

Decision withdrawn for reconsideration by order dated February 9, 2011.

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

CONNIE L. ANDERSON,)	
)	
Appellant,)	Case No. 09SV 007
)	
v.)	DECISION AND ORDER
)	REVERSING THE DECISION OF
SARPY COUNTY BOARD OF)	THE SARPY COUNTY BOARD OF
EQUALIZATION,)	EQUALIZATION
)	
Appellee.)	

The above-captioned case was called for a hearing on the merits of an appeal by Connie L. Anderson ("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 September 28, 2010, pursuant to an Order for Hearing and Notice of Hearing issued July 17, 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.

Connie L. Anderson was present at the hearing. No one appeared as legal counsel for the Taxpayer.

Kerry A. Schmid and John W. Reisz, Deputy County Attorneys for Sarpy County, Nebraska, were present as legal counsel for the Sarpy County Board of Equalization ("the County Board").

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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

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protest, and taxable value as determined by the County Board is shown in the following table:

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Description: Tax Lot R Section 12, Township 12, Range 10, Sarpy County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Agricultural Land	\$34,937.00	\$31,026.00	\$34,937.00
Home Site	\$9,000.00	In Ag Land	\$12,000.00
Residence	\$166,136.00	\$139,860.00	\$161,726.00
Farm Site	\$64,000.00	In Ag Land	\$47,000.00
Outbuilding	\$945.00	In Residence	\$945.00
Total	\$275,018.00	\$170,886.00	\$256,608.00

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 July 17, 2010, set a hearing of the appeal for September 28, 2010, at 1:00 p.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:

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Agricultural land	\$ 19,170.00
Farm Site	\$ 64,000.00
Home Site	\$ 6,840.00
Residence	\$ 154,521.00
Outbuildings	\$ 945.00
Total	<u>\$ 245,476.00.</u>

**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).

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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).

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10. The Legislature may enact laws to provide that the value of land actively devoted to agricultural or horticultural use shall for property tax purposes be that value which such land has for agricultural or horticultural use without regard to any value which such land might have for other purposes or uses. Neb. Const. art. VIII, §1 (5).
11. Agricultural or horticultural land which has an actual value as defined in section 77-112 reflecting purposes or uses other than agricultural or horticultural purposes or uses shall be assessed as provided in subsection (3) of section 77-201 if the land meets the qualifications of this subsection and an application for such special valuation is filed and approved pursuant to section 77-1345. In order for the land to qualify for special valuation all of the following criteria shall be met: (a) The land is located outside the corporate boundaries of any sanitary and improvement district, city, or village except as provided in subsection (2) of this section; and (b) the land is agricultural or horticultural land. Neb. Rev. Stat. §77-1344 (1) (Reissue 2009).
12. Agricultural land and horticultural land actively devoted to agricultural or horticultural purposes which has value for purposes other than agricultural or horticultural uses and which meets the qualifications for special valuation under section 77-1344 shall constitute a separate and distinct class of property for taxation, shall be subject to taxation, and shall be valued for taxation at seventy-five percent of its special value as defined in section 77-1343. Neb. Rev. Stat. §77-201 (3) (Reissue 2009).
13. Special value is the value land would have for agricultural or horticultural purposes or uses without regard to the actual value the land would have for other purposes.. Neb. Rev. Stat. §77-1343 (5) (Reissue 2009).

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14. 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).
15. 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).
16. The presumption disappears if there is competent evidence to the contrary. *Id.*
17. 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) (Reissue 2009).
18. 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).
19. "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).
20. 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).

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21. 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).
22. “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).
23. 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).
24. 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).
25. 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) (determination of actual value).

**IV.
ANALYSIS**

The subject property is a 36.5 acre parcel of land in rural Sarpy County Nebraska. The parcel is improved with a residence, detached garage, yard shed, and hay shed. The subject

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property was qualified for special valuation. The unimproved lands were assessed as agricultural land and horticultural land at their special value. The home site, farm site and improvements were assessed at actual value. The Taxpayer contends that the contribution to actual value of the home site is less than as determined by the County Board and that more unimproved land in the parcel should be classified and valued as waste land.

Waste land as a subclass of agricultural land and horticultural land is defined as “land that cannot be used economically and that are(sic) not suitable for agricultural or horticultural purposes. Such land types include but are not limited to, blowouts, riverwash (recent unstabilized alluvial deposits), marches, badlands, large deep gullies (including streambeds and banks), bluffs, rockland, gravel areas, and salt flats. To qualify for wasteland the land must be lying in or adjacent to and in common ownership or management with land used for agricultural or horticultural purposes. Some of these areas could be developed or reclaimed for beneficial use by land shaping, revegetation, drainage, or possibly other special practices. Until they are reclaimed, developed, or restored to agricultural production or recreational use, they should be classified as wasteland.” 350 Neb. Admin. Code, ch. 14, §002.54 (03/09). Assessment of the agricultural land and horticultural land component of the subject property as determined by the County Board is shown in Exhibit 8 at page 4 as an agland inventory report. That report shows 4 acres of waste land contributing assessed value of \$320. (E8:4). The Taxpayer contends that gullies in the southwest corner of the subject property with the slopes leading into them should be classified as waste and heavily timbered areas should be classified as waste land. After the County Board made its determination the County Assessor’s office reviewed its assessment records. After review the County Assessor’s office revised the agland inventory applicable to the

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subject property as shown in Exhibit 10 at page 3. The County Assessor's revised agland inventory shows two tracts of wasteland contributing assessed value of \$466 (\$394 + 72 = \$466). (E10:3). The agland inventory report relied on by the County Board as shown at Exhibit 8 at page 4 shows three soils by symbol and name MOD2 Monona Silt Loam Eroded 7, MSE2 Monona-Ida silt Loam Erod and MOE Monona Silt Loam 11-17. (E8:4). The County Assessor's revised agland inventory report shows the three soils relied on by the County Board, MOD2 Monona Silt Loam Eroded 7, MSE2 Monona-Ida Silt Loam Erod, and MOE Monona Silt Loam 11-17 and three additional soils MSF Monona - Ida Silt Loam 17-3, RK Rock Land, and RN Rough Broken Land - - Loes. (E10:3). The soil symbols and names were obtained from the soil survey for Sarpy County. Soil types as identified by symbol and name as found in the soil surveys are converted to classes and subclasses of land as prescribed by the Property Tax Administrator. Neb. Rev. Stat. §77-1362 (Revised Reissue 2009). The result is that soil types which are alike will be converted to like subclasses, land valuation groups (LCGs), of agricultural land and horticultural land. This allows uniform classification of lands. After classification, values are assigned to each LVG or classification. Because proper classification is a component of the assessment process, the Commission has examined the soil type definitions as found in the soil survey for Sarpy County. Descriptions of the soils as they appear in the soil survey are as follows:

Monona silt loam, 7 to 11 percent slopes, eroded (MoD2). This soil is in smooth areas above steeper soils that border entrenched drainageways in the uplands. This soil has a profile similar to that described as representative of the series, but the surface layer is thinner and lighter colored. . . . This soil is easy to

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till. Runoff is medium. Water erosion is the main hazard. Conserving rainfall is the main concern of management. Organic-matter content is moderate to moderately low. Most of the acreage is in cultivated crops, mainly corn, soybeans, and alfalfa. Small acreages are in grain sorghum and wheat. Some areas are in bromegrass. *Soil Survey of Douglas and Sarpy Counties, Nebraska*, United States Department of Agriculture, Soil Conservation Service, (1975) at 23.

Monona silt loam, 11 to 17 percent slopes (MoE). This soil is adjacent to entrenched drainageways in the uplands. This soil has a profile similar to that described as representative of the series, but the surface layer is slightly thinner. . . . This soil is easy to till. Runoff is medium. Water erosion is the main hazard. Conserving rainfall is the main concern of management. Organic-matter content is moderate. Most of the acreage is in grass or has been contour farmed, so the degree of erosion is only moderate. Small Ares are in cultivated crops, mainly corn, alfalfa, and grain sorghum. Small acreages are in soybeans and wheat. *Id.* at 23-24.

Monona and Ida silt loams, 1 to 17 percent slopes, eroded (MsE2). These soils are adjacent to entrenched drainageways in the uplands. Some areas are entirely Monona silt loam, others are entirely Ida silt loam, and many contain both soils. Each soil has a profile similar to the one described as representative of its respective series, but the surface layer is thinner. . . . Runoff is medium to rapid. Water erosion is the main hazard. Conserving rainfall is the main concern of management. Organic-matter content is moderate to low. Most of the acreage is

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in cultivated crops, mainly corn, soybeans, and alfalfa. Small acreages are in grain, sorghum and wheat. Some areas are in bromegrass. *Id.* at 24

Monona and Ida silt Loams, 17 to 30 percent slopes (MsF). These steep soils are mainly under grass and trees. Some areas are entirely Monona silt loam, others are entirely Ida silty loam, and many contain both soils. . . . Each soil has a profile similar to the one described as representative of its respective series, but the surface layer is slightly thinner. . . . Runoff is medium to rapid. Water erosion is the main hazard. Conserving and holding rainfall are the main concerns of management. Organic-matter content is moderate to low. Most of the acreage is in grass or grass and trees. The main grasses are big bluestem, little bluestem, side oats grama and switchgrass. Oaks, elm and hackberry are the main trees. *Id.* at 24.

Rock land (30 to 100 percent slopes) (Rk) is in very steep areas, mainly nearly vertical and vertical areas of rock outcrop along the bluffs of the Platte River Valley. Small areas are along the steep bank of large drainageways. The areas are 50 to 80 percent very shallow soils over sandstone or limestone; 10 to 45 percent of immature soils that formed in loess, glacial till, or shale; and about 10 percent bare rock. . . . Droughtiness is the main hazard. Steepness and high percentage of rack outcrop cause very rapid runoff. *Id.* at 28.

Rough Broken Land, Loess Rough broken land, loess (30 to 100 percent slopes) (Rn) consists of very steep to nearly vertical areas of Peoria Loess that contains large gullies and deeply entrenched drainageways and overfalls. . . .

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Water erosion is the main hazard. Runoff is very rapid. Soil slipping, which is common in steeper areas, forms short vertical steps, commonly called catsteps. Rough broken land, loess, is not suitable for cultivation. Some areas are used for whatever grazing is available. Adjacent cultivated areas are used for whatever grazing is available. Adjacent cultivated areas are used by wildlife for food, nesting, and cover. Some areas on the Missouri River Bluffs are parks used for recreation. The vegetation is trees, brush, and native grasses, mainly big bluestem, little bluestem, side-oats grama, switchgrass, and indiagrass. *Id.* at 28.

A map locating the described soils on the subject property is found at sheet 50 of the soil maps for Sarpy County as found in the *Soil Survey of Douglas and Sarpy Counties, Nebraska*, United States Department of Agriculture, Soil Conservation Service, (1975). A map produced as Exhibit 12:1 mirrors the mapping of soils found in the soil survey at sheet 50. The County Assessor's revised agland inventory is a correct representation of the soils found on the subject property. The agland inventory relied on by the County Board was deficient because it did not describe the presence of Rock Land, or Rough Broken Land Loess.

The soils classified as Rock Land, and Rough Broken Land Loess, are in the southwestern corner of the subject property. The taxpayer described the area as consisting of steep slopes leading into gullies or ravines and that it was not capable of agricultural production. The descriptions for those soil types supports the characterization of the Taxpayer. The Commission determines that the lands containing those soil types on the subject property should be classified as wasteland with a contributory value of \$80 per acre.

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After the County Board's determination, a representative of the County Assessor's office inspected the improvements on the subject property. Errors were found in the county's assessment records. After correction of the errors appearing in the assessment records the County Assessor's office reconsidered its estimate of the contribution to value made by the residence. The estimate of the contribution to value made by the residence as relied on by the County Board is shown at Exhibit 5 at page 23. The revised estimate of the contribution to value made by the residence as made by the County Assessor's office is shown at page 1 of Exhibit 10. A comparison of the two estimates shows that they were both made using the same methodology and that differences in value result from the changes in the characteristics of the residence. The County Board relied on erroneous information for its determination of the contribution to value made by the residence.

The evidence is that the County Board relied on incorrect classifications of land for its determination of the assessed value of the agricultural land and horticultural land and the contributory value of the residence. The determination of the County Board is unreasonable or arbitrary. The task before the Commission is now to determine based on the reasonableness of the evidence taxable value of the subject property. *See Garvey Elevators, Inc. v. Adams County Bd. of Equalization*, 261 Neb. 130, 136, 621 N.W.2d 518, 523-524 (2001).

Assessed value of the agricultural land and horticultural land can be determined by subtracting the value attributable to the 3.15 acres of Rough Broken Land - - Loes, \$14,753 and revaluing those acres as waste land at \$80 per acre and adding that value to the value of other agricultural land and horticultural land the result is \$19,170 (\$90,511 Total Land - \$64,000 Site - \$6,840 Site - \$753 Rough Broken Land - - Loes + (3.15 x \$80 = \$252) = \$19,170).

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The contributory value of the residence as redetermined by the County Assessor was accepted by the Taxpayer at \$154,521.

As noted there is a residence and shed on the subject property. 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). Because the sites are not agricultural and horticultural land they are assessed at actual value. Neb. Rev. Stat. 77-201 (Reissue 2009). The County Board classified and valued two sites. (E8:4). The contributory value of a one acre site was determined to be \$47,000 and the contributory value of another one acre site was determined to be \$12,000. (E8:4).

There is no evidence to support the County Board's determination that the contribution to value by the sites was \$47,000 and \$12,000. There is evidence that during the period the County Board was hearing protests it received recommendations from two appraisers relating to the contribution to value of sites. The advice of the appraisers appears in Exhibits 6 & 7. The advice of both appraisers was rejected and the County Board made its own determination on an unknown basis.

The Taxpayer contends that site contribution to value should be \$6720 per acre for .03 acres. The Taxpayer's opinion that site contribution to value was \$6,720 per acre is based on the average sale of parcels described in Exhibits 16, 18, 28, and 29. Dates of sale, sale price, acres sold, and average price per acre for the parcels described in Exhibits 16, 18, 28 and 29 are shown in the following table.

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Exhibit	Date of Sale	Sale Price	Size	Price/acre
16	07/26/2006	\$190,000	20.02	\$9,490
18	07/19/2006	\$190,000	20.02	\$9,490
28	10/31/2008	\$162,000	40.00	\$4,050
29	11/19/2008	\$160,000	34.30	\$4,665
Total		\$702,000	114.34	\$6,140 ¹

1. $\$702,000 \div 114.34 = \$6,110$. NOTE the average of the average price per/acre is $\$6,916.75$ ($\$9,490 + \$9,490 + \$4,050 + \$4,665 = \$27,695 \div 4 = \$6,923.75$).

The averaging methodology used by the Taxpayer is not an accepted appraisal technique. Averages are inherently subject to influence by the size of the sample and the degree of uniformity in the sample. For example an array of the average of the sum of 1, 2, 3, and 4 is 2.5 ($1 + 2 + 3 + 4 = 10 \div 4 = 2.5$) is the same as the average of .01 and 4.9 ($.10 + 4.9 = 5 \div 2 = 2.5$). The valuation date at issue is January 1, 2009. Two sales of parcel near the size of the subject property sold for \$4,050 and \$4,665 per acre respectively. If the desire is to find the actual value of a 36.45 acre unimproved parcel, perhaps those sales are the best indicator of that value as of January 1, 2009. Averages also mask another problem. The parcel described in Exhibit 16 was purchased as unimproved land for \$190,000. A residence and other improvements were placed on the parcel in 2009. (E16:1). Land used for the improvements totaled 2.68 acres. (E16:5). More land was acquired than necessary for the construction of the improvements. A portion of the parcel was purchased for residential use, the balance of the parcel was obtained for another use. The values assigned by the buyer to the two uses are unknown, however, if it assumed that the 2.68 acres of land to be used for residential purposes had a value to the buyer of \$120,000, the value per acre is \$44,776 per acre ($\$44,776 \div 2.68 = \$44,776$) and the balance has a value of

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\$4,036 per acre ($\$190,000 - \$120,000 - \$70,000 \div 17.34 = \$4,036$). The average price paid for the whole was \$9,490. The average sale price of lands, some of which are purchased for residential use and partly for another use is not evidence of the value given for either use.

As a further example the agricultural land and horticultural land and component of the subject property was assessed based on the values assigned to different uses, dry crop land, grass, and waste. (E8:4). The average assessed value per acre of the 34.5 acres of agricultural land and horticultural land as determined by the County Board is \$1,012.67 ($(\$93,937 - \$59,000 = \$34,937)(36.5 - 2 = 34.5)(\$34,937 \div 34.5 = \$1,012.67)$). The highest assessed value assigned to an acre of agricultural land and horticultural land is \$1,483 and the lowest assessed value assigned to an acre of agricultural land and horticultural and by the County Board is \$80. (E8:4). The Taxpayer does not argue that the agricultural land and horticultural land component of the subject property should be valued at an average value per acre, instead the Taxpayer argues for a reclassification of additional land as waste land so that its contribution to value is deemed to be \$80 per acre. The Taxpayers inconsistent positions do not support the use of an average value to determine the contribution to actual value of a site.

An appraiser employed by the County Assessor (“appraiser”) described the methodology used by that office to estimate the contribution to value of an acre of land used or to be used for residential purposes if contained in a larger parcel, for example a 40 acre tract. The basic premise of the analysis is that a higher value would be assigned to one acre and lesser values to succeeding acres due to the effects the principles of marginal utility. The argument is that the value of a commodity depends on the utility or usefulness of the marginal unit. *See Property Appraisal and Assessment Administration*, The International Association of Assessing Officers

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(1990) at 41. The theory assumes that the first unit purchased has higher utility or value than the second. *Id.* The County Assessor's office assumed that 5 acres was maximum acres that would be purchased for residential use and sought information on which to determine the value of marginal utility of each acre in a 5 acre tract. The County Assessor's arrayed sales are shown on a graph received as Exhibit 15 page 4.

Graphical analysis can help the appraiser discern systematic relationships in land values, which can then be incorporated into valuation schedules and adjustment factors. In general, sale price per unit is the dependent variable and should be depicted on the vertical (y) axis of the graph. Any other variable for which data are available should be selected as the independent variable and represented on the horizontal (x) axis. One variable of particular interest is the number of units, that is, the number of square feet, front feet or buildable units. Often there is a systematic negative relationship between the number of units and sale price per unit: The greater the number of units, the lower the price per unit. At least up to a point. *Id.* at 185.

Sales as graphed by the County Assessor show that as the size of a sold parcel increased as its per acre sale price declined. The trail of green triangles that represents a line through the data points was developed after several tries to obtain a best fit. The line indicates that one acre of land has a value of \$64,000 for residential use. (E15:4). After the contributory value of one acre was determined the contributory value of the four remaining acres in a five acre parcel was estimated. A value of \$9,000 per acre was assigned to the second and third acres and a value of \$6,500 was assigned to the fourth acre and all remaining acres. Application of the model

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produces a value of \$95,000 for a five acre parcel ($\$64,000 + (\$9,000 \times 2 = \$18,000) + (\$6,500 \times 2 = \$13,000) = \$95,000$). Many other combinations would also result in an indicated value of \$95,000 for a five acre parcel. For example a schedule with the first acre valued at \$47,000 and the 2nd, 3rd, 4th, and 5th acres valued at \$12,000 per acre will result in a value of \$95,000 assigned to a 5 acre parcel ($\$47,000 + (\$12,000 \times 4 = \$48,000) = \$95,000$). Given the possibility that alternate valuation schedules are possible, it is necessary to examine the evidence in support of the valuation schedule adopted by the County Assessor.

The evidence in support of an assignment of \$64,000 to the first acre is a sale for \$40,000 of a .63 acre parcel on March 3, 2007. The sale was of Lot 38 Thousand Oaks Addition. (E15:2). The sale price per acre was \$63,492 ($\$40,000 \div .63 = \$63,492$). Other sales in the array analyzed by the County Assessor were larger. The next smallest sale was of 3.07 acres. (E15:2 & 3). The average sale price of a three acre parcel would not indicate the contributory value of a 1 acre parcel for reasons noted above in the discussion of averages and marginal utility. When a value of \$64,000 is assigned to the first acre, the line that can be derived from the sales continues to move toward the left axis of the charts shown on pages 4 and 5 of Exhibit 5. Movement toward the left axis shows that price per acre increases as size decreases. The evidence that the first acre assigned a value of \$64,000 may be less than desired for certainty but there is evidence that it is appropriate.

The County Assessor assigned contribution to value of \$6,500 to the 4th and all succeeding acres. (E15:1). An examination of the line shown on Page 4 of Exhibit 15 shows that the average sale price of parcels over 5 acres but less than 30 acres ranges from \$16,000 to \$12,000. The average sale price of those parcels should not, however be considered as evidence

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of the contribution to value of the 3rd acre for reasons noted above concerning the use of averages. The average of small numbers is influenced by the highest and lowest number in the array. The average sale price would include the 1st and 2nd acres which based on application of marginal utility should have higher values. The average price of the 3rd acre is then influenced by the values that should be assigned to the 1st and 2nd acres. The average sale price of those parcels 5 to 30 acres in size may, likewise, not be the best indicator of the contribution to value of the 3rd, 4th, and 5th acres.

Another chart shown at page 5 of Exhibit 15 shows that the average sale price of parcels of farm sales over 30 acres produces a line showing the value per acre to be \$6,500. Those sales were not deemed to be sales of residential parcels and the average sale price would not be unduly influenced by the size of the parcel. There is evidence that the County Assessors assignment of a contributory value of \$6,500 to the 3rd 4th and 5th acres is correct.

An appraiser testified that 3 acres was the maximum number of acres found to have residential use in larger parcels. Using the schedule adopted by the county Assessor a 3 acre parcel would be deemed to have a value of \$82,000 ($\$64,000 + \$9,000 + \$9,000 = \$82,000$). Sales of 3 acre parcels range from \$67,000 to \$156,000). (E15:2).

Using the schedule adopted by the County Assessor a 5 acre parcel would be deemed to have a value of \$95,000 as shown above. Sales of five acre parcel range from \$75,000 to \$112,125. (E15:3).

Derivation of the contributory value assigned the 2nd acre is simply a mathematical calculation necessary to arrive at a gross value for a 5 acre parcel of \$95,000.

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Valuation is not an exact science. *Matter of Bock's Estate*, 198 Neb. 121, 124, 251 N.W.2d 872, 874 (1977). There is evidence to support the determinations of the County Assessor that sites contributed value on a sliding scale and that the scale applicable in this instance is \$65,000 for the first acre, \$9,000 for the second acre and third acre, and \$6,500 for each succeeding acre. There is no evidence to support the determinations of the County Board or the Taxpayer. The contribution to value of the sites on the subject property should be determined based on the County Assessor's schedule. The contribution to value of the sites on the subject property is \$70,840. (E10:3)

The Taxpayer argues that because one acre of the subject property cannot be sold for residential purposes that contributory value should not be determined for a residential use. Like wise one acre of the subject property could not be sold for Dry Use. The contributory value assigned to Dry Use land is however, accepted by the Taxpayer. If a parcel has multiple uses each use may have a unique contributory value. Actual value of the parcel is the sum of those contributions. While it may be difficult to estimate with certainty the contributory value of one acre of land used for residential purposes within a larger tract, that does not mean that no attempt should be made to recognize that value.

Property must be assessed based on its actual value or a percentage of its value for agricultural or horticultural purposes. Neb. Rev. Stat. 77-201 (Reissue 2009). Actual value is to be determined based on the highest and best use of the parcel. 350 Neb. Admin. Code, ch. 50, §.00204A (03/15/09). Highest and best use is the most reasonable and probable use of the property that will support the highest present value. 350 Neb. Admin. Code, ch. 10, §001.13 (3/15/09). It is the recognition of the contribution of that specific use to the community

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environment or community development goals in addition to wealth maximization of individual property owners. *Id.* “Highest and best use may be defined as follows: the reasonably probable and legal use of vacant land or an improved property that is physically possible, appropriately supported, and financially feasible and that results in the highest value.” *The Appraisal of Real Estate*, 13th Edition, Appraisal Institute, (2008) at 277. Both definitions require valuation of the use that will maximize value. The lands in the subject property have been classified by the County Assessor in accordance with their uses. Classification lands in a parcel based on actual uses does not offend the Constitution unless those uses do not reflect the highest and best use of the lands in the parcel. 1.76 acres of the lands in the subject property have been classified as sites for buildings. There is no evidence that the classification of some acres as the site of buildings is incorrect or an inappropriate determination of the highest and best use for those acres. Nebraska’s Constitution is not offended by that classification as it is appropriate for a determination of actual value of the parcel.

**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.

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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	\$ 19,170.00
Farm Site	\$ 64,000.00
Home Site	\$ 6,840.00
Residence	\$ 154,521.00
Outbuildings	\$ 945.00
Total	<u>\$ 245,476.00.</u>

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.

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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 January 26, 2011.

Signed and Sealed. January 26, 2011.

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 (Reissue 2009). 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) (Reissue 2009).

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The Commission is authorized to review decision of a County Board of Equalization determining taxable values. Neb. Rev. Stat. §77-5007 (Reissue 2009). 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. Nucholls Cty. Bd. Of Equal.*, 231 Neb. 297, 437 N.W.2d 501 (1989). The presumption stated by the Court was the presumption that had been found before the statute was enacted.

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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).

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

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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