

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

FUE FARMS, INC.,	)	
	)	
Appellant,	)	Case Nos. 07A-058, 07A-059
	)	
v.	)	DECISION AND ORDER
	)	AFFIRMING THE DECISIONS OF
HARLAN COUNTY BOARD OF	)	THE HARLAN COUNTY BOARD OF
EQUALIZATION,	)	EQUALIZATION
	)	
Appellee.	)	

The above-captioned cases were called for a hearing on the merits of appeals by FUE Farms, Inc. ("the Taxpayer") to the Tax Equalization and Review Commission ("the Commission"). The hearing was held in the Holiday Inn Express, 508 2nd Ave. Kearney, Nebraska, on November 6, 2008, pursuant to an Order for Hearing and Notice of Hearing issued September 5, 2008. Commissioners Wickersham, Warnes, and Salmon were present. Commissioner Wickersham was the presiding hearing officer. Commissioner Hotz was excused from participation by the presiding hearing officer. The appeal was heard by a panel of three commissioners pursuant to 442 Neb. Admin. Code, ch. 4, §011 (10/07).

Robert L. Lueking, President of FUE Farms, Inc., was present at the hearing without legal counsel.

Timothy E. Hoeft, was present as legal counsel for the Harlan County Board of Equalization ("the County Board").

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

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

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

## **I. ISSUES**

The Taxpayer has asserted that taxable value of the subject property as of January 1, 2007, is less than taxable value as determined by the County Board. The issues on appeal related to that assertion are:

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

The taxable value of the subject property on January 1, 2007.

## **II. FINDINGS OF FACT**

The Commission finds and determines that:

1. The Taxpayer has a sufficient interest in the outcome of the above captioned appeals to maintain them.
2. The parcels of real property to which the above captioned appeals pertain are ("the Subject Property") are described in the tables below.
3. Taxable value of each parcel of the subject property placed on the assessment roll as of January 1, 2007, ("the assessment date") by the Harlan County Assessor, value as proposed in timely protests, and taxable value as determined by the County Board is shown in the following tables:

Case No. 07A-058

Description: W½ Section 24, Township 4, Range 20, Harlan County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Agricultural Land	\$145,950.00	\$142,783.00	\$145,950.00
Total	\$145,950.00	\$142,783.00	\$145,950.00

Case No. 07A-059

Description: N½ Section 25, Township 4, Range 20, Harlan County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Agricultural Land	\$206,595.00	\$200,979.00	\$206,595.00
Total	\$206,595.00	\$200,979.00	\$206,595.00

4. Appeals of the County Board's decisions were filed with the Commission.
5. The County Board was served with Notices in Lieu of Summons and duly answered those Notices.
6. The appeals were consolidated for hearing by order of the Commission.
7. An Order for Hearing and Notice of Hearing issued on September 5, 2008, set a hearing of the appeals for November 6, 2008, at 1:00 p.m. CST.
8. An Affidavit of Service which appears in the records of the Commission establishes that a copy of the Order for Hearing and Notice of Hearing was served on all parties.
9. Taxable value of each parcel for the tax year 2007 is:

Case No. 07A-058

Agricultural land	\$ 145,950.00
Total	<u>\$ 145,950.00</u>

Case No. 07A-059

Agricultural land	\$ 206,595.00
Total	<u>\$ 206,595.00.</u>

**III.  
APPLICABLE LAW**

1. Subject matter jurisdiction of the Commission in each of the above captioned appeals is over all questions necessary to determine taxable value. Neb. Rev. Stat. §77-5016(7) (Supp. 2007).
2. “Actual value is the most probable price expressed in terms of money that a property will bring if exposed for sale in the open market, or in an arm’s length transaction, between a willing buyer and a willing seller, both of whom are knowledgeable concerning all the uses to which the real property is adapted and for which the real property is capable of being used. In analyzing the uses and restrictions applicable to real property the analysis shall include a full description of the physical characteristics of the real property and an identification of the property rights valued.” Neb. Rev. Stat. §77-112 (Reissue 2003).
3. Actual value may be determined using professionally accepted mass appraisal methods, including, but not limited to, the (1) sales comparison approach using the guidelines in section 77-1371, (2) income approach, and (3) cost approach. Neb. Rev. Stat. §77-112 (Reissue 2003).
4. “Actual value, market value, and fair market value mean exactly the same thing.” *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 ( 2002).

5. Taxable value is the percentage of actual value subject to taxation as directed by section 77-201 of Nebraska Statutes and has the same meaning as assessed value. Neb. Rev. Stat. §77-131 (Reissue 2003).
6. All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation. Neb. Rev. Stat. §77-201(1) (Cum. Supp. 2006).
7. Agricultural land and horticultural land shall be valued for purposes of taxation at seventy five percent of its actual value. Neb. Rev. Stat. §77-201 (2) (Cum. Supp. 2006).
8. Agricultural land and horticultural land means a parcel of land which is primarily used for agricultural or horticultural purposes, including wasteland lying in or adjacent to and in common ownership or management with other agricultural land and horticultural land. Agricultural land and horticultural land does not include any land directly associated with any building or enclosed structure." Neb. Rev. Stat. §77-1359 (1) (Cum. Supp. 2006).
9. "Agricultural or horticultural purposes means used for the commercial production of any plant or animal product in a raw or unprocessed state that is derived from the science and art of agriculture, aquaculture, or horticulture. Agricultural or horticultural purposes includes the following uses of land:
  - (a) Land retained or protected for future agricultural or horticultural purposes under a conservation easement as provided in the Conservation and Preservation Easements Act except when the parcel or a portion thereof is being used for purposes other than agricultural or horticultural purposes; and

(b) Land enrolled in a federal or state program in which payments are received for removing such land from agricultural or horticultural production shall be defined as agricultural land or horticultural land." Neb. Rev. Stat. §77-1359 (2) (Cum. Supp. 2006).

10. A presumption exists that the County Board has faithfully performed its duties and has acted on competent evidence. *City of York v. York County Bd. Of Equalization*, 266 Neb. 297, 64 N.W.2d 445 (2003).
11. The presumption in favor of the county board may be classified as a principle of procedure involving the burden of proof, namely, a taxpayer has the burden to prove that action by a board of equalization fixing or determining valuation of real estate for tax purposes is unauthorized by or contrary to constitutional or statutory provisions governing taxation. *Gordman Properties Company v. Board of Equalization of Hall County*, 225 Neb. 169, 403 N.W.2d 366 (1987).
12. The presumption disappears if there is competent evidence to the contrary. *Id.*
13. The order, decision, determination, or action appealed from shall be affirmed unless evidence is adduced establishing that the order, decision, determination, or action was unreasonable or arbitrary. Neb. Rev. Stat. §77-5016 (8) (Cum. Supp. 2006).
14. Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence. See, e.g. *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb.App. 171, 645 N.W.2d 821 (2002).

15. "Clear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved."  
*Castellano v. Bitkower*, 216 Neb. 806, 812, 346 N.W.2d 249, 253 (1984).
16. A decision is "arbitrary" when it is made in disregard of the facts and circumstances and without some basis which could lead a reasonable person to the same conclusion. *Phelps Cty. Bd. of Equal. v. Graf*, 258 Neb 810, 606 N.W.2d 736 (2000).
17. A decision is unreasonable only if the evidence presented leaves no room for differences of opinion among reasonable minds. *Pittman v. Sarpy Cty. Bd. of Equal.*, 258 Neb 390, 603 N.W.2d 447 (1999).
18. A corporate officer or other representative of an entity, must be shown to be familiar with the property in question and have a knowledge of values generally in the vicinity to be qualified to offer an opinion of value. *Kohl's Dept. Stores v. Douglas County Bd. of Equal.*, 10 Neb.App. 809, 638 N.W.2d, 881 (2002).
19. The County Board need not put on any evidence to support its valuation of the property at issue unless the taxpayer establishes the Board's valuation was unreasonable or arbitrary. *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).
20. A Taxpayer, who only produced evidence that was aimed at discrediting valuation methods utilized by the county assessor, failed to meet burden of proving that value of property was not fairly and proportionately equalized or that valuation placed upon property for tax purposes was unreasonable or arbitrary. *Beynon v. Board of Equalization of Lancaster County*, 213 Neb. 488, 329 N.W.2d 857 (1983).

21. A Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued. Cf. *Lincoln Tel. and Tel. Co. v. County Bd. Of Equalization of York County*, 209 Neb. 465, 308 N.W.2d 515 (1981); *Arenson v. Cedar County*, 212 Neb. 62, 321 N.W.2d 427 (1982) (determination of equalized values); and *Josten-Wilbert Vault Co. v. Board of Equalization for Buffalo County*, 179 Neb. 415, 138 N.W.2d 641 (1965) (determination of actual value).

#### IV. ANALYSIS

The subject property consists of two parcels of agricultural land and horticultural land.

The Taxpayer's President testified that taxable values for the two parcels of the subject property were not properly determined because portions of the parcels classified and valued by the assessor as irrigated cropland were in fact used as dryland cropland for the tax years 2006 and 2007 and would be used as dryland cropland for the tax years 2008 and 2009. The Taxpayer agreed to forego groundwater irrigation on 66 acres of the subject property used as dryland cropland for a period of four years in exchange for payments received in three years. (E16:3, 4, &5 and E9:2, 3, & 5).

Dryland cropland is defined as "land that is primarily used for crop production without irrigation." 350 Neb. Admin. Code, ch14, §002.21A (1/07). "Irrigated Cropland includes all land where irrigation is used, whether for cultivation of row crops, small grains, seeded hay, forage crops, or grasses." 350 Neb. Admin. Code, ch14, §002.21B (1/07). There were forty two acres of the parcel described in Case NO. 07A-058 classified by the assessor as IRRG 1ATE-EQP for tax year 2007. (E17:6). There were twenty four acres of the parcel described in Case



NO. 07A-059 classified by the assessor as IRRG 1ATE-EQP for tax year 2007. (E17:3). The EQP portion of the classification identifies land participating in the Environmental Quality Incentives Program ("EQIP"). The participating land may not be irrigated during the term of the EQIP agreement. Payments are made to encourage participation.

The Property Tax Administrator issued a directive on March 6, 2007 describing a procedure for valuation of EQIP land. (E15:1-4). On July 11, 2007 the Property Tax Administrator issued a revised directive describing a procedure for valuation of EQIP land. (E15:5-8). The revised directive was issued before the County Board made its decision on July 19, 2007. The July 11, 2007, directive advises an assessor to use the following procedure for assessment of EQIP land:

"Year 1---Assessor classifies the land as continued use in irrigation, but 'flags' the property card for land enrolled in EQIP (e.g. 3A1 land would be classified as 3A1EQ).

Land is valued as other 3A1 land.

Year 2---Assessor reviews the land for continued use and value remains the same

Year 3---Assessor observes sale of other 3A1EQ land but at a value less than 3A1 land, but more than 3D1 land. The value is adjusted to reflect the market indication and is assessed at 75% of the actual market value.

Year 4-10---Assessor continues to monitor the market for the 'EQ' land and annually makes the required adjustments to reflect 75% of actual value." (E15:7 and 8).

The subject property is within the jurisdiction of the Lower Republican Natural Resources District ("District"). Classification of the subject property for assessment purposes is complicated by rules of the District governing groundwater use for irrigation. The District's rules

in §6-6.8 require decertification for purposes of allocating water for irrigation if land is changed in the County Assessor's records from irrigated to non-irrigated. (E27:13). The Commission agrees that the rationale for a County Assessor's classification of land for taxation to be determinative of a water allocation by a political subdivision separate from Harlan County was not shown. The Commission, however, has no jurisdiction over the District and is unable to change its rules.

The Taxpayer argues that the rules of the District can cause the County Assessor to protect groundwater allocations with classifications of land as irrigated when in fact the land is not irrigated. Ultimately, however, it is not the classification that determines actual value. Actual value, as the Property Tax Administrator notes, is determined by sales. If a subclassification of EQ (EQIP land) is used uniformly as proposed by the Property Tax Administrator, sales of parcels having land with that subclassification would occur and from those sales a value could be derived for land which would be irrigated except for the EQIP agreement..

The Taxpayer urges the Commission to create a classification recognizing EQIP land as a subclass of dryland cropland. Presumably the Taxpayer believes that since the District's rule only targets classifications by the County Assessor that a classification by the Commission would not affect groundwater allocations. Creation of a new subclass of dryland cropland by the Commission would not answer the more fundamental question; What is the effect of EQIP participation on the actual value of a the parcel of land in which it lays? The land, even if classified as a type of dryland cropland, would have irrigation potential. Differentiating dryland cropland subject to an EQIP agreement from other dryland cropland without irrigation potential would be necessary to determine actual value. Whether the effect of an EQUIP agreement on

actual value is determined on land classified as irrigated cropland or as dryland cropland seems to lead to the same point, the effect of an EQIP agreement on its actual value. The Taxpayer acknowledges that sales of land with an EQIP agreement would eventually show the effect of EQUIP agreements on actual value. The Property Tax Administrator also notes that by years three or four and beyond, sales may begin to indicate the effect of EQIP agreements on the actual value of parcels land. (E15:8).

In the absence of sales, the Taxpayer's President testified that actual value and thereafter taxable value of the land classified as 1ATE-EQP in Harlan County, should be determined as a blend or average of the values assigned to 1ATE land and 1DTE land. The rationale for the blend is that the land subject to an EQIP agreement while it is being used as dryland cropland also has a payment attributed to it, EQIP payment, that other dryland cropland does not. There is no evidence that participation in the EQIP program affects actual value of land in the manner suggested by the Taxpayer's President.

The evidence does not support a finding that the decision of the County Board was unreasonable or arbitrary.

## **V. CONCLUSIONS OF LAW**

1. The Commission has subject matter jurisdiction in this appeal.
2. The Commission has jurisdiction over the parties to this appeal.
3. The Taxpayer has not produced competent evidence that the County Board failed to faithfully perform its official duties and to act on sufficient competent evidence to justify its actions.

4. The Taxpayer has not adduced sufficient, clear and convincing evidence that the decisions of the County Board are unreasonable or arbitrary and the decisions of the County Board should be affirmed.

**VI.  
ORDER**

**IT IS ORDERED THAT:**

1. The decisions of the County Board determining taxable values of the parcels comprising subject property as of the assessment date, January 1, 2007, are affirmed.
2. Taxable value, for the tax year 2007, of each parcel described in an appeal as referenced by the Case No. is:

Case No. 07A-058

Agricultural land    \$ 145,950.00

Total                            \$ 145,950.00

Case No. 07A-059

Agricultural land    \$ 206,595.00

Total                            \$ 206,595.00.

3. This decision, if no appeal is timely filed, shall be certified to the Harlan County Treasurer, and the Harlan County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Cum. Supp. 2006).
4. Any request for relief, by any party, which is not specifically provided for by this order is denied.

5. Each party is to bear its own costs in this proceeding.
6. This decision shall only be applicable to tax year 2007.
7. This order is effective for purposes of appeal on December 3, 2008.

Signed and Sealed. December 3, 2008.

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Nancy J. Salmon, Commissioner

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William C. Warnes, Commissioner

**SEAL**

**APPEALS FROM DECISIONS OF THE COMMISSION MUST SATISFY THE REQUIREMENTS OF NEB. REV. STAT. §77-5019 (CUM. SUPP. 2006), OTHER PROVISIONS OF NEBRASKA STATUTES, AND COURT RULES.**

I concur in the result.

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

Nebraska courts have held that the provisions of section 77-5016(8) of the Nebraska Statutes create a presumption that the County Board has faithfully performed its official duties

and has acted upon sufficient competent evidence to justify its actions. *City of York v. York County Board of Equalization*, 266 Neb. 297, 664 N.W.2d 445 (2003). The presumption cited in *York* has roots in the early jurisprudence of Nebraska. See, *State v. Savage*, 65 Neb. 714, 91 N.W. 716 (1902) (citing *Dixon Co. v. Halstead*, 23 Neb. 697, 37 N.W. 621 (1888) and *State v. County Board of Dodge Co.* 20 Neb. 595, 31 N.W. 117 (1887)). As early as 1903 Nebraska Statutes provided for review of County Board assessment decisions by the district courts. Laws 1903, c. 73 §124. The statute providing for review did not state a standard for that review. *Id.*

In 1959 the legislature provided a statutory standard for review by the district courts of county board of equalization, assessment decisions. 1959 Neb Laws, LB 55, §3. The statutory standard of review required the district Court to affirm the decision of the county board of equalization unless the decision was arbitrary or unreasonable or the value as established was too low. *Id.* The statutory standard of review was codified in section 77-1511 of the Nebraska Statutes. Neb. Rev. Stat. §77-1511 (Cum. Supp. 1959). Review of district court decisions made pursuant to section 77-1511 was de novo. *Future Motels, Inc. v. Custer County Board of Equalization*, 252 Neb. 565, 563 N.W.2d 785 (1997). The presumption functioned as a standard of review. See, e.g. *Gamboni v. County of Otoe*, 159 Neb. 417, 67 N.W.2d 492 (1954).

The Tax Equalization and Review Commission was created in 1995. 1995 Neb. Laws, LB 490 §153. Section 77-1511 of the Nebraska Statutes was made applicable to review of county board of equalization assessment decisions by the Commission. *Id.* In 2001 section 77-1511 of Nebraska Statutes was repealed. 2001 Neb. Laws, LB 465, §12. After repeal of section 77-1511 the standard for review to be applied by the Commission in most appeals was stated in section 77-5016 of the Nebraska Statutes. Section 77-5016 requires a finding that the decision

being reviewed was unreasonable or arbitrary. The basis for that determination is the evidence presented to the Commission in a new record. See, Neb. Rev. Stat. §77-5016 (Cum. Supp. 2006). Commission decisions are reviewed for error on the record. See, Neb. Rev. Stat. 77-5019(5) (Cum. Supp. 2006). The statutory basis for Commission review and the review of its decisions is analogous to district courts review of decisions made by administrative agencies. The basis for district court review of decisions made by administrative agencies is de novo on the record. *Tyson Fresh Meats v. State*, 270 Neb. 535, 704 N.W.2d 788 (2005). The decisions of the district court examining the administrative decision are reviewed for error on the record. *Thorson v. Nebraska Dept. of Health & Human Servs.*, 274 Neb. 322, 740 N.W.2d 27 (2007). The similarities are enough to suggest that the framework for review applied to district court decisions could be made applicable to decisions of the Commission.

Many appeals of decisions made pursuant to section 77-1511 were decided without reference to the statutory standard of review applicable to the district courts. See, e.g. *Grainger Brothers Company v. County Board of Equalization of the County of Lancaster*, 180 Neb. 571, 144 N.W.2d 161 (1966). As noted however review was de novo and the reviewing court was not bound by the standard of review imposed on district court. *Loskill v. Board of Equalization of Adams County*, 186 Neb. 707, 185 N.W.2d 852 (1971). In *Hastings Building Co., v. Board of Equalization of Adams County*, 190 Neb. 63, 206 N.W.2d 338 (1973), the Nebraska Supreme Court acknowledged that two standards of review existed for the district courts; one statutory, and the other judicial stated as a presumption that the county board of equalization faithfully performed its official duties and acted upon sufficient competent evidence. No attempt was

made by the *Hastings* Court to reconcile the two standards of review that were applicable to the district courts.

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



overcome the presumption that the county board of equalization faithfully discharged its duties and acted on sufficient competent evidence. In any event the statutory standard has been met and relief may be granted. Both standards of review are met in the fourth possibility and relief may be granted. Each analyses of the standards of review allowing a grant of relief requires a finding that the statutory standard has been met.

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

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Wm R. Wickersham, Commissioner