

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

JEAN G. VINDUSKA, TRUSTEE, JEAN) G. VINDUSKA, REV. TRUST,)) Appellant,)) v.)) SARPY COUNTY BOARD OF) EQUALIZATION,)) Appellee.))	Case No. 09SV 008 DECISION AND ORDER REVERSING THE DECISION OF THE SARPY COUNTY BOARD OF EQUALIZATION AFTER RECONSIDERATION
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The above-captioned case was called for a hearing on the merits of an appeal by Jean G. Vinduska, Trustee, Jean G. Vinduska, Rev. Trust ("the Taxpayer") to the Tax Equalization and Review Commission ("the Commission"). The hearing was held in the Commission's Hearing Room on the sixth floor of the Nebraska State Office Building in the City of Lincoln, Lancaster County, Nebraska, on September 30, 2010, pursuant to an Order for Hearing and Notice of Hearing issued July 17, 2010 as amended by an Order dated September 29, 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.

Jarel Vinduska, Co-Trustee of Jean G. Vinduska, Rev. Trust, was present at the hearing. No one appeared as legal counsel for the Taxpayer.

Kerry A. Schmid and John W. Reisz, Deputy County Attorneys for Sarpy County, Nebraska, 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 (2010 Cum. Supp.). 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.

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 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 008

Description: SE¼ Section 2, Township 12, Range 10, Sarpy County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Agricultural Land	\$105,123.00	\$105,123.00	\$105,123.00
Site	\$82,000.00	\$15,000.00	\$63,900.00
Residence	\$128,554.00	\$128,554.00	\$128,554.00
Outbuilding	\$4,462.00	\$4,462.00	\$4,462.00
Total	\$320,139.00	\$253,139.00	\$302,039.00

4. An appeal of the County Board's decision was filed with the Commission.
5. An Order for Hearing and Notice of Hearing issued on July 17, 2010, as amended by an Order issued on September 29, 2010, set a hearing of the appeal for September 30, 2010, at 9:00 a.m. CDST.
6. An Affidavit of Service, which appears in the records of the Commission, establishes that a copy of the Order for Hearing and Notice of Hearing was served on all parties.
7. Taxable value of the subject property as of the assessment date for the tax year 2009 is:

Case No. 09SV 008

Agricultural land	\$ 90,786.00
Site	\$ 85,793.00
Residence	\$ 128,554.00
Outbuildings	\$ 4,462.00
Total	<u>\$ 309,595.00.</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) (2010 Cum. Supp.).
2. “Actual value is the most probable price expressed in terms of money that a property will bring if exposed for sale in the open market, or in an arm’s length transaction, between a willing buyer and a willing seller, both of whom are knowledgeable concerning all the uses to which the real property is adapted and for which the real property is capable of

- being used. In analyzing the uses and restrictions applicable to real property the analysis shall include a full description of the physical characteristics of the real property and an identification of the property rights valued.” Neb. Rev. Stat. §77-112 (Reissue 2009).
3. “Actual value may be determined using professionally accepted mass appraisal methods, including, but not limited to, the (1) sales comparison approach using the guidelines in section 77-1371, (2) income approach, and (3) cost approach.” Neb. Rev. Stat. §77-112 (Reissue 2009).
 4. “Actual value, market value, and fair market value mean exactly the same thing.”
Omaha Country Club v. Douglas County Board of Equalization, et al., 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).
 5. Taxable value is the percentage of actual value subject to taxation as directed by section 77-201 of Nebraska Statutes and has the same meaning as assessed value. Neb. Rev. Stat. §77-131 (Reissue 2009).
 6. All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation. Neb. Rev. Stat. §77-201(1) (Reissue 2009).
 7. Agricultural land and horticultural land shall be valued for purposes of taxation at seventy five percent of its actual value. Neb. Rev. Stat. §77-201 (2) (Reissue 2009).
 8. “Agricultural land and horticultural land means a parcel of land which is primarily used for agricultural or horticultural purposes, including wasteland lying in or adjacent to and in common ownership or management with other agricultural land and horticultural land.

Agricultural land and horticultural land does not include any land directly associated with any building or enclosed structure." Neb. Rev. Stat. §77-1359 (1) (Reissue 2009).

9. "Agricultural or horticultural purposes means used for the commercial production of any plant or animal product in a raw or unprocessed state that is derived from the science and art of agriculture, aquaculture, or horticulture. Agricultural or horticultural purposes includes the following uses of land:

- (a) Land retained or protected for future agricultural or horticultural purposes under a conservation easement as provided in the Conservation and Preservation Easements Act except when the parcel or a portion thereof is being used for purposes other than agricultural or horticultural purposes; and

- (b) Land enrolled in a federal or state program in which payments are received for removing such land from agricultural or horticultural production shall be defined as agricultural land or horticultural land." Neb. Rev. Stat. §77-1359 (2)

(Reissue 2009).

10. The Legislature may enact laws to provide that the value of land actively devoted to agricultural or horticultural use shall for property tax purposes be that value which such land has for agricultural or horticultural use without regard to any value which such land might have for other purposes or uses. Neb. Const. art. VIII, §1 (5).
11. Agricultural or horticultural land which has an actual value as defined in section 77-112 reflecting purposes or uses other than agricultural or horticultural purposes or uses shall be assessed as provided in subsection (3) of section 77-201 if the land meets the qualifications of this subsection and an application for such special valuation is filed and

approved pursuant to section 77-1345. In order for the land to qualify for special valuation all of the following criteria shall be met: (a) The land is located outside the corporate boundaries of any sanitary and improvement district, city, or village except as provided in subsection (2) of this section; and (b) the land is agricultural or horticultural land. Neb. Rev. Stat. §77-1344 (1) (Reissue 2009).

12. Agricultural land and horticultural land actively devoted to agricultural or horticultural purposes which has value for purposes other than agricultural or horticultural uses and which meets the qualifications for special valuation under section 77-1344 shall constitute a separate and distinct class of property for taxation, shall be subject to taxation, and shall be valued for taxation at seventy-five percent of its special value as defined in section 77-1343. Neb. Rev. Stat. §77-201 (3) (Reissue 2009).
13. Special value is the value land would have for agricultural or horticultural purposes or uses without regard to the actual value the land would have for other purposes.. Neb. Rev. Stat. §77-1343 (5) (Reissue 2009).
14. “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.
15. 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).
16. 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).

17. 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).
18. 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).
19. 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).
20. 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).
21. 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).

22. 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).
23. 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).
24. 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).
25. The presumption disappears if there is competent evidence to the contrary. *Id.*
26. 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) (2010 Cum. Supp.).

27. 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).
28. "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).
29. 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).
30. 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).
31. "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).
32. 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).
33. 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).

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

IV. ANALYSIS

The subject property is an improved parcel in rural Sarpy County, Nebraska.

Improvements on the parcel are two residences and two shed. (E:8, 9, 10 & 11). The subject property is qualified for special valuation. The unimproved lands were assessed as agricultural land and horticultural land at their special value. The land classified as site and the improvements were assessed at actual value.

Assessment of the land component of the subject property as determined by the County Board is shown in Exhibit 8 at page 5 & 6 as an agland inventory report. The agland report shows 65.75 acres of Dry Use, 9.31 acres of Grass Use, 69.72 acres of GRT2 Use, and 3 acres of Site use. (E8:5 & 6). Following the County Board's determination the County Assessor's office reviewed its assessment records. After review the County Assessor's office revised the agland inventory applicable to the subject property as shown in Exhibit 11 at page 4 & 5. The revised

agland inventory shows 38.72 acres of Dry Use, 34.06 Acres of Grass Use, 57.75 acres of GRT2 Use, 6.76 acres of Site Use and 11.41 acres of Waste. (E11:4 & 5). A further revision of the agland inventory was made by the County Assessor's office after reviewing photographs produced by the Taxpayer as Exhibit 46. After review of the photographs the number of Site Use acres was reduced and the number of Dry Use and GRT2 Use acres were decreased. The fact that classification of the land affects the determination of taxable value is apparent from the examination of any of the property record files submitted. In general, Dry Use contributes greater value than Grass Use, Grass Use contributes greater value than Grt2 use and Grt2 Use contributes more value than waste. The highest contribution to value is for Site Use.

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

The Taxpayer does not dispute the contribution to value made by the lands classified as Dry Use, Grass Use, Grt2 use or Waste. The contention of the Taxpayer is that the contribution to value made by the lands classified as site is excessive.

As noted there are two residences on the subject property and two sheds. "Agricultural land and horticultural land does not include any land directly associated with any building or enclosed structure." Neb. Rev. Stat. §77-1359 (1) (Reissue 2009). Because the sites are not agricultural and horticultural land they are assessed at actual value. Neb. Rev. Stat. 77-201

(Reissue 2009). The County Board classified and valued two sites. (E8:6). The contributory value of an one acre site was determined to be \$42,300 and the contributory value of a two acre site was determined to be \$21,600. (E8:6).

There is no evidence to support the County Board’s determination that the contribution to value by the sites was \$42,300 and \$10,800. There is evidence that during the period the County Board was hearing protests it received recommendations from two appraisers relating to the contribution to value of sites. The advice of the appraisers appears in Exhibits 6 & 7. The advice of both appraisers was rejected and the County Board made its own determination on an unknown basis.

The Taxpayers opinion of the contribution to value made by the sites is based on an appraisal and per acre value derived from the sales of parcels he deemed comparable. The appraisal relied on by the Taxpayer was not received. The property record files for seven parcels submitted by the Taxpayer were received as Exhibits 31, 32, 33, 34, 35, 36, and 37. Dates of sale, sale price, acres sold, and average price per acre for the parcels described in Exhibits 31, 32, 33, 34, 35, 36, and 37 are shown in the following table.

Exhibit	Date of Sale	Sale Price	Size	Price/acre
31	04/24/2008	\$125,000	3.12 acres	\$40,064.10
32	03/02/2007	\$40,000	.63 acres	\$63,492.06
33	10/31/2008	\$162,000	40 acres	\$4,050.00
34	06/19/2007	\$1,464,000	122.29 Acres	\$11,971.54
35	07/31/2007	\$66,950	3.19 acres	Not Calculated ¹
36	11/19/2008	160,000	34.3 acres	\$4,664.72
37	7/20/2007	\$1,625,000	272.68 acres	\$5,959.37

1. The parcel was improved at time of sale. Because some of the value paid would be attributed to the improvements the price paid for the land only cannot be determined.

Parcels described in Exhibits 31 and 32 were not considered by the Taxpayer to be comparable parcels. An Appraiser employed by the County Assessor's office stated that the parcels described in Exhibits 33, and 36 were not arms-length transactions and should not be considered. Arms-length transactions are sales between two or more parties, each seeking to maximize their positions from the transaction. 350 Neb. Admin. Code, ch 12, §002.21 (03/15/09). Arms-length transactions are deemed qualified sales. 350 Neb. Admin. Code, ch 12, §002.11 (3/15/09). Prices disclosed in qualified sales are used to estimate the value of unsold parcels. *See* Neb. Admin. Code, chs 12 & 50, (03/15/09). "Sales that are not arms-length ... should be identified and rarely if ever used." *The Appraisal of Real Estate*, 13th Edition, Appraisal Institute, (2008) at 304. "Non arms-length sales are usually not made on the open market or are not made with the objective of maximizing the financial position of the parties involved. Thus, they provide unreliable evidence of market value." *Mass Appraisal of Real Property*, International Association of Assessing Officers, (1999) at 53. "Sales in which the buyer is an executor or trustee are usually nonmarket sales at nominal consideration. Sales from an estate may be made to satisfy the debts of the deceased or the wishes of an heir; otherwise, the sales in which an estate is the seller may well be valid arms-length sales." *Id.* at 53-54. The sales were made at auction as part of the settlement of an estate. The Taxpayer did not offer evidence contradicting the conclusion of the Appraiser. The Commission adopts the Appraiser's conclusion. The remaining parcels for consideration are those described in Exhibits 34 and 37.

Both sales are for more than \$5,500 per acre. Even assuming that the Taxpayer's methodology is correct the evidence does not support his conclusion.

The Taxpayer asserts that the average selling price of an unimproved parcel can indicate the value that should be attributed to the lands used as the site for a residence or other buildings. While the Taxpayer implicitly recognizes that there are different uses for different portions of the parcel there is no recognition that different values might be assigned to those uses. An examination of the values assigned to the agricultural land and horticultural land component of the subject property will illustrate the difficulty presented by the Taxpayer's position. The agland inventory as adopted by the County Board shows four uses of the subject property, Dry Use, Gras Use, GRT2 and Site Use. (E8:5 & 6). Values assigned to the Dry Uses range from \$880 per acre to \$2,153 per ag/acre. (E8:5). The average value of an acre of Dry use would not be the value assigned to any of its constituent parts. Like wise if the parcel as a whole is considered, the same analysis could be made. The Taxpayers argument that the contribution to value of sites use on the subject property may be determined based on the average sales prices of parcels that may or may not have multiple uses is not persuasive.

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

Officers (1990) at 41. The theory assumes that the first unit purchased has higher utility or value than the second. *Id.* The County Assessor's office assumed that 5 acres was maximum acres that would be purchased for residential use and sought information on which to determine the value of marginal utility of each acre in a 5 acre tract. The County Assessor's arrayed sales are shown on a graph received as Exhibit 14 page 4.

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

Sales as graphed by the County Assessor show that as the size of a sold parcel increased 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. (E14:4). 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 5 acre parcel ($\$47,000 + (\$12,000 \times 4 = \$48,000) = \$95,000$). Given the possibility that alternate valuation schedules are possible, it is necessary to examine the evidence in support of the valuation schedule adopted by the County Assessor.

The evidence in support of an assignment of \$64,000 to the first acre is a sale for \$40,000 of a .63 acre parcel on March 3, 2007. The sale was of Lot 38 Thousand Oaks Addition. (E14:2). 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. (E14:2 & 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 14. Movement toward the left axis shows that price per acre increases as size decreases. The evidence that the first acre assigned a value of \$64,000 may be less than desired for certainty but there is evidence that it is appropriate.

The County Assessor assigned contribution to value of \$6,500 to the 4th and all succeeding acres. (E14:1). An examination of the line shown on Page 4 of Exhibit 14 shows that the average sale price of parcels over 5 acres but less than 30 acres ranges from \$16,000 to \$12,000. The average sale price of those parcels should not, however be considered as evidence

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

Another chart shown at page 5 of Exhibit 14 shows that the average sale price of parcels of farm sales over 30 acres produces a line showing the value per acre to be \$6,500. Those sales were not deemed to be sales of residential parcels and the average sale price would not be unduly influenced by the size of the parcel. There is evidence that the County Assessors assignment of a contributory value of \$6,500 to the 3rd 4th and 5th acres is correct.

An appraiser testified that 3 acres was the maximum number of acres found to have residential use in larger parcels. Using the schedule adopted by the county Assessor a 3 acre parcel would be deemed to have a value of \$82,000. ($\$64,000 + \$9,000 + \$9,000 = \$82,000$). Sales of 3 acre parcels range from \$67,000 to \$156,000). (E14:2).

Using the schedule adopted by the County Assessor a five acre parcel would be deemed to have a value of \$95,000 as shown above. Sales of five acre parcel range from \$75,000 to \$112,125. (E14:3).

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

The discussion above is based on contributions to value that are not adjusted for location. The County Assessor's value schedule was adjusted based on proximity to a highway and a landfill.

Valuation is not an exact science. *Matter of Bock's Estate*, 198 Neb. 121, 124, 251 N.W.2d 872, 874 (1977). There is evidence to support the determinations of the County Assessor that sites contributed value on a sliding scale and that the scale applicable in this instance is \$65,000 for the first acre, \$9,000 for the second acre and 3rd acre, and \$6,500 for each succeeding acre. The contributions to value made by the Site Use portions of the subject property were adjusted based on proximity to a highway. There is no evidence to support the determinations of the County Board or the Taxpayer. Values as determined by the Appraiser after review of available information is the most reasonable estimate of the taxable value of the subject property.

The Taxpayer contends that taxable value of the subject property is not equalized because various parcels with different zoning were included in a class for analysis. Zoning restrictions applicable to the subject property or any other parcel are not in evidence and the Commission is unable to evaluate what effect zoning restrictions, whatever they are, might have on the actual value of any parcel or manner in which those restrictions might affect consideration of the equalized taxable value of the subject property.

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 008

Agricultural land	\$ 90,786.00
Site	\$ 85,793.00
Residence	\$ 128,554.00
Outbuildings	\$ 4,462.00
Total	<u>\$ 309,595.00.</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 (2010 Cum. Supp.).
 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 June 1, 2011.
- Signed and Sealed. June 1, 2011.

Nancy J. Salmon, Commissioner

SEAL

APPEALS FROM DECISIONS OF THE COMMISSION MUST SATISFY THE REQUIREMENTS OF NEB. REV. STAT. §77-5019 (2010 Cum. Supp.), 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 (2010 Cum. Supp.). 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) (2010 Cum. Supp.).

The Commission is authorized to review decision of a County Board of Equalization determining taxable values. Neb. Rev. Stat. §77-5007 (2010 Cum. Supp.). 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