

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

NEBCO INTERMODAL, INC.,)	
)	
Appellant,)	Case Nos. 09C 053, 09C 054, and 09C 055
)	
v.)	DECISION AND ORDER
)	AFFIRMING THE DECISIONS OF
SARPY COUNTY BOARD OF)	THE SARPY COUNTY BOARD OF
EQUALIZATION,)	EQUALIZATION
)	
Appellee.)	

The above-captioned cases were called for a hearing on the merits of appeals by NEBCO Intermodal, Inc. ("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 November 4, 2009, pursuant to an Order for Hearing and Notice of Hearing issued October 27, 2009. Commissioners Wickersham, Warnes, Salmon, and Hotz were present. Commissioner Wickersham, Chairperson of the Commission was the presiding hearing officer.

Robert E. Miller, Vice President of NEBCO Intermodal, Inc., was present at the hearing. No one appeared as legal counsel for the Taxpayer.

John W. Reisz, a Deputy County Attorney for Sarpy County, Nebraska, was present as legal counsel for the Sarpy County Board of Equalization ("the County Board").

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

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

**I.
ISSUES**

The Taxpayer has asserted that taxable value of the subject property as of January 1, 2009, 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, 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 appeals to maintain them.
2. The parcels of real property to which the above captioned appeals pertain ("the Subject Property") are described in the tables below.
3. Actual 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 timely protests, and actual values as determined by the County Board are shown in the following tables:

Case No. 09C 053

Description: Govt Lot 1, Tax Lot A S of RR and Tax Lot 1, Section 19, Township 12, Range 11, Sarpy County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$264,040.00	\$189,200.00	\$264,040.00
Total	\$264,040.00	\$189,200.00	\$264,040.00

Case No. 09C 054

Description: W 20 Ac Tax Lot 2 Govt Lot 3 and E 14.2 Ac Tax Lot 2 and Accretion, Section 20, Township 12, Sarpy County, Nebraska

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$252,900.00	\$210,750.00	\$252,900.00
Total	\$252,900.00	\$210,750.00	\$252,900.00

Case No. 09C 055

Description: Tax Lots A, 1A, 1B, 2B and SW¼SE¼ Section 17, Township 12, Range 11, Sarpy County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$327,300.00	\$272,750.00	\$327,300.00
Total	\$327,300.00	\$272,750.00	\$327,300.00

4. Appeals of the County Board's decisions were filed with the Commission.
5. The County Board was served with Notices in Lieu of Summons and duly answered those Notices.
6. The captioned appeal was consolidated for hearing with other appeals, by request of the parties.

7. An Order for Hearing and Notice of Hearing issued on October 27, 2009, set a hearing of the appeals for November 4, 2009, at 9:00 a.m. CST.
8. 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.
9. Actual value of each parcel for the tax year 2009 is:

Case No. 09C 053

Land value \$264,040.00

Total value \$264,040.00

Case No. 09C 054

Land value \$252,900.00

Total value \$252,900.00

Case No. 09C 055

Land value \$327,300.00

Total value \$327,300.00.

**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. “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.

8. 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).
9. 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).
10. 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).
11. 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).
12. 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).
13. 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).

14. 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).
15. 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).
16. 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).
17. 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).
18. The presumption disappears if there is competent evidence to the contrary. *Id.*

19. The order, decision, determination, or action appealed from shall be affirmed unless evidence is adduced establishing that the order, decision, determination, or action was unreasonable or arbitrary. Neb. Rev. Stat. §77-5016 (8) (Cum. Supp. 2006).
20. 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).
21. "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).
22. 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).
23. 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).
24. A corporate officer or other representative of an entity, must be shown to be familiar with the property in question and have a knowledge of values generally in the vicinity to be qualified to offer an opinion of value. *Kohl's Dept. Stores v. Douglas County Bd. of Equal.*, 10 Neb.App. 809, 638 N.W.2d, 881 (2002).
25. 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).

26. 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).
27. 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).

IV. ANALYSIS

The subject property is composed of three parcels in rural Sarpy County. One parcel of the subject property is used for the mining of sand. There are rented cabin sites on two parcels of the subject property.

The County Assessor determined actual value of the subject property as part of a six parcel economic unit. (E4:3). Four of the parcels in the economic unit, as defined by the County Assessor, were owned by NEBCO Intermodal, Inc., and two were owned by NEBCO, Inc. (E4:2).

Three parcels in the economic unit were assessed as agricultural land and horticultural land receiving special valuation. (E4:2). Special value is the value that can be attributed to use solely for agricultural or horticultural purposes or uses without regard to the actual value the land would have for other purposes or uses. Neb. Rev. Stat. §77-1343(5). (Reissue 2009). Parcels to

which special valuation is applicable are assessed at 75% of their special value. Neb. Rev. Stat. §77-201 (3) (Reissue 2009). The parcels granted special valuation were then assessed, in part, at 75% of their special value for agricultural and horticultural uses or purposes. No parts of the three parcels comprising the subject property were assessed as agricultural land or horticultural land receiving special valuation.

Six parcels, including the three parcels comprising the subject property, were included in an economic unit created by the County Assessor. All lands in the economic unit were valued by the County Assessor based on a scale that assigned a value of \$35,000 to the first acre, \$8,000 to the second acre and \$3,000 to all other acres in the unit. The first and second acres of the economic unit are in the lands described in Case No. 09C 053. (E4:3). All other lands in the parcels comprising the subject property were valued and assessed by the County Board at \$3,000 per acre as part of the economic unit.

Nebraska law requires an assessor to prepare an assessment roll each year. Neb. Rev. Stat. §77-1303 (Reissue 2009). The assessment roll lists each parcel, its owner, the number of acres or lots which comprise it and the value thereof, and the improvements and the value thereof. *Id.* A parcel is defined as a contiguous tract of land determined by its boundaries under the same ownership, and in the same tax district and section. Parcel also means an improvement on leased land. If all or several lots in the same block are owned by the same person and contained in the same district, they may be included in one parcel. Neb. Rev. Stat. §77-132 (Reissue 2009).

Nebraska's constitution requires that taxes 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, Sec. 1 (1). Four of the parcels in the economic unit as defined by the County Assessor are owned by the Taxpayer. Two of the parcels in the economic unit are owned by an entity related to the Taxpayer through ownership and officers. All of the parcels comprising the subject property are owned by the Taxpayer. Differential tax treatments between parcels can, however, only be based on the nature of the property, not upon who controls the property. *Constructors, Inc. v. Cass County Board of Equalization*, 258 Neb. 866, 606 N.W.2d 786 (2000). The nature of the six parcels included in the economic unit is obviously varied, three qualified for special valuation and three did not for example. The only criterion expressed for inclusion in the economic unit was ownership. Valuation of multiple parcels as parts of an economic unit solely because of common ownership is contrary to law. The decisions of the County Board are therefore unreasonable.

The Taxpayer contends that taxable value of the subject property is not equalized with the taxable values of other comparable parcels. Specifically, the Taxpayer's evidence is that other comparable parcels were granted special valuation and are assessed, in whole or in part, at 75% of their value for agricultural or horticultural purposes while the subject property is assessed at 100% of its actual value for recreational purposes determined as described above.

Only agricultural land and horticultural land as defined by the legislature is eligible for special valuation. Neb. Rev. Stat. §77-1344 (1) (Reissue 2009). "For purposes of sections 77-1359 to 77-1363:

(1) 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;

(2) 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;

(3) Farm home site means not more than one acre of land contiguous to a farm site which includes an inhabitable residence and improvements used for residential purposes, and such improvements include utility connections, water and sewer systems, and improved access to a public road; and

(4) Farm site means the portion of land contiguous to land actively devoted to agriculture which includes improvements that are agricultural or horticultural in nature, including any uninhabitable or unimproved farm home site.” Neb. Rev. Stat. §77-1359 (Reissue 2009).

“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).

Parcels to which special valuation is applicable are assessed at 75% of their special value. Neb. Rev. Stat. §77-201(3) (Supp. 2007). Special value is the value that can be attributed to use solely for agricultural or horticultural purposes or uses without regard to the actual value the land would have for other purposes or uses. Neb. Rev. Stat. §77-1343(5). (Reissue 2009).

One of the comparable parcels receiving special valuation Tax Lot 7, is similar to the parcel of the subject property described in Case NO. 09C 053 because it is under water. (E37:47-51). Sand had been extracted from Tax Lot 7 by the Taxpayer under contract with the owner. The Taxpayer’s Vice-President testified that he believed the owner of Tax Lot 7 intended to develop a recreational lake on the parcel. Govt Lot 1B, another comparable parcel, is also largely under water and was granted special valuation by the County Board. (E37:1-5). Govt Lots 1C and 1D are not under water; however, there is no evidence of agricultural or horticultural use on parcels Govt Lots 1C or 1D. The two parcels that are largely under water cannot be deemed agricultural and horticultural lands eligible for special valuation. The evidence is that other comparable parcels receiving special valuation are not in fact eligible for special valuation. The result was favorable assessment of the comparable parcels as compared to assessment of the subject property.

The Taxpayer did not apply for special valuation of any parcel comprising the subject property and does not contend that any parcel of the subject property is eligible for special valuation. Nonetheless, the County Board has a duty to equalize taxable values within the County. Neb. Rev. Stat. §77-1501 (Supp. 2007). Disparate treatment of parcels as shown by the evidence in this appeal is a breach of that duty. The Taxpayer is entitled to have its 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).

The property record file for each parcel the Taxpayer submitted as a comparable contains an Agland Inventory Report for the roll year 2008. (E37:2, E37:9, E37:14, E37:19, E37:27, E37:32, E37:37, E37:42, and E37:48,). The Agland Inventory Reports show the classification of the lands in a parcel into various subclasses by use, dry cropland, grassland, etc., soil types assigned to (LVGs”), and the values assigned to those LVGs. The process for development of a classification system for agricultural land and horticultural land based on soil types and land uses is described in Chapter 14 of Title 350 of Nebraska’s Administrative Code. Special values assigned to the LVGs of the classification system may be determined based on comparable sales or use of an income analysis. 350 Neb. Admin. Code, ch. 11 (3/15/09). Application of the classification system and the special values assigned to LVGs may be seen in the Agland Inventory Report for the parcel described in Exhibit 19. The Agland Inventory Report shows that the parcel contains 78.36 acres 66.60 of which are classified as dry cropland, 6.36 acres of which is a home site and 5.40 acres of which are classified as waste. (E19:5). The dry cropland is

further classified by LVG codes as 1D, 2D1, and 3D subclasses . (E19:5). A special value per acre has been assigned to each LVG of dry crop land. Each acre classified as 1D has an assigned special value of 2,153, each acre of 2D1 has an assigned special value of 1,934 and each acre of 3D has an assigned special value of 1,483. (E19:5). The actual value assigned to the 8030 LVG, is 3,000 per acre and to waste LVG, 80 per acre. The contribution to assessed value of the land is then the sum of the contributions of the components. A review of the property record files for the other parcels offered by the Taxpayer as comparables shows use of the same process, although the classifications of land and the number of acres in a LVG classification vary from parcel to parcel. Notwithstanding the described valuation process and the variables that it utilizes, the Taxpayer produced evidence of the average assessed value of the parcels it considered comparable. The classification, special or actual values assigned to each acre in a classification, the resulting value, and the average value per acre are shown in the following tables for roll year 2009.

E19:5

LVG Code	Acres	Ag/Acre	Assessed Value	Average
1D	9.66	2,153	20,798	NA
2D1	39.11	1,934	75,639	NA
3D	17.83	1,483	26,442	NA
8030	6.36	3,000	19,080	NA
Waste	5.40	80	432	NA
Total	78.36		142,391 ¹	1,817

E26:3

LVG Code	Acres	Ag/Acre	Assessed Value	Average
2D	213.8	1,819	388,902	NA
3D	25.5	1,483	37,817	NA
4D	1.6	880	1,408	NA
2G	44.4	884	39,250	NA
3G	28.1	771	21,665	NA
4G	.6	630	378	NA
Road	6	0	0	NA
Total	320		489,419 ¹	1,529

1. Rounding error of 1.

An examination of the tables shows that the average value per acre is influenced by the size of the parcel and the subclasses of land found in each parcel. The average assessed value per acre ranges from \$1,529 to \$1,817 per acre. If a parcel contains lands classified as LVG 803, a site or farm site, those lands are assessed at actual value and the average assessed value is a mix of actual and special values. The average assessed values of the comparables do not indicate what the assessed value of the subject property would be if assessed as agricultural land and horticultural land receiving special valuation.

As noted the comparables parcels are assessed as agricultural land and horticultural land receiving special valuation. The following are land classifications and their associated values as extracted from Exhibits 19 and 26 for tax year 2009.

Classification	Taxable value per acre
1D	\$2,153
2D1	\$1,934
2D	\$1,819
3D	\$1,483
4D	\$880
2G	\$884
3G	\$771
4G	\$630
Site 803	\$3,000
Waste	\$80.

No evidence of the soil types or the land uses that might be associated with the subject property was presented for the tax year 2009. Soil types and uses for the roll year 2006 are shown in Exhibit 6 at page 11 for the parcel described in Case NO. 09C 053. The LVGs assigned to the soil types and uses found in that parcel for the tax year 2006 are as follows:

Use	LVG	Acres
Farm	803	6
Grass	2G1	8
Grass	3G	6
GRT2	3GT2	51.47
Home	803	1
Waste	Waste	3.21. (E6:11).

Soil types and uses for the roll year 2006 are shown in Exhibit 10 at page 9 for the parcel described in Case NO. 09C 054. The LVGs assigned to the soil types and uses found in that parcel for the tax year 2006 are as follows:

Use	LVG	Acres
Farm	803	6
Grass	3G	19
GRT2	3GT2	34.3
Road	1500	25. (E10:9).

Soil types and uses for the roll year 2006 are shown in Exhibit 14 at page 9 for the parcel described in Case NO. 09C 055. The LVGs assigned to the soil types and uses found in that parcel for the tax year 2006 are as follows:

Use	LVG	Acres
Dry	2D1	30.47
Dry	3D	11.00
Grass	4G1	7.00
GRT2	2GT2	3.00
GRT2	3GT2	51.10
Road	1500	2.00
Waste	Waste	4.53. (E14:9).

Use classifications from the year 2006 to 2009 could change. The assessed values that would be assigned to various classifications for the year 2009 are shown above. The classifications for which values are known do not include all of the classifications for the parcels in the subject property. It is not possible for the Commission to determine what the assessed value of the subject property would be if valued as agricultural land and horticultural land receiving special valuation. In addition there are various sites rented for cabins on two parcels of the subject

property. Whether the cabin sites on the subject property should be valued at \$3,000 per site to achieve uniformity with the Farm and/or Site values of \$3,000 per acre assigned to portions of the parcels presented as comparables for the tax year 2008 or the site lands on the parcel described in Exhibit 19 for the tax year 2009, is unknown and the number of acres that might receive site value is unknown for the tax year 2009. It is the Taxpayer's burden to show both that relief should be granted and the relief to be granted. 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 values).

Finally as noted above the parcel described in Case No. 09C 53 is used for the mining of sand. That use is unlike the use or uses of any other parcel presented in evidence. As noted above, the subject property together with two other parcels owned by the Taxpayer, were classified and used for recreational purposes. Recreational lands are those predominately used or intended to be used for diversion, entertainment, and relaxation on an occasional basis. Some of the uses would include fishing, hunting, camping, boating, hiking, picnicking, and the access or view that simply allows relation, diversion, and entertainment. 350 Neb. Admin. Code, ch. 10, §001.05E (3/15/09). The evidence is that access to the subject property is restricted to those persons engaged in the removal of sand due to the hazards of the mining operation. The parcel of the subject property described in Case No. 0C 053 cannot be said to have recreational uses as used on January 1, 2009. The parcel described in Case No 09C 053 cannot be considered comparable or even similar to the other parcels described in Case Nos. 09C 053 and 09C 054 valued at \$3,000 per acre as recreational land.

The Commission has determined that the Taxpayer is entitled to relief, however the relief to which the Taxpayer is entitled cannot be determined from the evidence. Relief although justified, cannot be granted.

**V.
CONCLUSIONS OF LAW**

1. The Commission has subject matter jurisdiction in this appeal.
2. The Commission has jurisdiction over the parties to this appeal.
3. The Taxpayer has 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 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 actual values of the parcels comprising subject property as of the assessment date, January 1, 2009, are affirmed.
2. Actual value, for the tax year 2009, of each parcel described in an appeal as referenced by the Case No. is:

Case No. 09C 053

Land value \$264,040.00

Total value \$264,040.00

Case No. 09C 054

Land value \$252,900.00

Total value \$252,900.00

Case No. 09C 055

Land value \$327,300.00

Total value \$327,300.00.

3. This decision, if no appeal is timely filed, shall be certified to the Sarpy County Treasurer, and the Sarpy County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Reissue 2009).
4. Any request for relief, by any party, which is not specifically provided for by this order is denied.
5. Each party is to bear its own costs in this proceeding.
6. This decision shall only be applicable to tax year 2009.
7. This order is effective for purposes of appeal on February 2, 2011.

Signed and Sealed. February 2, 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*, *supra*. Clear and convincing evidence that a county board of equalization's determination, action, order, or decision was unreasonable or arbitrary, as those terms have been defined, may however overcome the presumption that the county board of equalization faithfully discharged its duties and acted on sufficient competent evidence. In any event the statutory standard has been met and relief may be granted. Both standards of review are met in the fourth possibility and relief may be granted.

Use of the presumption as a standard of review has been criticized. See, G. Michael Fenner, *About Presumptions in Civil Cases*, 17 *Creighton L. Rev.* 307 (1984). In the view of that author the presumption should be returned to its roots as a burden of proof. *Id.* Nebraska's Supreme Court acknowledged the difficulty of using two standards of review and classified the presumption in favor of the county board of equalization as a principle of procedure involving the burden of proof, namely, a taxpayer has the burden to prove that action by a board of equalization fixing or determining valuation of real estate for tax purposes is unauthorized by or contrary to constitutional or statutory provisions governing taxation. See, *Gordman Properties*

Company v. Board of Equalization of Hall County, 225 Neb. 169, 403 N.W.2d 366 (1987). Use of the *Gordman* analysis allows consideration of both the presumption and the statutory standard of review without the difficulties inherent in the application of two standards of review. It is within that framework that I have analyzed the evidence.

Wm R. Wickersham, Commissioner

Commissioner Wm. C. Warnes, Concurring.

I must comment on the reasoning used by my colleague in his dissent to the majority opinion.

The reasoning of the dissent gives rise to an attempt to grant relief despite the lack of evidence to support such a decision. The evidence that is missing in this appeal is the soil type(s) and the use made of the land which makes up the subject property. This vital information is how the special valuation for land was determined by the County Assessor and the County Board of Equalization for each of the three alleged comparable parcels.

The majority holds that the Taxpayer did rebut the presumption and also proved that the County Board was arbitrary and unreasonable in determining value of the subject property using the recreational land values while at the same time determining values for comparable parcels using special value. The majority believes that the evidence shows that relief should be granted to the Taxpayer. The issue is, did the Taxpayer provide proof of actual value and the evidence for the calculation of relief? I respectfully believe the answer is no.

The dissent acknowledges that the needed evidence to calculate the special value used by the County Board to determine valuation of the alleged comparables was made using the soil

types and land uses. This same information is missing for the subject property and I do not excuse the Taxpayer from providing this evidence to the Commission based on their belief that it should not have been their burden since they did not believe the subject property was eligible for special valuation. The Taxpayer's relief as requested is for uniform treatment for the subject property to that of the alleged comparables and as such, this intent carries with it the burden of providing to the Commission the required information as was used in the determination of value for the alleged comparables.

Instead, the dissent would bridge this absence of evidence by taking a ratio of what the alleged comparables should have been assessed as recreational land to that of which they were assessed as special valuation and using the lesser of the three to equalize the subject property. To me this is tantamount to attempting to use two wrongs to make a right.

The first wrong is the County Board's determination that the alleged comparables should be valued as special value. The second wrong is the dissent's view that the Commission should estimate a value for the subject property using parcels of differing soil types, parcel sizes, areas of each soil type and the uses that differ from those found in the subject property and a ratio that is not directly related to the subject property. This method is not an approved valuation method, but in my opinion amounts to a second wrong/mistake. Relief cannot be granted due to there not being the required evidence to determine value.

William C. Warnes, Commissioner

Commissioner Hotz, dissenting.

I respectfully dissent. In each of these appeals, the majority has concluded the presumption in favor of the County Board has been rebutted by sufficient competent evidence and that the County Board's determination was arbitrary or unreasonable by clear and convincing evidence. I agree.

The majority finds that several comparable parcels were granted special valuation by the County Board while not eligible for special valuation, and that the County Board "acted in a manner contrary to Nebraska law and the result was favorable tax treatment of the comparable parcels as compared to assessment of the subject property." Again, I agree.

After making these findings, however, the majority concludes that, "[it is not possible for the Commission to determine what assessed value of any parcel of the subject property would be if valued as agricultural land and horticultural land receiving special valuation" and that, "[relief, although justified, cannot be granted." I disagree and would grant relief.

The County Assessor assessed each of the subject properties and several comparable properties (hereinafter "comparables") as recreational lands. Both the County Assessor and an appraiser for the County Assessor also testified before the Commission as witnesses for the Taxpayer, giving their opinions that each of the subject properties, as well as each of these comparables, should be valued as recreational land, not agricultural land receiving special valuation. I would give great weight to these opinions.

Nevertheless, while the County Board agreed to value each the subject properties as recreational land, it granted special valuation to the comparables, against the recommendation of the County Assessor. It is important to note that the Taxpayer has not asserted the subject

properties should be valued as agricultural land receiving special value but, rather, that the comparables were valued by the County Board as agricultural land receiving special value resulting in taxable values at a fraction of actual value as recreational property.

Rather than comparing a recreational parcel (each subject parcel) to other recreational parcels (the comparables), the majority emphasizes the failure of the Taxpayer to present evidence of the value of its parcel as agricultural land receiving special value. This would be required despite the fact that at no time in these proceedings did either the County Assessor or the County Board produce evidence of the value of the subject properties as agricultural land receiving special value. Effectively, the majority requires the Taxpayer to present evidence of soil types and land classifications (methods used to value agricultural land), while acknowledging that neither the subject property nor the comparables are agricultural land (i.e., both are recreational land). In my view, the Taxpayer should not be required to maintain such an evidentiary burden.

The Uniformity Clause of the Nebraska Constitution, Article VIII, Section 1, provides that “[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.” “[The right of the taxpayer whose property alone is taxed at 100 per cent of its true value is to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of statute.” *Kearney Convention Center, Inc. v. Buffalo County Bd. of Equal.* 216 Neb. 292, 304, 344 N.W.2d 620, 626 (1984). Simply stated, the Uniformity Clause requires that the ratio of taxable value to actual value of the subject property be no more than the same ratio of a comparable property. The burden of proof is

on the taxpayer to establish the taxpayer's contention that the value of the taxpayer's property has been arbitrarily or unlawfully fixed by the county board of equalization at an amount greater than its actual value, or that its value has not been fairly and properly equalized when considered in connection with the assessment of other property and that such disparity and lack of uniformity result in a discriminatory, unjust, and unfair assessment. See, *Newman v. County of Dawson*, 167 Neb. 666, 94 N.W.2d 47 (1959).

The County Assessor testified that recreational land in Sarpy County was valued uniformly per acre: the first acre at \$35,000; the second acre at \$8,000; and each additional acre at \$3,000. When originally assessing the properties, this was the schedule used by the County Assessor to value both the subject properties¹ and the comparables, and it was also the schedule used by the County Board to value each of the subject properties. For purposes of uniformity, I would reapply this same schedule to each of the comparables that the Assessor deemed to be recreational land.

The comparable at Exhibit 40, pages 1-2 was originally valued by the County Assessor as recreational land. Its 8.8 acres would have been assessed at \$63,400 (the first acre at \$35,000; the second acre at \$8,000; and each additional acre at \$3,000). Instead, the County Board, rejecting the County Assessor's recommendation, valued the 8.8 acres as agricultural land receiving special valuation, with a value of \$4,505. Based upon findings that the parcel should have been valued as recreational land, the County Board's determination of actual value was a

¹This was based upon the County Assessor's determination that the subject property was included in one economic unit, which included all three of the parcels in cases 09C-053, 09C-054, and 09C-055. The first and second acres of the economic unit were accounted for in the parcel in case 09C-053. (E4:3).

mere 7.11% of what it would have been had it been correctly valued as recreational land (\$4,505 / \$63,400).

The comparable at Exhibit 40, pages 3-6 was originally valued by the County Assessor as recreational land. Its 15.52 acres would have been assessed at \$83,560 (the first acre at \$35,000; the second acre at \$8,000; and each additional acre at \$3,000). Instead, the County Board, rejecting the County Assessor's recommendation, valued the 15.52 acres as agricultural land receiving special valuation, with a value of \$9,001. Based upon findings that the parcel should have been valued as recreational land, the County Board's determination of actual value was only 10.77% of what it would have been had it been correctly valued as recreational land (\$9,001 / \$83,560).

The comparable at Exhibit 40, pages 7-8 was originally valued by the County Assessor as recreational land. Its 15.82 acres would have been assessed at \$84,460 (the first acre at \$35,000; the second acre at \$8,000; and each additional acre at \$3,000). Instead, the County Board, again rejecting the County Assessor's recommendation, valued the 15.82 acres as agricultural land receiving special valuation, with a value of \$7,568. Based upon findings that the parcel should have been valued as recreational land, the County Board's determination of actual value was a mere 8.96% of what it would have been had it been correctly valued as recreational land (\$7,568 / \$84,460).

Thus, I would find that the subject properties were properly valued at actual value as recreational land, but that the comparables were valued at a mere percentage of actual value by the County Board when they were deemed to be agricultural land receiving special value rather than recreational parcels. "[Where it is impossible to secure both the standards of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the

just and ultimate purpose of the law." *Kearney Convention Center, Inc. v. Buffalo County Bd. of Equal.* 216 Neb. 292, 304, 344 N.W.2d 620, 626 (1984). It follows that the appropriate analysis for equalization purposes would be to determine the relationship of taxable value to actual value of the comparables² and then apply that percentage to the actual value of each of the subject properties.³

In 09C-053, I would find the actual value of the subject property as recreational property was properly determined to be \$264,040. (1:1), but that the Taxpayer's property was not valued uniformly and proportionately with other recreational property, which was assigned a taxable value at 7.11% of its actual value. Therefore, the taxable value of the Taxpayer's property should be reduced to 7.11%⁴ of its actual value in order to equalize it with other comparable recreational property, as required by the Uniformity Clause of the Nebraska Constitution.

In 09C-054, I would find the actual value of the subject property as recreational property was properly determined to be \$252,900. (2:1), but that the Taxpayer's property was not valued uniformly and proportionately with other recreational property, which was assigned a taxable value at 7.11% of its actual value. Therefore, the taxable value of the Taxpayer's property should be reduced to 7.11%⁵ of its actual value in order to equalize it with other comparable recreational property, as required by the Uniformity Clause of the Nebraska Constitution.

In 09C-055, I would find the actual value of the subject property as recreational property was properly determined to be \$327,300. (3:1), but that the Taxpayer's property was not valued

² Value as agricultural property receiving special valuation as determined by the County Board divided by value as recreational property as determined by the County Assessor.

³ Actual value as recreational property as determined by the County Board.

⁴ Comparing to the parcel at Exhibit 40, pages 1-2.

⁵ Comparing to the parcel at Exhibit 40, pages 1-2.

uniformly and proportionately with other recreational property, which was assigned a taxable value at 7.11% of its actual value. Therefore, the taxable value of the Taxpayer's property should be reduced to 7.11%⁶ of its actual value in order to equalize it with other comparable recreational property, as required by the Uniformity Clause of the Nebraska Constitution.

I acknowledge the application of this principle has a dramatic effect on the taxable value of the subject properties in these appeals. Nevertheless, once the County Board valued the comparables at a fraction of their actual values, this result "is to be preferred as the just and ultimate purpose of the law." *Id.* Otherwise, to ignore this uniformity requirement would result in a taxable value that amounts to a discriminatory, unjust, and unfair assessment of the subject property.

Therefore, I would conclude that in 09C-053, the equalized value of the subject property is \$18,773 ($\$264,040 \times .0711$); in 09C-054, the equalized value of the subject property is \$17,981 ($\$252,900 \times .0711$); and in 09C-055, the equalized value of the subject property is $\$327,300 \times .0711$).

Robert W. Hotz, Commissioner

⁶ Comparing to the parcel at Exhibit 40, pages 1-2.