BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

RUTH LIENEMANN, Appellant, v. SARPY COUNTY BOARD OF EQUALIZATION, Appellee.	)	Case No. 09A 003 DECISION AND ORDER REVERSING THE DECISION OF THE SARPY COUNTY BOARD OF EQUALIZATION

The above-captioned case was called for a hearing on the merits of an appeal by Ruth Lienemann ("the Taxpayer") to the Tax Equalization and Review Commission ("the Commission"). The hearing was held in the Commission's Hearing Room on the sixth floor of the Nebraska State Office Building in the City of Lincoln, Lancaster County, Nebraska, on June 22, 2010, pursuant to an Order for Hearing and Notice of Hearing issued March 23, 2010. Commissioner Wickersham, Chairperson of the Commission, was the presiding hearing officer. Commissioner Warnes was absent. Commissioner Wickersham, as Chairperson, designated Commissioners Wickersham, Salmon, and Hotz as a panel of the Commission to hear the appeal. Commissioner Hotz was excused. Commissioner Salmon was present. The appeal was heard by a quorum of a panel of the Commission.

Ruth Lienemann was present at the hearing. No one appeared as legal counsel for the Taxpayer.

John W. Reisz, a Deputy County Attorney for Sarpy County, Nebraska, was present as legal counsel for the Sarpy 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 (Reissue 2009). 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, 2009, 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, 2009.

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, 2009, ("the assessment date") by the Sarpy County Assessor, value as proposed in a timely protest, and taxable value as determined by the County Board is shown in the following table:

Description: S½SE¼ Exc ROW Section 2, Township 13, Range 12, Sarpy County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Agricultural Land	$141,683.00	$186,133.00	$141,683.00
Home Site	$64,000.00	Included in Ag Land	$47,000.00
Residence	$66,212.00	$34,886.00	$66,212.00
Farm Site	$9,000.00	Included in Ag Land	$12,000.00
Outbuilding	$5,049.00	Included with Residence	$5,049.00
Total	$285,944.00	$201,019.00	$271,944.00

4. An appeal of the County Board's decision was filed with the Commission.

5. An Order for Hearing and Notice of Hearing issued on March 23, 2010, set a hearing of the appeal for June 22, 2010, at 9:00 a.m. CDST.

6. 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.

7. Taxable value of the subject property as of the assessment date for the tax year 2009 is:

Agricultural land	$ 141,683.00
Farm Site	$ 9,000.00
Home Site	$ 64,000.00
Residence	$ 36,161.00
Outbuildings	$ 5,049.00
Total	$ 255,893.00.

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) (Reissue 2009).

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 2009).

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 2009).

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 2009).

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) (Reissue 2009).

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) (Reissue 2009).

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) (Reissue 2009).

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) (Reissue 2009).

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. 2008).

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.

IV.
ANALYSIS

The subject property is an improved parcel in Sarpy County. Improvements on the parcel include a residence, a barn, a corn crib, detached garage and a grain bin. (E3:9 & 10).

The County Board stipulated that its decision was arbitrary or unreasonable. Once it is determined that the decision of County Board was unreasonable or arbitrary, the Commission must review the evidence and adopt the most reasonable estimate of actual value presented. *Garvey Elevators, Inc. v. Adams County Bd. of Equalization*, 261 Neb. 130, 621 N.W.2d 518 (2001).

The contention of the Taxpayer on appeal is that the contributions to value made by a home site and a farm site, a residence and a corn crib are excessive as determined by the County Board.

The Taxpayer contends that the contribution to actual value made by the corn crib is zero because it was not usable as a corn crib on the assessment date because of its design. The contribution to value of the corn crib as determined by the County Board was $163. (E6:4). The subject property was inspected on October 30, 2009. After inspection by an appraiser for Sarpy County the contribution to value made by the corn crib was determined to be $163. (E9:3). The contribution to value corn crib rests on the Taxpayer's contention that it may not be used as a corn crib. Other uses for the structure were not excluded. An appraiser for the County determined, after inspection, that the corn crib made a contribution to value. The determination of the appraiser is the most reasonable estimate of value before the Commission.

The Taxpayer contends that the contribution to value made by the residence is zero because of its condition. A number of photographs were received as Exhibit 10 pages 7, 9, 10, 11, and 12 and Exhibit 15 pages 1 & 2, depict the residence as of October 30, 2009. After inspection by an appraiser for Sarpy County the condition of the residence was changed from fair to poor in the assessment records of the county. (E3:5 and E9:1). The contribution to

value made by the residence after inspection was determined to be $36,161. (E9:2). One of the photographs shows that the chimney pipe for the furnace would need repair before the residence could be used. (E15:1). Other photographs show that other repairs and cleaning would be appropriate. That does not mean, however, that the repairs could not be made and the residence used. The evidence is that the residence was in poor condition as of January 1, 2009. The appraiser determined that a structure in poor condition may still make a contribution to value. The Taxpayer had the residence removed in December of 2009 by donating it to a local fire department for a burning exercise. The evidence is that the Taxpayer determined after the inspection by the appraiser for the County that she would never use the residence and that continuing to insure it and pay taxes on its contribution to value was not in her best interest. Removal of the residence in December 2009 is not evidence that it made no contribution to value as of January 1, 2009. The most reasonable evidence of the contribution to value made by the residence as of January 1, 2009, is $36,161 as estimated by the Sarpy County appraiser after inspection.

The final contention of the Taxpayer is that the contribution to value of the two one acre sites should be $25,000. In support of that contention the Taxpayer relied on the schedule of values shown in Exhibit 4 at page 5. The schedule of values for property type C as shown in Exhibit 4 at page 5 indicates that $20,000 should be deemed the contribution to value made by the first acre and $5,000 the contribution to value made by the second acre. A two acre site such as that found on the subject property would then have a value of $25,000. Exhibit 4 was a recommendation to the Sarpy County Board of Equalization by an appraiser acting as a referee for the Board. The County Board did not adopt the referees recommendation as it determined

that the first acre of the two acre site had a value of $47,000 and that the second acre had a value of $12,000. (E6:5). A witness for the Taxpayer criticized the recommendation shown in Exhibit 4 for being based on sales of lots in subdivisions that were not similar to the sites on the subject property.

A witness for the Taxpayer also testified that first acre of sites in other nearby counties were valued at $17,000 to $28,000 per acre Saunders County, $40,000 per acre Dodge County, $45,000 Washington County, $17,000 to $30,000 per acre Cass County, and $20,000 per acre Douglas County. Value of the second acre in sites found in the nearby counties is not in the record. Given that evidence two acre sites in those Counties would have values as follows: $34,000 to $56,000 Saunders County; $80,000 Dodge County; $90,000 Washington County; $34,000 to $60,000 Cass County; and $40,000 in Douglas County. The County Board's determination of value of the two acre site on the subject property was $59,000. The County Assessor's determination of value of the two acre site on the subject property was $73,000 Neither the contribution to value as determined by the County Board or the County Assessor is so excessive that it is an apparent aberration when measured by the assessment practices of the neighboring counties.

The County Assessor developed a schedule for the valuation of rural sites. (E10:1). An appraiser acting as a referee for the Sarpy County Board of Equalization reviewed the schedule prepared by the Sarpy County Assessor and recommended no change. (E5).

Exhibit 10 pages 2 through 7, Exhibit 11, Exhibit 12, and Exhibit 13 are unexplained. The Commission will not attempt an analysis of unexplained exhibits.

To summarize there is no evidence in support of the County Board's determination that the two sites contributed $59,000 to value. The only evidence in support of a contribution to value for the sites of $25,000 is the referee's opinion contained in Exhibit 4. The opinion in Exhibit 4 is contradicted by the opinion of another referee in Exhibit 5. The opinion offered by a referee in Exhibit 5 supports the determination of the County Assessor. There is no evidence from which the Commission could develop an estimate of the contribution to value made by the sites independent of the estimates developed using the schedule in Exhibit 4 or the County Assessor's schedule as supported in Exhibit 5.

The schedule for estimating contribution to value by sites as adopted by the County Assessor has been reviewed and accepted by a referee acting for the County Board. A schedule for estimating contributions to value by sites was recommended by a referee acting on behalf of the County Board has not been accepted or adopted by the County Board. The most reasonable estimate of the contribution to value made by the home and farm sites is derived from the schedule adopted by the County Assessor.

V.
CONCLUSIONS OF LAW

1. The Commission has subject matter jurisdiction in this appeal.
2. The Commission has jurisdiction over the parties to this appeal.
3. The Taxpayer has produced competent evidence that the County Board failed to faithfully perform its official duties and to act on sufficient competent evidence to justify its actions.

4. The Taxpayer has adduced sufficient, clear and convincing evidence that the decision of the County Board is unreasonable or arbitrary and the decision of the County Board should be vacated and reversed.

VI.
ORDER

IT IS ORDERED THAT:

1. The decision of the County Board determining taxable value of the subject property as of the assessment date, January 1, 2009, is vacated and reversed.

2. Taxable value, for the tax year 2009, of the subject property is:

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Agricultural land	$ 141,683.00
Farm Site	$ 9,000.00
Home Site	$ 64,000.00
Residence	$ 36,161.00
Outbuildings	$ 5,049.00
Total	$ 255,893.00.

3. This decision, if no appeal is timely filed, shall be certified to the Sarpy County Treasurer, and the Sarpy County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Reissue 2009).

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 2009.

7. This order is effective for purposes of appeal on July 21, 2010.

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Nancy J. Salmon, Commissioner

SEAL

APPEALS FROM DECISIONS OF THE COMMISSION MUST SATISFY THE REQUIREMENTS OF NEB. REV. STAT. §77-5019 (REISSUE 2009), OTHER PROVISIONS OF NEBRASKA STATUTES, AND COURT RULES.

I concur in the result.

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

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

The Commission is authorized to review decision of a county board of equalization determining taxable values. Neb. Rev. Stat. §77-5007 (Supp. 2007). Review of county board of equalization decisions is not new in Nebraska law. As early as 1903 Nebraska Statutes provided for review of County Board assessment decisions by the district courts. Laws 1903, c. 73 §124. The statute providing for review did not state a standard for that review. *Id*. A standard of review stated as a presumption was adopted by Nebraska's Supreme Court. See *State v. Savage*, 65 Neb. 714, 91 N.W. 716 (1902) (citing *Dixon Co. v. Halstead*, 23 Neb. 697, 37 N.W. 621 (1888) and *State v. County Board of Dodge Co.* 20 Neb. 595, 31 N.W. 117 (1887). The presumption was that the County Board had faithfully performed its official duties and had acted upon sufficient competent evidence to justify its actions. See *id*. In 1959, the legislature provided a statutory standard for review by the district courts of county board of equalization, assessment decisions. 1959 Neb Laws, LB 55, §3. The statutory standard of review required the District Court to affirm the decision of the county board of equalization unless the decision was arbitrary or unreasonable or the value as established was too low. *Id.* The statutory standard of review was codified in section 77-1511 of the Nebraska Statutes. Neb. Rev. Stat. §77-1511 (Cum. Supp. 1959). After adoption of the statutory standard of review Nebraska Courts have held that the provisions of section 77-5011 of the Nebraska Statutes created a presumption that the County Board has faithfully performed its official duties and has acted upon sufficient competent evidence to justify its actions. See, e.g*., Ideal Basic Indus. V. Nuckolls Cty. Bd. Of Equal*., 231 Neb. 653, 437 N.W.2d 501 (1989). The presumption stated by the Court was the presumption that had been found before the statute was enacted.

Many appeals of decisions made pursuant to section 77-1511 were decided without reference to the statutory standard of review applicable to the district courts review of a county board of equalization's decision. See, e.g., *Grainger Brothers Company v. County Board of Equalization of the County of Lancaster*, 180 Neb. 571, 144 N.W.2d 161 (1966). In *Hastings Building Co., v. Board of Equalization of Adams County*, 190 Neb. 63, 206 N.W.2d 338 (1973), the Nebraska Supreme Court acknowledged that two standards of review existed for reviews by the district court; one statutory requiring a finding that the decision reviewed was unreasonable or arbitrary, and another judicial requiring a finding that a presumption that the county board of equalization faithfully performed its official duties and acted upon sufficient competent evidence was overcome. No attempt was made by the *Hastings* Court to reconcile the two standards of review that were applicable to the District Courts.

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

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

standard has been met and relief may be granted. Both standards of review are met in the fourth possibility and relief may be granted.

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

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Wm. R. Wickersham, Commissioner