

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

JAMES T. O'ROURKE,)	
)	
Appellant,)	Case Nos. 10A 392, 10A 393, & 10A 394
)	
v.)	DECISION AND ORDER
)	AFFIRMING THE DECISIONS OF
DAWES COUNTY BOARD OF)	THE DAWES COUNTY BOARD OF
EQUALIZATION,)	EQUALIZATION
)	
Appellee.)	

The above-captioned cases were called for a hearing on the merits of appeals by James T. O'Rourke ("the Taxpayer") to the Tax Equalization and Review Commission ("the Commission"). The hearing was held in the Best Western Inn, 1100 W 10th ST, Chadron, Nebraska, on May 31, 2011, pursuant to an Order for Hearing and Notice of Hearing issued January 28, 2011. 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.

Presence of the Taxpayer at the hearing was excused. Lisa Adams appeared as legal counsel for the Taxpayer.

J. Adam Edmund & Joe W. Stecher, Deputy County Attorneys for Dawes County, Nebraska, were present as legal counsel for the Dawes 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 the consolidated cases is as follows.

**I.
ISSUES**

The Taxpayer has asserted that taxable value of the subject property as of January 1, 2010, 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, 2010.

The Taxpayer has asserted that taxable value of the subject property as of January 1, 2010, is not equalized with the taxable value of other real property. The issues on appeal related to that assertion are:

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

Whether the equalized taxable value of the subject property was determined by the County Board in a manner and an amount that is uniform and proportionate as required by Nebraska's Constitution in Article VIII §1; and

The equalized taxable value of the subject property on January 1, 2010.

**II.
FINDINGS OF FACT**

The Commission finds and determines that:

1. The Taxpayer has a sufficient interest in the outcome of the above captioned appeals to maintain them.
2. The parcels of real property to which the above captioned appeals pertain are ("the Subject Property") described in the tables below.
3. Taxable value of each parcel of the subject property placed on the assessment roll as of January 1, 2010, ("the assessment date") by the Dawes County Assessor, value as proposed in timely protests, and taxable value as determined by the County Board is shown in the following tables:

Case No. 10A 392

Description: Pt S1/2SE1/4 West of Hwy Section 12, Township 32, Range 49, Dawes County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Agricultural Land	\$16,500.00	\$21,700.00	\$16,500.00
Home Site	\$8,000.00	In Ag Land	\$8,000.00
Residence	\$110,725.00	\$115,940.00	\$110,725.00
Farm Site	\$2,000.00	In Ag Land	\$2,000.00
Outbuilding	\$23,540.00	In Residence	\$23,540.00
Total	\$160,765.00	\$137,640.00	\$160,765.00

Case No. 10A 393

Description: N1/2NW1/4, SE1/4NW1/4, Pt NE1/4 West of Hwy, Pt SE1/4 Section 13, Township 32, Range 49, Dawes County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Agricultural Land	\$92,990.00	\$72,990.00	\$92,990.00
Total	\$92,990.00	\$72,990.00	\$92,990.00

Case No. 10A 394

Description: Pt SE1/4NE1/4 Section 13, Township 32, Range 49, Dawes County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Agricultural Land	\$375.00	\$290.00	\$375.00
Total	\$375.00	\$290.00	\$375.00

4. Appeals of the County Board's decisions were filed with the Commission.
5. The appeals were consolidated for hearing by order of the Commission.
6. An Order for Hearing and Notice of Hearing issued on January 28, 2011, set a hearing of the appeals for May 31, 2011, at 9:00 a.m. MDT.
7. An Affidavit of Service, which appears in the records of the Commission, establishes that a copy of the Order for Hearing and Notice of Hearing was served on all parties.
8. Taxable value of each parcel for the tax year 2010 is:

Case No. 10A 392

Agricultural land	\$ 16,500.00
Farm Site	\$ 2,000.00
Home Site	\$ 8,000.00
Residence	\$ 110,725.00

Outbuildings \$ 23,540.00

Total \$ 160,765.00

Case No. 10A 393

Agricultural land \$ 92,990.00

Total \$ 92,990.00

Case No. 10A 394

Agricultural land \$ 375.00

Total \$ 375.00.

**III.
APPLICABLE LAW**

1. Subject matter jurisdiction of the Commission in each of the above captioned appeals is over all questions necessary to determine taxable value. Neb. Rev. Stat. §77-5016(7) (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. 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).
 14. Agricultural land and horticultural land qualified for special valuation is assessed a 75% of its special value. Neb. Rev. Stat. 77-201 (3) (Reissue 2009).
 15. “Taxes shall be levied by valuation uniformly and proportionately upon all real property and franchises as defined by the Legislature except as otherwise provided in or permitted by this Constitution.” Neb. Const., Art. VIII, §1.
 16. Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value. *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).
 17. The purpose of equalization of assessments is to bring the assessment of different parts of a taxing district to the same relative standard, so that no one of the parts may be compelled to pay a disproportionate part of the tax. *MAPCO Ammonia Pipeline v. State*

Bd. of Equal., 238 Neb. 565, 471 N.W.2d 734 (1991); *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623, (1999).

18. Equalization to obtain proportionate valuation 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).
19. Uniformity requires that whatever methods are used to determine actual or taxable value for various classifications of real property that the results be correlated to show uniformity. *Banner County v. State Board of Equalization*, 226 Neb. 236, 411 N.W.2d 35 (1987).
20. Taxpayers are entitled to have their property assessed uniformly and proportionately, even though the result may be that it is assessed at less than the actual value. *Equitable Life v. Lincoln County Bd. of Equal.*, 229 Neb. 60, 425 N.W.2d 320 (1988); *Fremont Plaza v. Dodge County Bd. of Equal.*, 225 Neb. 303, 405 N.W.2d 555 (1987).
21. The constitutional requirement of uniformity in taxation extends to both rate and valuation. *First Nat. Bank & Trust Co. v. County of Lancaster*, 177 Neb. 390, 128 N.W.2d 820 (1964).
22. In the evaluation of real property for tax purposes, where buildings and improvements are taxable as a part of the real estate, the critical issue is the actual value of the entire property, not the proportion of that value which is allocated to the land or to the buildings and improvements by the appraiser. *Bumgarner v. Valley County*, 208 Neb. 361, 303 N.W.2d 307 (1981).

23. If taxable values are to be equalized it is necessary for a Taxpayer to establish by clear and convincing evidence that valuation placed on his or her property when compared with valuations placed on similar property is grossly excessive and is the result of systematic will or failure of a plain legal duty, and not mere error of judgement. There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity. *Newman v. County of Dawson*, 167 Neb. 666, 94 N.W.2d 47 (1959).
24. 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).
25. 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).
26. The presumption disappears if there is competent evidence to the contrary. *Id.*
27. 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).

28. 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).
29. "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).
30. 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).
31. 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).
32. "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).
33. 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).
34. 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).

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

IV. ANALYSIS

The subject property consists of two parcels of unimproved lands and one parcel of improved land in rural Dawes County. The contributions to value of the improvements are not at issue and the contribution to value of the land on which improvements are situated, site value, is not at issue.

The Taxpayer presented several assertions regarding the contribution to value of the agricultural land and horticultural land component of the subject property. The Taxpayer's assertions are discussed below.

The Taxpayer Asserts that

the Change in Assessed Value from Tax Year 2009 to 2010 Is Excessive.

A prior year's assessment is not relevant to a subsequent year's valuation. *DeVore v. Bd. Of Equal.*, 144 Neb. 351, 13 N.W.2d 451 (1944). *Affiliated Foods Coop v. Madison Co. Bd. Of*

Equal., 229 Neb. 605, 428 N.W.2d 201 (1988). If a prior year's assessment is not relevant then it follows that a percentage increase from that assessment is not a relevant consideration when valuation for a subsequent year is being considered.

**The Taxpayer Asserts that
the Classification System Used for the Assessment of Agricultural Land and Horticultural
Land Causes Over Valuation**

The basis for assessment of agricultural land and horticultural land is, in part, prescribed by statute:

“Agricultural land and horticultural land shall be divided into classes and subclasses of real property under section 77-103.01, including, but not limited to, irrigated cropland, dryland cropland, grassland, wasteland, nurseries, feedlots, and orchards, so that the categories reflect uses appropriate for the valuation of such land according to law. Classes shall be inventoried by subclasses of real property based on soil classification standards developed by the Natural Resources Conservation Service of the United States Department of Agriculture as converted into land capability groups by the Property Tax Administrator. County assessors shall utilize soil surveys from the Natural Resources Conservation Service of the United States Department of Agriculture as directed by the Property Tax Administrator. Nothing in this section shall be construed to limit the classes and subclasses of real property that may be used by county assessors or the Tax Equalization and Review Commission to achieve more uniform and proportionate valuations.” Neb. Rev. Stat. 77-1363 (Reissue 2009).

The statutory requirements are supplemented by a process for the classification of agricultural land and horticultural land for assessment described in the rules and regulations of the Tax Commissioner in chapter 14 of Title 350 of Nebraska's Administrative Code. The purpose of the rules and regulations in chapter 14 of Title 350 is to provide a consistent and standard land classification and inventory system which can be used statewide. 350 Neb. Admin. Code, ch. 14, §004.08D (3/15/09). The classification system is based on the county's most recent soil survey. 350 Neb. Admin. Code, ch. 14, §004.08A (3/15/09). After a soils map has been produced, soils that have similar production capabilities and characteristics are placed in groups. 350 Neb. Admin. Code, ch. 14, §004.08A (3/15/09). The groupings are prescribed by the Property Tax Administrator. Neb. Rev. Stat. §77-1362 (Reissue 2009). The initial use related groupings are irrigated cropland, dry cropland, and grassland. 350 Neb. Admin. Code, ch. 14, §004.08A (3/15/09). Each of those use groupings is further subdivided into at least four subgroups. *Id.* The resulting 12 classifications are described in section 004.08H of chapter 14 of Title 350 of Nebraska's Administrative Code. Other classifications may also be developed. Neb. Rev. Stat. §77-1363 (Reissue 2009) and 350 Neb. Admin. Code, ch. 14, §006.04C (3/15/09).

After the soils and their groupings have been determined for a county, the lands in each parcel of agricultural land and horticultural land are analyzed and the number of acres of a soil type and its classification are determined. 350 Neb. Admin. Code, ch. 14, §004.06 (3/15/09). The results of the analysis are placed on property record cards that list the soils, the land use, the number of acres of each use, and the classification groups for each parcel of agricultural land and horticultural land being assessed. 350 Neb. Admin. Code, ch. 14, §004.06D (3/15/09). The contribution to value for each acre of a classification is then determined and assessed at 75% of

actual value. See, 350 Neb. Admin. Code, ch. 14, §006.05 (3/15/09). The results are shown for each parcel of the subject property on a page of the property record file captioned “Real Property Break Down.”

The Taxpayer asserts that the classification system utilized by the County Assessor improperly includes soils with different production classifications in the same valuation group. The result, in the Taxpayer's analysis, is that higher capability soils in the group increase the values assigned to lands with lesser production capability and, therefore, increase assessed values. The reverse of the argument would be that soils with lesser capability decrease the values assigned to lands with greater production capability. Whether Taxpayers benefit or are disadvantaged by the classification system would then depend on the specific soil types found in a parcel. A refinement of the classification system could alleviate the potential for winners and losers as indicated by the Taxpayer's argument, but the Commission has no evidence on which to base a reclassification of the subject property or the assignment of values to the reclassified land.

The assertions of the Taxpayer are based on a belief that the preparers of the soil survey used a classification system consisting of eight capability groups for the classification of soils in Dawes County. The County Assessor used a classification system based on four capability groups. The soil survey for Dawes County does show that an eight capability group classification system was utilized for irrigated and dry cropland. *Soil Survey of Dawes County, Nebraska*, United States Department of Agriculture, Natural Resources Conservation Service, (1977) pp. 54-71. Range lands or grass lands are, however, classified in the soil survey by range sites. *Soil Survey*, *Supra*, pp. 73-74. The range sites described are: Wet Land, Subirrigated, Silty Overflow, Clayey Overflow, Sandy Lowland, Silty Lowland, Saline Lowland, Sands, Savannah, Sandy,

Silty, Clayey, Limy Upland, Shallow Clay, Shallow to Gravel, Shallow Limy, Thin Loess, Saline Upland, Panspots, Woodland, and Windbreaks. *Soil Survey*, Supra, pp. 73-84. The subject property is primarily grassland. The manner in which the classification and valuation of grasslands by range sites, as described in the Soil Survey, might affect valuation of the subject property is not in evidence.

The evidence concerning an alternative to the classification system is not clear and convincing evidence that the decisions of the County Board were unreasonable or arbitrary.

The Taxpayer Asserts that

Board of Educational Lands and Funds Values Show Assessed Values for Agricultural Land and Horticultural Land as Determined by the County Assessor and Affirmed by the County Board Exceed 75% of Actual Value or Agricultural and Horticultural Value

The report of the Board of Educational Lands and Funds relied on by the Taxpayer is for the 2006-2008 years. (E7:10). The assessment year at issue is 2010. How a report of values issued by the Board of Educational Lands and Funds based on data for the years 2006-2008 is relevant to tax year 2010, has not been shown.

The Taxpayer asserts that values of land held by the Board of Educational Lands and Funds are determined by the Nebraska Department of Revenue and Taxation. Values for land held by the Board of Educational Lands and Funds for rental purposes are determined as appraised rent capitalized at 4%. Neb. Rev. Stat. §77-205 (Reissue 2009). Appraised rents are determined based on the rental rates found for similar lands. *Id.* The methodology employed by the Board of Educational Lands and Funds is similar to the application of gross rent multipliers as a means of estimating value using the income approach. A gross rent multiplier is the sale

price of a parcel divided by the gross rent that might be obtained. See, *Property Appraisal and Assessment Administration*, IAAO, (1990) p. 269. A sale of a parcel for \$10,000 from which gross rent of \$1,000 could be obtained has a gross rent multiplier of 10 ($\$10,000 \div \$1,000 = 10$). If it is assumed that rent of 4% could be obtained then a sale of a parcel for \$10,000 could be deemed to have gross rent of \$400. The resulting gross rent multiplier is 25 ($\$10,000 \div \$400 = 25$). To finish the process, gross rents for a subject parcel are determined and then divided by the gross rent multiplier. Gross rent of \$400 for a parcel with a gross rent multiplier of 4% produces an estimated value of \$10,000 ($\$400 \times 25 = \$10,000$). There is evidence that gross rents in the area of the subject property vary from \$4 to \$6 per acre. The gross rents that might be obtained from the subject property are not in evidence. The Commission cannot, from the evidence, determine that a rate of 4% when applied to a value, will yield the expected gross rent that might be obtained from the subject property. In addition, applying a rate of 4% to a value in order to obtain an estimate of gross rents begs the question before the Commission “What is the value of the subject property?” A determination of value cannot become a self fulfilling exercise where an estimate of value is used to produce a gross rent multiplier that will in turn be the estimate of value used to produce the gross rent multiplier.

Lands held by the Board of Educational Lands and Funds may only be sold at a public auction. Neb. Rev. Stat. §77-212 (Reissue 2009). Lands offered for sale may not, however, be sold for less than appraised value. Neb. Rev. Stat. §77-257 (Reissue 2009). Appraised value is the adjusted value as determined by the Property Tax Administrator or his or her representative such that the real property’s assessed value for the current year is adjusted to one hundred percent of actual value, unless the Board of Educational Lands and Funds establishes a higher value

pursuant to section 72-257 or 77-258, in which case that value shall be the appraised value for purposes of sale. Neb. Rev. Stat. §77-258.03 (Reissue 2009). Lands held by the Board of Educational Lands and Funds may be subject to taxation pursuant to sections 77-202.11 and 77-202.12 pertaining to taxation of public property. Values subject to taxation are determined by the County Assessor. Neb. Rev. Stat. §77-202.12.

The Taxpayer's assertions regarding the comparison of values shown in a report concerning land held by the Board of Educational Lands and Funds are not persuasive for two reasons. First, the information in the report is for a period ending two years prior to the assessment date. It is true that a sales file utilized for the determination of values for agricultural land and horticultural land would include sales more than two years old, however, the sales file would also include more recent sales and the objective is to obtain a current value. The same cannot be said of a report which would not be current for the 2010 assessment year. Second, statutes governing the Board of Educational Lands and Funds distinguish between rental value and actual value. Rental value is not considered to be actual value. Agricultural land and horticultural land must be assessed at 75% of actual value or, if qualified for special valuation, at 75% of its value solely for agricultural or horticultural purposes. Neb. Rev. Stat. §77-201(2) & (3) (Reissue 2009). If the Board of Educational Land and Funds report relied on by the Taxpayer reported rental values, rental value would not be an appropriate basis for estimating actual value or the taxable value of the subject property. Values as reported by the Board of Educational Lands and Funds are not clear and convincing evidence that the County Board's decisions were arbitrary or unreasonable.

The Taxpayer Asserts that

Nebraska Farm Real Estate Highlights 2009-2010 Show Assessed Values for Agricultural Land and Horticultural Land as Determined by the County Assessor and Affirmed by the County Board Exceed 75% of Actual Value or Agricultural and Horticultural Value

Nebraska Farm Real Estate Market Highlights 2009-2010 is published by the Department of Agricultural Economics of the University of Nebraska Lincoln. Table 1 of that report does show a decline in value for nontillable grazing land in the Northwest reporting district. The Northwest District includes all counties in the Panhandle of Nebraska. The reported average actual value of nontillable grazing land for 2010 was \$260/acre, value for the year 2009 was \$281/acre. The *2010 Reports and Opinions of the Property Tax Administrator, Dawes County*, at page 46 shows that the average assessed value of grassland in Dawes County was \$270.54/acre. Actual value as indicated by an assessed value of \$270.54/acre is \$360.72/acre ($\$270.54 \div .75 = \360.72). There are 11 counties in the Panhandle of Nebraska. An average is the result of adding all of the values of an array and dividing by the number of values. Unless all numbers in the array are equal, some are lower and some are higher than the mathematical average. An average may mask substantial variations in the array of numbers. For example, the average of the number's 15, 10, and 2 is 9. The average of the number's 9, 9, and 9 is also 9. The Taxpayer produced evidence that assessed values of grassland varied across the counties in the Panhandle. (E7:5 and 6). It is reasonable to assume that the average nontillable grassland values reported in Nebraska Farm Real Estate Market Highlights 2009-2010 masks variances in values across the Panhandle.

Appendix Table 5 of the Nebraska Farm Real Estate Market Highlights 2009-2010 shows that the reported actual value for Low Grade Grazing (Nontillable) land for the year 2010 was

\$225/acre and for High Grade Grazing (Nontillable) land \$325/acre. The average of the two reported values is \$275/acre ($\$325 + \$225 = \$550 \div 2 = \275). The reported actual value for all Grazing (Nontillable) land is, however, \$260/acre.

The *2010 Reports and Opinions of the Property Tax Administrator, Dawes County*, contains information specific to Dawes County and is therefore, not subject to the difficulties associated with reported average values across a wide area. It is important to note also that the average values reported in the *2010 Reports and Opinions of the Property Tax Administrator, Dawes County* are averages determined by multiplying values times the number of acres associated with that value and then summing the results. The result is a weighted average. For example 5,000 acres at \$200 per acre and 1,000 acres at \$300 per acre have an average value of \$216.67 per acre ($(5,000 \times \$200 = 1,000,000) + (1,000 \times \$300 = \$300,000)(\$1,000,000 + \$300,000 = \$1,300,000)(\$1,300,000 \div (5,000 + 1,000 = 6,000) = \216.67). Reversing the values and assigning a value of \$300 per acre to 5,000 acres and a value of \$200 per acre to 1,000 acres produces an average value of \$283.33 per acre.

Average values reported in the *2010 Reports and Opinions of the Property Tax Administrator, Dawes County* and the average values reported in the Nebraska Farm Real Estate Market Highlights 2009-2010 were not prepared on the same basis. The evidence does not show how average values as reported in the Nebraska Farm Real Estate Market Highlights 2009-2010, may be related to average values reported in the *2010 Reports and Opinions of the Property Tax Administrator, Dawes County*. The average value of Grass (Nontillable) as reported in the Nebraska Farm Real Estate Market Highlights 2009-2010, is not in and of itself clear and convincing evidence that the County Board's decisions were unreasonable or arbitrary.

The Taxpayer Asserts that

Income Produced from the Subject Property Indicates A Lower Assessed Value for

Agricultural Land and Horticultural Land

Agricultural land and horticultural land is assessed at 75% of its actual value, or, if qualified for special valuation, at 75% of its value solely for agricultural or horticultural purposes. 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).

The steps required for use of the income approach with direct capitalization may be summarized as: (1) estimate potential gross income; (2) deduct estimated vacancy and collection loss to determine effective gross income; (3) deduct estimated expenses to determine net operating income; and (4) divide net operating income by an estimated capitalization rate to yield indicated value. *The Appraisal of Real Estate* 13th Edition, The Appraisal Institute, 2008, p. 466. A variety of techniques may be used to quantify various components of any application of the approach. *Id.* at chs 20-24.

Two major methods are used to develop an indication of value using the income approach: direct capitalization and yield capitalization. *Id.* at 465. The direct capitalization method produces an indication of value based on a single year's estimated income. *Id.* A yield capitalization method requires an analysis of income and expected returns over multiple years. *Id.* Discounted cash flow analysis is a refinement of the yield capitalization method in which cash flows and an eventual sale price is discounted at a rate to indicate a present value. *Id.* at 540.

The income approach at its simplest can be described as a formula in which income is divided by a capitalization rate to derive an estimate of value ($I \div R = V$). *Id.* at 500. Income equals the sum of income less expenses. As the formula is applied, if an expense is increased, income is reduced, and the indication of value is reduced. The inverse is true for the reduction of an expense. The reduction of an expense produces an increase in income and an increase in the value indication.

There is evidence that rates for grassland leases vary from \$4 to \$6 per acre. There is no evidence of the lease rate that might be applicable to the subject property.

There is evidence that real estate taxes may be \$4.00/acre. However, when property is valued for ad valorem tax purposes, taxes should not be considered an expense item. *Property Assessment Valuation, 2nd Ed.*, International Association of Assessing Officers, 1996, p. 240.

The appropriate use of taxes is to include a factor for taxes in the capitalization rate. A “loaded” capitalization rate includes the effective tax rate. *Id.* at p. 233. The basis for that position is the interplay between tax rates, value, and resulting tax when a valuation estimate is developed using the income approach.

Taxes to be paid are a function of both the rate and the value to which the rate is applied. When taxes are deducted for purposes of determining value, the tax rate is applied to a stated value, the tax is determined, and a deduction is taken. The process produces a circularity in the calculations. If, for example, value is reduced, the resulting tax deduction should be reduced, producing in turn a higher indication of value when the formula is rerun. Because the objective in an ad valorem tax proceeding is to determine the value to which the tax rate is to be applied, the formula calls for use of an unknown that will be found only with the use of the unknown

itself. Use of a loaded capitalization rate avoids the circularity produced by an expense deduction for taxes because the loaded capitalization rate is indifferent to the items of income or expense, the sum of which it is divided into.

Statutory provisions for determination of actual value, the levy, and payment of the resulting tax are also important considerations. Actual or taxable value is determined as of January 1 of each year. Neb. Rev. Stat. §77-1301 (Reissue 2009). Levies on taxable value are determined by October 15 of each year. Neb. Rev. Stat. §77-1601 (Reissue 2009). The resulting amount of tax is then determined and a notice sent to a taxpayer. Neb. Rev. Stat. §77-1701 (Reissue 2009). The tax is due and payable on December 31 of each year. Neb. Rev. Stat. §77-203 (Reissue 2009). Payment of the tax due may be made in two installments, the first due on May 1 or April 1, and the second due on September 1 or August 1 of the year following its levy. Neb. Rev. Stat. §77-204 (Reissue 2009). If taxes are paid in the year after a levy, and considered an expense item in the year paid, the taxes paid may not be those which are attributable to the year in which other expenses or income being annualized were determined. In short, one expense item, real property taxes, will be a year off the time frame of all other expense items if the taxes are paid immediately prior to the delinquency dates. Use of a loaded cap rate makes consideration of an adjustment to financial information unnecessary. For the reasons stated, the use of a loaded capitalization rate, as opposed to the deduction of real property taxes as an expense, will produce a more accurate estimate of actual value when the income approach is used to estimate actual value for ad valorem tax purposes.

There is no evidence of expenses that could be deducted from gross income to arrive at net income that would then be capitalized to arrive at an estimate of value using the income approach.

The Taxpayer presented evidence that the Board of Educational Lands and Funds used a capitalization rate of 4% for the determination of base rents. There is no evidence that 4% is the base capitalization rate that should be used if value of subject property is to be estimated using the income approach.

There is no evidence of the capitalization rate that might be applied if the income approach was used to develop an estimate of value for the subject property

An estimate of value using the income approach may also be obtained based on gross income and a gross income multiplier. *The Appraisal of Real Estate* 13th Edition, The Appraisal Institute, 2008, pp 516-517. A gross income multiplier can be obtained by dividing the sale price of each comparable parcel by its potential gross income and analyzing the results. *Id.* at 516. The gross income of the property for which value is to be estimated is then multiplied by the gross income multiplier derived from the sales of comparable parcels. *Id.* at 516-517. There is, however, no evidence from which the gross rent of the subject property could be determined or the multiplier that would be applicable.

An estimate of actual value, using the income approach, may not be developed for the subject property.

**The Taxpayer Asserts that
Taxes Have Been Increasing While Income from the Land Has Not and Taxes Now Exceed
the Taxpayer's Ability to Pay Them from the Land's Income**

Taxes are the mathematical result of a levy applied to a value. The levy expressed in dollars or cents per \$100 dollars of value is in turn determined by the tax requests of various political subdivisions divided into the value subject to tax in a subdivision. A tax request of \$1,000,000 to be funded by taxes on \$100,000,000 of value results in a levy of \$1.00/\$100 of taxable value ($\$100,000 \div \$10,000,000 = \$0.01 \times \$100 = \$1.00$). The issue in this proceeding is value. Value is one component of the formula by which taxes are determined. If assessed value were determined as the amount necessary to have a levy of \$1 and a tax request of \$1,000,000 then value would be a function of the tax rate. Instead assessed value is determined independently of the tax request as market value, or in case of agricultural land and horticultural land, 75% of market value or the value solely for agricultural and horticultural purposes. In turn, market value is to be determined as prescribed by statute. The Commission cannot act contrary to the dictates of state statutes and determine what taxes should be, as opposed to the value subject to tax. The fact that taxes are a factor in valuation is illustrated by the use of taxes as a factor in the development of an estimate of value using the capitalized income approach as discussed above. Economic principles suggest that if taxes are higher than can be paid from income attributable to property, the tax burden would cause values to decline to the point where the resulting tax would allow a profit to be made from the land. However, there is not sufficient evidence to develop an estimate of value using the income approach for reasons stated above.

The Taxpayer Asserts that

Assessed Values for Various Classifications of Agricultural Land and Horticultural Land Found in Dawes County are Higher than those found in other Counties of the Panhandle

The Taxpayer produced graphs showing the assessed values assigned to several classifications of agricultural and horticultural land in Dawes, Banner, Box Butte, Cheyenne, Deuel, Garden, Kimball, Morrill, Scottsbluff, Sheridan, and Sioux Counties. (E7:5 & 6). The classifications for which value is shown are 1A, 1D, 1G, 2A, 2D, 2G, 4G, and 4D. (E7:5 & 6). As shown on the graphs, Dawes County has the highest assessed values in the 2D, 1G, 2G, & 4G classifications. The *2010 Reports and Opinions of the Property Tax Administrator, Dawes County*, at pages 43, 44, and 45 detail the number of acres of agricultural land and horticultural land found in three market areas in Dawes County. The total agricultural land and horticultural land acres are 789,310.50. The total agricultural land and horticultural land in the classifications of 2D, 1G, 2G and 4G are 31,180.86, 39,429.01, 56,969.51, and 439,656.57 acres respectively. As a percentage of the total agricultural land and horticultural land the classifications of 2D, 1G, 2G, and 4G represent 3.95%, 5%, 7.22% and 55.70% of the acres respectively. Collectively the four classifications represent 71.87% of the agricultural land and horticultural land in Dawes County. The purpose of the analysis was to show that assessed values of agricultural land and horticultural lands in Dawes County are higher than the rest of the counties in the Panhandle. That would be true in a county that was predominately grassland. A different result could be obtained if the focus is on other classifications of agricultural land and horticultural land.

For example, in Banner County 25.16% of the acres is dry cropland and 67.8% is grassland. *2010 Reports and Opinions of the Property Tax Administrator, Banner County*, at page 40. In Scottsbluff County 42.34% of the acres is irrigated cropland and 46.17% is grassland. *2010 Reports and Opinions of the Property Tax Administrator, Scottsbluff County*, at pages 47. The analysis shows that 4G is the predominate classification of grassland in Dawes

County and that the classification has a higher assessed value than the same class of land in other counties in the Panhandle. As described above, the assessed value of agricultural land and horticultural land is based on a classification system and the assignment of values to the classification found in a county. Differences in the values assigned to various classifications are expected. Differences in values from county to county are expected and are shown in the Taxpayer's analysis. The evidence indicates that the values assigned to various classifications were derived from sales. The graphs show that the value assigned by the County Assessor to the classification of 4G land was the highest of the compared counties and that 4G is a predominated class of grassland in Dawes County. What the graphs do not show is whether the assessed value of grassland in Dawes County in fact exceeds 75% of actual value for 75% of value for agricultural or horticultural purposes.

The Taxpayer Asserts that

Assessed Values of Agricultural Land and Horticultural Land in the Northern Portion of Dawes County are Affected by Special Factors.

A witness for the Taxpayer stated that grassland in the northern part of Dawes County is less productive than grassland in other parts of the county. A witness for the Taxpayer also testified that sales of grassland in the northern part of Dawes County are affected by the availability of stock water and the agreements for the operation of water pipelines. A class or subclass of real property is

“a group of properties that share one or more characteristics typically common to all the properties in the class or subclass, but are not typically found in the properties outside the class or subclass. Class or subclass includes, but is not limited to, the classifications of

agricultural land or horticultural land listed in section parcel use, parcel type, location, geographic characteristics, zoning, city size, parcel size, and market characteristics appropriate for the valuation of such land. A class or subclass based on market characteristics shall be based on characteristics that affect the actual value in a different manner than it affects the actual value of properties not within the market characteristic class or subclass.” Neb. Rev. Stat. §77-103.04 (Reissue 2009).

The testimony relates to factors associated with the development of market areas as a class or subclass. There are three market areas for agricultural land and horticultural land in Dawes County for tax year 2010. *2010 Reports and Opinions of the Property Tax Administrator, Dawes County*, pg 26. Market area 1 includes the northern and southern parts of the County. *Id.* The values assigned by the County Assessor to various classifications of uninfluenced agricultural land and horticultural land, and agricultural land and horticultural land qualified for special valuation, are the same in all three market areas. Actual values for agricultural land and horticultural land as influenced by factors other than agricultural or horticultural uses do vary by market area. The Taxpayer’s evidence is that the values for grassland in the northern part of Dawes County are affected by specific factors. Those factors may support a determination that the northern part of Dawes County should be in a market area. The Commission cannot, however, create a market area. See, *Bartlett v. Dawes County Board of Equalization*, 259 Neb. 954, 613 N.W.2d 810 (2000). Even if the Commission could create a market area, there is no evidence from which boundaries of a market area in the northern part of Dawes County might be determined, or from which values applicable to the various classifications of agricultural land and horticultural land found in the market area might be determined.

The graphs produced by the Taxpayer are not clear and convincing evidence that the values as determined by the County Assessor and affirmed by the County Board are arbitrary or unreasonable.

The Taxpayer Asserts that

Adjusted Sales Prices for Various Parcels When Compared to Assessed Value on the Date of Sale and Assessed Value for the Current Year Demonstrate that Assessed Values for Agricultural Land and Horticultural Land as Determined by the County Assessor and Affirmed by the County Board Exceed 75% of Actual Value or 75% of Agricultural and Horticultural Value

Page 4 of the Taxpayer's Exhibit shows a graph of the adjusted sale price, the assessed value as of date of sale, and the assessed value for the current year. The current year is understood to be the year 2010. The basis for adjustments, who made the adjustments, and the adjustment made are not known. Sales 11, 14, 15, 16, and 17 occurred in tax year 2010. The graph shows that the sale prices of sales 11 and 16 were more than double their assessed value. The assessed values of sales 14 and 15 exceeded their sales prices. The assessed value of sale 17 was less than its sale price. The graphical analysis of sales shown on page 4 of the Taxpayer's Exhibit is not clear and convincing evidence that the decisions of the county board were unreasonable or arbitrary.

The Taxpayer Asserts that

Assessed Values for Agricultural Land and Horticultural Land as Determined by the County Assessor and Affirmed by the County Board Exceed 75% of Actual Value or 75%

**of Agricultural and Horticultural Value Because the Data Used to Develop Estimates of
Value Contained Errors**

The Taxpayer asserts that at least one sale in the qualified sales roster was not an arm's length transaction and should not have been used. The Taxpayer asserts that another sale was affected by income tax considerations, a 1031 exchange, and should have been excluded from the sales file. The Taxpayer also asserts soil classifications for sold parcels were erroneous and that sale prices had not been properly adjusted for improvements or growing crops on a parcel or personal property sold with the land.

Arm's length transactions are sales between two or more parties, each seeking to maximize their positions from the transaction. 350 Neb. Admin. Code, ch. 12, §002.21 (03/09). Arm's length transactions are deemed qualified sales. 350 Neb. Admin. Code, ch. 12, §002.11 (3/09). Prices disclosed in qualified sales are used to estimate the value of unsold parcels. See, 350 Neb. Admin. Code, chs. 12 & 50, (03/09).

In general, comparable sales can be understood to be sales of comparable parcels. Comparable parcels are those that share similar quality, architectural attractiveness (style), age, size, amenities, functional utility, and physical condition. *Property Assessment Valuation*, 2nd Ed., International Association of Assessing Officers, 1996, p. 98. Comparable sales are those in which the parcels sold share characteristics. Regardless of the parcel's characteristics, arm's length sales are those transactions which maximized the parties' positions. The focus for determining whether a sale is an arm's length transaction is the transaction. The focus for determining whether a sale is the sale of a comparable parcel or a comparable sale is the sold parcel. With that distinction in mind the text of a pertinent Nebraska statute is set out in full.

“Comparable sales are recent sales of properties that are similar to the property being assessed in significant physical, functional, and location characteristics and in their contribution to value. When using comparable sales in determining actual value of an individual property under the sales comparison approach provided in section 77-112, the following guidelines shall be considered in determining what constitutes a comparable sale:

- (1) Whether the sale was financed by the seller and included any special financing considerations or the value of improvements;
- (2) Whether zoning affected the sale price of the property;
- (3) For sales of agricultural land or horticultural land as defined in section 77-1359, whether a premium was paid to acquire nearby property. Land within one mile of currently owned property shall be considered nearby property;
- (4) Whether sales or transfers made in connection with foreclosure, bankruptcy, or condemnations, in lieu of foreclosure, or in consideration of other legal actions should be excluded from comparable sales analysis as not reflecting current market value;
- (5) Whether sales between family members within the third degree of consanguinity include considerations that fail to reflect current market value;
- (6) Whether sales to or from federal or state agencies or local political subdivisions reflect current market value;
- (7) Whether sales of undivided interests in real property or parcels less than forty acres or sales conveying only a portion of the unit assessed reflect current market value;

- (8) Whether sales or transfers of property in exchange for other real estate, stocks, bonds, or other personal property reflect current market value;
- (9) Whether deeds recorded for transfers of convenience, transfers of title to cemetery lots, mineral rights, and rights of easement reflect current market value;
- (10) Whether sales or transfers of property involving railroads or other public utility corporations reflect current market value;
- (11) Whether sales of property substantially improved subsequent to assessment and prior to sale should be adjusted to reflect current market value or eliminated from such analysis; and
- (12) For agricultural land or horticultural land as defined in section 77-1359 which is or has been receiving the special valuation pursuant to sections 77-1343 to 77-1347.01, whether the sale price reflects a value which the land has for purposes or uses other than as agricultural land or horticultural land and therefor does not reflect current market value of other agricultural land or horticultural land.

The Property Tax Administrator may issue guidelines for assessing officials for use in determining what constitutes a comparable sale. Guidelines shall take into account the factors listed in this section and other relevant factors as prescribed by the Property Tax Administrator.”

Neb. Rev. Stat. §77-1731 (Reissue 2009).

The factors listed in section 77-1731 of Nebraska Statutes relate to the transaction and not to the parcel. The factors listed in section 77-1731 of Nebraska Statutes can best be understood as those which can affect the characterization of a transaction as an arm’s length transaction.

Whether or not a sale can be considered an arm's length transaction is sometimes expressed in the negative; that is when should a sale not be considered an arm's length transaction. "Sales that are not arms-length ... should be identified and rarely if ever used." *The Appraisal of Real Estate*, 13th Edition, Appraisal Institute, 2008, p. 304. Non-arm's length sales are usually not made on the open market or are not made with the objective of maximizing the financial position of the parties involved. Thus, they provide unreliable evidence of market value. *Mass Appraisal of Real Property*, International Association of Assessing Officers, p. 53 (1999).

"These sales are usually not made on the open market or are not made with the objective of maximizing the financial position of the parties involved. Thus, they provide unreliable evidence of market value. The following transactions can generally be considered non-arm's-length sales.

Sales involving courts, governmental entities, or public utilities. These are generally forced sales, such as condemnation or tax sales.

Sales involving charitable, religious, or educational institutions. These are often full or partial gifts and thus not representative of market value.

Sales in which a financial institution is the buyer. These sales are often made in lieu of a foreclosure and are not exposed to the open market. However, open-market sales in which a financial institution is a willing buyer, such as the purchase of vacant land for a branch bank, are likely to be valid. Sales in which a financial institution is the seller should be viewed cautiously but may be valid if made on the open market.

Sales between relatives or corporate affiliates. These are not open-market sales and are usually made at prices favorable to the buyer. Relationships between buyers and sellers are usually best identified by a direct question on the affidavit of value or the sales questionnaire. A difference in surnames is never a sufficient indication of no relationship. Occasionally, sales between relatives do represent market value, particularly in rural areas where blood relationships among landowners are common. Corporate sales often require considerable research to determine legal relationships.

Sales of convenience. Sales of this kind are made to change or correct the title or deed. The grantee and grantor may be the same, and the sale price is usually nominal. A review of the deed is usually the best method of identification.

Estate sales. Sales in which the *buyer* is an executor or trustee are usually nonmarket sales at nominal consideration. Sales from an estate may be made to satisfy the debts of the deceased or the wishes of an heir; otherwise, the sales in which an estate is the *seller* may well be valid arm's-length sales." *Mass Appraisal of Real Property*, International Association of Assessing Officers, pp 53 & 54, (1999).

Qualified sales are used by the County Assessor to estimate values in a county. Qualified sales are sales which are arm's length transactions included in the sales file. 350 Neb. Admin. Code, ch. 12, §002.11. (03/09). Prior to inclusion in a qualified sales file, data concerning the sale should be verified and necessary adjustments made. Cf. 350 Neb. Admin. Code, ch. 12, §003.04 (03/09). The qualified sales file used by the County Assessor to determine value contains 17 sales. *2010 Reports and Opinions of the Property Tax Administrator, Dawes County*, pg 30. Changes in the sales roster could affect the analysis.

One sale in the qualified roster was for the sale of a small parcel adjoining a residence. A sale of the parcel was offered after the seller expressed a desire to place a mobile home within view of the residence on an adjoining parcel. The adjoining property owner believed the mobile home would detract from the view. Lengthy and acrimonious negotiations took place before an agreement was reached. A sale and purchase in which the purchaser is forced to purchase a small parcel to protect a view is not an arm's length transaction. The evidence supports a conclusion that the qualified sales file used by the County Assessor to develop estimates of values contained a least one sale that was not an arm's length transaction.

The sales file contained a transaction in which the buyer stated that a premium was paid due to income tax considerations derived from application of section 1031 of the Internal Revenue Code. 1031 transactions may not be arm's length transactions.

A witness for the Taxpayer testified that he believed the sales prices of several sales should be adjusted for growing crops. A security interest in farm products which include growing crops may be granted apart from any encumbrance of the real estate on which the crop is to be grown. See, Neb. U.U.C. §9 (Reissue 2010 and Cum. Supp 2010). The beneficiaries of the estate of a life estate may retain an interest in a growing crop on termination of the tenancy. *In Re Estate of Mishke*, 136 Neb. 875, 287 N.W. 760 (1939). A tenant may harvest a growing crop at termination of the lease provided for by terms of the lease or local custom. See, *Fisher v. Stuckey*, 201 Neb. 439, 267 N.W.2d 768 (1978). While it is clear that a growing crop can be considered something apart from the real estate on which it is growing, none of the cited cases or laws concern allocation of value to a growing crop on the sale of real property. In a manner analogous to the treatment of a growing crop on termination of a lease, allocation of a sale price

would be recognized if agreed to by the parties, or if shown to be a common local practice. It has not been shown that either agreement or local custom would support a deduction from the purchase price for the value of growing crops on any of the sold lands described in the sales file. In addition, even if an allocation of the sale price to growing crops was appropriate, there is no evidence from which the appropriate adjustment could be determined.

Some sold lands were misclassified for assessment purposes at time of sale. The misclassification caused a sale that was part dry cropland to be analyzed as a sale of grassland. Because dry cropland would be expected to have a greater per acre value than grassland, more value may have been attributed to grassland than was appropriate. Because, however, more than one sale was analyzed, the misclassification of some land, in one sale, may or may not have affected resulting values.

Whatever errors were made in qualification of sales or the adjustment of qualified sales, counsel for the Taxpayer acknowledged, and the Commission has noted, that the effect of the errors on valuation of the subject property is not in evidence. A Taxpayer, who only produces evidence that is aimed at discrediting valuation methods utilized by the county assessor, fails to meet the 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). 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). The effect correction of the errors would have on a determination of values is not in evidence. The evidence of errors

is, therefore, not clear and convincing evidence that the decisions of the County Board determining taxable values were arbitrary or unreasonable.

Evidence that grassland values are higher in Dawes County than neighboring or nearby counties, that special factors may influence values in the northern part of Dawes County, and that there are errors in the data used to determine agricultural land and horticultural land assessed value, indicates that assessed values for the agricultural land and horticultural land component of the subject property may be incorrect.

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). The County Board relied on the facts as presented to it and those facts provided a basis for making decisions. The Board's decisions were not arbitrary.

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). There is no showing that an analysis of a corrected qualified sales file would result in different estimates of value. The decisions of the County Board are not unreasonable when after correcting for errors, the same decisions could have been made.

The Commission cannot grant relief based on the Taxpayer's claim that taxable value of agricultural land and horticultural land is greater than 75% of its actual value or if qualified for special valuation at 75% of its value solely for agricultural or horticultural purposes.

A witness for the Taxpayer suggested that a reappraisal might be required to rectify problems with the assessment of agricultural land and horticultural land in Dawes County. The

witness' suggestion is understood to be a request for the Commission to order the County to redo the qualified sales file and to redetermine values for unimproved agricultural land and horticultural land in Dawes County for the year 2010. The Commission has statutory authority to order a reappraisal of property within a county, an area within a county, or classes or subclasses of property within a county if no other relief is adequate to resolve a dispute Neb. Rev. Stat. §77-5017(1) (Reissue 2009). The Taxpayer could have prepared a qualified sales roster and analyzed it to produce estimates of the contribution to value of the various classifications of agricultural land and horticultural land found on the subject property or produced other evidence of actual value. The Taxpayer has been provided meaningful opportunities to present evidence and for review and analysis of that evidence by the County Board and this Commission. Resolution of the dispute does not require another opportunity for more evidence, analysis, and review.

Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value. *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991). If taxable values are to be equalized, it is necessary for a Taxpayer to establish by clear and convincing evidence that valuation placed on his or her property when compared with valuations placed on similar property is grossly excessive and is the result of systematic will or failure of a plain legal duty, and not mere error of judgement.

“Something more than a difference of opinion must be shown. It must be demonstrated by evidence that the assessment is grossly excessive and is a result of arbitrary or unlawful action, and not a mere error of judgment. A claim of disproportionate assessment is not sustained when supported only by opinion evidence that the property is assessed at a

higher proportion to its actual value than some other property. Such a contention must be sustained by evidence that the valuation is arbitrary or capricious, or so wholly out of line with actual values as to give rise to an inference that the assessor and county board of equalization have not properly discharged their duties. Mere errors of judgment do not sustain a claim of discrimination. There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity.” *Newman v. County of Dawson*, 167 Neb. 666, 671, 94 N.W.2d 47, 50 (1959).

The Taxpayer has not met that burden.

**V.
CONCLUSIONS OF LAW**

1. The Commission has subject matter jurisdiction in the captioned appeals.
2. The Commission has jurisdiction over the parties to captioned appeals.
3. The Taxpayer has not produced competent evidence that the County Board failed to faithfully perform its official duties and to act on sufficient competent evidence to justify its actions.
4. The Taxpayer has not adduced sufficient, clear and convincing evidence that the decisions of the County Board are unreasonable or arbitrary and the decisions of the County Board should be affirmed.

**VI.
ORDER**

IT IS ORDERED THAT:

1. The decisions of the County Board determining taxable values of the parcels comprising subject property as of the assessment date, January 1, 2010, are affirmed.
2. Taxable value, for the tax year 2010, of each parcel described in an appeal as referenced by the Case No. is:

Case No. 10A 392

Agricultural land	\$ 16,500.00
Farm Site	\$ 2,000.00
Home Site	\$ 8,000.00
Residence	\$ 110,725.00
Outbuildings	\$ 23,540.00
Total	<u>\$ 160,765.00</u>

Case No. 10A 393

Agricultural land	\$ 92,990.00
Total	<u>\$ 92,990.00</u>

Case No. 10A 394

Agricultural land	\$ 375.00
Total	<u>\$ 375.00.</u>

3. This decision, if no appeal is timely filed, shall be certified to the Dawes County Treasurer, and the Dawes 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 2010.
 7. This order is effective for purposes of appeal on June 29, 2011.
- Signed and Sealed. June 29, 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).

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.

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 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 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