a purchase because "the ultimate purpose of

the merger was the purchase of the target corporation's assets.” The Commission therefore held that the increase in assessed value to reflect the Nebraska adjusted basis as that basis determined under I.R.C. § 338 was correct and affirmed the determination of the Douglas County Board of Equalization. Mid City then appealed the Commission’s decision, which the Nebraska Supreme Court moved to their docket on their own motion pursuant to the Supreme Court’s authority to regulate the caseloads of the appellate courts.

The critical question in the case was whether Mid City acquired the subject property by “purchase,” which is defined by Neb.Rev.Stat. § 77-122 (Reissue 1996) as follows: Purchase shall include taking by sale, discount, negotiation, or any other transaction for value creating an interest in property except liens. Purchase shall not include transfers for stock or other ownership interests upon creation, dissolution, or any other tax-free reorganization for income tax purposes of any corporation, partnership, limited liability company, trust, or other entity.

Mid City argued that the transaction in question fell within the scope of the second sentence of § 77-122 and was therefore not a “purchase,” so that the Nebraska adjusted basis in the tangible personal property, which it acquired in the transaction, was the same as that of the previous owner pursuant to § 77-201(3). The Douglas County Board of Equalization contended that under the “step transaction doctrine,” the transactions involving Mid City, Western Security Holding Company, and Western Security Bank must be viewed as a single transaction in which the tangible personal property of Western Security Bank was acquired by Mid City, requiring valuation as of the date of the purchase. In resolving the issue in favor of the taxing authority, the Commission reasoned that the stock purchase was not an isolated transaction, but, rather, an integral portion of a multipart transaction intended to achieve the acquisition of Western Security Bank's assets by Mid City. The Commission concluded that Mid City's argument that it purchased stock and not assets “would have the Commission ignore the substance of the underlying transaction, and base its decision solely on the form of part of the transaction, rather than substance. It is not the function of the law to exalt form over substance.”

The court utilized the step transaction doctrine to analyze the case. Under this doctrine, interrelated yet formally distinct steps in an integrated transaction may not be considered independently of the overall transaction. By “inking together all interdependent steps with legal or business significance, rather than taking them in isolation,” federal tax liability may be based “on a realistic view of the entire transaction. The step transaction doctrine arose from the “central tenet of tax law that tax liability depends upon the substance not the form of a transaction. Although the doctrine was first applied in the context of federal income taxation, it has since been utilized by state courts in analyzing issues involving various forms of state taxation.

Although the court had not previously invoked the step transaction doctrine, they concluded that it was appropriate to do so in this case in order to determine whether the series of transactions occurring over a period of less than 8 months were separate and distinct or were so interrelated as to constitute a single transaction for purposes of personal property taxation. The court found that the facts of the case supported a reasonable inference that Mid City intended from the outset to reach the end result of acquiring both the stock and assets of Western Security Bank through an integrated series of transactions. Thus, applying the end result test component of the step transaction doctrine (which is based upon the initial intent of the parties), the several transactions could be considered as one, and the determination by the Commission that the substantive nature of the transaction amounted to a purchase of assets was therefore supported by

competent evidence and was not arbitrary or capricious. The court therefore affirmed the decision of the Commission, finding that the Commission's decision conformed to the law, was supported by competent evidence, was not arbitrary, capricious, or unreasonable.

***Pfizer Inc. v. Lancaster County Bd. of Equalization*, 260 Neb. 265, 616 N.W.2d 326 (2000).**

Taxpayer that purchased property when it acquired pharmaceutical corporation sought review of the decision of the Tax Equalization and Review Commission, affirming the decision of County Board of Equalization, and finding that assessed value of tangible personal property purchased by taxpayer was required to be calculated based on acquisition cost, or purchase price, of property, as adjusted for depreciation as of the date of purchase. The Nebraska Supreme Court, held that: (1) taxpayer was not entitled to value property based upon net book value and adjusted basis established by pharmaceutical corporation as original owner, and rather taxpayer was required to value property based on net book value at time property was transferred; (2) state's acquisition value taxation scheme for valuing tangible personal property did not violate Equal Protection Clause; (3) acquisition value taxation scheme did not impose a discriminatory burden on interstate commerce, in violation of the Commerce Clause; (4) acquisition taxation scheme was not special legislation, in violation of state constitution; and (5) acquisition taxation scheme did not violate state constitution's uniformity clause. Therefore, the Nebraska Supreme Court affirmed the judgment of the Commission.

Pfizer Inc. was a multinational corporation authorized to do business in Nebraska, engaged in the development, manufacture, and sale of pharmaceuticals and other health care products. In 1994, Pfizer agreed to purchase the assets of SmithKline Beecham Animal Health (SBAH) from SmithKline Beecham PLC, a publicly owned British corporation. This transaction was completed in 1995. As part of the acquisition, Pfizer purchased the assets of SmithKline Beecham Corporation, a subsidiary of the British parent corporation. These included assets located in Lancaster County referred to as the "Lincoln Plant," the "Lincoln Farm," and the "Agnew Farm." On January 1, 1996, Pfizer owned these properties, including the personal property located therein. Pfizer filed tax returns for 1996, basing those returns on information provided to Pfizer by SBAH, classified by class of property and year first placed in service. The returns were prepared as if the property had still been owned by SBAH, without regard to the transfer of ownership from SBAH to Pfizer. Subsequently, the Lancaster County assessor issued tax increase notices to Pfizer with respect to the three previously mentioned properties, increasing the value of the personal property described on the 1996 tax returns. Pfizer timely protested the tax increase notices to the Lancaster County Board of Equalization (the Board). The Board denied Pfizer's protests, and Pfizer appealed to the Tax Equalization and Review Commission (the Commission).

The Commission affirmed the decision of the Board. The Commission found that the purchase of the tangible personal property of SBAH by Pfizer was a purchase as defined by Neb.Rev.Stat. § 77-122 (Reissue 1996) and that the property must therefore be valued at its net book value as defined by Neb.Rev.Stat. §§ 77-118 and 77-120 (Reissue 1996). The Commission determined that pursuant to the relevant federal tax laws, the assessed value of the subject tangible personal property must be calculated based on the acquisition cost, or purchase price, of the property, as adjusted for depreciation pursuant to § 77-120. The Commission further

determined that the relevant date for calculating that depreciation was the date of the purchase by Pfizer and, thus, affirmed the determination of the Board. Pfizer appealed.

Statutory Interpretation Argument: There was no dispute that the property at issue in the instant case was tangible personal property subject to taxation, nor was there a dispute that the transaction in which Pfizer acquired the property was a purchase within the meaning of § 77-122. Pfizer argued that although it purchased the property at issue when it acquired SBAH, it was entitled to value the property based upon the net book value and the Nebraska adjusted basis established by SBAH as the original owner of the property. Pfizer claimed that it should be allowed to value the property as if it had been the original owner and no intervening purchase had taken place. The court found that such an interpretation conflicted with the plain language of the relevant statutes. Pursuant to I.R.C. § 1012, “generally, a taxpayer's basis in an asset is equal to the cost to the taxpayer of acquiring the asset.” Under I.R.C. § 1012, the basis of property is its cost to the taxpayer—in this case, Pfizer. The basis as defined by § 1012, in turn, composes the Nebraska adjusted basis under § 77-118, which then composes the net book value under § 77-120(1). The plain language of the statutes supports the determination of the Commission. The Court also noted that § 77-201(3) provides specifically that a subsequent property owner may assume the adjusted basis of the previous owner where the transfer of ownership is by gift, devise, or another transaction “which is not a purchase” and that property purchased to replace converted property may assume the adjusted basis of the converted property being replaced. The legal principle of *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of the others) recognizes the general principle of statutory construction that an expressed object of a statute's operation excludes the statute's operation on all other objects unmentioned by the statute. Since the Legislature saw fit to define the circumstances under which a taxpayer may value property based upon the adjusted basis established by a previous owner, it stands to reason that the Legislature intended such a specification to foreclose the possibility that a subsequent owner could assume the benefit of that status under other circumstances. The court found that the basic principles of statutory interpretation require us to conclude that § 77-201(3) delimits the circumstances under which a subsequent property owner may assume the adjusted basis of the previous owner.

Equal Protection Argument: Pfizer argued that §§ 77-118, 77-120, and 77-201, as interpreted by the Commission, violated the Equal Protection Clause of the U.S. Constitution. The court found that the Equal Protection Clause does not forbid classifications; it simply keeps governmental decision-makers from treating differently persons who are in all relevant respects alike, and that generally, the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification. This standard is especially deferential in the context of classifications made by complex tax laws, and in structuring internal taxation schemes, the states have large leeway in making classifications and drawing lines which, in their judgment, produce reasonable systems of taxation. Pfizer argued primarily that the Nebraska statutes violate equal protection because they can result in items that are purchased at different prices or times, but are otherwise identical, having different net book values. The flaw in Pfizer's argument, however, is that the distinctions between such pieces of property are rational, being based on the time and cost associated with the purchase of the property. However, the court found that the State could legitimately conclude that a new owner at the time of acquiring his [or her] property does not have the same reliance interest warranting protection against higher taxes as does an existing

owner. The State may deny a new owner at the point of purchase the right to “lock in” to the same assessed value as is enjoyed by an existing owner of comparable property, because an existing owner rationally may be thought to have vested expectations in his [or her] property ... that are more deserving of protection than the anticipatory expectations of a new owner at the point of purchase. A new owner has full information about the scope of future tax liability before acquiring the property, and if he [or she] thinks the future tax burden is too demanding, he [or she] can decide not to complete the purchase at all. By contrast, the existing owner, already saddled with his [or her] purchase, does not have the option of deciding not to buy [the property] if taxes become prohibitively high. Additionally, the legislative history of the Nebraska statutes at issue revealed another rational basis underlying the Nebraska legislation at issue. The legislative history indicates that one of the specific reasons for adopting the net book value depreciation tax, as defined, was that it would provide an objective measure of valuing property and would be easily administered because it relies on information already available for federal income tax purposes. Pfizer also claimed that the legitimate state interests served by the statutes can be served by other schemes that would not suffer from claimed constitutional infirmities. The court found that in the area of economics and social welfare, a state does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some reasonable basis, it does not offend the U.S. Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality. The fact that other schemes could have been selected does not mean that the scheme chosen is constitutionally infirm.

Commerce Clause Argument: Pfizer claimed that the statutes at issue violated the Commerce Clause of the U.S. Constitution. In denying this assertion, the Court noted that the U.S. Supreme Court has long held that the express grant to Congress of the power to regulate commerce among the several states, contains a further, negative command, known as the dormant Commerce Clause, prohibiting certain state taxation even when Congress has failed to legislate on the subject. This construction serves the Commerce Clause's purpose of preventing a state from retreating into economic isolation or jeopardizing the welfare of the nation as a whole, as it would do if it were free to place burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear. The first flaw in Pfizer's argument was that the tax in question was not addressed to the flow of commerce across the borders of Nebraska.

Pfizer then argued that the valuation method set forth in the statutes nonetheless had an adverse effect on interstate transactions. In that regard, the court noted that the U.S. Supreme Court had set forth a four-part test, sustaining a tax against a Commerce Clause challenge when the tax is applied to an activity with a substantial nexus with the taxing state, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the state. In applying the test, the court found that in this case, there was a substantial nexus between Nebraska and the subject of the tax, as the property at issue is located in the state, thereby meeting the first prong. In regards to the second prong, the court found that it was clear that Nebraska's personal property tax scheme was both internally and externally consistent and that the adoption of identical schemes in every state would not result in multiple taxation of the same property, nor would Nebraska's tax present any real threat of multiple taxation by any other states, as Nebraska's tax reached only the activity taking place within the

taxing State. When looking at the third prong of the test, the court noted that even though states are barred from discriminating against foreign enterprises competing with local businesses and from discriminating against commercial activity occurring outside the taxing state, with the Nebraska tax, the fact that the purchase was made in an interstate transaction had no bearing on the reason for the tax. Only Nebraska can levy a property tax on property in use in this state, and that tax is imposed regardless of whether the property is purchased in an intrastate or interstate transaction. The court found that to accept Pfizer's argument would be to conclude that any variation in the taxation schemes of the states would result in a Commerce Clause infirmity in all of those taxation statutes. This absurd result flows from Pfizer's mistaken assertion that a multinational corporation "cannot know" the tax implications of a large, interstate asset purchase. The fact that the statutes of different jurisdictions might result in a particular type of transaction being advantageous in one jurisdiction and disadvantageous in another does not mean that the Commerce Clause is violated; it simply means that the purchaser has to make a choice regarding its own best interests. A taxing state cannot be responsible for a taxpayer's failure to be aware of, or properly ascertain, the taxpayer's potential tax liability. Finally, the court found that the fourth prong of test (the measure of the tax be reasonably related to the taxpayer's presence or activities in the taxing state) was satisfied by the fact that the property being taxed is in use in Nebraska, and amount of the tax is based on the depreciated cost of the property. Therefore the court found that Nebraska's personal property tax valuation scheme did not impose a discriminatory burden on interstate commerce under the standards set forth by the U.S. Supreme Court.

Special Legislation Argument: Pfizer claimed that the statutes in question are special legislation, in violation of Neb. Const. art. III, § 18. A legislative act constitutes special legislation, violating Neb. Const. art. III, § 18, if (1) it creates an arbitrary and unreasonable method of classification or (2) it creates a permanently closed class. Pfizer did not contend that the statutes create a permanently closed class. With reference to Pfizer's argument that the statutes create an arbitrary and unreasonable method of classification, the Court concluded in their equal protection analysis that any classifications drawn based on the time and cost of the purchase of property was a reasonable relation to the legitimate objectives and purposes of the legislation. Therefore, the court determined that the statutes at issue did not violate Neb. Const. art. III, § 18.

Uniformity Clause Argument: Pfizer argued that the statutes at issue violated the uniformity clause of the Nebraska Constitution. The uniformity clause gives the Legislature two options with respect to tangible personal property: to tax the property on a depreciated cost basis using the same depreciation method with reasonable class lives, or to tax all such property uniformly and proportionately. The Legislature obviously chose the former option. The statutes at issue in this case clearly fall within the depreciated cost method contemplated by Neb. Const. art. VIII, § 1(2). Section 77-201 states that all such property shall be taxed using the same depreciation method unless exempted from taxation, and Pfizer offered little argument on why the class lives defined by § 77-120 are unreasonable.

The court therefore affirmed the judgment of the Commission, as it found that the Commission correctly determined that the net book value of tangible personal property, when transferred by purchase, is based upon the cost of that property to the taxpayer. Additionally,

this scheme for the valuation of tangible personal property did not violate the Equal Protection or Commerce Clauses of the U.S. Constitution, or the special legislation or uniformity clauses of the Nebraska Constitution.

Phelps County Bd. of Equalization. v. Graf, 258 Neb. 810, 606 N.W.2d 736 (2000).

County assessor appealed decision of county board of equalization reducing assessed value on certain parcels of real estate. The Tax Equalization and Review Commission (the Commission) vacated and reversed the board's action, and board appealed. On removal from the docket of the Court of Appeals, the Supreme Court, held that: (1) protest of board's action was not a prerequisite to assessor's appeal to the Commission; (2) evidence presented to the Commission was sufficient to rebut presumption of validity of board's adjustment of assessed values; and (3) board had made an adjustment to a subclass of property contrary to law. Thus, the Nebraska Supreme Court affirmed the decision of the Commission.

The Phelps County Board of Equalization (Board) reduced the assessed value on certain parcels of real estate that had previously been valued by the Phelps County assessor (Assessor). The Board reduced by 25 percent the value of more than 80 parcels of real estate located in Holdrege, Nebraska. Thereafter, the Board mailed notices of valuation change to the subject property owners between July 23 and August 1, 1998. No protests were filed. However, on August 10, the Assessor appealed to the Commission regarding the Board's action of July 21. The Commission subsequently overruled the Board's motion for a continuance and change of venue. At the hearing, the Board moved for summary dismissal on the basis that the Assessor had not filed a protest with the Board prior to appealing to the Commission and therefore had not properly perfected the appeal. This motion was overruled. On December 23, 1998, the Commission vacated and reversed the action of the Board, having concluded that the action of the Board was unreasonable and arbitrary and constituted an adjustment to a subclass of real property. The Board timely appealed to the Nebraska Court of Appeals, and we moved this appeal to our docket pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.

The Court found that the Commission did have the jurisdiction to hear the Assessor's appeal. It is clear that an assessor may appeal a decision of a county board to the Commission, the issue was whether an assessor must first file a protest with the county board before an appeal could be taken to the Commission. The court found no valid reason why an assessor in his or her official capacity should be required to file a protest with the county board before taking an appeal to the Commission under § 77-5007. The court therefore concluded that since the authority of county assessors to appeal decisions of the county boards is derived from the Act, a protest described in § 77-1504 is not a prerequisite to an appeal by an assessor. Accordingly, the Commission had jurisdiction to hear the Assessor's appeal.

The court next determined that the decision of the Commission, regarding the action of the Board was not arbitrary or capricious, and supported by competent evidence. The commission concluded the Assessor had established that the decision of the Board which reduced the property value of certain parcels of real estate by 25 percent was unreasonable and arbitrary. There is a presumption that a county board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action. That presumption remains until there is competent evidence presented to the

contrary. Additionally, a decision is arbitrary when it is made in disregard of the facts or circumstances and without some basis which would lead a reasonable person to the same conclusion. There was no evidence which showed that the Board researched the valuation of lower priced lots to determine if these lots should have received the same reduction. The evidence did not support the Board's decision to exclude lots with improvements in excess of \$1,500. The Court found that the evidence presented to the Commission was sufficient to rebut the presumption of the validity of the Board's actions. The 25-percent reduction by the Board was based upon a Board member's conversation with real estate agents concerning only eight or nine lots, yet the Board reduced all the lots based upon this recommendation. Therefore, the real property was valued by a method different from the method applied by the Assessor to other residential lots in Phelps County. As a result, the real property in Phelps County was not uniformly and proportionately assessed as required by Neb. Const. art. VIII, § 1. Thus the Board did not establish a clear-cut procedure by which it was able to justify such valuation, and the Court concluded that the Commission's decision was not contrary to law, and was supported by competent evidence, and therefore not arbitrary, capricious, or unreasonable.

Finally, the court considered the issue of whether the action of the Board constituted an adjustment to a subclass of real property, which is a power specifically reserved to the Commission. The Commission determined that by reducing the values of certain parcels of residential real estate, the Board had made an adjustment to a subclass, and the court agreed. The subclass created by the Board was vacant residential real property located in Holdrege with an assessed value of \$5,000 or more and improvements of \$1,500 or less. The Board's action of July 21, 1998, reduced by 25 percent the assessed value of real property described in the subclass. The Board claims it did not make adjustments to a subclass of real property, but, instead, reduced the values of various parcels of real property specifically identified in its motion. However, the court found this argument to be without merit, as the Board did not consider the lots individually, but gave all the lots the same percentage reduction. Because the power to make adjustments to a subclass of real property is reserved to the Commission, and the Commission correctly determined that the Board had made an adjustment to a subclass of property, this action was contrary to law. Thus the court affirmed the decision of the Commission against the Phelps County Board of Equalization.

***County of Douglas v. NE Tax Equalization and Review Com'n*, 262 Neb. 578, 635 N.W.2d 413 (2001).**

Douglas County appealed from an order of the Tax Equalization and Review Commission (the Commission) that increased the value of the commercial property in county by 7%. The Nebraska Supreme Court, held that: (1) the Commission correctly concluded that it was not necessary to order a percentage adjustment to the residential property in county; (2) determination that "sales chasing" had occurred in county during the relevant time period was supported by competent evidence; (3) finding that a time adjustment was not necessary was supported by the record; (4) the Commission was not precluded from using past sales data to determine that statistical analysis by county was not reliable; and (5) the Commission's use of only one year of sales data to evaluate level of assessment of commercial property did not violate state constitution's uniformity clause.

For the 2000 tax year, the statistical reports for the commercial class of property were to be determined by use of sales during the 3-year period from July 1, 1996, through June 30, 1999. NE Dept. of Revenue Property Assessment Division Legal Case Summaries May 4, 2011

However, for Douglas, Lancaster, and Sarpy Counties, the PTA's reports and opinions included calculations based on sales of commercial property using only 1 year's worth of data (July 1, 1998, through June 30, 1999). For Douglas County, the PTA rounded the median assessment-sales ratio for commercial property and reported it to be 90 percent. This calculation was based on a "trimmed profile" that included 464 sales in Douglas County between July 1, 1998, and June 30, 1999. A trimmed profile is a summary of statistical studies provided in the PTA's reports and opinion that utilizes only sales with an assessment-sales ratio between 25 and 200 percent. In an attempt to "make Douglas County comparable with other counties," the PTA applied a 4-percent increase to the reported median assessment-sales ratio of 90 percent, "which represented a twelve month adjustment to the midpoint of the time frame established by the Nebraska Tax Equalization and Review Commission. The PTA opined that adjusting the median assessment-sales ratio of 90 percent to 94 percent brought the existing commercial values in Douglas County within the statutorily acceptable range of 92 to 100 percent, but the quality of assessment was not acceptable because the reported 23.17 percent COD was above the acceptable range of 0 to 20 percent.

On April 18, 2000, the Commission commenced its equalization proceedings. The Commission sought the assistance of an expert witness to evaluate the PTA's reports and opinion for Douglas County, and the expert testified that the methodology used by the PTA on the commercial property in Douglas County was not consistent with professionally accepted mass appraisal standards and that the mathematical calculation used by the PTA was not appropriate. Relying upon the expert's opinion, the Commission concluded that there was no credible evidence to support the PTA's 4 percent time adjustment of the median assessment-sales ratio from 90 percent to 94 percent. The Commission concluded that an order directing the PTA to adjust commercial property values was necessary to ensure compliance with the uniformity and proportionality provisions of article VIII, § 1, of the Nebraska Constitution and § 77-5023. The Commission issued an order directing Douglas County to show cause why the value of the commercial property in Douglas County should not be increased by 7 percent. On May 10, 2000, the Commission filed its "Findings and Orders Adjusting Values," in which the Commission rejected the PTA's proposed 4-percent time adjustment to the median assessment-sales ratio because none of the standard reference works identified this adjustment as a professionally accepted mass appraisal method. The Commission concluded that the PTA's 4-percent time adjustment to the median assessment-sales ratio was not recognized, reliable, or credible. The Commission concluded that a just and equitable assessment of the commercial property in Douglas County could not be made without increasing the value of property by a percentage and the Commission therefore ordered an increase of 7 percent in the assessed value of the commercial property in Douglas County. This 7-percent adjustment was to be applied to all commercial and industrial real property in Douglas County, including both land and improvements. The Commission found that this increase would bring the median assessment-sales ratio to 96 percent, the midpoint of the acceptable range required by § 77-5023. On May 22, 2000, Douglas County filed an appeal with the Nebraska Court of Appeals, and the Nebraska Supreme Court granted Douglas County's petition to bypass.

Douglas County claimed that the Commission acted in an arbitrary fashion by accepting a time adjustment to the residential property in Douglas County, but not to the commercial property. The Supreme Court did not find the Commission's actions to be arbitrary. Even without a time adjustment, the median value of real property was still within the acceptable range

of 92 to 100 percent, and the Commission correctly concluded that it was not necessary to order a percentage adjustment to the residential property in Douglas County.

Douglas County then argued that the Commission lacked sufficient evidence to issue the order to show cause. Pursuant to § 77-5023, the Commission is given the authority to issue an order to show cause why the value of a class of property should not be adjusted. See § 77-5026. In considering the show cause order, the Commission relied upon the expert's testimony that the 4-percent time adjustment that the PTA applied to the median assessment-sales ratio for commercial property in Douglas County was not consistent with a professionally accepted mass appraisal standard. The court found that this was sufficient evidence to support the Commission's actions, and therefore the Commission did not act arbitrarily in issuing the show cause order to Douglas County.

Douglas County also objected to the Commission's findings in its May 10, 2000, order as arbitrary, unsupported by the evidence, and not in conformity with the law. The county claimed that a number of analyses could have been used by the Commission which showed that the median level of value for commercial property in Douglas County was within the statutorily acceptable range. Instead, the county argued that the Commission based its findings on the unsupported theory that "sales chasing" had occurred prior to January 1999. The county asserted that even though the Commission, the PTA, and the county's own witness all agreed that "sales chasing" could be evidenced, it was not conclusively shown by a comparison between the percent in sales base value to the percent change in assessed base value. The court noted that "sales chasing" occurs when values for properties that have been sold are changed while values for unsold properties remain constant. The practice is unprofessional because it creates inequities between properties and, unless adjusted for, renders sales ratio studies invalid. The Commission argues that evidence of "sales chasing" is shown in the assessment-sales ratio data contained in the profile prepared by the PTA. This data reflected a marked decrease in the assessment-sales ratio for commercial property in Douglas County between the last two quarters of 1998 (94 and 93.18 percent) and the first two quarters of 1999 (84.12 and 80.20 percent), with a net drop in the median of 14 percent in 6 months. The Commission asserted that the practice of "sales chasing" tainted the sales data prior to January 1, 1999. The court noted that the evidence was undisputed that the commercial real estate market in Douglas County was strong and increasing at a rate of 4 percent per year. As the Commission noted, under these circumstances, the quarterly assessment-sales ratios listed in the profile should have decreased. No witness provided any explanation for the dramatic change in the median after the former assessor left office in January 1999, and Douglas County presented no evidence to explain the inconsistency. Therefore the court found that the Commission's determination that "sales chasing" had occurred in Douglas County during this time period was supported by competent evidence and the Commission's findings with respect to "sales chasing" were neither arbitrary, capricious, nor unreasonable.

Finally, Douglas County argued that the Commission violated the uniformity clause of the Nebraska Constitution by failing to treat Douglas County in a manner that was uniform with other counties within the state. In particular, the county asserts that it was improper to analyze Douglas County on 2 quarters, or one-half of 1 year, while analyzing the rest of the counties using a 3-year timeframe. Douglas County contended that it was treated differently than Lancaster County, which was permitted to provide 3 years' worth of sales information. However, the record showed that the PTA's reports and opinions for both Douglas and Lancaster Counties

used only 1 year's worth of sales data. Pursuant to state law, the court looked to whether there was a substantial difference of situation or circumstance or some public policy reason that would justify why Douglas County was not evaluated using a 3-year timeframe as were the other counties within the state. The court agreed with the Commission's assertion that the different timeframe was justified by the evidence of "sales chasing." The record in the case contained substantial evidence that "sales chasing" had occurred in Douglas County and that the "sales chasing" affected the 3-year sales information. The data for Lancaster County did not indicate that the sales information for Lancaster County was contaminated by the type of "sales chasing" that had occurred in Douglas County. Therefore, the court concluded that the evidence of "sales chasing" justified the differential treatment accorded to Douglas County. Thus based upon the factual situation presented, the court found that the Commission did not err in using only 1 year of sales data to evaluate the level of assessment of the commercial property in Douglas County. The court therefore affirmed the Commission's order.

Falotico v. Grant County Bd. of Equalization, 262 Neb. 292, 631 N.W.2d 492 (2001).

Taxpayers sought review of decision by the Tax Equalization and Review Commission upholding denial of valuation protests. The Supreme Court moved case to its docket. The Supreme Court, held as a matter of first impression that increase in valuation was void since the county clerk violated the statutory duty to give notice to the taxpayers within seven days of the county equalization board's decision.

The Grant County assessor assessed higher valuations for the subject properties for purposes of taxation as of January 1, 1999. The proposed valuations were based on a sample size of only five sales concerning four properties (one property was sold twice over a 3-year period). The taxpayers filed protests to the proposed valuations. The Board denied the taxpayers' protests, making its decision on July 23, 1999. The county clerk, though required under Neb. Rev. Stat. § 77-1502 (Cum.Supp.2000) to send the taxpayers notice of the Board's decision within 7 days of that decision, did not send the notices until August 19. The taxpayers received the notices on August 21, which fell on a Saturday. The deadline under Neb.Rev.Stat. § 77-1510 (Cum.Supp.2000) for filing an appeal with the Commission was Tuesday, August 24. Thus, the taxpayers had only 2 business days within which to prepare and file their appeals. Moreover, the forms the Commission provided to the taxpayers stated that the deadline was August 25, 1 day later than the statutory deadline. The taxpayers mailed their appeal forms to the Commission on August 25, and the Commission received and filed them on August 26. The Commission held a hearing to determine whether it had jurisdiction to hear the cases and then issued an order declaring that it could properly do so, because dismissing the taxpayers' appeals on jurisdictional grounds would violate the principle of equity and would further deny the taxpayers due process of law (notification within 7 days of the Board's decision and 30 days within which to appeal). The Commission granted the Board's motion to dismiss largely because the taxpayers had not produced any evidence regarding the actual values of the properties. Because they offered no evidence, the Commission found that the taxpayers had not shown that the Board's valuations were grossly excessive and had thus not rebutted the presumption favoring the Board's action. The taxpayers sought review in the Nebraska Court of Appeals, and the Nebraska Supreme Court moved the case to its docket pursuant to the power to regulate the caseloads of the Nebraska Supreme Court and the Court of Appeals.

The court noted that the issue was whether the Commission had subject matter jurisdiction over the case. Subject matter jurisdiction is the power of a tribunal to hear and determine a case of the general class or category to which the proceedings in question belong and to deal with the general subject matter involved and to acquire jurisdiction over the subject matter of the action, there must be strict compliance with the time requirements of the statute granting the appeal. The statutes require that any appeal to the Commission shall be filed within thirty days after adjournment of the board. Thirty days past July 25, 1999, is August 24. Here, the taxpayers postmarked their appeals on August 25, and they were actually received and filed by the Commission on August 26. Thus, the taxpayers' appeals were filed after the expiration of the statutory 30-day period. However, the reason for the delay was due both to the failure of the county assessor to mail out the notice for the hearing within the stated time frame, and due to an error on the form.

Procedure prescribed by the Legislature in respect to levying a tax must be strictly observed. In previous cases, the court had found that the statute requiring notice by the county assessor to the taxpayer is mandatory and that the failure to give the required notice is fatal to the tax levied on the increase in valuation of the property. Here, the court concluded that just as notice by the county assessor under § 77-1315 is essential to the validity of the levy, so too is notice by the county clerk under § 77-1502. Because the county clerk violated the statutory duty under § 77-1502, the increase in the valuation is void and the Commission thus lacked jurisdiction over the case. The court therefore reversed the affirmance by the Commission of the Board's decision which denied the protests filed by the taxpayers, vacated the decision of the Board denying the protests of the taxpayers, and declared that the action of the Grant County assessor increasing the valuations of the subject properties for the purposes of taxation as of January 1, 1999, was void.

***Firethorn Inv. v. Lancaster County Bd. of Equalization*, 261 Neb. 231, 622 N.W.2d 605 (2001).**

Landowners filed tax protests with county board of equalization after assessed value of their golf course was increased. The board denied the protests. Landowners appealed. The Tax Equalization and Review Commission (the Commission) affirmed. Landowners appealed. The Nebraska Supreme Court held that: (1) presumption existed that county board faithfully performed its official duties in making an assessment and acted upon sufficient competent evidence; (2) owners failed to rebut the presumption; (3) a sale to a political subdivision can reflect current market value and serve as a comparable sale for an assessment; and (4) single sale may in some instances provide evidence of market value.

Firethorn owns four tracts of land which compose a private golf course. At issue in this case is the value of the land underlying the golf course. In 1998, Firethorn developed and/or conveyed some of its real property. In 1999, the Lancaster County assessor notified Firethorn of tax increases due to an increase in the assessed valuation of the property. Under the 1999 assessment, the value of the property increased from \$3,504,476 to \$6,171,000. The increase was based primarily on an assigned land value of \$15,000 per acre. Firethorn appeared before a referee appointed by the Board, Wayne Kubert, who recommended no change to the valuation. Firethorn then appeared before the Board, which also accepted the valuation. Firethorn then appealed to the Commission.

In proceedings before the Commission, Allen, a certified real estate appraiser, testified for Firethorn. Allen testified that he appraised the golf course property using 31 comparable sales, with emphasis placed on 9 sales, but only 4 that were primarily relied on. Allen admitted that three of the four sales were to the City. Allen testified that he confirmed that the sales were arm's-length transactions by speaking with the City and that they were based on an appraisal of like-kind properties, with the purchase price negotiated from that price. Robert Stanley, the county appraiser who performed the assessment on the property, testified that when he made his assessment, he was unaware of the conservation and preservation easements on the property but that he was aware that the property was included in a community unit plan. The record shows that the Board was aware of the conservation and preservation easements. In assessing the property, Stanley looked at sales of 14 properties but placed emphasis on 5 sales ranging in price from \$10,000 to \$24,758 per acre. Stanley testified that he did not consider the sales Allen relied on comparable for several reasons, the main one being that in regards to the sales to the City, Stanley testified that even in the absence of an overt threat of condemnation, the ability of the City to take the property is always present, thus making it a distressed sale. In its findings and order, the Commission found that the community unit plan and the conservation easements did not affect the fair market value of the golf course property and that the highest and best use of the property was as a golf course. The Commission further found that three of the four most comparable sales used by Allen were ones in which the City was the buyer. Based on this, the Commission found that the record did not establish that any of the sales to the City reflected the current market value. In finding that the sales to the City were not comparable, the Commission relied largely on Stanley's testimony that the threat of condemnation is always present, along with the policy of the county assessor's office to always disqualify such sales. The Commission further concluded that one sale did not establish market value. Finally, the Commission concluded that the action of the Board was not unreasonable or arbitrary and affirmed their decision.

Firethorn first argued that the Commission acted unreasonably when it found that the Board gave due regard to the restricted use of the property. In particular, Firethorn argues that Stanley was unaware of the conservation easements on the property and that the Board disregarded the effect of the easements. Although Stanley was unaware of the conservation easements on the property, he was aware of the community unit plan. In upholding the assessed value, the Board was aware of both the community unit plan and the conservation easements. Both parties presented testimony that the highest and best use of the property was as a golf course and neither was able to locate sales of other properties subject to conservation easements when determining value based on comparable sales. The court found that it was reasonable for the Board and the Commission to determine that the limitations placed on the property by the conservation easements did not act to lower the value of the property since the limitations were generally similar to restrictions placed on the property through the community unit plan and to the use that has always been made of the property. Additionally, Firethorn did not present evidence to show how the conservation easements affected the value of the property. Without evidence of sales of property that are restricted in use, it is impossible to conclude that the restricted use of Firethorn's property actually lowered its value. In the absence of evidence through the use of comparable sales or another assessment method showing how the conservation easements affected the value of the property, and to what dollar amount, Firethorn failed to meet its burden to overcome the presumption that the Board acted reasonably.

Firethorn then argued that the Commission erred in failing to consider three sales of property to the city. In its order, the Commission stated that the sales were disregarded because sales to a political subdivision implicitly carry a threat of condemnation and because it was the policy of the county assessor's office to disqualify such sales. Although the Commission stated it found that the sales of property to the City did not reflect current market value, a reading of the order as a whole showed that this conclusion was based solely on the finding that sales to a political subdivision are always under a perceived threat of condemnation. The court determined that such a finding would act to always disqualify sales to a political subdivision, and nowhere do the statutes state that sales to a political subdivision are to be automatically excluded from consideration. Rather, this finding is contrary to the provisions of § 77-1371 which states that consideration shall be given to whether such a sale reflects market value. Thus the court held that a sale may not be disregarded solely because it is a sale to a political subdivision. As a result, the court reversed and remanded for the Commission to consider whether the sales to the City reflected market value.

Firethorn also argued that the Commission erred in disregarding evidence of a fourth sale consisting of land sold in a private sale for the purpose of being developed into a golf course. The Commission's order showed that consideration was not given to the fourth sale presented by Firethorn solely due to a finding that adjustments had not been made and because of a determination that a single sale cannot show market value. However, the record shows that Allen did make some adjustments to the property. Thus, the court concluded that the Commission's factual finding to the opposite was not supported by competent evidence. Additionally, the court held further that a single sale may in some instances provide evidence of market value, as a single sale should not be excluded merely because it is a single sale. Rather, the fact that evidence of other sales is not presented goes to the weight of the evidence. Because the Commission's order indicated that it gave no consideration to the sale due to an erroneous factual finding and because it was only one sale, the court concluded that the Commission erred in disregarding the fourth sale.

Finally, Firethorn argued that the Commission erred in utilizing information regarding Firethorn's purchase and sale of property to conclude that remaining portions of Firethorn's property, including the golf course, were worth \$16,814 per acre without taking into account substantial changes and differences in zoning among various portions of the property. In its brief, the Board agreed that the Commission erred, but contended that the error was harmless. The court agreed that the Commission erred in making that calculation and therefore the Commission could not rely on that calculation on remand. Thus the court reversed the decision of the Commission and remanded for further proceedings.

Garvey Elevators, Inc. v. Adams County Bd. of Equalization, 261 Neb. 130, 621 N.W.2d 518 (2001).

Taxpayer protested assessment valuation of two parcels of commercial property. County board of equalization reduced value of one parcel, but not the other. Taxpayer appealed. The Tax Equalization and Review Commission (the Commission) affirmed the board's decision, and taxpayer appealed. On its own motion to remove case from docket of the Court of Appeals, the Supreme Court held that: (1) county board of equalization was entitled to a presumption of

validity regarding valuation of taxpayer's property; (2) board was not required to produce evidence to show how it determined actual value of taxpayer's property; and (3) taxpayer failed to establish that valuations were grossly excessive and result of a systematic exercise of intentional will or failure of plain duty.

Garvey is in the grain storage and merchandising business. The property in question consists of two parcels of property located in Adams County, Nebraska. The first parcel, which we refer to as the "improved parcel," consists of approximately 22.09 acres. The improvements on this parcel have a total capacity of 8 million bushels, including a grain elevator terminal which has a concrete elevator with a total of 258 bins and 4,733,000 bushels of storage capacity. The second parcel of property, which we refer to as the "unimproved parcel," consists of approximately 83.82 acres of solely agricultural land. Garvey alleged in its protest to the Board that for the tax year 1998, the Adams County assessor proposed valuing the improved parcel in the amount of \$1,965,375. This amount included \$1,845,395 for the improvements on the property and \$119,980 for the land itself. However, the property record card for the improved parcel indicates that the assessor had proposed valuing the improved parcel in the amount of \$1,871,785, which included \$1,757,520 for the improvements on the property and \$114,265 for the land itself. As the Commission noted, nothing in the record explains the difference between the valuations. Garvey filed its protest regarding the improved parcel with the Board and requested that the valuation of the improved parcel be reduced to zero. The Board reduced the 1998 assessment value of the improved parcel to \$1 million. This amount included \$880,020 for the improvements on the property and \$119,980 for the land itself. Garvey appealed the Board's decision to the Commission.

The Commission noted that when a "Phase I Environmental Site Assessment" was conducted on the property in question, it was determined that the soil was contaminated with carbon tetrachloride in an area consisting of approximately 502,655 square feet extending down to the water table, and the total soil affected was estimated to be 55 million cubic feet. The Commission found that from the record before it, the actual or fair market value (including the effect on value of the contamination) as of the assessment date was \$1 million for the improved parcel. The Commission found that the property record card for the unimproved parcel demonstrated that the Board's final determination of value for the unimproved parcel was \$72,415 and that \$72,415 was the actual or fair market value as of the assessment date. The Commission also concluded that there was not sufficient evidence to establish that the decision of the Board was unreasonable or arbitrary and the Commission therefore affirmed the decision of the Board. Garvey appealed to the Nebraska Court of Appeals, and the Nebraska Supreme Court moved the case to their docket.

Garvey first argues that the Board's valuation is not entitled to any presumption because the Board failed to act upon its own information and failed to utilize any of the required statutory methods for determining the actual value of the property. Garvey claims that because the Board did not offer any evidence to support its valuation of the subject property, the Board was not entitled to a presumption of validity regarding the \$1 million valuation. § 77-1511 creates a presumption that a county board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action, and that presumption remains until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence adduced on appeal to the contrary. The court found that no record was made of the proceedings before the Board, and there was no

evidence to establish that a valid assessment of the property had not been made. Thus the court determined that Garvey did not establish that the Board was not entitled to a presumption that the Board faithfully performed its official duties in making the assessment and acted upon sufficient competent evidence to justify its action.

Garvey also argued that the Board was required to produce evidence to show how it determined the actual value of the property in accordance with § 77-112. Garvey claimed that because the Board did not contradict its evidence in support of a zero valuation, such evidence was therefore undisputed and the Commission's decision must be reversed. This argument also failed, as the court found that Garvey had not presented competent evidence to rebut the presumption that the Board had faithfully performed its duties. It was Garvey's duty to show by competent evidence that the action by the Board was unreasonable or arbitrary, and he did not do so. Until there has been competent evidence presented by the taxpayer, the Board does not have to present any evidence to support its valuation.

Finally, Garvey argued that even if the Board was entitled to the aforementioned presumption, it had successfully rebutted such presumption and that the Board was therefore required to put on evidence to support its valuation. The unreasonableness of the valuation must be established by clear and convincing evidence that such valuation when compared with valuations placed on other similar property is grossly excessive and is the result of a systematic exercise of intentional will or failure of plain duty and not mere errors of judgment. Unless such unreasonableness is shown, the Commission must affirm the action taken by the Board. Garvey failed to establish by clear and convincing evidence that the valuations placed upon its property when compared to valuations placed on other similar property were grossly excessive and the result of a systematic exercise of intentional will or failure of plain duty, and not mere errors of judgment. Thus the Commission's determinations that Garvey failed to provide credible evidence that the Board's actions were unreasonable or arbitrary and that Garvey did not rebut the presumption that the Board faithfully performed its duties and acted upon sufficient competent evidence were not clearly wrong. Therefore the court concluded that the Commission did not act arbitrarily, capriciously, or unreasonably in affirming the decision of the Board, and affirmed the decision of the Commission.

***Bethesda Foundation v. Buffalo County Bd. of Equalization*, 263 Neb. 454, 640 N.W.2d 398 (2002).**

Charitable organization that owned and operated assisted living facility requested property tax exemption, which the county board of equalization denied. Charitable organization appealed and the Tax Equalization and Review Commission (the Commission) affirmed the board's denial. Charitable organization appealed. The Nebraska Supreme Court held that primary or dominant use of assisted living facility was for charitable purposes.

The Bethesda Foundation (Bethesda) requested a property tax exemption for the 2000 tax year. Bethesda sought the exemption under Neb.Rev.Stat. § 77-202(1)(c) (Cum.Supp.1998) for an assisted living facility (Cambridge Court) which Bethesda asserted was property owned by a charitable organization and used for a charitable purpose. The Buffalo County Board of Equalization (Board) denied the application, and Bethesda appealed to the Commission, which affirmed the Board's denial, as the decision to deny the application for an exemption was not unreasonable or arbitrary. Bethesda then appealed to the Nebraska Court of Appeals. The

appeal was moved to Nebraska Supreme court's docket pursuant to its authority to regulate the caseloads of its court and the Court of Appeals.

The court considered only the issue of whether the primary use of the assisted living facility was for charitable purposes. The Commission found that Cambridge Court was not used exclusively for charitable purposes, in part, because Medicaid waiver program residents make up only 17 percent of the residents, that the services provided by the facility did not have any “exclusively” or “predominantly” charitable character and that Cambridge Court was not used exclusively or predominantly for a charitable purpose. Bethesda argued that assisted living facilities currently provide services equivalent to those provided by nursing homes in the past and that nursing homes have been granted property tax exemptions.

The court found that the residents of Cambridge Court were admitted without regard to race, color, or national origin and without regard to the ability of the residents to pay. The criterion for admission to the facility was the need for care. No resident had ever been discharged for failure to pay, nor has Bethesda ever filed a suit to collect delinquent accounts. Cambridge Court was a health care facility and had secured the required state license to function as an assisted living facility and all residents were permitted to remain in the facility regardless of their ability to pay for services provided. For these reasons, the court determined that the Commission erred in finding that the assisted living facility was not used for charitable purposes. A decision is arbitrary when it is made in disregard of facts or circumstances and without some basis which would lead a reasonable person to the same conclusion. The court found the Commission's decision to be arbitrary, because the evidence clearly established that the predominant use of the property was for a charitable purpose. Therefore, the court reversed the Commission's order and remanded the case to the Commission with directions to instruct the Board to grant the exemption.

***Green v. Lore*, 263 Neb. 496, 640 N.W.2d 673 (2002).**

Taxpayers filed action seeking writ of mandamus to compel county assessor to implement resolution passed by county board of equalization adjusting subclass of property. The District Court of Box Butte County denied mandamus. Taxpayers appealed. The Nebraska Supreme Court, held that issue did not inherently evade appellate review and thus court would not apply public interest exception to review case, which had become moot because tax year at issue had already passed.

For the 2000 tax year, real property in Box Butte County was assessed by using a sales comparison approach and the establishment of market areas, which was an appraisal technique in which the appraising officer determined market value based on the location of real property within the county. In July of 2000, the Board passed resolution No.2000-19, finding that the market areas used for assessing property for subclasses of agricultural land involved the drawing of arbitrary lines. As a result, the Board ordered that assessed values for all sub-classifications of agricultural land in the county be equalized using the lowest value of any subclass of agricultural land for each market area. The Box Butte County assessor refused to implement the Board's resolution and on August 3, 2000, filed an appeal of the resolution to the Commission. While Lore's appeal was pending, on August 25, the appellants (Leonard Green, Kent Green, and Edna Fisher) filed a petition seeking mandamus to compel Lore to implement the resolution. The record shows that Leonard Green also filed a protest with the Board concerning the valuation of a portion, but not all, of his property and that he was granted relief. The record shows that the

other appellants did not file protests. The district court concluded that Lore did not have a clear duty to implement the Board's resolution and denied mandamus.

Because the tax year at issue had already passed, the court first addressed whether the appeal was moot. At oral argument, the appellants conceded that the case is moot but argued that the court should be heard regardless under the "public interest exception." The court had previously held that that an application of the public interest exception is inappropriate when the issue presented on appeal does not inherently evade appellate review. The court determined that the issue of whether Lore was required to implement the resolution of the county board did not inherently evade appellate review. Lore had filed an appeal of the Board's resolution to the Commission, and that appeal was still pending. Furthermore, a taxpayer concerned about an overvaluation of his or her property had the opportunity to file a protest with the Board. The action of the Board upon the protest could be appealed to the Commission, which in turn could be appealed to the Nebraska Court of Appeals. Leonard Green had filed a protest and was granted relief. Because the issue presented on appeal did not inherently evade appellate review, the court did not apply the public interest exception to this case. Therefore the court did not reach the merits of the appeal and dismissed.

KLH Retirement Planning, Ltd. V. Okwumuo, 263 Neb. 760, 642 N.W.2d 801 (2002).

Petition was filed seeking order confirming a judicial sale under a decree foreclosing a real estate mortgage. The District Court of Lancaster County entered an order confirming the sale. Mortgagors and inferior lien-holder appealed. The Nebraska Supreme Court held that: (1) district court clerk's failure to include a signed copy of order of sale in the court file did not warrant setting aside sale, but (2) court erred in confirming sale when mortgagee did not comply with statutory requirements for service by publication.

After taking assignment of a tax certificate, and establishing the right as first lien-holder, between KLH asked the court four times between 1999 and 2000 to issue an order of sale for the property, but none of the published sales ever took place. On August 10, 2000, KLH filed a notice that its tax sale certificate had been redeemed in full and that it was releasing its interest in the property. On August 11, Cornhusker Bank (who had second priority) requested an order of sale, but the record contains only an unsigned, proposed order. On September 13, Cornhusker Bank filed a proof of service that it had sent a copy of the notification to the attorneys of the remaining parties. The notification, stating that the sale would take place on September 19, was first published in The Daily Reporter on August 25. The master commissioner's return to order of sale indicates that he received the order on August 16, 2000, and caused notification to be published in The Daily Reporter for 4 consecutive weeks, beginning August 25. He then sold the property through public auction on September 19 to "Hot to Trot Specialty Foods, Inc.," for \$39,000. On October 2, 2000, F & F Oil (who had a third priority through liens) filed a motion to set aside the sale because, among other reasons: (1) Cornhusker Bank had not complied with § 25-520.01 and (2) the amount of the sale price, \$39,000, was inadequate when the property had a value of over \$100,000. Vincent and Sabrina (the original owners of the property) also filed a motion to set aside the sale. In November 2000, the court entered an order confirming the sale. The court found that the sale was made in conformity with the law in all respects and that the property sold for fair value under the circumstances and conditions of the sale. The appellants (Vincent Okwumuo, Sabrina Okwumuo, and F & F Oil Co., Inc.) then filed this appeal.

The appellants argued that the master commissioner was without authority to sell the property because the district court clerk did not issue an order of sale as required under Neb. Rev. Stat. § 25-1501 (Reissue 1995). Cornhusker Bank argued that the clerk's failure to include a signed copy of the order in the court file is an insufficient reason to set aside the sale. The court agreed with Cornhusker Bank. In the absence of evidence to the contrary, it may be presumed that public officers faithfully performed their official duties and that absent evidence showing misconduct or disregard of law, the regularity of official acts is presumed. Although the record contained only an unsigned, proposed order, the presumption of regularity was not overcome.

The appellants also argued that the notice they received did not comply with § 25-520.01 or the requirements of due process. Neither F & F Oil nor Vincent and Sabrina raised a due process objection in their motions to set aside the sale or in their arguments to the court at the confirmation hearing. Thus, the court only considered their argument that the notice of sale did not comply with § 25-520.01. Section 25-520.01 provides: In any action or proceeding of any kind or nature ... where a notice by publication is given as authorized by law, a party instituting or maintaining the action or proceeding with respect to notice or his attorney shall within five days after the first publication of notice send by United States mail a copy of such published notice to each and every party appearing to have a direct legal interest in such action or proceeding whose name and post office address are known to him. Proof by affidavit of the mailing of such notice shall be made by the party or his attorney and shall be filed with the officer with whom filings are required to be made in such action or proceeding within ten days after mailing of such notice.

Cornhusker Bank claimed that it substantially complied with § 25-520.01 by serving notice of publication on the attorneys of record for the appellants as provided for under Neb.Rev.Stat. § 25-534 (Reissue 1995). That section allows for service or notice of any document other than a summons to be given to a party's attorney of record unless the court orders otherwise. Even if § 25-534 modifies the requirement of § 25-520.01 to mail notice to the parties, that would not overcome Cornhusker Bank's failure to mail the notice within 5 days of the first publication. Cornhusker Bank cannot, and did not, claim that it substantially complied with the 5 day notice requirement when it sent notice of publication to the parties' attorneys 19 days after the first publication. Section 25-1531 requires a court to carefully examine the proceedings and "be satisfied that the sale has in all respects been made in conformity to the provisions of this chapter" before confirming a mortgage foreclosure sale. The court therefore determined that the district court abused its discretion in confirming this sale when the facts showed that Cornhusker Bank did not comply with the requirements of § 25-520.01, and thus reversed the decision of the lower court.

Marshall v. Dawes County Bd. of Equalization, 265 Neb. 33, 654 N.W. 2d 184 (2002).

Taxpayers brought property valuation protests to county board of equalization, which denied the protests, and taxpayers appealed. The Tax Equalization and Review Commission (The Commission) found that procedure utilized by board in addressing protests was arbitrary and unreasonable, but affirmed the board's denial of the protests. The taxpayers appealed, and the board cross-appealed. After granting taxpayers' petition to bypass the Court of Appeals, the Nebraska Supreme Court, 259 Neb. 954, 613 N.W.2d 810, reversed and remanded. On remand,

the Commission reversed board's determinations and ordered that valuations of subject properties were to be reduced to amounts requested by taxpayers, but denied taxpayers' further requests for order adjusting values of all agricultural land in county. The taxpayers appealed. The Nebraska Supreme Court held that: (1) The Commission should not have been made a party to appeal, and (2) the Commission did not err in failing to issue additional orders beyond individual relief requested by taxpayers.

The taxpayers appealed an order of the Commission reversing determinations made by the Dawes County Board of Equalization. Marshall and Bartlett and other parties had previously appealed an earlier Commission decision in which the Commission had affirmed determinations by the board. *Bartlett v. Dawes Cty. Bd. of Equal.*, 259 Neb. 954, 613 N.W.2d 810 (2000) (*Bartlett I*). In *Bartlett I*, the Supreme Court reversed the Commission's decision and remanded the case to the Commission with orders to remand the taxpayers' consolidated protests of 1998 agricultural real property valuations to the board for further proceedings. On remand, the board again denied the taxpayers' protests with respect to certain properties, and the taxpayers appealed to the Commission. The appeals were consolidated, and the Commission reversed the board's decisions and ordered that the valuations of the subject properties be reduced to the amounts requested by the taxpayers. The valuation of Bartlett's property was reduced from \$73,520 to \$38,350. The valuation of Marshall's property was reduced from \$59,430 to \$28,970. Notwithstanding the fact that the taxpayers received the reduction in valuations they initially sought in their valuation protests, the taxpayers nevertheless appealed the Commission's order on the basis that the Commission did not further order adjustment and equalization of 1998 valuations for all agricultural real property throughout Dawes County or order the board to do so. The Commission asserted that it should not have been named a party in the appeal.

The Commission asserted that it should not have been made a party to the present appeal and that it should therefore be dismissed from this appeal because § 77-5019(2)(a) provides that the Commission “shall only be made a party of record if the action complained of is an order issued by the Commission pursuant to section 77-1504.01 or 77-5023,” and the Commission asserted that the order appealed from was issued pursuant to Neb.Rev.Stat. § 77-5018 (Cum.Supp.2002), not § 77-1504.01 or § 77-5023. The taxpayers argued that the present appeal was the continuation of the dispute that was previously before this court in *Bartlett I* in which the Commission was named as a party. The taxpayers argued that the Commission should continue to be a party until the issues raised in *Bartlett I* were resolved in the present appeal. The court found that the determining factor of whether the Commission was a party to this appeal was whether under § 77-5019(2)(a) “the action complained of is an order issued by [the Commission] pursuant to § 77-1504.01 or § 77-5023.” The court concluded that “the action complained of” in this appeal is the December 21, 2001, order of the Commission and that such order was an order issued pursuant to § 77-5018 relating to appeals from decisions of a county board of equalization and not an order pursuant to § 77-1504.01 or § 77-5023. The court found that the plain language in § 77-5019(2)(a) referring to “the action complained of” refers to the particular Commission order being appealed and does not refer to a previous order of the Commission which might be relevant to issues in the current appeal. Therefore, the Commission was dismissed as a party to this appeal.

The taxpayers asserted that the Commission failed to give full and proper relief because, although the taxpayers were awarded the requested reductions in the 1998 valuations of their individual properties, the Commission did not take action or order the board to take action to

equalize 1998 valuations on all agricultural land throughout Dawes County. The court concluded that the Commission did not err in refusing to order countywide adjustments because the relief afforded the taxpayers was adequate and the additional equalization relief the taxpayers were seeking was not required within the context of the present proceedings, which were undertaken as individual property valuation protests. The protests initiated by the taxpayers in 1998 were the “exclusive remedy for relief from overvaluation” as complained of with respect to the specific pieces of property identified in the property valuation protests. The court found that the scope of the initial proceedings brought on by the filing of the property valuation protests was limited to a consideration of the valuation of the specific properties identified in the taxpayers' protests. The additional relief of an order to equalize 1998 valuations on all agricultural land throughout Dawes County was not necessary to resolve the case. Therefore the court affirmed the Commission’s order.

***Ottaco, Inc. v. McHugh*, 263 Neb. 489, 640 N.W.2d 662 (2002).**

Purchaser of tax sale certificate filed action to quiet title against city and owners of record. The District Court of Hall County determined that tax deed was invalid and dismissed purchaser's petition. The purchaser appealed. The Nebraska Supreme Court held that tax deed was not invalid on the ground that county treasurer failed to execute and deliver deed within three-year, six-month time limitation period.

Following a private tax sale by the Hall County treasurer for delinquent taxes, the purchaser assigned the tax sale certificate to Ottaco, Inc. Although Ottaco timely requested the tax deed, it was not issued by the county treasurer within the 3-year, 6-month time limitation under Neb.Rev.Stat. § 77-1837 (Reissue 1996). When Ottaco filed a petition to quiet the title of the property, the district court found that there had not been strict compliance with the statute, as Ottaco did not have the tax deed within the time period set forth by the statute. The court determined that the tax deed was invalid and dismissed Ottaco’s petition, and Ottaco appealed.

The Nebraska Supreme Court determined that the sole issue in the case was whether a tax deed is invalid if the county treasurer fails to execute and deliver the deed within the 3-year, 6-month time limitation specified under § 77-1837. The court determined that once a purchaser of a tax sale certificate has shown proof of notice as provided for under chapter 77, article 18, of the Nebraska Revised Statutes and has requested a deed within 6 months after the expiration of 3 years from the date of sale, the purchaser has done all that is required under article 18 to acquire a treasurer's tax deed. The court noted it would be unreasonable to conclude that an otherwise blameless purchaser should have his or her deed declared invalid because the county treasurer failed to execute and deliver the deed within the request period. The court further determined that the county treasurer's authority to execute and deliver the deed was not limited to the time limitation provided for in § 77-1837, as there was evidence that the Legislature intended for the 6-month time limitation to apply to the purchaser, not to the country treasurer. Thus the court reversed the decision of the district court.

***Shaul v. Lang*, 263 Neb. 499, 640 N.W.2d 668 (2002).**

After the property tax administrator (PTA) denied county assessor's protests of PTA's inclusion in sales file of certain sales transactions of agricultural property, assessor appealed to the Tax Equalization and Review Commission (the Commission), which reversed the PTA. The PTA filed petition for review. After moving the case to its docket, the Nebraska Supreme Court

held that the Commission did not have the statutory authority to adjust the selling price of property before inclusion in the sales file, even if transactions were atypical of the county because of large number of acres purchased.

The Department of Property Assessment and Taxation maintains the qualified agricultural sales roster (hereinafter the sales file), a database of all arm's-length sales of real property in Nebraska transacted over a 3-year period. In 2000, Janet L. Shaul, Garden County assessor, filed protests with the PTA over the PTA's inclusion in the sales file of 19 sales transactions of agricultural real property. Shaul requested that several of the transactions be excluded entirely from the sales file because they were not arm's-length transactions. Shaul requested that the sales prices of several other transactions be reduced by \$25 per acre because (1) the buyer owned adjoining property and therefore paid more than market value for the land or (2) the significant number of acres purchased rendered these transactions atypical of Garden County. The PTA denied all of Shaul's protests, who appealed the PTA's decisions to the Commission. The Commission reversed the PTA and held that the sales prices of six of the parcels of agricultural real property should be reduced by \$25 per acre before inclusion in the sales file. The Commission found that professionally accepted mass appraisal methodologies allowed for an adjustment in the sale price to account for the acquisition of adjoining land. Nebraska state law also recognizes this principle, and specifically expands the principle to allow for the acquisition of land located within one-mile of the buyer's existing property. Neb.Rev.Stat. § 77-1371 (Cum.Supp. 2000). The PTA filed a petition for review, and the Supreme Court moved the case to its docket pursuant to the authority to regulate the caseloads of the Court of Appeals.

The PTA argued that adjusting the selling price of property before inclusion in the sales file was contrary to the statutes governing the sales file, none of which allow for such an adjustment. The court noted that the real property transactions eligible for inclusion in the sales file are those transactions for which the statement required by Neb.Rev.Stat. § 76-214 (Cum.Supp.2000) is filed. This statement is filed with the register of deeds, and its contents are prescribed by the PTA. Among the information required to be in the statement is the total consideration paid for the property. § 76-214(1). It is thus apparent that for those transactions initially eligible for inclusion in the sales file, the price to be included in the sales file is the total consideration paid as listed on the statement described in § 76-214(1).

Shaul argued that the six transactions at issue here are “atypical” of Garden County because of the large number of acres purchased. The court found that while that may have been true, whether a transaction is made at arm's length is not dependent upon the number of acres purchased. However, both parties conceded that the transactions were arm's-length transactions. Shaul also argued that the Commission correctly found statutory authority for ordering an adjustment to the sales prices in Neb.Rev.Stat. § 77-1371 (Cum.Supp.2000) which provided that “when using comparable sales in any method of determining actual value provided in section 77-112, the following guidelines shall be considered in determining what constitutes a comparable sale:(3) For sales of agricultural land or horticultural land as defined in section 77-1359, whether a premium was paid to acquire nearby property. Land within one mile of currently owned property shall be considered nearby property.”

The court determined that the Commission's determination did not conform to the law because § 77-1371(3) pertained to determining actual value for purposes of taxation when a comparable sales methodology is used. Section 77-1371(3) did not pertain to a compilation of a

sales file under § 77-1372. Thus the court found that the decision of the Commission to adjust the value of the land by lowering the same \$25 per acre did not conform to the law, and therefore reversed the decision of the Commission and remanded the case to the Commission with directions to reinstate the decision of the PTA to include the sales price of the real estate in question in the sales file, without the adjustments made by Shaul.

City of Alliance v. Box Butte County Bd. of Equalization, 265 Neb. 262, 656 N.W.2d 439 (2003).

The County Board of Equalization determined that several city-owned properties were not being used for public purpose, and denied tax-exempt status for the properties. The city appealed. The Tax Equalization and Review Commission (the Commission) affirmed the Board's decisions. The city appealed. The Nebraska Supreme Court held that as a matter of first impression, the properties were acquired and held by the city for resale in conjunction with the city's municipal duties and responsibilities, and were therefore exempt from taxation as property used by governmental subdivision for public purposes.

Alliance had created several improvement districts in connection with the anticipated development of five residential subdivisions within the city. The city, by ordinance, levied special assessments against various residential lots which were specially benefited by the improvements, including the lots which were the subject of this action. Because property owners did not pay the special assessments, the city made expenditures from its general fund to service the bonded indebtedness. As a result of the special assessment defaults, the city acquired title to various properties by foreclosure or conveyance in lieu of foreclosure. The city offered these properties for sale to the public at prices which did not exceed the amount of delinquent special assessments and interest for each property. The city had not leased or rented any of the properties at issue and did not realize any revenue from them. In 2001, the Board determined that the subject properties were taxable because they were not being used for a public purpose or being developed for a public use. Thereafter, the city filed protests on each of the subject properties, which the Board denied. The city filed appeals with the Commission. The city and the Board stipulated that the only issue before the Commission was whether the properties were being utilized for a public purpose. The Commission entered an order in which it affirmed the Board's decisions. The city filed appealed.

The court determined the sole issue as being, when real property is acquired by a city through enforcement of special assessment liens and is offered for sale to the public at a price which does not exceed the delinquent special assessments and accrued interest, is the real property being used “for a public purpose” and therefore exempt from real estate taxation? The court determined that based on the Nebraska State Constitution, Neb.Rev.Stat. § 77-202(1)(a), and the Department of Property Assessment and Taxation, that in order to qualify for the public purpose exemption, the properties at issue must either be used to carry out the city's “duties or responsibilities conferred by law,” or to provide “public services” in order to be tax-exempt.

The court found that the record reflected that the city had acquired and offered the subject properties for sale for the sole purpose of realizing the value of the city's special assessment liens so as to reimburse its general fund for payments on its bonded indebtedness. As such, the city was prudently exercising its legal authority to defray the cost of public improvements from a revenue source legally designated for that purpose. Based on those facts, the court concluded that the city acquired and was holding the subject properties for resale in conjunction with its

municipal duties and responsibilities. The plain language of § 77-202(1)(a)(ii) provides that property which is used “to carry out the duties and responsibilities conferred by law” is held for a public purpose and is not subject to taxation. The court thus reversed the Commission’s order and remanded the case to the Commission with directions to instruct the Board to grant the requested exemptions on each of the subject properties.

City of York v. York County Bd. of Equalization, 266 Neb. 297, 664 N.W.2d 445 (2003).

City appealed decision of the county board of equalization that city property leased to a private party for agricultural use was not exempt from taxation. The Tax Equalization and Review Commission (The Commission) affirmed board's decision, and city appealed. The Nebraska Supreme Court held that city's leasing of land for agricultural use was incidental to its purpose as a buffer zone for airport and, thus, the leased property was exempt from taxation.

The City was the owner of property located in York County, Nebraska, that was adjacent to the York Municipal Airport. The tracts comprise approximately 423.2 acres. The airport property was improved with a paved runway, as well as a number of hangars and other buildings, taxiways, and roads. These improvements are surrounded by the unimproved tracts at issue in this case. Pursuant to FAA regulations regarding erosion control, the City had two options concerning these unimproved tracts: It could seed and otherwise maintain the unimproved land at its own expense, or it could lease the property for restricted agricultural use. The City elected to lease approximately 245 acres to a private party for agricultural use. Only these 245 acres were determined to be taxable by the Board, and only that property was at issue in this appeal.

The York County assessor notified the City of her determination that the leased property was not being used or developed for a public purpose. The county assessor testified that she reviewed the lease and then sent a notice to the City stating that the property was income producing and therefore taxable because it was not being used for a public purpose. After the county assessor made her determination, she received a directive from the state Property Tax Administrator indicating that the areas within the buffer zone would not be subject to taxation. However, after the county assessor notified the City that the land at issue was taxable, the City filed a protest to the Board. The Board denied the protest, and the City appealed the denial to the Commission.

The City argued before the Commission that the primary purpose of the lease of the land surrounding the airport was to control erosion and wildlife, as recommended by the FAA. The City asserted that the agricultural use was incidental. The Commission found that the land at issue was leased to a private party for agricultural use and was in direct competition with all other land available for lease for agricultural use. The Commission stated that the City had failed to demonstrate that the agricultural use of the property by a private party was a qualifying “public purpose” under Neb.Rev.Stat. § 77-202(1)(a) (Cum.Supp.2000). The Commission therefore affirmed the decision of the Board denying the City's protest, and the City appealed.

The Nebraska Supreme Court dealt with the issue of whether the lease served a public purpose. § 77-202(1)(a), provides: that the following property shall be exempt from property taxes:

- (a) Property of the state and its governmental subdivisions to the extent used or being developed for use by the state or governmental subdivision for a public purpose. For purposes of this subdivision, public purpose means use of the property (i) to

provide public services with or without cost to the recipient, including the general operation of government, public education, public safety, transportation, public works, civil and criminal justice, public health and welfare.... Public purpose does not include leasing of property to a private party unless the lease of the property is at fair market value for a public purpose.

The leasing of property by a municipality to a private party is not exempt unless the lease is at fair market value for a public purpose. The primary or dominant use, and not an incidental use, is controlling in determining whether property is exempt from taxation. It was not disputed before the Commission that the lease was for fair market value. The property was leased for the purpose of maintaining the area surrounding the runways as a buffer zone as required by the FAA assurances, federal legislation, and state law. The lease ensured that the grounds would be properly maintained and that weeds would be controlled without the use of city labor or at the City's expense. The revenue generated from the rent was used to support the airport's operating expenses as required by the FAA and as provided by federal legislation. Therefore the Court concluded that the primary use of the land was as an airport buffer zone and that the agricultural use was incidental. The land was being leased for agricultural use, which was incidental to its purpose as a buffer zone for the airport. Thus the court concluded as a matter of law that the leased property was being used for a public purpose and was exempt from taxation. Therefore the court concluded that the Commission's decision did not conform to the law, and therefore, reversed the decision and remanded the case with directions that the Commission reverse the decision of the Board finding the property to be taxable.

City of York v. York County Bd. of Equalization, 266 Neb. 305, 664 N.W.2d 452 (2003).

The City appealed decision of county of board of equalization that land leased to a private party for agricultural use was not exempt from taxation. The Tax Equalization and Review Commission (the Commission) affirmed the board's decision, and city appealed. The Nebraska Supreme Court held that city's renting property for agricultural use was incidental to primary use as industrial park land and, as such, leased property was exempt from taxation as a community development project.

The property at issue is in the York Industrial Park, York County, Nebraska. The property, referred to as "the industrial park," included approximately 85.04 acres, of which 83.5 acres had been leased to a private party for agricultural use. The 83.5 acres which have been leased were determined to be taxable and were the subject of the appeal. The industrial park had been developed by the City as part of its economic development plan. The primary purpose of creating the industrial park was to allow the City to offer improved industrial land for sale, which would attract industry to the community. The property at issue was leased for \$100 per acre, which the city administrator stated represented the fair market value. The lease was subject to the sale of the property for industrial use. The York County assessor reviewed the lease and determined that because the property was income producing and not used for a public purpose, it was not exempt from taxation. She notified the City, which filed a protest with the Board. The Board denied the exemption, and the City appealed to the Commission. The Commission found that the primary or predominant use of the industrial park land was for agricultural purposes and that the property was not being used or developed for use as a development project. It concluded

that the City had failed to establish that leasing of the industrial park land was a qualifying use under the community development definition found in state regulations. The Commission also found that the City had failed to establish the imminent sale of any of the lots or to demonstrate that the use of the leased land qualified as a public purpose. For these reasons, the Commission affirmed the decision of the Board denying the exemption. The City appealed.

The issue before the Nebraska Supreme Court was whether the 83.5 acres of leased property in the City's industrial park was being used for a public purpose. One of the uses which qualifies as a public purpose under § 77-202(1)(a) is "community development." The term is defined in state regulations as "public property for use in a development project." See 350 Neb. Admin. Code, ch. 15, § 002.13 (2001). The land at issue was authorized for development as an industrial park when the city council adopted a comprehensive plan in 1996. Six lots were sold between 1994 and 2001. Prior to the hearing before the Commission, the City had transferred ownership of an additional four lots. The zoning of some of the lots had been changed to commercial. Contrary to the findings of the Commission, a number of the lots in the industrial park have been sold. The industrial park was created by the city council acting as a community redevelopment authority for the purpose of community development. The court concluded that the primary use the industrial park land serves was for a public purpose and that the agricultural use was incidental. The leased property was exempt as a community development project under § 77-202(1)(a). The unsold lots had been leased for a 3-year term for agricultural use. This use of the property was incidental to the primary purpose of being an industrial park for community development. The primary use of the property was for a public purpose. The court found that tenting the property for \$100 per acre cannot be considered anything but an incidental use when one compares the rental income to the \$13,500 per acre spent by the City to develop the area. Therefore, the court found that the Commission's decision did not conform to the law, and thus, reversed the decision remanded the case with directions that the Commission reverse the decision of the Board finding the property to be taxable.

City of York v. York County Bd. of Equalization, 266 Neb. 311, 664 N.W.2d 456 (2003).

The City of York owned land which was adjacent to the York Municipal Airport and was used as a solid waste landfill. The York County Board of Equalization (Board) upheld the county assessor's determination that a 44-acre parcel of the land was not being used for a public purpose and was taxable because the parcel was leased to a private party for agricultural use. The Tax Equalization and Review Commission (the Commission) affirmed the Board's decision, and the City appealed.

The landfill was owned and operated by the York Area Solid Waste Agency (Agency). The landfill received solid waste, disposed of it in accordance with state and federal regulations, conducted recycling activities, and did ground water monitoring. The parcel at issue was acquired via eminent domain after it was discovered that the landfill's monitoring wells needed to be extended. During the eminent domain proceedings, the Agency was required to establish that the land was being taken for a public purpose. At the time of the hearing before the Commission, the leased property was being maintained for future expansion of the recycling facility and for use as cover for solid waste cells. Three of the landfill's monitoring wells were located on this property, and were approximately 6 feet by 6 feet each. Each of these wells was located along the property line and minimally disturbed use of the leased property. The remainder of the property was used for agricultural production and other investigative activities,

such as geo-probing and soil borings for ground water monitoring. The parcel of land held to be taxable was leased to a private party, and it included 44 acres of tillable irrigated cropland. The land rented for \$135 per acre, for a total annual rent of \$5,940. The rental income was placed in the landfill fund and used to fund capital and operating expenses.

After the York County assessor reviewed the lease, she determined that the 44-acre parcel was income producing and was therefore not used for a public purpose. She notified the City that the property was taxable. The City filed a protest with the Board, which also found the property to be taxable. The City appealed to the Commission, alleging that the primary use of the land was for ground water monitoring required by DEQ and that the agricultural use was an incidental use. The Commission found that the City failed to demonstrate that the lease was for a public purpose, and thus affirmed the decision of the Board denying the protest.

The Agency, which operated the landfill, was created in 1993 by the City and York County. In March 2000, the City leased 44 acres of the landfill to a private party for agricultural use at \$135 per acre. The parties agreed that the lease represented the fair market value of the property. The issue was whether the parcel was used for a public purpose. The district court ultimately concluded that the Agency had authority pursuant to the Act to acquire the land by eminent domain for the purpose of conducting the investigation of ground water contamination. Therefore, it was clear that the property at issue was acquired for a public purpose. However, the court then focused on whether the subsequent leasing of the property for agricultural purposes subjects the property to taxation.

The Act authorizes a county, municipality, or agency to purchase, develop, maintain, and improve solid waste facilities. Landfills operated by local government entities must have long-range plans to ensure sufficient capacity to meet future waste disposal requirements because state law requires landfills to have adequate capacity for solid waste disposal until 2014. The court concluded that renting the property for \$135 per acre for agricultural purposes was incidental to the land's primary purpose as a landfill, the purpose for which the land was condemned. The 44 acres of land at issue was acquired for use as a landfill at a total cost of \$216,191. The fact that the Agency derives income from the leased property does not change its primary purpose. Therefore, the Commission erred in finding that the leased property was not being used for a public purpose and in determining that it is taxable, as the primary purpose of the property was for the use as a solid waste landfill, and the lease for the agricultural use was incidental to that purpose. Thus the court reversed the Commission's decision, and remanded the case with directions that the Commission reverse the decision of the board finding the property to be taxable.

River City Life Center Ltd. Partnership v. Douglas County Bd. of Equalization, 265 Neb. 723, 658 N.W.2d 717 (2003).

The appellants, River City Life Center Limited Partnership and Prairie Life Center of Q Street, Ltd., sought further review of the summary dismissal by the Nebraska Court of Appeals. The sole issue on appeal was whether the district court and Court of Appeals erred in dismissing the appeal for lack of jurisdiction for the reason that the appellants' praecipe was not filed with the clerk of the district court, as required by Neb.Rev.Stat. § 25-1905 (Reissue 1995), within the time period prescribed by Neb.Rev.Stat. § 25-1931 (Cum.Supp.2002). The Nebraska Supreme Court affirmed this decision.

In 2002, the Douglas County Board of Equalization (Board) granted continued approval of a partial property tax exemption to Community Health Vision, Inc., (now known as Alegent Health), doing business as Lakeside Wellness Center (Lakeside). On April 23, River City Life filed a petition in error in the district court. River City Life alleged that the exemption from property tax granted by the Board to Lakeside was contrary to applicable statutes when the property considered as a whole is not used exclusively for exempt purposes. On the same date, River City Life filed a praecipe with the Douglas County clerk, the custodian of the Board's records. On May 28, River City Life filed a certificate of transcript with the district court, which was beyond the requirement of § 25-1931 that the certificate be filed 30 days after the rendition of judgment. In their respective answers, the Board and Lakeside, alleged that the district court lacked jurisdiction over the proceeding in error because River City failed to file a transcript of the proceedings or praecipe with the district court, as required by § 25-1905, within the time period prescribed by § 25-1931. Both the Board and Lakeside also filed separate motions for summary judgment.

In an order dated August 13, 2002, the district court sustained the Board and Lakesides' motions for summary judgment. The court held that there were no issues of material fact and that the Board and Lakeside were entitled to judgment as a matter of law. The court construed § 25-1905 to require that for jurisdiction to attach, a praecipe must be filed with the district court requested to review such judgment, and not with the tribunal, board, or officer charged with preparing the transcript. Therefore, the district court dismissed River City Life's petition in error for lack of jurisdiction because the praecipe was not timely filed with the clerk of the district court. The River City Life then filed an appeal, which was summarily dismissed on October 15, 2002, by the Court of Appeals on the same grounds as that of the district court. The Nebraska Supreme Court granted River City Lifes' petition for further review.

The sole issue on appeal was whether § 25-1905 required a praecipe for transcript to be filed specifically with the court requested to review a judgment in order to confer jurisdiction on such court. The requirement that a plaintiff in error shall file with his petition a transcript of the proceedings is mandatory and jurisdictional. In the absence of a transcript as the statute requires, the court in which a petition in error is filed has no jurisdiction to proceed further than to dismiss the petition in error. It is presumed that when a statute has been construed by the Supreme Court and the same statute is substantially reenacted, the Legislature gave to the language the significance previously accorded to it by the Supreme Court. *Brown v. Kindred*, 259 Neb. 95, 608 N.W.2d 577 (2000). Because the Legislature did not change the jurisdictional requirements, the court concluded the statute's plain language required that for jurisdiction to attach, the transcript of the proceedings or praecipe had to be filed specifically with the petition in error in the court requested to review such judgment. The court's conclusion was consistent with the language of the statute and prior case law.

In this case, the River City Life timely filed the petition in error with the district court, but filed the praecipe with the county clerk. River City Life subsequently filed an untimely certificate of transcript with the district court. Because River City Life failed to timely file a transcript or praecipe with the petition in error in district court in accordance with § 25-1905, the court concluded the court lacked jurisdiction to hear the case. Therefore, the court affirmed the summary dismissal by the Court of Appeals.

Ottaco Acceptance, Inc. v. Huntzinger, 268 Neb. 258, 682 N.W.2d 232 (2004).

Ottaco Acceptance, holder of treasurer's tax deeds for three properties filed petition to quiet title to properties. The District Court of Custer County, denied petition, and deed holder appealed. The Nebraska Supreme Court held that: (1) the record owner of properties was precluded from questioning titles acquired by deed holder, and (2) the tenant in possession did not rebut presumption that it was properly served with notice that was prerequisite to delivery of treasurer's tax deed.

On July 24, 1996, tax sales certificates Nos. 307, 308, and 340 were sold by the Custer County treasurer on the real estate at issue in this case. The purchaser of the tax certificates later assigned them to Ottaco. The record owner of each of the three properties was Huntzinger. In April 1999, Ottaco sent notices to Huntzinger containing the information required by Neb.Rev.Stat. § 77-1831 (Reissue 2003). The notices were sent by certified mail to Huntzinger at "555 Russell Rd A-5 Westfield, MA 01086." The record contained signed certified mail receipts indicating that on May 18, 1999, "J Huntzinger" received the notices. Stamps on the notices indicated that they were received in Wheeling, Illinois. Huntzinger testified at trial that she never signed the certified mail receipts, never authorized anyone to sign on her behalf, and never received the notices sent by Ottaco. She testified that she lived at the Westfield, Massachusetts, address from September 1994 to September 1998, at which time she moved to Wheeling, Illinois. The Massachusetts address was the address on file with the Custer County treasurer. Huntzinger testified that she did not inform the Custer County treasurer of her change of address but did arrange with the post office to have all her mail forwarded to her in Wheeling. She further testified that she was present in Wheeling on May 18, 1999.

On January 12, 2000, Ottaco received treasurer's tax deeds for the three properties. Shortly thereafter, it initiated this action Ottaco's petition also alleged that Wiese Brothers, a partnership between Dean Wiese and Duane Wiese, may claim an interest in the properties as a tenant in possession. Wiese Brothers filed an answer admitting that it was a tenant in possession of the properties at issue, but denying that it received proper notice. Following a bench trial, the district court denied Ottaco's petition on January 30, 2003. The court found that neither Huntzinger nor the tenant in possession received notice as required by law; thus, the treasurer's tax deeds were unlawfully issued and conveyed no valid title to Ottaco. The court specifically said that "[Huntzinger's] testimony shows that she did not sign the mail receipts and that she was not living at the address shown on the receipts at the time alleged." Ottaco appealed, and the Nebraska Supreme Court moved the case to its docket.

The Nebraska Supreme Court found that Ottaco had requested and obtained treasurer's tax deeds under article 18. Ottaco argued that Huntzinger was precluded from contesting the title it acquired to the properties by virtue of those treasurer's tax deeds. It relied upon § 77-1844, which provided:

No person shall be permitted to question the title acquired by a treasurer's deed without first showing that he, or the person under whom he claims title, had title to the property at the time of the sale, or that the title was obtained from the United States or this state after the sale, and *that all taxes due upon the property had been paid by such person or the persons under whom he claims title as aforesaid.*

Ottaco specifically argued that Huntzinger failed to pay all taxes due upon the properties. The court found that Huntzinger did not “show” by the evidence that she had paid all taxes due on the properties. Trial in this case was held on October 30, 2002, and the district court entered judgment on January 30, 2003. The transcript includes a copy of a receipt from the Custer County treasurer indicating that “Jason White, Trustee for Janet M. Huntzinger Trust” paid \$45,050.01. The receipt itself is dated January 24, 2003. The copy of the receipt in the transcript was file stamped by the clerk of the district court as being received on January 30, 2003. However, the receipt was not offered and received into evidence in this case; it was merely included in the transcript. The court found that there had been no showing of compliance as this receipt was not offered into evidence, and thus Huntzinger was precluded from questioning the titles acquired by Ottaco.

Ottaco's petition was also challenged by Wiese Brothers. Wiese Brothers' answer asserted that at all relevant times, it was the tenant in possession of each of the properties at issue. It further asserted that it did not receive notice from Ottaco as required by law and that, therefore, Ottaco's treasurer's tax deeds were not valid. Prior to requesting a treasurer's tax deed, Ottaco was required to comply with the notice provisions of § 77-1831 and Neb.Rev.Stat. § 77-1832 (Reissue 1996). Section 77-1831 requires that a purchaser of a tax sale certificate serve or cause to be served notice at least 3 months before applying for the deed. The court noted that the burden of proving noncompliance with respect to the tenant in possession fell upon the Wiese Brothers in this case. The court had previously held that in suits relating to the rights of the purchaser, a county treasurer's tax deed was presumptive evidence that all things whatsoever required by law to make a good and valid tax sale and vest title in the purchaser were done. However, the presumption was not conclusive and could be rebutted, but the burden was on the party attacking the validity of such a deed to show by competent evidence some jurisdictional defect voiding the deed. However, the Wiese Brothers did not appear at trial. The *only* evidence received at trial that remotely deals with the tenant in possession is the following question by Huntzinger's attorney and her answer: “Q. Do you know whether or not your tenants on the property received notice? A. I have not heard from them that they received anything.” Thus the court found this evidence insufficient to rebut the presumption under §77-1842 that Wiese Brothers had received proper notice. The court reversed the district court’s judgment in favor in Huntzinger and remanded the case with directions to enter judgment quieting title to the properties in favor of Ottaco.

Destiny 98 TD v. Miodowski, 269 Neb. 427, 693 N.W.2d 278 (2005).

On March 1, 1999, Destiny 98 TD (Destiny 98) purchased Douglas County treasurer's certificate of tax sale No. 99-01220, representing a tax lien on Burlington Place Addition, in Douglas County, Nebraska. On September 11, 2002, Destiny 98 filed an amended petition to foreclose liens represented by various tax sale certificates. John J. Miodowski and “_____ Miodowski” were alleged to be the owners of the property and were named as defendants in the third cause of action, which pertained to the real property and tax sale certificate described above. On February 21, 2003, Destiny 98 filed a motion for judgment by default with respect to the third cause of action, alleging that the Miodowskis had been properly served with summons but had failed to respond with a timely responsive pleading. On March 7, the district court

entered a default judgment and decree ordering a sheriff's sale of the property. Notice of the sale was published in *The Daily Record*, a legal newspaper in Douglas County, on June 27 and July 4, 11, and 18, 2003. At the sheriff's sale held on July 29, Bel Fury Investments Group, L.L.C. (Bel Fury), purchased the property for \$6,360. On August 21, the district court confirmed the sale of the property and ordered that a sheriff's deed be delivered to Bel Fury. Subsequent to execution and delivery of a sheriff's deed dated September 3, 2003, Bel Fury filed a praecipe for writ of assistance.

Several days thereafter, Empire Title of Nebraska, Inc. (Empire Title), filed an ex parte application seeking to intervene in the proceeding and for other relief. In its application, Empire Title represented that it had served as trustee and closing agent in a refinancing of the Miodowski property in August 2003 and that it believed it had distributed funds to satisfy the tax liens represented by the tax sale certificates in foreclosure, but that through "error, omission or misunderstanding," this may not have occurred. The district court quashed the writ of assistance as it related to the property in question and scheduled an evidentiary hearing for October 1, 2003. On September 23, the Miodowskis filed an application to set aside the confirmation of the sale and the sheriff's deed based on Destiny 98's failure to provide them with a notice of homestead exemption pursuant to § 25-1531. Upon being granted leave to intervene during the hearing on October 1, Empire Title filed a motion to vacate confirmation of the sale on grounds that "the property was not sold in conformity to the provisions of Chapter 25 [of the Nebraska Revised Statutes] for fair value under the circumstances and conditions of the sale, and subsequent sale would realize a greater amount."

In an order entered on October 8, 2003, the district court ruled that § 25-1531 did not apply to proceedings to foreclose tax sale certificates pursuant to Neb.Rev.Stat. § 77-1902 (Reissue 2003) and denied the relief sought by the Miodowskis and Empire Title. However, after conducting a hearing on October 10, the court changed its ruling and concluded in an order entered on November 10 that § 25-1531 was applicable. The district court therefore vacated its prior order confirming the sale because the Miodowskis had not been given notice of the homestead exemption procedures in accordance with § 25-1531. In a separate order entered on November 26, the court denied Bel Fury's oral motion for attorney fees, stating that there was no statutory authority or recognized custom whereupon attorney fees would be allowable. Bel Fury then appealed, and the Nebraska Supreme Court moved the case to its docket pursuant to its authority to regulate the caseloads of the appellate courts of Nebraska.

The court looked at the narrow question of whether notice of the homestead exemption procedures was required. Bel Fury argued that because the tax foreclosure statutes codified at chapter 77 of the Nebraska Revised Statutes did not require notice of a homestead exemption, there was no such requirement in a proceeding to foreclose a tax sale certificate. On the other hand, the Miodowskis and Empire Title argue that because § 77-1902 directs that a tax sale certificate foreclosure is to be conducted "in the same manner and with like effect as in the foreclosure of a real estate mortgage," except where §§ 77-1903 to 77-1917 specifically provide otherwise, the homestead exemption notice requirement set forth in § 25-1531 is applicable.

The court found that a notice of homestead exemption rights is required prior to confirmation of sale only in those mortgage foreclosure proceedings where such rights exist. However, neither the Miodowskis nor Empire Title provided the court with any argument or authority supporting the existence of any homestead exemption right which would affect the confirmation of a sheriff's sale in a proceeding to foreclose the lien for taxes represented by a tax

sale certificate. Thus the court concluded that the tax lien was superior to any homestead interest which could be claimed by the Miodowskis, and therefore held that the provisions of § 25-1531 requiring notice of homestead exemption rights did not apply to foreclosure of a tax lien represented by a tax sale certificate. Therefore, the district court erred in vacating and setting aside its order confirming the sale entered on August 21, 2003.

Bel Fury also argued that the district court erred in determining that it was not entitled to recover its attorney fees incurred in this action. As a general rule, attorney fees and expenses may be recovered in a civil action only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees. Here, the district court found no statutory authority or uniform course of procedure which would permit an award of attorney fees. The court agreed, and concluded that this assignment of error was without merit. Therefore, the Nebraska Supreme Court affirmed only that part of the judgment of the district court denying Bel Fury's application for attorney fees. The Court reversed that part of the judgment which vacated the August 21, 2003, order confirming the sale based upon our determination that the district court erred in concluding that the Miodowskis had a legal right to notice of homestead exemption rights prior to confirmation. Accordingly, the cause was remanded to the district court with directions to reinstate the order confirming the sale and for such further proceedings consistent with this opinion as may be necessary to conclude the foreclosure.

INA Group, LLC v. Young, 271 Neb. 956, 716 N.W.2d 733 (2006).

Assignee of tax sale certificate, a private party, filed eight separate foreclosure complaints alleging that city's special assessment liens were inferior to assignee's tax liens. The District Court of Douglas County determined in five cases that city's special assessment liens were junior to assignee's interests, and determined in three cases that city's special assessment liens were perpetual and would remain attached to the properties. City appealed in five cases, assignee appealed in three cases, and appeals were consolidated. The Nebraska Supreme Court held that the city's special assessment liens were secondary to the general lien represented by the tax certificate and were extinguished by foreclosure and sheriff's sale, regardless of whether the proceeds of the sale were sufficient to pay the special assessments.

INA filed various complaints against various property owners. In each complaint, INA alleged that it was the assignee of a tax certificate for a parcel of real property in the City. Each of the complaints alleged that there was a sum of money due to INA on the tax liens represented by the certificates, that INA had spent \$100 on a title search for the property, and that INA was entitled to an attorney fees award of 10 percent of the amount due to be taxed. Each of the complaints alleged that the City claimed an interest in the properties by virtue of code enforcement, weed, litter, or building demolition assessments it had levied on the properties. INA alleged that the City's interests were junior and inferior to INA's interests. The City filed an answer in each case denying that its interests were junior or inferior to that of INA. However, the eight cases had been assigned to seven different judges of the district court, and different results were reached with respect to INA's tax liens and the City's special assessment liens.

In three cases, the court determined that the City's special assessment liens were perpetual and that the buyer at any sale would receive a deed only upon payment of subsequent taxes *and* all the special assessments upon the property. In each of those cases, INA appealed. In

the other five cases, the court determined that the City's special assessment liens were junior to INA's interests. In those cases, should the proceeds of the sale be insufficient to satisfy all the outstanding liens, the City's special assessment liens would be extinguished. In those cases, the City appealed. All eight cases were consolidated on appeal. The Nebraska Court of Appeals ordered that in the consolidated appeals, INA would be treated as the appellant and the City would be treated as the appellee and cross-appellant. The Nebraska Supreme Court then moved the appeals to its docket pursuant to its authority to regulate the caseloads of the appellate courts of this state.

The court noted that under the statutory framework set forth in Nebraska, general taxes are a first lien upon the real estate upon which they are levied, and that special assessment liens are subject to general tax liens. When property is sold at a tax foreclosure to satisfy a lien of general taxes, it passes free and clear of special assessment liens because that is necessary in order for general taxes to remain a first lien. In the very nature of things a sale under a foreclosure of a first lien cannot be made subject to any other lien, for to do so would be to make the junior lien a senior lien. It would destroy the very purpose of the legislative provisions making general taxes a first lien. If the special assessments remain a lien after title passes under the foreclosure proceedings, the result would be that the junior lien could then come forward and destroy the title based on the superior lien. Such a result would nullify the very purpose of the tax foreclosure laws. To make the first lien of general taxes fully effective, the title must pass, as the legislature declares it shall pass, free and clear of all other liens. Anything short of that would nullify the purposes of the law and the foreclosure proceedings.

Therefore, in five of the consolidated cases, the district court correctly concluded that the City's special assessment liens were secondary to the general lien represented by the tax certificate and that the special assessment liens would be extinguished by foreclosure and sheriff's sale, regardless of whether the proceeds of the sale were sufficient to pay the special assessments. The court's orders in those cases were affirmed. In the remaining three cases, the court incorrectly concluded that the special assessment liens would remain attached to the property after foreclosure and sale. In those cases, the court's orders were reversed, and the causes were remanded for further proceedings consistent with this opinion.

Ottaco Acceptance, Inc. v. Larkin, 273 Neb. 765, 733 N.W.2d 539 (2007).

Sigma Investments, Inc. (Sigma), appealed from a judgment entered against it by the Douglas County District Court. Ottaco Acceptance, Inc. (Ottaco), sought to quiet title to real property located in Omaha, Nebraska, claiming that it was the owner of the property by virtue of a treasurer's tax deed. Sigma, which was issued a trustee's deed on the property, claimed title adverse to Ottaco's title. Sigma argued that its lien on the property was not extinguished by the issuance of Ottaco's tax deed and that Ottaco's tax deed was void or voidable. The district court found that Ottaco's tax deed was not void and that Sigma failed to prove it had redeemed the property.

On March 3, 1997, Equifunding, Inc., was issued the tax certificate for the property in question by the Douglas County treasurer. Although the assignment of the tax certificate is not contained in the record, it is undisputed in the present appeal that Equifunding assigned the tax certificate to Ottaco. Pursuant to Neb.Rev.Stat. § 77-1831 (Reissue 2003), in April and May 2000, notice was personally served upon Martin Sylvester and Connie Sylvester, the tenants of the property. Notice was sent via certified mail on December 7, 1999, to Teresa Larkin, record

title owner of the property; on January 3, 2000, to Industry Mortgage Company, L.P. (Industry Mortgage), and a beneficiary under a trust deed issued on the property; and on January 3 to Steffi Swanson, trustee under the trust deed. In a letter dated August 25, 2000, Ottaco requested a tax deed for the property from the Douglas County treasurer. On September 5, the treasurer issued a tax deed to Ottaco. The deed states in pertinent part that the property in question was sold for nonpayment of taxes to Ottaco on March 3, 1997. The tax deed was recorded on September 7, 2000.

On August 29, 2000, Swanson, as trustee, sold the property to Sigma at a trustee's sale for \$29,000 pursuant to the trust deed for breach and default under the terms of the deed. Sigma, as purchaser, was issued a trustee's deed on August 29, and the same was recorded on September 6. The record reflects that Kiely Sindelar, a shareholder of Sigma, had researched the property on the computerized Douglas County information system prior to Sigma's purchase of the property at the trustee's sale and knew the property was subject to a tax sale certificate for delinquent taxes. On August 31, 2000, Ottaco filed a petition with the district court requesting (1) an accounting of the amount due under the tax certificate; (2) that its lien be adjudged a first lien; (3) that the property be sold for satisfaction of the lien; (4) that the rights of various defendants, including Larkin, the Sylvesters, Industry Mortgage, Swanson, and Sigma, be determined and found to be subsequent to Ottaco's; (5) that the defendants be foreclosed from redemption; and (6) that Ottaco recover its costs. Pursuant to a request by Sigma, the court, in July 2001, entered an order authorizing Sigma to make repairs to the property and authorizing the sale of the property. Sigma claims to have spent approximately \$36,818.25 to repair the property which was then sold to a third party for \$66,295.73. The proceeds of the sale were paid to the clerk of the district court to be held in a trust account. After the issuance and filing of its tax deed, Ottaco filed the operative petition, wherein Ottaco requested that title to the property be quieted in its name and that all proceeds from the sale of the property be distributed to it.

In its answer, Sigma (the only remaining defendant) alleged that Ottaco's tax deed was void because Ottaco failed to provide Sigma with notice pursuant to § 77-1831 and because Ottaco failed to produce to the treasurer its tax certificate pursuant to § 77-1837. Sigma claimed that it was entitled to reimbursement for the \$29,000 it purchased the property for at the trustee's sale and the \$36,818.25 it expended for repairs, because: (1) Ottaco did not notify it of Ottaco's intent to seek a tax deed; (2) Ottaco's interest in the tax deed is a lien interest in the property; (3) Sigma's interest, in the property is derivative of Industry Mortgage's interest, and Sigma's interest should be considered superior; and (4) it would be unjust and unfair for Ottaco to benefit at Sigma's expense. Sigma also counterclaimed, alleging unjust enrichment on the part of Ottaco for the amount expended by Sigma. The district court entered an order in favor of Ottaco, as they found that Sigma had failed to meet its burden of proof to raise its challenges to Ottaco's tax deed. The court found that under Neb.Rev.Stat. § 77-1843 (Reissue 2003), Sigma was required to prove that it had properly redeemed the property. The court found that Sigma failed to meet its burden under § 77-1843 and, therefore, could not defeat Ottaco's tax deed. Sigma appealed. Sigma first argued that the Ottaco's tax deed merely represented a lien on the property. The court concluded that the tax deed conveyed title to Ottaco, and was not merely a lien interest in the property. Sigma then argued that it was not required to comply with §§ 77-1843 and 77-1844 because Ottaco's tax deed was void or voidable. The court disagreed and found that Section 77-1843 sets forth those conditions a party seeking to defeat title conveyed under a treasurer's deed must prove. Section 77-1844 sets forth those conditions a party seeking to question title

conveyed under a treasurer's deed must prove. Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. The court noted that it was clear from the language of §§ 77-1843 and 77-1844 that even if title under a tax deed is void or voidable, the conditions precedent set forth in those statutes must be met in order to first question and then defeat title, and here, those precedents were not met.

First, Sigma argued that Ottaco failed to personally serve notice to the record titleholder. However, Sigma cannot assert a claim based on improper service to another party. Next, Sigma claimed that Ottaco failed to submit the original tax certificate to the treasurer as required. In this case, Ottaco did not return the original tax certificate to the treasurer because the original tax certificate was already in the treasurer's possession. Instead, Ottaco presented the treasurer with a copy of the tax certificate. The court found that where the original tax certificate is in the possession of the treasurer, the holder of the certificate is not obligated to undertake the formalistic procedure of requesting the return of the original tax certificate only to "present" the tax certificate back to the treasurer. Sigma then asserted that Ottaco's deed incorrectly identified Ottaco as the purchaser of the property in question on March 3, 1997. In fact, Equifunding was the purchaser of the property on that date and later assigned its interest in the property to Ottaco. The court found that while Ottaco's tax deed misidentified Ottaco as the purchaser of the property at the March 3, 1997, sale, there was no indication in the record that either Ottaco or the treasurer was unaware that Equifunding was the original purchaser at the tax sale or that the tax deed would not have been executed had Equifunding been properly identified. At most, the misidentification of Ottaco as the purchaser at the tax sale necessitated reformation of the tax deed. The court found that notwithstanding the tax deed's misidentification of Ottaco as the purchaser of the property at the tax sale, the tax deed is made in compliance with § 77-1839. Finally, Sigma argued that Ottaco's tax deed lacked a legible treasurer's seal as required by Neb.Rev.Stat. § 77-1857 (Reissue 2003). Section 77-1857 provided that the county treasurer shall affix an impression or representation of its official seal to every tax sale certificate and tax deed made by him or her. The court read sections 77-1839 and 77-1857 as merely requiring that the treasurer's seal be affixed. They do not require that the treasurer's seal be entirely legible. Because it is not within the province of this court to read a meaning into the statute which is not there, the court concluded that Ottaco's tax deed was substantially in compliance with § 77-1839. Therefore, Sigma's contentions that Ottaco's tax deed is void or voidable are without merit.

The court then found that Sigma could not defeat Ottaco's title because Sigma did not argue, nor present any evidence that the four conditions of §77-1843 had been satisfied, and thus not satisfied the requirements of §77-1843. Therefore, the court affirmed the decision of the district court.

Agena v. Lancaster County Bd. of Equalization, 276 Neb. 851, 758 N.W.2d 363 (2008).

Taxpayers protested county assessor's disqualification of their properties for special "greenbelt status" valuation, for tax purposes, as agricultural or horticultural land. The county board of equalization found in favor of taxpayers. County assessor appealed. The Tax Equalization and Review Commission (the Commission) reversed. County board of equalization appealed, and two taxpayers cross-appealed.

This case involved the eligibility of four properties for special valuation as agricultural or horticultural land for tax purposes under Neb.Rev.Stat. §§ 77-201(2) and 77-1344 (Cum. Supp. NE Dept. of Revenue Property Assessment Division Legal Case Summaries May 4, 2011

2006). This particular special valuation is colloquially known as “greenbelt status.” These four properties are the “Treetop” property, the “Large” property, the “Johnson” property, and the “Church” property. Prior to the 2007 tax year, the properties, or at least portions of the properties, at issue in these appeals had been considered agricultural land and qualified for greenbelt status under § 77-1344. However, as a result of an amendment to Neb.Rev.Stat. § 77-1359 (Cum. Supp. 2006), which defines agricultural or horticultural land, and pursuant to its authority under Neb.Rev.Stat. §§ 77-1347 (Cum. Supp. 2006) and 77-1347.01 (Supp. 2007), the Lancaster County assessor's office reevaluated certain properties receiving greenbelt status. Pursuant to this evaluation the Lancaster County assessor, recommended disqualification of the greenbelt status for each of these properties. In response, each taxpayer filed a protest with the Lancaster County Board of Equalization (Board), as permitted by § 77-1347.01. The taxpayers argued that their properties were primarily used for agricultural purposes and therefore entitled to continued greenbelt status.

The Board rejected the county assessor's recommendations and instead agreed with the taxpayers that each property was being primarily used for an agricultural purpose and was entitled to greenbelt status. The county assessor appealed the Board's decisions to the Tax Equalization and Review Commission (the Commission) pursuant to § 77-1347.01 and Neb.Rev.Stat. § 77-5013 (Cum. Supp. 2006). The Commission reversed the Board's decisions and concluded that none of the properties were agricultural as defined by § 77-1359. Pursuant to Neb.Rev.Stat. § 77-5019 (Cum. Supp. 2006), the Board appeals. Two of the four taxpayers cross-appeal.

First, the Nebraska Supreme Court determined that the Board had standing to appeal the Commission's decisions to the court. Then the court looked to the issue of whether the Commission erred in reversing the decisions of the Board in finding the respective properties to be agricultural and granting those properties greenbelt status. The court noted that the definition of agricultural land under § 77-1359 was central to the resolution of this case. In particular, the court was concerned with the following language: “agricultural land ... means a parcel of land which is primarily used for agricultural ... purposes Agricultural land ... does not include any land directly associated with any building or enclosed structure.” In concluding that the subject properties were not agricultural and therefore not eligible for greenbelt status, the county assessor concluded that the amendment to § 77-1359 effected a change in the operation of the statute. The county assessor noted that the addition of the term “parcel,” defined as a “contiguous tract of land,” indicated that he was to consider the primary use of an entire parcel rather than the primary use of the land. Prior to the change in the statute, the county assessor had divided the land into different uses, regardless of whether the use was primary. In contrast, the Board made its decision by asking three questions of property owners: (1) whether the property had an FSA number; (2) whether a form 1040 farm tax return was filed showing farm income; and (3) whether a “majority” of the parcel (determined by looking at the number of acres devoted to the activity) generated income from recreation, hobby, or agricultural or horticultural use. According to a member of the Board, the Board gave consideration to whether there was a residence on the property and then “looked at the balance of the land to see how that was actually being used.”

The court found that given the language of the statute, both were reasonable interpretations, and thus concluded that § 77-1359 was ambiguous, and that interpreting the statute, the court needed to look to its legislative history. The legislative history of the

amendments to § 77-1359 showed that the Legislature intended to narrow the definition of agricultural property. From the history, it was also clear that the addition of the term “parcel” was intended to require a county assessor to consider the entire tract of land, including any home site, to determine whether the predominate use of the *parcel* was for agricultural purposes. This was the approach taken by the county assessor in these cases. The Commission had the authority to reverse the Board's decisions classifying the subject properties as agricultural and granting greenbelt status if the Board's decisions were unreasonable or arbitrary. In each of these cases, the Board failed to consider the use of the entire parcel in determining whether the property was agricultural, and the court concluded that this failure was unreasonable and arbitrary. As such, the court could not conclude that the Commission’s decisions reversing the Board's decisions were in error. The arguments of the Board, Treetop, and Large were therefore without merit.

The court then addressed the argument by Treetop that §§ 77-132 and 77-1359, when considered together, are vague. Under § 77-1359, agricultural land was defined as “a parcel of land which is primarily used for agricultural ... purposes.” Treetop argued that the use of the term “parcel” was vague, because the definition of that term, found in § 77-132, provides that “[i]f 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.” Treetop argued that the statutes did not provide adequate standards for the county assessor in determining what should be considered a parcel. The court concluded that Treetop lacked standing to assert vagueness in both arguments. With respect to the alleged vagueness of the definition of parcel, the property owned by Treetop clearly fit within the definition of “parcel” set forth by § 77-132. Moreover, the discretion granted to the county assessor by the last sentence of § 77-132 was not applicable to Treetop's situation.

Treetop also alleged that §§ 77-132 and 77-1359, as amended, could not be uniformly enforced. The court found that Treetop's assertion regarding uniformity was also without merit. The Legislature enacted §§ 77-132 and 77-1359 in order to provide a definition for agricultural land. Neb. Const. art. VIII, § 1, allows the Legislature to do so. The Legislature chose to narrow the classification of properties in such definition to exclude properties which do not meet certain standards of agricultural use when considered as a whole. The amendments as enacted are capable of being uniformly applied and, accordingly, did not violate article VIII, § 1.

Thus the court found that the Board had standing to appeal the Commission’s decisions to this court. Further, the Commission did not err in reversing the decision of the Board granting the properties at issue greenbelt status. Additionally, with respect to Treetop's cross-appeal, the court concluded that Treetop lacked standing to raise a vagueness challenge to §§ 77-132 and 77-1359 and that these statutes did not violate Neb. Const. art. VIII, § 1.

Brenner v. Banner County Bd. of Equalization, 276 Neb. 275, 753 N.W.2d 802 (2008).

Taxpayers appealed an order of the Tax Equalization and Review Commission (the Commission) that affirmed a decision of the county board of equalization denying taxpayers' protest of valuation of their residence for property tax purposes. The Nebraska Supreme Court concluded that the Commission’s decision and order was supported by competent evidence, and was not arbitrary, capricious, or unreasonable.

The Brenner’s were the owners of the property in question, which is a single-family residence located in rural Banner County, Nebraska. The county assessor determined the 2004 actual value of the structure alone, based upon replacement cost less depreciation, to be

\$220,374. The Brenner's filed a protest of the 2004 valuation with the Board. After hearing the testimony of the Brenner's, the Board accepted the assessor's 2004 valuation of the Brenner home. The Brenner's filed an appeal to the Commission, challenging the valuation of their property for specific reasons. The Board filed an answer in which it alleged that the valuation was in accordance with applicable Nebraska law and the Commission regulations, and was not arbitrary, capricious, or unreasonable.

The Banner County clerk and ex officio assessor testified that she requested the audit conducted by the Department of Property Assessment and Taxation in 2001-02 and that the audit disclosed certain deficiencies in her office, which she corrected. At least partially as a result of the audit, Banner County retained High Plains to conduct a countywide reappraisal for 2003. In determining property valuations for 2004, the assessor utilized data collected by High Plains for the 2003 reappraisal, including data for the Brenner property. In June 2003, the Nebraska Real Property Appraiser Board (NRPAB) commenced an investigation which concluded that High Plains and appraiser Holliday had committed various errors during the countywide reappraisal for Banner County. The county assessor was aware of the complaint against Holliday and the settlement, but testified that she had no basis for concluding that there was any flaw in the actual data collected by High Plains in the countywide reappraisal for the 2003 tax year, and thus used it in a computer program called TerraScan in order to compute the property value of the Brenner's home. The assessor acknowledged that she did not personally inspect the Brenner property prior to the 2004 valuation, asserting that she was denied access by the Brenner's. When she personally inspected the property in December 2006, she confirmed that the data previously entered in the TerraScan program was generally correct. The assessor testified that in arriving at the 2004 valuation of the Brenner residence, she considered its condition to be "average" and its quality to be "average plus." She explained that the home had certain features which would not be expected in a home of "average" quality, so she rated the quality "between average and good."

In its written decision and order, the Commission found that the Board's valuation of the residence as of the assessment date for the tax year 2004 was \$220,374. The Commission noted that while the Brenner's argued generally that the data was so poor that any valuation based upon it would be unreasonable and arbitrary, "[n]o evidence was presented ... concerning variances between data collected as shown on a valuation printout and actual characteristics" of the property. The Commission noted that the only specific discrepancy claimed by the Brenner's involved the quality of the home, which they claimed to be "average" and the assessor evaluated as "average plus." Exercising its statutory authority to utilize its own experience and technical competence in evaluating the evidence on this issue, the Commission concluded that the residence was "not of average quality as proposed by the Brenner's and their appraiser." The Brenner's filed a timely notice of appeal from this decision, and the Nebraska Supreme Court moved the appeal to its docket on its own motion.

The court noted that there was a presumption that a board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action. That presumption remains until there is competent evidence to the contrary presented, and that burden is on the taxpayer. The Brenner's argued that the Commission conducted the appeal hearing in a manner which deprived them of their due process rights to present evidence and be heard before an impartial board. They argued that formal rules of evidence were applied despite the fact that the hearing was to be informal and that the

chairman of the Commission panel frequently interrupted their presentation and excluded certain evidence. Because the hearing was to be informal, as specified in the order, the Commission was required to “give probative effect to evidence which possesses probative value commonly accepted by reasonably prudent persons in the conduct of their affairs excluding incompetent, irrelevant, immaterial, and unduly repetitious evidence” and to honor statutory privilege rules, but was “not otherwise ... bound by the usual common-law or statutory rules of evidence.” However, the Commission is afforded discretion, and the court found that that discretion was not abused when the Commission excluded certain pieces of evidence introduced by the Brenner’s. The court found that the record reflected that the Commission had afforded the Brenner’s an opportunity to be heard and present their case before an impartial tribunal, and thus they were not denied procedural due process.

With regards to the valuation of the property, the Brenner’s had the burden of persuading the Commission that the Board’s valuation of their property was arbitrary or unreasonable. The Brenner’s contended that no meaningful valuation of the property could have occurred, because the assessor did not personally inspect the property before arriving at the 2004 valuation. The record reflected that the assessor's office had basic information about the interior of the home obtained by data collectors during and after construction, and generally, an assessor may reasonably rely on physical measurements made by an appraiser as part of a mass appraisal. The court found significance of the assessor's testimony that when she did inspect the property in 2006, she found nothing which would change her opinion regarding the 2004 valuation. The Brenner’s also argue that the assessor's use of the TerraScan computer program to perform the actual computations used for the 2004 valuation was arbitrary and unreasonable because the program used flawed data obtained from the 2003 countywide reappraisal, but they could not identify any specific errors in the data. The court found that it could not determine from the record that the TerraScan program utilized incorrect costing information and thus could not conclude that the valuations derived from the TerraScan program were arbitrary or unreasonable. While the court found that there was some ambiguity and lack of clarity in both the Brenner’s and the assessor's valuation determinations, the court agreed with the Commission that in the end, the record reflected nothing more than a difference of opinion between the Board and the Brenner’s regarding the actual value of the residence for purposes of 2004 taxation, and did not establish that the Board acted arbitrarily or unreasonably in arriving at its valuation.

Finally, in their appeal to the Commission, the Brenner’s claimed that the taxable value of their property as of January 1, 2004, was not equalized with the value of other real property in the county. The Brenner’s attempted to prove their allegation that the Board failed to properly equalize assessments, through the county assessor's records pertaining to a single residential property built in 1976, which the Brenner’s claimed to be comparable to theirs. The Commission concluded that the property was not comparable to the Brenner’s residence and that there was no other evidence in the record demonstrating that the taxable value of the Brenner property was “not the same proportion of actual value as is the taxable value of comparable property.” The court agreed with the Commission. Thus the court affirmed the decision and order of the Commission, based upon its determination that the decision was supported by competent evidence and was not arbitrary, capricious, or unreasonable.

Darnall Ranch Inc. v. Banner County Bd. of Equalization, 276 Neb. 296, 753 N.W.2d 819 (2008).

Darnall Ranch, Inc. (DRI), owned several residences located on its ranch property in Banner County, Nebraska. It protested the 2004 valuation of each residence for tax purposes, but the protests were denied by the Banner County Board of Equalization (Board). DRI then appealed to the Tax Equalization and Review Commission (the Commission), which upheld the valuations as determined by the Board. This was an appeal from the decision and order of the Commission. The Nebraska Supreme Court affirmed in part, and in part reversed and remanded with directions to adjust the 2004 valuations of two residences which are located in close proximity to a feedlot.

The county assessor relied on data collected during a countywide reappraisal in 2003. She did not independently verify the data in determining the 2004 valuations. In a 2006 disciplinary proceeding before the Nebraska Real Estate Appraiser Board, the appraiser who conducted the 2003 countywide reappraisal admitted that she violated certain standards during the reappraisal and consented to disciplinary measures. The Banner County assessor was aware of the disciplinary proceeding, but was never informed that it involved deficiencies in the 2003 data collection. According to the county assessor, “no one has ever proved that the data collection for 2003 was incorrect.” The 2003 data was entered into a computer program called TerraScan, which was used by the county assessor to compute all 2004 valuations for residential and agricultural property in the county. The assessor testified that the Nebraska Department of Property Assessment and Taxation was aware that Banner County used the TerraScan program and had never objected to or questioned its reliability. After the 2004 valuations were established, DRI filed protests for the residential properties which were the subject of this case. In each instance, the assessor recommended no change in the valuations, and the Board accepted this recommendation.

DRI protested the valuations of 5 different houses, the “Feedlot House,” “Lanes House,” “Gary’s House,” “Parents’ House,” and “Labor House.” The Commission determined that there were two issues raised by the appeal: (1) whether the decision of the Board determining taxable value of the subject properties was unreasonable or arbitrary and (2) the taxable value of the subject properties on January 1, 2004. The Commission determined that it would not consider any equalization issues, because DRI had not raised such issues in its protests to the Board. The Commission further determined that DRI had not shown the 2004 valuations of the subject properties to be unreasonable or arbitrary and that the evidence of actual value presented by DRI was not persuasive and was an insufficient basis for relief. The Commission affirmed the determinations of the Board with respect to the 2004 valuations of the subject properties. DRI appealed to the Nebraska Supreme Court.

DRI first argued that the Commission conducted the appeal hearing in a manner which deprived it of due process rights to present evidence and be heard before an impartial board. It argued that formal rules of evidence were applied, despite the fact that the hearing was to be informal, and that the chairman of the Commission panel frequently interrupted its presentation and “became an advocate.” However, the court noted that the Commission must be afforded some discretion in determining the probative value and admissibility of evidence in an informal appeal hearing, and it followed that a proper exercise of such discretion cannot constitute a denial of procedural due process. DRI argued that the Commission sustained objections to several exhibits it offered and argues that the cumulative effect of these rulings was prejudicial,

but DRI made no attempt to explain why the rulings excluding these exhibits were incorrect. Additionally, the Commission excluded several exhibits offered by the Board, based upon objections by counsel for DRI. Viewing the record as a whole, the Commission applied the same standard of admissibility to evidence offered by both parties and DRI therefore suffered no prejudice. With regards to DRI's argument that the Commission chairman interrupted its presentation in a manner which demonstrated bias, the court found that while interruptions did occur, it could not conclude from the record that they were indicative of bias. In an informal hearing, the Commission must have a certain degree of latitude in seeking clarification and focus of testimony as it is received, and there is nothing in the record to suggest that the Commission exercised this authority in a manner prejudicial to DRI.

With regards to the valuation of the properties, DRI argued that the Board's valuation of its property was arbitrary or unreasonable. An administrative agency's decision is "arbitrary" when it is made in disregard of the facts or circumstances without some basis which would lead a reasonable person to the same conclusion. DRI contended that neither the assessor nor the Board had personally inspected any of the residences to determine their actual physical characteristics before arriving at the 2004 valuations. The assessor acknowledged this, but testified that she relied on data collected during the 2003 countywide reappraisal. The assessor also acknowledged that the person who conducted the 2003 reappraisal was subsequently disciplined for certain irregularities which occurred during the reappraisal, but the assessor was never informed that there was any problem with the 2003 data collection. Here, the assessor also testified that when she inspected the properties subsequent to the 2004 valuations, she found no errors in the data utilized in 2004. The court found that the record did not reflect any significant errors or discrepancies in the description of the physical characteristics used to determine the 2004 valuations. DRI also argued that the Board's 2004 valuations were arbitrary and unreasonable because the assessor did not follow regulations and manuals promulgated by the Property Tax Administrator, and that the TerraScan program utilized incorrect costing information in arriving at the 2004 valuations. The court concluded that the costing information was not arbitrary or unreasonable, based on the evidence given.

DRI also argued that the Commission failed to properly consider the taxpayers' opinions and those of its expert regarding the quality, condition, and value of the subject properties. The Commission had determined that the president of DRI's testimony regarding the quality and condition of the properties was not related to any specific criteria or standards. The record supports this determination, as he could not articulate what his standards meant. A resident owner who is familiar with his or her property and knows its worth is permitted to testify as to its value without further foundation. The president resided in one of the subject properties and was the president of the corporation which owned each of them. However, he did not utilize the valuation system in arriving at his opinions of the value of each property. His opinions were based upon his knowledge of unidentified "other properties" and "just a judgment call on my part of those experiences of having bought property and sold property in this area." He offered no details of any valuation or sales of comparable residential property. Therefore the court found that the record supported the Commission's finding that the taxpayer's evidence of actual value was not persuasive.

Finally, DRI argued that the Commission erred in rejecting its argument that external or "locational" depreciation should have been applied in determining the value of Lane's house and the feedlot house, due to their proximity to a cattle feedlot. The court found that this argument

had merit. The court followed a decision by the Nebraska Court of Appeals in *Livingston v. Jefferson Cty. Bd. of Equal.* where it was found that “it was arbitrary for the Board and the Commission to ignore the effect that the nearby hog facility would have on the house's fair market value in the ordinary course of trade.” It was undisputed that an external depreciation was applied in determining the valuations of these properties for 2002 and 2003, due to the proximity to the feedlot, but not for 2004, as the assessor in 2004 did not consider the home to be “close enough to the feedlot that it has the problems that the taxpayer contends.” The Board produced no evidence reinforcing this change, and so the court found the Board’s valuations of Lane’s house and the feedlot house and the affirmance by the Commission to be arbitrary and unreasonable. For the reasons discussed, the court reversed the Commission’s order with respect to the valuation of Lane's house, and the feedlot house. As to those properties, the court remanded the cause to the Commission with directions to adjust the 2004 valuations by applying external, or “locational,” depreciation in the same manner as in 2002 and 2003. In all other respects, the court affirmed the Commission’s order.

McClellan v. Board of Equalization of Douglas County, 275 Neb. 581, 748 N.W.2d 66 (2008).

The appellants, taxpayers and homeowners in Douglas County, appealed from the denial of their petition in error to the district court. The appellants sought review of the tax-exempt status granted to three neighboring residential properties owned by the Intecessors of the Lamb, Inc. (Intecessors). The Nebraska Supreme Court determined that the taxpayers lacked standing to seek direct review of the exempt status of another's property and that the district court lacked subject matter jurisdiction over appeals from tax exemptions, and appeals should instead be lodged with the Tax Equalization and Review Commission (the Commission).

The Intecessors were a Catholic religious organization formed as a nonprofit corporation. Eleven residences and some real property owned by the Intecessors in an area known as Ponca Hills had already been deemed tax exempt and are not the subject of the current appeal. The Intecessors acquired three additional residences in Ponca Hills that, in 2005, they asked also to be designated as tax exempt pursuant to Neb.Rev.Stat. § 77-202(1)(d) (Reissue 2003). A public hearing before the Douglas County Board of Equalization (Board) was held on the Intecessors' request to exempt the three properties from taxation. Michael D. McClellan, a taxpayer in Douglas County and an attorney for a neighborhood association in Ponca Hills, along with several residents and members of the Ponca Hills community, were allowed to express their objections before the Board. The residents were concerned about the declining tax base of the area which, they argued, increased the tax burden of the nonexempt residents. In addition, one of the houses under consideration and two previously designated exempt residential properties are located in a Sanitary Improvement District (SID). Members of this SID raised concerns to the Board regarding the ability to fund the SID, although there was evidence that the Intecessors were voluntarily making SID payments for that property. The Board ultimately granted the exemptions. McClellan and the other objectors (hereinafter petitioners), filed a petition in error in the district court contesting the Board's grant of exempt status for the three properties. The district court affirmed the decision of the Board, and the petitioners appealed.

The Nebraska Supreme Court dealt with two issues: (1) who has standing to seek review of the Board's decision and (2) where any such review must take place. With regards to standing, the court noted that standing requires that a litigant have such a personal stake in the

outcome of a controversy as to warrant invocation of a court's jurisdiction and justify the exercise of the court's remedial powers on the litigant's behalf. Generally, in order to have standing to bring suit to restrain an act of a municipal body, the persons seeking such action must show some special injury peculiar to themselves aside from a general injury to the public, and it is not sufficient that they have merely a general interest common to all members of the public. Because there did not appear to be any common-law right to seek direct review of an order relating to the exemption of another taxpayer's property the question of whether a taxpayer may seek review of the exempt status of another taxpayer's property depended on whether the Legislature conferred such a right.

§ 77-202.04 stated “Persons, corporations, or organizations may appeal denial of an application for exemption by a county board of equalization. *Only the county assessor may appeal the grant of such an exemption* by a county board of equalization. Appeals pursuant to this section shall be made to the Commission.” After review of the legislative history, the court found that the Tax Equalization and Review Commission Act (TERC Act) provided that the Commission had “the power and duty to hear and determine appeals of ... (2) decisions of any county board of equalization granting or denying tax-exempt status for real or personal property.” Thus, the Commission would hear appeals of individual assessment and property exemption disputes and hear appeals of the Property Tax Administrator on tax issues.

The petitioners argued that a petition in error was significantly different from an “appeal,” because a petition in error provided a much more circumscribed scope of review. They argued that it would not be inconsistent for § 77-202.04 and the TERC Act to leave this narrower form of relief intact for those taxpayers who have no means to perfect a broader, direct “appeal” under these provisions. But the court found the petitioners' argument to be incorrect. The court determined the scope of review under a “petition in error” and under an “appeal” to the Commission under § 77-1510 (Cum.Supp.2006), like many other “appeals,” to be the same. Because there was no right to a petition in error, and under common law, taxpayers do not have standing to seek direct review of the tax-exempt status of someone else's property, the court concluded that the district court lacked jurisdiction over the petition in error that was the subject of this appeal. When a lower court lacks the authority to exercise its subject matter jurisdiction to adjudicate the merits of the claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court. However, when an appeal is dismissed because the lower court lacked jurisdiction to enter the order appealed from, an appellate court may nevertheless enter an order vacating the order issued by the lower court without jurisdiction. The Nebraska Supreme Court therefore vacated the order of the district court and dismissed the appeal.

St. Monica's v. Lancaster County Bd. of Equalization, 275 Neb. 999, 751 N.W.2d (2008).

St. Monica's, a nonprofit religious charitable organization appealed a Tax Equalization and Review Commission (the Commission) decision upholding the denial of an exemption for recently acquired property. The Nebraska Supreme Court affirmed.

St. Monica's provided substance abuse and mental health treatment for women on a charitable basis. St. Monica's was a Nebraska nonprofit corporation that holds a 501(c)(3) exemption designation from the Internal Revenue Service as a religious charitable organization. In March of 2005, St. Monica's purchased real property located in Lincoln, Nebraska, to convert into a short-term residential therapeutic community, an outpatient facility, and administrative

offices. On March 28, an application for a property tax exemption was filed. On or about May 5, St. Monica's was notified that the Lancaster County assessor's office had recommended denial of the application because St. Monica's was not yet using the subject property for exempt purposes.

Following the hearing on May 24, 2005, and based upon the county assessor's recommendation, the Lancaster County Board of Equalization voted to deny St. Monica's the exemption. St. Monica's applied for the proper building permits on July 21, and the property was remodeled, and St. Monica's began occupying it in October. There was nothing in the record that suggested that St. Monica's reapplied at any time for a property tax exemption for the 2005 tax year. On December 22, 2005, St. Monica's petitioned the Commission to reverse the decision of the Board and grant its exemption. The Commission upheld the Board's decision, and St. Monica's appealed.

The sole issue was whether the Commission erred in upholding the denial of application for property tax exemption filed by St. Monica's. Neb.Rev.Stat. § 77-202(1) (Reissue 2003) requires (1) the property be owned by an educational, religious, charitable, or cemetery organization and (2) the property be used exclusively for educational, religious, charitable, or cemetery purposes. Neb.Rev.Stat. § 77-202.03(3)(a) (Cum.Supp.2006) provides that "the exempt use shall be determined as of the date of application" for exemption.

The court found that the property was not being used exclusively for an exempt purpose as of the date of the application, March 28, 2005. The court had consistently held that the "intention to use property in the future for an exempt purpose is not a use of the property for [exempt] purposes. Because at most St. Monica's expressed an intent to use the property in an exempt manner in the future, the court determined that the conclusion reached that St. Monica's was not entitled to its requested property tax exemption for the 2005 tax year was not error.

St. Monica's also argued that because it was qualified for the exemption, it was unnecessary for it to reapply by August 1, 2005, in order to obtain such exemption. The basis for this argument was that as of July 21, St. Monica's had obtained the necessary building permits, and in accordance with the county assessor's policy, the subject property was considered to be devoted to an exempt purpose. The court also rejected this contention. § 77-202.03(3)(a) required a property owner seeking an exemption to file for that exemption and further stated that "the exempt use shall be determined as of the date of application." The record demonstrates that St. Monica's applied for an exemption on March 28, 2005, at a time when, as demonstrated in the record, it was not using the property for an exempt purpose. Even assuming that St. Monica's thereafter began to use the property for an exempt purpose, it was required under § 77-202.03 to reapply for the exemption and allow the county assessor and the Board to consider any possible exemption of the property anew. Because St. Monica's was not using the property for an exempt purpose as of the date of its application, it was not entitled to an exemption, and the court affirmed the denial of application for property tax exemption.

Fort Calhoun Bapt. Ch. v. Washington County Bd. of Equalization, 277 Neb. 25, 759 N.W.2d 475 (2009).

The Fort Calhoun Baptist Church (Church) leased part of its facilities to the Fort Calhoun Community School District (School). As a result of the lease, the Washington County Board of Equalization (Board) reduced the tax exemption on the Church's property from 100 percent to 80 percent. The Tax Equalization and Review Commission (the Commission) affirmed the Board's action, and the Church appealed. The Nebraska Supreme Court held that although ownership

and use of the property may be by different entities, exclusive use of the property for exempt purposes is required for property to be exempt from taxation, and the church's property was used exclusively for religious and/or educational purposes, and thus, regardless of whether the lease was below the market rate, the property was exempt from taxation.

The Church was a religious organization that meets the requirements to hold property exempt from property taxes. The Church owned real property in Fort Calhoun, Nebraska. In February 2006, the School, also a tax-exempt organization, began looking for a space to use for a new special education program. At that time, the School's special education students were receiving services in Omaha, Nebraska, and the School sought to provide these services in Fort Calhoun. The School and the Church ultimately entered into a lease, which would allow the School to use the Church for its special education program. After physically upgrading the building to accommodate the School, the Church applied for a 100-percent tax exemption on its real property on November 20, 2006. The Washington County assessor subsequently recommended an 80-percent exemption. The Board concurred with the assessor's recommendation and notified the Church of the valuation change designating 20 percent of the property as taxable. The Church timely protested the valuation, and the Commission scheduled a hearing.

The Commission found that the evidence did not support a finding that the Church had leased the property to the School at a below-market rate. As such, it determined that the Church had not met its burden of proving its eligibility for an exemption, because it “failed to demonstrate that the lease of the subject property to the School was for less than market value or that its lease of the subject property to the School represents a contribution of any manner in aid of a charitable, religious or educational use by the School.” It concluded the Church had not proved by clear and convincing evidence that the Board's decision was unreasonable or arbitrary, and it affirmed the Board's recommendation of an 80-percent exemption. The Church then appealed.

The Nebraska Supreme court focused on the issue of whether the property leased by the Church to the School was used exclusively for educational, religious, or charitable purposes and, therefore, was exempt from taxation pursuant to Neb.Rev.Stat. § 77-202 (Cum. Supp. 2006). The Commission relied upon *United Way* in affirming the Board's decision. The Commission examined whether the lease to the School was a qualified charitable use by the Church. It found that the leased property was used by the Church for religious purposes on weekends, Wednesday evenings, and other times when necessary. The Commission found there was no evidence that the School used the property for religious purposes or that the Church made any educational use of the leased premises except in conjunction with its religious use. Because this property was used a significant amount of time by the School for educational purposes, the Commission concluded that the Church did not use the property exclusively for a religious use. The Commission also examined the comparable leases submitted by the School and concluded that the lease to the School was not at a below-market rate, and because the lease was not below the market rate, the Commission found that the lease did not represent a contribution in aid of a charitable, religious, or educational use by the School. Therefore, it concluded that the leased portion of the property was not exempt. The Commission affirmed the Board's reduction of the Church's exemption to 80 percent.

The court determined that the in *United Way*, the inquiry should have ended with whether the use of the leased space was charitable. In this case, the court found that it is the exclusive use

of the property that governs the exemption, and not the market value of the lease. It was not disputed that the Church and the School were organizations qualified to own property exempt from taxation. The issue of financial gain or profit to the owner or user of the subject property was not an issue to be considered by the Commission. Here, the property was being used exclusively for religious or educational purposes. The court concluded that the property owned by the Church was used exclusively for religious and/or educational purposes. The School used the fellowship hall, restrooms, and areas for ingress and egress Monday through Friday during school hours, unless the use would interfere with a wedding, funeral, or election. This use was educational and was an exempt use. The remainder of the time, the Church used the property for religious purposes, which was also an exempt use. The lease of the property by the Church to the School did not create a taxable use. Both of the uses were exempt. The property was used for a combination of exempt uses. The Commission was misled by the court's reasoning in *United Way*. Therefore, the lease by the Church to the School did not create a non-exempt use of the property. The property continued to be used exclusively for religious and education purposes. Thus, the Commission's order was reversed and the cause remanded with directions to instruct the Board to grant a 100-percent exemption on the Church's property.

Garey v. Nebraska Dept. of Nat. Resources, 277 Neb. 149, 759 N.W.2d 919 (2009).

Residents and taxpayers of natural resources districts filed an action for declaratory and injunctive relief alleging that a property tax levy authorized by statute was unconstitutional. The District Court, Lancaster County concluded that the challenged provision was unconstitutional and entered an order granting declaratory judgment, severed the offending provision, and enjoined various governmental agencies from enforcing the provision. Various governmental agencies appealed, and plaintiffs cross-appealed. The Nebraska Supreme Court, held that the statute authorizing natural resources districts to levy a property tax that could be used to repay bonds issued for the purpose of acquiring water rights violated the State Constitution's prohibition against the State levying a property tax for a state purpose.

Appellees in this case were residents and taxpayers of the NRD's (Natural Resource Districts). Defendant-appellant Department of Natural Resources is an administrative department of the State and has jurisdiction over matters pertaining to water rights for irrigation, power, or other useful purposes. The NRD's are districts within the State; one of their purposes is the regulation of ground water within their respective districts. The remaining appellants in this case are individuals and entities with the authority to impose and collect property taxes in the counties that make up the NRD's.

Appellees in this case are residents and taxpayers of the NRD's. Defendant-appellant Department of Natural Resources is an administrative department of the State and has jurisdiction over matters pertaining to water rights for irrigation, power, or other useful purposes. The states of Colorado, Kansas, and Nebraska and the United States are party signatories to the Republican River Compact of 1943. Under the terms of the Compact, each signatory state is allotted an annual number of acre-feet of water for "beneficial consumptive use. By entering into the Compact, Nebraska agreed to limit its consumption of water from the Republican River Basin to ensure that downstream Kansas would receive its allotted share of the water.

In 2004, Nebraska's Governor and Attorney General informed the NRD's' water users that to comply with an earlier settlement agreement, water consumption would need to be reduced in dry years, and that to ensure compliance with the Compact, the State could step in if the NRD's

failed to control usage. In 2006 and 2007, the department leased or purchased surface water rights from the Bostwick Irrigation District to assist the State in meeting its obligations under the Compact. On May 1, 2007, the Governor signed L.B. 701 into law. Section 11 of L.B. 701, at issue in this case, amended § 2-3225(1)(d) and (2), and essentially put into place a property tax levy. The office of the Nebraska Governor issued a press release stating that the passage of L.B. 701 created a cash fund which, among other things, could be used to help the state continue to comply with interstate compacts and agreements. In September of 2007, letters were sent on behalf of appellees to each of the NRD's, formally requesting that the NRD's "vote not to levy any property taxes ... sanctioned by the Nebraska Legislature in L.B. 701. Nevertheless, in September 2007, the NRD's each adopted property tax levies authorized by L.B. 701. In response to the levies, appellees filed an action seeking a declaratory judgment and alleging that the property tax levy found in L.B. 701 is unconstitutional and unenforceable. Appellees claim that the property tax levy in represented a property tax levy for state purposes, in violation of Neb. Const. art. VIII, § 1A; results in a commutation of taxes, in violation of Neb. Const. art. VIII, § 4; and constitutes special legislation, in violation of Neb. Const. art. III, § 18. After a trial on stipulated facts, the district court entered an order granting declaratory judgment and injunctive relief to appellees, concluding that although § 11(1)(d) of L.B. 701 does not violate Neb. Const. art. VIII, § 1A or § 4, it is special legislation, in violation of Neb. Const. art. III, § 18, and, therefore, unconstitutional. Both sides appealed.

The Nebraska Supreme Court concluded § 11(1)(d) of L.B. 701 violated the prohibition against a property tax levy for state purposes contained in Neb. Const. art. VIII, § 1A, and therefore, was unconstitutional on this basis. Neb. Const. art. VIII, § 1A, states that "[t]he state shall be prohibited from levying a property tax for state purposes." This constitutional provision contains two aspects: First, the property tax at issue must be levied by the State, and second, the property tax at issue must be levied for a state purpose. In assessing § 11(1)(d) of L.B. 701 for constitutional analysis, the court looked to the legislative history, and found that it was clear from the legislative history that L.B. 701 had the purpose of ensuring the State's compliance with the Compact and additionally addressing the water problems of the Republican River Basin. Therefore the court concluded that the purposes of the property tax provisions found at § 11(1)(d) of L.B. 701 were intermingled state and local purposes.

Given the stipulated facts and applicable law, the court concluded that the property tax levy in L.B. was effectively a state levy and that its primary purpose was for a state purpose, and thus the property tax levy violated Neb. Const. art. VIII, § 1A. In determining that the property tax at issue is primarily for state purposes, the court specifically noted that the legislative history, some of which is quoted by the district court in its order, was full of testimony that the predominant purpose of the property tax provision of L.B. 701 was for the purpose of maintaining the State's compliance with the Compact. The court determined this to be a state purpose. Therefore, the court held that L.B. 701(1)(d) violated the prohibition against levying a property tax for state purposes found in Neb. Const. art. VIII, § 1A, and that such provision was therefore unconstitutional. Under § 34 of L.B. 701, the court severed the offending provision and the ruling has no bearing on the remaining provisions of L.B. 701. The court noted that although its reasoning was different from that of the district court, which also concluded that § 11(1)(d) of L.B. 701 was unconstitutional, albeit on another basis, it was nevertheless affirming the order of the district court, which declared § 11(1)(d) of L.B. 701 unconstitutional and enjoined its enforcement.

***Johnson v. City of Kearney*, 277 Neb. 481, 763 N.W.2d 103 (2009).**

Landowners brought action to challenge creation of paving and improvement district and the validity of a special assessment levied against their property. The District Court of Buffalo County, entered judgment for city, and landowners appealed. The Nebraska Supreme Court held that the court lacked jurisdiction over challenge to district's creation, and that the evidence was sufficient to support the finding that the assessment benefited the landowners' property.

Appellants, Marlo Johnson and Jennifer Johnson, were the owners of real estate abutting the east side of south Central Avenue in Kearney, Nebraska. The Johnson's were challenging the passage of the ordinance creating paving and improvement district No. 2000-822 along Central Avenue and the special assessment levied on their property. In February of 2000, the Kearney City Council adopted ordinance No. 6621, which created paving and improvement district No. 2000-822. District No. 2000-822 called for the widening of a section of Central Avenue from a 24-foot-wide street to a 36-foot-wide street and also called for curbs, gutters, and new storm sewers. The Johnson's prepared a written petition objecting to the proposed district and circulated the petition among the landowners abutting the affected portion of Central Avenue. They originally received more than the 50 percent of landowners subject to special assessments signatures, but after some withdrew their signatures, only 47.01 percent of the landowners were still objecting. Based on this, the city found that there were insufficient objections to the ordinance, and the improvements were made.

Two and a half years later and after construction of improvements, in November 2002, the city council, sitting as a board of equalization, heard objections to a proposed special assessment to pay for the construction. The Johnson's appeared at the hearing and objected to the amount and validity of the proposed special assessment levied against their property. The council voted in favor of the special assessment and levied an assessment in the amount of \$30,686.04 against the Johnsons' property. The Johnson's filed a notice of appeal in the district court for Buffalo County and alleged that the ordinance creating the district should be repealed based on the objections filed under § 16-620 and that the special assessment levied against their property was excessive. The district court entered judgment in favor of the city. With respect to the propriety of the ordinance creating the district, the court concluded that objectors may properly withdraw their objections until such time as the city repeals the newly created ordinance. The court thereby approved of the ordinance and the creation of the district. The court next found that the paving project did in fact enhance the Johnsons' property. Specifically, the district court noted that the road was widened; temporary asphalt was replaced with permanent concrete; roadside ditches were replaced with curbing, gutters, and additional drainage; soil and gravel were removed; and modern lighting was installed. The assessment was affirmed, and the Johnson's appealed.

The Johnson's claimed that the ordinance creating the paving and improvement district should have been repealed based on the number of objections initially filed pursuant to § 16-620. The city questioned the authority of the district court to determine the validity of the ordinance creating the district in this case, which was filed under § 19-2422. The Nebraska Supreme Court agreed with the city that the district court did not have authority to rule on the propriety of the ordinance in this case brought under § 19-2422. The court had previously held that a city council's determination whether or not there are a sufficient number of objections to challenge an ordinance, and prevent a city from going forward with a paving district, is an exercise of the city council's judicial function, not the district court's. In this case, the Johnsons should have

challenged the city council's determination as to the sufficiency of the objections through the petition in error statute and should have done so within 30 days. However, their petition filed in December 2002 challenging the city council's March 2000 decision regarding the propriety of the newly enacted ordinance was out of time. Because the aspect of the Johnsons' case challenging the validity of the ordinance was not timely, the Nebraska Supreme Court found that the district court was without authority to rule on the propriety of the city council's decision regarding the sufficiency of the objections under § 16-620, and thus the challenge to this portion of the district court's decision was without merit.

The Johnson's also argued that the special assessment created by the ordinance levied against their property by the district was excessive. The court noted that special assessments were charges imposed by law on land to defray the expense of a local municipal improvement on the theory that the property has received special benefits from the improvements in excess of the benefits accruing to property or people in general. The amount of a special assessment cannot exceed the amount of benefit conferred on the property assessed. Additionally, it is the property owner who challenges the special assessment who has the burden of establishing its invalidity. After a de novo review of the record, the court could not say that the board's decision to approve the special assessment was arbitrary, capricious, or unreasonable. The city then set forth evidence that the paving and improvement district made improvements to the property by widening the street, updating the sewage system, modernizing the lighting, and replacing dirt and soil with curbing. The officials testified that these improvements addressed many of the problems complained of by the residents and business owners. The city engineer also testified as to the method used in determining the amount of the assessment and the steps taken to ensure that the assessment was fair and uniform among all landowners assessed. It was the Johnsons' burden to rebut the presumption in favor of the assessment, and based on the record, the court found they did not set forth sufficient evidence refuting the benefits of the improvement, as described by the city officials, or show that the assessment was arbitrary, capricious, or unreasonable. Therefore, the court concluded that the Johnson's did not rebut the presumption that the assessment levied pursuant to the creation of paving and improvement district No. 2000-822 benefited appellants' property, and thus they affirmed the decision of the district court.

Cargill Meat Solutions v. Colfax County Bd. of Equal., 281 Neb. 93 (2011)

Cargill prevailed, but the Court's frustration with their technical win was evident. Using terms like "jurisdictional trap," "procedural maze," "procedural minefield," and "procedural trap," the Court in this case gave as strong an indication as they could to the Legislature that they need to fix the statute governing appeals from the Tax Equalization and Review Commission.

Cargill owned a facility that it used to slaughter cattle and pack meat. The County appraised the property as of 1/1/2000 at \$21,300,700 using the cost approach. Every year thereafter, the County would update the appraisal by calculating the value of any improvements made to the property and adding that to the value from the previous year, without accounting for depreciation. The value for TY 2008 was \$26,191,375. Cargill protested, the Board recommended no change, and Cargill appealed to the Commission. The Commission rejected the Board's valuation, finding that failing to account for functional or physical depreciation met the threshold for deeming the Board's action as "unreasonable or arbitrary." While the

Commission apparently found Cargill's appraisal to be less detailed than the Board's, they found it still met professional standards, concluded that the value of the land and improvements together was \$14,809,190, and vacated and reversed the Board's valuation.

The Board appealed, filing a "Petition for Judicial Review and Notice of Appeal" with the Court of Appeals. The Court of Appeals issued a summons to be served upon Cargill, and instructed the Board to serve the summons on Cargill and file a return of service with the Court of Appeals. However, instead of serving Cargill, the Board served Cargill's attorney. The Supreme Court moved the case onto their docket. Cargill moved to dismiss, arguing that the Board had failed to comply with Neb. Rev. Stat. § 77-5019(2)(a). That statute provides:

Proceedings for review shall be instituted by filing a petition and the appropriate docket fees in the Court of Appeals within thirty days after the date on which a final appealable order is entered by the commission. All parties of record shall be made parties to the proceedings for review. The commission shall only be made a party of record if the action complained of is an order issued by the commission pursuant to section [77-1504.01](#) or [77-5020](#) or sections [77-5023](#) to [77-5028](#). Summons shall be served on all parties within thirty days after the filing of the petition in the manner provided for service of a summons in section [25-510.02](#).

The court, in its discretion, may permit other interested persons to intervene. No bond or undertaking is required for an appeal to the Court of Appeals.

The Court considered whether it had jurisdiction. Noting that Neb. Rev. Stat. § 25-510.02 provides the manner for serving the state or a political subdivision, the Court found that Cargill, a private corporation, could not possibly be served in accordance with § 25-510.02, and so § 77-5019(2)(a) could not apply.

The Board argued that the applicable rule would be the Nebraska Court Rules of Appellate Procedure § 2-101(D), which provides: "In an appeal from an order of [a] tribunal from which an appeal can be taken directly to this court, the procedure shall be that provided for in appeals from the district court, except as otherwise provided by statute." The procedure for appeals from district court is found at Neb. Rev. Stat. § 25-1912, which requires two steps: (1) the appellant must file notice of appeal with the district court clerk of the court where the judgment was rendered; and (2) the party must deposit a docket fee with the district court clerk.

The Court found that the Board did not comply with the rule. The Board filed its notice of appeal with the Court of Appeals, rather than the Commission (finding the Commission to be analogous to district court). The Board's appeal was not properly perfected under § 2-101(D), and the Court concluded it did not, therefore, have jurisdiction.

In criticizing the words used in § 77-5019(2)(a), the Court says that statute "does not make sense ... not all parties to a TERC hearing or a subsequent appeal are political subdivisions. It defies the language of § 25-510.02 to require a county board of equalization to serve a private party, such as Cargill, as if it were a political subdivision ... We can think of no sensible reason for doing this ... Stating the obvious, the Legislature needs to correct this procedural trap."

In all cases, any court will first look to see if they have jurisdiction. This is consistent with the “gatekeeper” role courts are supposed to play. Courts are notoriously overburdened by the volume of litigation that appears before them, and one of the ways they reduce their caseload is by distinguishing those cases that have been properly filed from those that have not. This is not to suggest that courts shirk their duties; far from it. However, while “access to the courts” is something that the law favors in principle, one of the first tests of a potential litigant’s seriousness is whether they file their appeal properly. The Court seems to acknowledge, however, that this statute makes appeals from the Commission a tricky business.

***Vandenberg v. Butler County*, 281 Neb. 437 (2011)**

One of the items that was not even addressed by the Supreme Court was the jurisdictional issue raised in *Cargill Meat Solutions v. Colfax County*, *supra*. Apparently, serving process directly to Mrs. Vandenberg, whether or not it was served through the Tax Equalization and Review Commission (which does not have authority to serve summonses) or the Court of Appeals (which is what the County had done), was adequate.

First, the Supreme Court reiterates the very high standard for overturning decisions from lower courts: for errors appearing on the record, the inquiry is whether the decision conforms to law and is neither arbitrary, capricious, or unreasonable. Review of TERC decisions, however, are merely *de novo* on the record. This standard has been around for a long time, but the crucial distinction between the deference accorded the legal opinion of a lower court and the Commission is worth noting.

The Court starts its analysis with [Neb. Rev. Stat. § 77-105](#), particularly the trade fixture provision. They also reviewed the Property Assessment Division’s regulation defining the same.

The Court focuses on *how* the machinery is used, and not *who* uses it. The Court states “The statutory language clearly focuses on the activity being conducted on the land, not who is conducting that activity.” They find that raising crops for profit is “commercial activity” for the purposes of § 77-105.

The Court concludes by discussing *Northern Natural Gas*. They say:

“The three-part test was appropriately applied in *Cook* [*Northern Natural Gas*’ predecessor] and remains appropriate for determinations of whether fixtures should be encompassed by land sale contracts. However, § 77-105 clearly controls the issue of classifications of fixtures for taxation purposes. Accordingly, the three-part test does not apply to taxation determinations of this nature. To the extent that *Northern Natural Gas Co.* holds to the contrary, it is expressly overruled.” (emphasis supplied)

As a result of this case, the analysis of whether or not property is a fixture falls explicitly under the trade fixture statute. If a piece of property is machinery or equipment used directly in commercial, manufacturing, or processing activities conducted on real property, it is a trade fixture, and therefore personal property. If it is not, additional analysis under the three-part test from *Northern Natural Gas* could be appropriate.