

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

TAMARA BISHOP,)	
)	
Appellant,)	Case No. 08A 183
)	
v.)	DECISION AND ORDER
)	AFFIRMING THE DECISION OF
HARLAN COUNTY BOARD OF)	THE HARLAN COUNTY BOARD OF
EQUALIZATION,)	EQUALIZATION
)	
Appellee.)	

The above-captioned case was called for a hearing on the merits of an appeal by Tamara Bishop ("the Taxpayer") to the Tax Equalization and Review Commission ("the Commission"). The hearing was held in the Holiday Inn Express, 508 2nd Avenue, Kearney, Nebraska, on September 17, 2009, pursuant to an Order for Hearing and Notice of Hearing issued July 17, 2009. Commissioners Wickersham, Salmon, and Hotz were present. Commissioner Wickersham was the presiding hearing officer. Commissioner Warnes was excused from participation by the presiding hearing officer.

Tamara Bishop was not present at the hearing. The presence of Tamara Bishop at the hearing was waived. Richard Calkins appeared as legal counsel for the Taxpayer.

Bryan S. McQuay, County Attorney for Harlan County, Nebraska, 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. 2008). The final decision and order of the Commission in this case is as follows.

I. ISSUES

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

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

The taxable value of the subject property on January 1, 2008.

II. FINDINGS OF FACT

The Commission finds and determines that:

1. The Taxpayer has a sufficient interest in the outcome of the above captioned appeal to maintain the appeal.
2. The parcel of real property to which this appeal pertains ("the Subject Property") is described in the table below.
3. Taxable value of the subject property placed on the assessment roll as of January 1, 2008, ("the assessment date") by the Harlan County Assessor, value as proposed in a timely protest, and taxable value as determined by the County Board is shown in the following table:

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Description: Fcl W½SE¼, Fcl Lot 7 Section 35, Township 2, Range 19, Harlan County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Agricultural Land	\$40,255.00	\$34,195.00	\$40,255.00
Total	\$40,255.00	\$34,195.00	\$40,255.00

4. An appeal of the County Board's decision was filed with the Commission.
5. The County Board was served with a Notice in Lieu of Summons and duly answered that Notice.
6. An Order for Hearing and Notice of Hearing issued on July 17, 2009, set a hearing of the appeal for September 17, 2009, at 8:00 a.m. CDST.
7. An Affidavit of Service, which appears in the records of the Commission, establishes that a copy of the Order for Hearing and Notice of Hearing was served on all parties.
8. Taxable value of the subject property as of the assessment date for the tax year 2008 is:

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Agricultural land \$ 40,255.00

Total \$ 40,255.00.

III. APPLICABLE LAW

1. Subject matter jurisdiction of the Commission in this appeal is over all questions necessary to determine taxable value. Neb. Rev. Stat. §77-5016(7) (Cum. Supp. 2008).
2. “Actual value is the most probable price expressed in terms of money that a property will bring if exposed for sale in the open market, or in an arm’s length transaction, between a willing buyer and a willing seller, both of whom are knowledgeable concerning all the uses to which the real property is adapted and for which the real property is capable of

- being used. In analyzing the uses and restrictions applicable to real property the analysis shall include a full description of the physical characteristics of the real property and an identification of the property rights valued.” Neb. Rev. Stat. §77-112 (Reissue 2003).
3. Actual value may be determined using professionally accepted mass appraisal methods, including, but not limited to, the (1) sales comparison approach using the guidelines in section 77-1371, (2) income approach, and (3) cost approach. Neb. Rev. Stat. §77-112 (Reissue 2003).
 4. “Actual value, market value, and fair market value mean exactly the same thing.”
Omaha Country Club v. Douglas County Board of Equalization, et al., 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).
 5. Taxable value is the percentage of actual value subject to taxation as directed by section 77-201 of Nebraska Statutes and has the same meaning as assessed value. Neb. Rev. Stat. §77-131 (Reissue 2003).
 6. All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation. Neb. Rev. Stat. §77-201(1) (Cum. Supp. 2008).
 7. Agricultural land and horticultural land shall be valued for purposes of taxation at seventy five percent of its actual value. Neb. Rev. Stat. §77-201 (2) (Cum. Supp. 2008).
 8. Agricultural land and horticultural land means a parcel of land which is primarily used for agricultural or horticultural purposes, including wasteland lying in or adjacent to and in common ownership or management with other agricultural land and horticultural land.

Agricultural land and horticultural land does not include any land directly associated with any building or enclosed structure." Neb. Rev. Stat. §77-1359 (1) (Cum. Supp. 2008).

9. "Agricultural or horticultural purposes means used for the commercial production of any plant or animal product in a raw or unprocessed state that is derived from the science and art of agriculture, aquaculture, or horticulture. Agricultural or horticultural purposes includes the following uses of land:

- (a) Land retained or protected for future agricultural or horticultural purposes under a conservation easement as provided in the Conservation and Preservation Easements Act except when the parcel or a portion thereof is being used for purposes other than agricultural or horticultural purposes; and

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

(Cum. Supp. 2008).

10. 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 appealed from was unreasonable or arbitrary must be made by clear and convincing evidence. See, e.g., *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb.App. 171, 645 N.W.2d 821 (2002).
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. "An owner who is familiar with his property and knows its worth is permitted to testify as to its value." *U. S. Ecology v. Boyd County Bd. Of Equalization*, 256 Neb. 7, 16, 588 N.W.2d 575, 581 (1999).

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

IV. ANALYSIS

The subject property is an unimproved parcel of agricultural land and horticultural land.

The issue in this appeal is the valuation of agricultural land and horticultural land classified as irrigated by the County Assessor. The Taxpayer asserts that a general classification of land as irrigated land does not consider the effect on valuation of limitations on the availability of either surface or ground water for irrigation. The Taxpayer argues that subclassifications of irrigated land should be changed so that limitations on the availability of water for surface or groundwater irrigation would be recognized in the land classification system used by the County. The Taxpayer suggests that a classification of intermittent irrigated crop land be used to reflect

the intermittent availability of water for irrigation from surface water. The Taxpayer also suggests that a classification of limited irrigated crop land be used to reflect the limited availability of water for irrigation from ground water.

At a minimum, agricultural land and horticultural land is to be classified as irrigated crop land, dryland cropland, grassland, wasteland, nurseries, feedlots, and orchards, so that the categories reflect uses appropriate for the valuation of such land according to law. Neb. Rev. Stat. §77-1363 (Cum. Supp. 2006). Classes of agricultural land and horticultural land are to be inventoried by subclasses based on soil classifications. *Id.* Other classes and subclasses may be used by the county assessor or the Tax Equalization and Review Commission to achieve more uniform and proportionate valuation. *Id.*

Rules and regulations promulgated by the Property Tax Administrator define irrigated land as land upon which irrigation is applied for the production of grass or other crops. Neb. Admin. Code, ch 14, §002.37B (01/07).

The Taxpayer presented substantial and persuasive evidence that the availability of ground and surface water for irrigation of crops was limited or intermittent for tax year 2008, as well as prior years and will be limited or intermittent for the foreseeable future. Surface water availability is limited to periods after high rain fall and even then is limited by efforts to comply with State of Nebraska obligations under a compact with the State of Kansas. Ground water usage is limited by the characteristics of the aquifer from which the water is drawn and efforts to comply with State of Nebraska obligations under a compact with the State of Kansas. The Taxpayer has also shown that limited water means yields from irrigated crops will be less than if

adequate water is available. Limited irrigated production also affects potential income and logically affects value.

In Directive 07-03 the Property Tax Administrator discussed techniques that could be used by assessors and others to determine the effect of water use restrictions on actual value. The procedure calls for the identification of the lands for which water use is restricted and monitoring of sales of those lands for comparison with sales of land on which water use was not restricted. Property Tax Directive 07-03 (reissued) (July 11, 2007). The process described in Directive 07-03 is applicable in this instance.

The evidence shows that crop production on the subject property and other parcels is limited by the amount of irrigation water that may be applied. Creation of subclasses of irrigated land to identify intermittent or limited availability of water for irrigation does not, however, answer the fundamental valuation question: What is the effect of intermittent or limited water for irrigation on the actual value of a parcel for which irrigation water is intermittently available or is limited?

For tax year 2008, three market areas were identified in County for the valuation of agricultural land and horticultural land. *2008 Reports and Opinions of the Property Tax Administrator for Harlan County*, 62. Boundaries of the market areas are shown on Exhibit 42A at page 1 of the *2008 Reports and Opinions of the Property Tax Administrator for Harlan County*. The subject property is located in neighborhood (market area) 3. (E8:15). Exhibit 42A page 2 of the *2008 Reports and Opinions of the Property Tax Administrator for Harlan County*, shows few recorded wells with a capacity of 500 GPM (Gallons Per Minute). A witness testified that even a well rated at 500 GPM might not be sufficient for irrigation use because that rate

could not be sustained through an irrigation season. The Taxpayer does not challenge the assessment practices of the County Assessor. Whatever the effect of limited groundwater for irrigation on actual value of the subject property may be, the subject property has been included in a market area in which values would have been developed reflecting limited ground water availability.

For tax year 2008, the subject property had limited ground water available for irrigation. The subject property has a storage surface water appropriation. The storage right makes some water available for irrigation. There is no showing that those characteristics are not shared with other lands in Market Area 3 or, if not shared, the differential in actual value of the subject property when compared to other parcels in Market Area 3 with greater availability of water for irrigation. If classifications of intermittent or limited irrigation potential were created, either might be applicable in this appeal. Whichever classification might be applicable to the each parcel of the subject property, there is no evidence of actual value for lands in either of the classifications proposed by the Taxpayer. The Commission cannot grant the relief requested.

V. CONCLUSIONS OF LAW

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

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

**VI.
ORDER**

IT IS ORDERED THAT:

1. The decision of the County Board determining taxable value of the subject property as of the assessment date, January 1, 2008, is affirmed.
2. Taxable value, for the tax year 2008, of the subject property is:

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Agricultural land \$ 40,255.00

Total \$ 40,255.00.

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. 2008).
4. Any request for relief, by any party, which is not specifically provided for by this order is denied.
5. Each party is to bear its own costs in this proceeding.
6. This decision shall only be applicable to tax year 2008.
7. This order is effective for purposes of appeal on November 9, 2009.

Signed and Sealed. November 9, 2009.

Nancy J. Salmon, Commissioner

Robert W. Hotz, Commissioner

SEAL

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

I concur in the result.

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

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

The Commission is authorized to review decision of a county board of equalization determining taxable values. Neb. Rev. Stat. §77-5007 (Supp. 2007). Review of county board of equalization decisions is not new in Nebraska law. As early as 1903 Nebraska Statutes provided for review of County Board assessment decisions by the district courts. Laws 1903, c. 73 §124. The statute providing for review did not state a standard for that review. *Id.* A standard of

review stated as a presumption was adopted by Nebraska's Supreme Court. See *State v. Savage*, 65 Neb. 714, 91 N.W. 716 (1902) (citing *Dixon Co. v. Halstead*, 23 Neb. 697, 37 N.W. 621 (1888) and *State v. County Board of Dodge Co.* 20 Neb. 595, 31 N.W. 117 (1887). The presumption was that the County Board had faithfully performed its official duties and had acted upon sufficient competent evidence to justify its actions. See *id.* In 1959, the legislature provided a statutory standard for review by the district courts of county board of equalization, assessment decisions. 1959 Neb Laws, LB 55, §3. The statutory standard of review required the District Court to affirm the decision of the county board of equalization unless the decision was arbitrary or unreasonable or the value as established was too low. *Id.* The statutory standard of review was codified in section 77-1511 of the Nebraska Statutes. Neb. Rev. Stat. §77-1511 (Cum. Supp. 1959). After adoption of the statutory standard of review Nebraska Courts have held that the provisions of section 77-5011 of the Nebraska Statutes created a presumption that the County Board has faithfully performed its official duties and has acted upon sufficient competent evidence to justify its actions. See, e.g., *Ideal Basic Indus. V. Nuckolls Cty. Bd. Of Equal.*, 231 Neb. 653, 437 N.W.2d 501 (1989). The presumption stated by the Court was the presumption that had been found before the statute was enacted.

Many appeals of decisions made pursuant to section 77-1511 were decided without reference to the statutory standard of review applicable to the district courts review of a county board of equalization's decision. See, e.g., *Grainger Brothers Company v. County Board of Equalization of the County of Lancaster*, 180 Neb. 571, 144 N.W.2d 161 (1966). In *Hastings Building Co., v. Board of Equalization of Adams County*, 190 Neb. 63, 206 N.W.2d 338 (1973), the Nebraska Supreme Court acknowledged that two standards of review existed for reviews by

the district court; one statutory requiring a finding that the decision reviewed was unreasonable or arbitrary, and another judicial requiring a finding that a presumption that the county board of equalization faithfully performed its official duties and acted upon sufficient competent evidence was overcome. No attempt was made by the *Hastings* Court to reconcile the two standards of review that were applicable to the District Courts.

The Tax Equalization and Review Commission was created in 1995. 1995 Neb. Laws, LB 490 §153. Section 77-1511 of the Nebraska Statutes was made applicable to review of county board of equalization assessment decisions by the Commission. *Id.* In 2001 section 77-1511 of Nebraska Statutes was repealed. 2001 Neb. Laws, LB 465, §12. After repeal of section 77-1511 the standard for review to be applied by the Commission in most appeals was stated in section 77-5016 of the Nebraska Statutes. Section 77-5016(8) requires a finding that the decision being reviewed was unreasonable or arbitrary. *Brenner v. Banner County Board of Equalization*, 276 Neb. 275, 753 N.W.2d 802 (2008). The Supreme Court has stated that the presumption which arose from section 77-1511 is applicable to the decisions of the Commission. *Garvey Elevators, Inc. V. Adams County Bd. of Equalization*, 261 Neb. 130, 621 N.W.2d 518 (2001).

The possible results from application of the presumption as a standard of review and the statutory standard of review are: (1) the presumption is not overcome and the statutory standard is not overcome; (2) the presumption is overcome and the statutory standard is not overcome; (3) the presumption is not overcome and the statutory standard is overcome; (4) and finally the presumption is overcome and the statutory standard is overcome. The first possibility does not allow a grant of relief, neither standard of review has been met. The second possibility does not therefore allow a grant of relief even though the presumption is overcome because the statutory

standard remains. See *City of York v. York County Bd of Equal.*, 266 Neb. 297, 664 N.W.2d 445 (2003). The third possibility requires analysis. The presumption and the statutory standard of review are different legal standards, and the statutory standard remains after the presumption has been overcome. See *id.* The burden of proof to overcome the presumption is competent evidence. *Id.* Clear and convincing evidence is required to show that a county board of equalization's decision was unreasonable or arbitrary. See, e.g., *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb.App. 171, 645 N.W.2d 821 (2002). Competent evidence that the county board of equalization failed to perform its duties or act upon sufficient competent evidence is not always evidence that the county board of equalization acted unreasonably or arbitrarily because the statutory standard of review remains even if the presumption is overcome. *City of York*, *supra*. Clear and convincing evidence that a county board of equalization's determination, action, order, or decision was unreasonable or arbitrary, as those terms have been defined, may however overcome the presumption that the county board of equalization faithfully discharged its duties and acted on sufficient competent evidence. In any event the statutory standard has been met and relief may be granted. Both standards of review are met in the fourth possibility and relief may be granted.

Use of the presumption as a standard of review has been criticized. See G. Michael Fenner, *About Presumptions in Civil Cases*, 17 Creighton L. Rev. 307 (1984). In the view of that author, the presumption should be returned to its roots as a burden of proof. *Id.* Nebraska's Supreme Court acknowledged the difficulty of using two standards of review and classified the presumption in favor of the county board of equalization as a principle of procedure involving the burden of proof, namely, a taxpayer has the burden to prove that action by a board of

equalization fixing or determining valuation of real estate for tax purposes is unauthorized by or contrary to constitutional or statutory provisions governing taxation. See *Gordman Properties Company v. Board of Equalization of Hall County*, 225 Neb. 169, 403 N.W.2d 366 (1987). Use of the *Gordman* analysis allows consideration of both the presumption and the statutory standard of review without the difficulties inherent in the application of two standards of review. It is within that framework that I have analyzed the evidence.

Wm R. Wickersham, Commissioner