

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

RICHARD R. GREEN, TRUSTEE,	)	
RICHARD R. & BETTY L. GREEN	)	
TRUST,	)	Case No. 09A 015
	)	
Appellant,	)	DECISION AND ORDER
	)	AFFIRMING THE DECISION OF
v.	)	THE MORRILL COUNTY BOARD OF
	)	EQUALIZATION
MORRILL COUNTY BOARD OF	)	
EQUALIZATION,	)	
	)	
Appellee.		

The above-captioned case was called for a hearing on the merits of an appeal by Richard R. Green, Trustee, Richard R. & Betty L. Green Trust ("the Taxpayer") to the Tax Equalization and Review Commission ("the Commission"). The hearing was held in the Hampton Inn, 301 W Hwy 26, Scottsbluff, Nebraska, on June 2, 2010, pursuant to an Order for Hearing and Notice of Hearing issued February 26, 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.

Richard R. Green, Trustee of Richard R. & Betty L. Green Trust, was present at the hearing. No one appeared as legal counsel for the Taxpayer.

Jean Rhodes, County Attorney for Morrill County, Nebraska, was present as legal counsel for the Morrill 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 Morrill 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: All Section 35, Township 23, Range 52, Morrill County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Agricultural Land	\$114,660.00	\$61,506.00	\$114,660.00
Total	\$114,660.00	\$61,506.00	\$114,660.00

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 February 26, 2010, set a hearing of the appeal for June 2, 2010, at 3:00 p.m. MDST.
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:

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Agricultural land    \$ 114,660.00

Total                    \$ 114,660.00.

**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. *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 classified as agricultural land and horticultural land. (E9:6).

The Taxpayer contends that taxable value of the subject property as of the assessment date was \$61,506. The Taxpayer reached that conclusion after consideration of several factors: the value assigned by the County Assessor to LVG 4G, \$180; the number of acres for each LVG contained within the subject property as determined by the County Assessor; and the feed capability (lbs/acre) for each soil type contained with the subject property as shown in Exhibit 6.

The feed capability was extracted from Table 8 found in the 1985 Soil Survey of Morrill County as published by the United States Department of Agriculture. The Taxpayer observed that soils TAG and TBF were assigned production capacities that were one-half of the production capacity of soil type MYE but their contributions to value were deemed equal at \$180/ acre by the County Board. The Taxpayer developed an equation which when solved would indicate the values that should be assigned to soil types based on their feed capabilities relative to the feed capability of soil type MYE. In algebraic terms the equation developed by the Taxpayer appears as follow;

$$\frac{\text{Feed capability of a target soil type}}{1,500 \text{ the feed capability of MYE soil}} = \frac{\text{Unknown value for the target soil type}}{\$180/\text{acre taxable value assigned to 4G land}}$$

Soils found in the subject property are ANC, BXE, MYE, TAG, and TBF. (E7:1). Using the Taxpayer's equation values assigned to soil types found in the subject property are as follow:

$$\begin{aligned} \text{ANC } 1,300 \div 1,500 \times \$180 &= \$156; \\ \text{BXE } 1,600 \div 1,500 \times \$180 &= \$192; \\ \text{MYE } 1,500 \div 1,500 \times \$180 &= \$180; \\ \text{TAG } 750 \div 1,500 \times \$180 &= \$ 90; \\ \text{TBF } 750 \div 1,500 \times \$180 &= \$ 90. \end{aligned}$$

After the relative value for a soil type was determined that value was multiplied by the acres of that soil type contained in the subject property and the values summed to estimate taxable value of the parcel. The calculations are as follow:

$$\begin{aligned} \text{ANC } \$156/\text{acre} \times 22 &= \$ 3,432 \\ \text{BXE } \$192/\text{acre} \times 17 &= \$ 3,264 \\ \text{MYE } \$180/\text{acre} \times 11 &= \$ 1,980 \\ \text{TAG } \$90/\text{acre} \times 386 &= \$34,740 \\ \text{TBF } \$90/\text{acre} \times 201 &= \underline{\$18,090} \\ \text{Total} &= \underline{\underline{\$61,506}}. \end{aligned}$$



Soil types have been assigned to LVGs by the County Assessor based on a directive issued by the Property Tax Administrator. *Directive 99-8*, Property Tax Administrator, (12/30/1999). Soil type ANC is assigned to LVG 3G. (E9:6). An LVG of 3G typically indicates soils that have greater value than land in LVG 4G. Greater value is assumed to indicate greater production capacity. The table in Exhibit 6 shows, however, that ANC soil assigned to LVG 3G has less production capacity than soils assigned to LVG 4G. Mathematics and the logical analysis of the Taxpayer cast doubt on the determination of the County Board.

In Exhibit 9 at pages 13-126, the County Board produced property record files for various parcels sold within a three and one-half year time period prior to the assessment date. The County Assessor had relied on those sales to determine the contribution to value made by each LVG. The 640 acre parcel described in Exhibit 9 at pages 19-23 sold on March 30, 2006 for \$93,800 or \$146/acre. (E9:19). The parcel was described by a witness for the Taxpayer as poorer ground than the subject property. A 1,755 acre parcel described in Exhibit 9 at pages 102-126 sold on July 1, 2005 for \$450,000 or \$256/acre. There are 61 acres of dry crop land in the sold lands. (E9:122). There are 28 acres of 3G grass land in the sold lands. (E9:113). There are 28 acres of 2G grass land in the sold lands. (E9:109). The balance of the sold parcel is 4G or 4G1 grass lands. The predominance of 4G and 4G1 makes it comparable to the subject property.

Agricultural land and horticultural land is assessed at 75% of its actual value. Neb. Rev. Stat. §77-201 (2) (Reissue 2009). Assessed values per acre of the two sold parcels based on their sales process would be \$109.50/acre and \$192.00 ( $\$146 \times .75 = \$109.50$  and  $\$256 \times .75 = \$192.00$ ). Assessed value of the subject property as determined by the County Board was \$179.16/acre ( $\$114,660 \div 640 = \$179.16$ ). That value is above the per acre value of the poorer

land and below the per acre value for the other parcel. In addition, the market for agricultural land and horticultural land has been a rising market supporting a conclusion that lands sold in 2005 and 2006 would have higher sale prices nearer the assessment date. The sales described support the determination of the County Board regardless of the mathematical and logical difficulties presented in an analysis of the assessment records.

The Taxpayer asserted that taxable value of the subject property was not equalized. Equalization requires that taxes be levied by valuation uniformly and proportionately upon all real property and franchises. *Neb. Const.*, Art. VIII, §1.

If assessed on the same basis, soil types assigned to LVGs, per acre values assigned to each LVG, determination of the acres of each LVG in a parcel and the summing of the results after multiplying the number of acres in each LVG by its assigned value the results will be uniform. The evidence is, however, that all parcels of agricultural land and horticultural land were assessed on the same basis. The uniformity requirement has been met.

The Taxpayer determined the average assessed value per average feed capability of an acre in a parcel. To make his determination the Taxpayer multiplied the feed capability of each soil type by the number of acres of that soil type in a parcel and summed the results. The result was then divided by the number of acres so that an average feed capability was determined. The assessed value of the parcel was then divided by the per acre average feed capability. The result of that calculation was the average assessed value per average feed capability of a parcel.

Through the described analysis the Taxpayer showed that parcels with better classifications of land than the subject property, had lower assessed values per average feed capability. What the Taxpayer has shown is a logical difficulty with the valuation methodology used by the County

Board of Equalization to obtain proportionate valuation, however, it requires a comparison of the ratio of assessed to actual value for the subject property and comparable property. See *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999). The Taxpayer has not produced evidence that the assessed values of other parcels are at a lesser ratio of assessed value to actual value than the subject property, therefore relief cannot be granted.

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

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Agricultural land	\$ 114,660.00
Total	<u>\$ 114,660.00.</u>

3. This decision, if no appeal is timely filed, shall be certified to the Morrill County Treasurer, and the Morrill 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