

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

DONALD J. FIBICH,)	
)	
Appellant,)	Case No. 09SV 015
)	
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 Donald J. Fibich ("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 December 10, 2010, pursuant to an Order for Hearing and Notice of Hearing issued October 21, 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.

Donald J. Fibich was present at the hearing. No one appeared as legal counsel for the Taxpayer.

Nicole L. O'Keefe, and Kerry A. Schmid, Deputy County Attorneys for Sarpy County, Nebraska, were present as legal counsel for the Sarpy County Board of Equalization ("the County Board").

The Commission took statutory notice, received exhibits, and heard testimony.

The Commission is required to state its final decision and order concerning an appeal, with findings of fact and conclusions of law, on the record or in writing. Neb. Rev. Stat. §77-5018 (Reissue 2009). The final decision and order of the Commission in this case is as follows.

I. ISSUES

The Taxpayer has asserted that taxable value of the subject property as of January 1, 2009, is less than taxable value as determined by the County Board. The issues on appeal related to that assertion are:

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

The taxable value of the subject property on January 1, 2009.

II. FINDINGS OF FACT

The Commission finds and determines that:

1. The Taxpayer has a sufficient interest in the outcome of the above captioned appeal to maintain the appeal.
2. The parcel of real property to which this appeal pertains ("the Subject Property") is described in the table below.
3. Taxable value of the subject property placed on the assessment roll as of January 1, 2009, ("the assessment date") by the Sarpy County Assessor, value as proposed in a timely

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

Case No. 09SV 015

Description: Lot 2 Fawn Acres, Sarpy County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Agricultural Land	\$13,168.00	\$34,000.00	\$13,168.00
Home Site	\$74,980.00	In Land Total	\$61,640.00
Residence	\$261,903.00	\$192,000.00	\$244,684.00
Total	\$350,051.00	\$226,000.00	\$319,492.00

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 October 21, 2010, set a hearing of the appeal for December 10, 2010, at 11:00 a.m. CST.
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:

Case No. 09SV 015

Agricultural land	\$ 13,168.00
Home Site	\$ 74,980.00
Residence	\$244,684.00
Total	<u>\$332,832.00.</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).

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 for 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 at 75% of its special value. Neb. Rev. Stat. 77-201 (3) (Reissue 2009)
15. 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).
16. 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).
17. The presumption disappears if there is competent evidence to the contrary. *Id.*
18. 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).
19. 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).
20. "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).

21. 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).
22. 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).
23. "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).
24. 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).
25. 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).
26. 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 an improved parcel in rural Sarpy County. The improvement on the parcel is a single family residence. (E8). The contribution to value made by the improvement as determined by the County Board is contested on appeal. A part of the parcel is agricultural land and horticultural land qualified for special valuation. The contribution to value made by the agricultural land and horticultural land qualified for special valuation was not contested on appeal.

The contribution to value of the sites designated as LVG code 8470 or 8120 was contested on appeal. The lands classified as site are those on which residence is situated. The lands classified as site had been valued by the County Assessor using a standard operating procedure for farm site valuation described in Exhibit 10. The contribution to value made by the two acres of the subject property classified as site as determined by the County Assessor was based on a valuation schedule that assigned a contributory value of \$64,000 to the first acre, \$9,000 to the 2nd and 3rd acres and \$6,500 to each additional acre in a parcel. Using the county assessor's schedule, the contribution to value made by the 2.22 acres of the subject property classified as site, was \$74,980 ($\$64,000 + 9,000 + (\$9,000 \times .22 = \$1,980) = \$74,980$). The contribution to value made by the two acres of the subject property classified as site as determined by the County Board was based on a valuation schedule that assigned a contributory value of \$47,000 to the first acre, \$12,000 to the 2nd, 3rd, 4th and 5th acres and \$6,250 to each additional acre in a parcel. The County Board determined, based on the valuation schedule that it adopted, that the contribution to value made by the 2.22 acres of the subject property classified as

site was \$61,640 (\$47,000 + \$14,640). (E8:5). The Taxpayer contends on appeal that the contribution to value of the 2.22 acres classified as site should be \$44,400 at \$20,000 per acre.

There is no evidence in the record in support of the valuation schedule adopted by the County Board. The County Board is not, however, required to produce evidence in support of its decision. 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).

After adoption of its base valuation schedule, the County Assessor's office developed percentage adjustments to the schedule deemed necessary to obtain assessments within various neighborhoods at required levels of value. Adjustments were for proximity to a landfill (-10%), driveway access on a major highway (-10%), and location in a subdivision called Equestrian Estates (+25%). Application of the valuation schedule as adjusted was then tested with an analysis of sales in five neighborhoods to determine the assessment to sales ratios that would result from application of the schedule as adjusted. The purpose of the analysis was to determine whether the schedule would produce a median assessment to sale ratio indicating a level of value higher than 92% and lower than 100% as required by state law for a statistical analysis of appraisal performance. The analysis and supporting documentation was received as Exhibits 12 through 16. The County Board adopted the neighborhood adjustments developed by the County Assessor's office and applied those adjustments to parcels protested to it. An examination of the adjusted valuation schedule, as adopted by the County Board, is necessary to determine whether its use would result in valuations meeting the requirements of state law.

Because the value adjustment made by the County Board relates to land value only, it is necessary to consider sales of lands without buildings to estimate the contribution to value that would be made by the land. The assessment to sales ratios for unimproved parcels resulting from use of the adjusted valuation schedule as applied by the County Assessor is shown in the Table A below. Table A also shows the assessment to sales ratios for the same unimproved parcels resulting from application of the County Board's adjusted valuation schedule. Unimproved parcels are those in which the value in the column labeled "Assed Value Recorded" is equal to the value in the "Ass'ed Land" column. Adjustments to the schedule were determined as the percentage difference between the contribution to value of land as indicated by an unadjusted use of the schedule shown in the "Bd Av" and the "Ass Av" columns and the value shown in assessed value recorded column in the Exhibits. If an adjustment was found in the application of the schedule by the County Assessor the same percentage adjustment was applied to the value indicated by use of the County Board's schedule. For example the parcel 11295554, Lot 1 Hidden Valley, shown on page 2 of Exhibit 14 is a 3.12 acre parcel. Value as indicated by the unadjusted schedule adopted by the County Assessor is \$82,780 ($\$64,000 + \$9,000 + \$9,000 + \$780 (.12 \times \$6,500)$). The value in the "Ass'ed Land" column is \$99,336. A positive adjustment of 20% had been applied ($\$99,336 - \$82,780 = \$16,556 \div \$82,780 = .20$). The calculated adjustment is confirmed by the table found on page 11 of Exhibit 14 showing a 1.20 adjustment to Lot 1 Hidden Valley. The column in the table labeled "Asses Value Assr" is the value in the column labeled "Ass'ed Land" in Exhibits 12 through 16. The Bd A/S Ratio is the number from the column headed Assess Value Bd divided by the Sale Price. The Assr A/S Ratio is the number from the column headed Assess Value Assr divided by the Sales Price.

Table A

ID#	Acres	BD Value/Acre	Assess Value Bd	Assr Value/Acre	Asses Value Assr	Sale Price	Bd A/S Ratio	Assr A/S Ratio
BACR Neighborhood								
11587251	1	47000	47000	64000	64000			
	2	12000	24000	9000	18000			
	.3	12000	3600	6500	1950			
	3.3		74600		83950	88000	0.8477	0.954
RAC Neighborhood								
10946608 7	1	47000	47000	64000	64000			
	2	12000	24000	9000	18000			
	2	12000	24000	6500	13000			
	.28	6250	1750	6500	1820			
	5.28		96750		96820	80000	1.2094	1.2103
11580051	1	47000	47000	64000	64000			
	2	12000	24000	9000	18000			
	2	12000	24000	6500	13000			
	1.91	6250	11938	6500	12415			
	6.91		106938		107415	100000	1.0694	1.0742
11589350	1	47000	47000	64000	64000			
	2	12000	24000	9000	18000			
	2	12000	24000	6500	13000			
	5.0		95000		95000	100000	0.95	0.95
HAC Neighborhood								
11579493	1	47000	47000	64000	64000			
	2	12000	24000	9000	18000			

ID#	Acres	BD Value/Acre	Assess Value Bd	Assr Value/Acre	Asses Value Assr	Sale Price	Bd A/S Ratio	Assr A/S Ratio
	2	12000	24000	6500	13000			
	.01	6250	63	6500	65			
	5.01		104569 ¹		104572 ¹	140000	0.7469	0.7469
11575710	1	47000	47000	64000	64000			
	2	12000	24000	9000	18000			
	2	12000	24000	6500	13000			
	11.9	6250	74375	6500	77350			
	16.9		169375		172350	265000	0.6392	0.6504
11295554	1	47000	47000	64000	64000			
	2	12000	24000	9000	18000			
	.12	12000	1440	6500	780			
	3.12		86928 ¹		99336 ¹	125000	0.6954	.7947
11295554	1	47000	47000	64000	64000			
	2	12000	24000	9000	18000			
	.12	12000	1440	6500	780			
	3.12		86928 ¹		99336 ¹	156000	.5572	.6368
10346864	.63	47000	29610	64000	40320	40000	.7403	1.008
11590219	1	47000	47000	64000	64000			
	2	12000	24000	9000	18000			
	.07	12000	840	6500	455			
	3.07		57472 ¹		65964 ¹	67000	0.8578	0.9845
11590222	1	47000	47000	64000	64000			
	2	12000	24000	9000	18000			
	.28	12000	3360	6500	1820			

ID#	Acres	BD Value/Acre	Assess Value Bd	Assr Value/Acre	Asses Value Assr	Sale Price	Bd A/S Ratio	Assr A/S Ratio
	3.28		59488		67056	68500	0.8684	0.9789
GRAC Neighborhood								
11588194	1	47000	47000	64000	64000			
	2	12000	24000	9000	18000			
	2	12000	24000	6500	13000			
	23.31	6250	145688	6500	151515			
	5.0		240688		246515	282000	.8535	.8742
11590405	1	47000	47000	64000	64000			
	2	12000	24000	9000	18000			
	2	12000	24000	6500	13000			
	25.03	6250	156437	6500	162695			
	30.03		251437		257695	300000	.8381	.8590
11590406	1	47000	47000	64000	64000			
	2	12000	24000	9000	18000			
	2	12000	24000	6500	13000			
	16.01	6250	100063	6500	104065			
	21.01		195063		199065	206000	.9469	.9663
11216603	1	47000	47000	64000	64000			
	2	12000	24000	9000	18000			
	2	12000	24000	6500	13000			
	4.02	6250	25125	6500	26130			
	9.02		120125		121130	110000	1.092	1.1012
GHAC Neighborhood								
11559466	1	47000	47000	64000	64000			

ID#	Acres	BD Value/Acre	Assess Value Bd	Assr Value/Acre	Asses Value Assr	Sale Price	Bd A/S Ratio	Assr A/S Ratio
	2	12000	24000	9000	18000			
	2	12000	24000	6500	13000			
	5		95000		95000	120000	.7917	.7917
11559473	1	47000	47000	64000	64000			
	2	12000	24000	9000	18000			
	2	12000	24000	6500	13000			
	5		95000		95000	115000	.8261	.8261
11295708	1	47000	47000	64000	64000			
	2	12000	24000	9000	18000			
	2	12000	24000	6500	13000			
	4.72	6250	29500	6500	30680			
	9.72		155625 ¹		157100 ¹	159950	.9730	.9822

1. An adjustment was made from value indicated by the schedule.

The A/S ratios from the table above are arrayed in Table B.

Table B

BD A/S Ratios		Assr A/S Ratios	
.5572		.6368	
.6392		.6504	
.6954		.7469	
.7403		.7917	
.7469		.7947	
.7917		.8261	
.8261		.859	
.8381	Median	.8742	Median
.8477	.8506	.95	.952

BD A/S Ratios		Assr A/S Ratios	
.8535		.954	
.8578		.9663	
.8684		.9789	
.9469		.9822	
.95		.9845	
.973		1.008	
1.0694		1.0742	
1.092		1.1012	
1.2094		1.2103	

The median of assessment sales ratios is used annually by the Commission as a preferred indicator of the level of value in a class or subclass of real property for purposes of equalizing values across Nebraska. 442 Neb. Admin. Code, ch. 9, §004 (06/09). The median as an indicator of the level of value shows that valuation using the adjusted schedule developed by the County Board indicates a level of value of .8506. The level of value indicated by the analysis of the County Board's schedule is less than 100% of actual value as required by statute. The level of value is also outside the 92% to 100% range allowed by statute for statistical analysis of the level of value. See, Neb. Rev. Stat. §77-5023 (Reissue 2009).

The Taxpayer noted that some of the sales analyzed by the County Assessor were improved with sewer, water, electrical service, or paved roads. The water, sewer, electrical services are itemized as a separate component contributing \$12,500 of the replacement cost new of the building on the subject property. (E8:3). An appraiser employed by the County Assessor testified that sales of parcels with water, sewer, or electrical services were adjusted for those

services so that the land classified as site in the subject property was valued on the same basis as sales of other lands were evaluated.

The evidence is that use of the County Board's adjusted schedule would under value rural residential sites. If the adjusted schedule, as adopted by the County Board, cannot meet the requirements of state law for assessment, use of the adjusted schedule cannot be valid for the assessment of the subject property. Use of the adjusted schedule developed by the County Board will result in assessments that would not meet the requirements of Nebraska law and its use is arbitrary or unreasonable.

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 of 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 (1990), at 41. The theory assumes that the first unit purchased has higher utility or value than the second. *Id.* The County Assessor's arrayed sales are shown on a graph received as Exhibit 11 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.” *Property Appraisal and Assessment Administration*, The International Association of Assessing Officers (1990) at 185.

Sales as graphed by the County Assessor show that as the size of a sold parcel increased, 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. (E11:4). 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 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 five 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. (E11:2). 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. (E11:2 & 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 11. Movement toward the left axis shows that price per acre increases as size decreases.

The County Assessor assigned a contribution to value of \$6,500 to the 4th and all succeeding acres. (E16:6). An examination of the line shown on Page 4 of Exhibit 11 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 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 11 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 Assessor's assignment of a contributory value of \$6,500 to the 3rd 4th and 5th acres is correct.

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

Several sales of three acre parcels are found in Exhibit 15. Using the schedule adopted by the County Assessor a 3 acre parcel would be deemed to have a value of \$82,000 ($\$64,000 + \$9,000 + \$9,000 = \$82,000$). Using the schedule adopted by the County Board three acre parcels would be deemed to have a value of \$71,000, ($\$47,000 + \$12,000 + \$12,000 = \$71,000$). Sales of 3 acre parcels range from \$67,000 to \$156,000). (E11:2).

Using the schedule adopted by the County Assessor a 5 acre parcel would be deemed to have a value of \$95,000 ($\$64,000 + \$9,000 + \$9,000 + \$6,500 + \$6,500 + \$95,000$). Using the schedule adopted by the County Board a five acre parcel would be deemed to have a value of \$95,000 ($\$47,000 + \$12,000 + \$12,000 + \$12,000 + \$12,000 = \$95,000$). Sales of five acre parcels range from \$75,000 to \$112,125. (E11:3).

Table B shows that use of the adjusted schedule as developed by the County Assessor results in a median A/S ratio of .952. As an indicator of the level of value that ratio is within the range permitted for statistical analysis. *See Neb. Rev. Stat. 77-5023 (Reissue 2009)*.

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 determination of the County Assessor that sites contributed value on a sliding scale and that the scale applicable in this instance is \$64,000 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 determination of the County Board that sites contributed value on a scale of \$47,000 for the first acre, \$12,000 for the 2nd through 5th acre, and \$6,250 for each additional acre. 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 \$74,980 ($\$64,000 + 9,000 + (\$9,000 \times .22 = \$1,980)$) = \$74,980).

The Taxpayer asserted that the County Board's determination of the contribution to value attributable to the residence was excessive. No evidence was produced to support that assertion.

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. Likewise one acre of the subject property could not be sold for Dry Use LVG 1D. The contributory value assigned to Dry Use land LVG 1D as shown in Exhibit 8 at page 5, 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.

The Taxpayer asserts that taxable value of the subject property is not equalized with other similar parcels because the contribution to value of one component, lands classified as site, exceeds the contribution to value of the same component in another parcel. 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). Taxable value of the subject property is the sum of the contribution to value made by buildings and the lands they are situated on assessed at 100% of actual value, and the contribution to value of agricultural land and horticultural land qualified for special valuation assessed at 75% of actual value solely for agricultural and horticultural uses and purposes.

Because taxable value of the subject property and others like it, is a composite of elements lawfully assessed at varying levels of value, the relationship of taxable value to actual value for a parcel is dependent on the contributory value of the components and will necessarily vary from parcel to parcel.

In this appeal the contributory value of the component assessed at 75% of its actual value solely for agricultural and horticultural uses and purposes is not disputed. The contributory value of the component to be assessed at 100% of actual value is contested. The component to be assessed at 100% of actual value is also composed of multiple parts: a building; and land on which the building is situated. For parcels composed of property assessed at the same level of value it is the aggregate value of the components that must be equalized. *See Bumgarner v. Valley County*, 208 Neb. 361, 303 N.W.2d 307, (1981). It is reasonable to extend the rationale of *Bumgarner* to the components of the subject property that are to be assessed at 100% of actual value. The evidence in this appeal is that the County Board undervalued the land on which the buildings are situated. The building is, however, assessed at 100% of actual value. The result of the County Board's action in this appeal is that the aggregate assessment of the building and the land it is situated on is less than 100% of actual value. The County Board used the valuation schedule discussed in this appeal to determine the contribution to value of lands on which buildings were situated in other parcels for which protests were filed. The result would be under valuation of those lands. There is no evidence, however, that the combined contribution to value of buildings and the lands on which they are situated in any other parcel resulted in an assessment at less than 100% of actual value. There is no basis for a claim by the Taxpayer, that the lands on which the building is situated, in the subject property should be undervalued to

obtain equalization. Without evidence that aggregate contribution to value of the building and lands on which they are situated on in other parcels is less than 100% of actual value, the Taxpayer's equalization claim is not a basis for relief. *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623, (1999).

**V.
CONCLUSIONS OF LAW**

1. The Commission has subject matter jurisdiction in this appeal.
2. The Commission has jurisdiction over the parties to this appeal.
3. The Taxpayer has produced competent evidence that the County Board failed to faithfully perform its official duties and to act on sufficient competent evidence to justify its actions.
4. The Taxpayer has adduced sufficient, clear and convincing evidence that the decision of the County Board is unreasonable or arbitrary and the decision of the County Board should be vacated and reversed.

**VI.
ORDER**

IT IS ORDERED THAT:

1. The decision of the County Board determining taxable value of the subject property as of the assessment date, January 1, 2009, is vacated and reversed.
2. Taxable value, for the tax year 2009, of the subject property is:

Case No. 09SV 015

Agricultural land	\$ 13,168.00
Home Site	\$ 74,980.00
Residence	\$244,684.00
Total	<u>\$332,832.00.</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.
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 December 22, 2010.

Signed and Sealed. December 22, 2010.

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