

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

MARY P. PRITCHARD,)	
)	
Appellant,)	Case No. 10R 077
)	
v.)	DECISION AND ORDER
)	AFFIRMING THE DECISION OF
SARPY COUNTY BOARD OF)	THE SARPY COUNTY BOARD OF
EQUALIZATION,)	EQUALIZATION
)	
Appellee.)	

The above-captioned case was called for a hearing on the merits of an appeal by Mary P. Pritchard ("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 February 15, 2011, pursuant to an Order for Hearing and Notice of Hearing issued December 8, 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.

Mary P. Pritchard was present at the hearing. No one appeared as legal counsel for the Taxpayer.

Kerry A. Schmid, 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 this case is as follows.

**I.
ISSUES**

The Taxpayer has asserted that actual value of the subject property as of January 1, 2010, is less than actual value as determined by the County Board. The issues on appeal related to that assertion are:

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

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

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

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

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

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

**II.
FINDINGS OF FACT**

The Commission finds and determines that:

1. The Taxpayer has a sufficient interest in the outcome of the above captioned 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. Actual value of the subject property placed on the assessment roll as of January 1, 2010, ("the assessment date") by the Sarpy County Assessor, value as proposed in a timely protest, and actual value as determined by the County Board is shown in the following table:

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Description: SE¹/₄SE¹/₄ Section 19, Township13, Range 13, Sarpy County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$248,000.00	\$16,636.00	\$220,000.00
Total	\$248,000.00	\$16,636.00	\$220,000.00

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 December 8, 2010, set a hearing of the appeal for February 15, 2011, at 11:00 a.m. CST.
6. An Affidavit of Service, which appears in the records of the Commission, establishes that a copy of the Order for Hearing and Notice of Hearing was served on all parties.
7. Actual value of the subject property as of the assessment date for the tax year 2010 is:

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Land value	\$220,000.00
Total value	<u>\$220,000.00.</u>

III. APPLICABLE LAW

1. Subject matter jurisdiction of the Commission in this appeal is over all questions necessary to determine taxable value. Neb. Rev. Stat. §77-5016(7) (Reissue 2009).
2. “Actual value is the most probable price expressed in terms of money that a property will bring if exposed for sale in the open market, or in an arm’s length transaction, between a willing buyer and a willing seller, both of whom are knowledgeable concerning all the uses to which the real property is adapted and for which the real property is capable of being used. In analyzing the uses and restrictions applicable to real property the analysis shall include a full description of the physical characteristics of the real property and an identification of the property rights valued.” Neb. Rev. Stat. §77-112 (Reissue 2009).
3. “Actual value may be determined using professionally accepted mass appraisal methods, including, but not limited to, the (1) sales comparison approach using the guidelines in section 77-1371, (2) income approach, and (3) cost approach.” Neb. Rev. Stat. §77-112 (Reissue 2009).
4. “Actual value, market value, and fair market value mean exactly the same thing.” *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).

5. Taxable value is the percentage of actual value subject to taxation as directed by section 77-201 of Nebraska Statutes and has the same meaning as assessed value. Neb. Rev. Stat. §77-131 (Reissue 2009).
6. All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation. Neb. Rev. Stat. §77-201(1) (Reissue 2009).
7. “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) (Reissue 2009).
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. “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).
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)(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 unimproved 40.01 acre parcel in rural Sarpy County, Nebraska. Hay is produced on about 2 acres. The balance is either unused or used for hunting and hiking.

Before the Commission can consider the merits of the Taxpayer's appeal, it is necessary to determine the scope of review. On June 29, 2010, the Taxpayer applied for the use of special valuation to determine the assessment value of the subject property in tax year 2010. (E8:1). On June 30, 2010, a protest concerning valuation of the subject property was filed with the County Board stating that the "property is overvalued and not equitable with similar properties." (E5:1) On July 9, 2010, the County Assessor denied the Taxpayer's application for use of special valuation. (E8:1). A protest of the denial of an application for use of special valuation by a county assessor, may be filed with a county board of equalization within 30 days after the mailing of the denial. Neb. Rev. Stat. §77-1345.01(3)(a) (Reissue 2009). The protest received as Exhibit 5 was filed with the County Board before the Taxpayer's application for use of special valuation was denied. The protest filed with the County Board on June 30, 2010, could not have pertained to denial of the application for use of special valuation by the County Assessor. A protest could have been filed pursuant to section 77-1502 of Nebraska Statutes relating to taxable value of the subject property. Because there is no evidence that a protest of the County Assessor's denial of the Taxpayer's application for use of special valuation was filed with the County Board of Equalization, the Commission cannot now consider eligibility of the subject

property for special valuation. Because a protest concerning taxable value of the subject property could have been filed on June 30, 2010, taxable value of the subject property will be considered.

This appeal raises a variety of issues related either to a determination of either actual value or equalized taxable value with facts that require consideration in more than one context. Some repetition of facts may be present in the analysis so that the context in which facts are being considered is clear.

The County Assessor determined that taxable value of the subject property was \$248,000. (E5:1). The Taxpayer protested that determination suggesting that taxable value of the subject property was \$16,636. (E5:1). Taxable value of the subject property as determined by the County Board is \$220,000 at \$5,500 per acre. (E1).

The Taxpayer on appeal asserted that actual value of the subject property should be between \$80,000 and \$120,000. The Taxpayer's opinion was based on an analysis of the recapture values assigned to various parcels for a prior tax year. The obligation to determine recapture values terminated in tax year 2008. Neb. Rev. Stat. 77-1344(5) (Cum. Supp. 2008). Recapture values for a prior tax year would have been the estimates of actual value for that year. An appraiser employed by the County Assessor ("appraiser") testified that recapture values as shown in the assessment records were not estimates of actual value for the parcels as of tax year 2010. The tax year at issue in this appeal is 2010. A prior year's assessment is not relevant to the subsequent year's valuation. *DeVore v. Bd. Of Equal.*, 144 Neb. 351, 13 N.W.2d 451 (1944). *Affiliated Foods Coop v. Madison Co. Bd. Of Equal.*, 229 Neb. 605, 428 N.W.2d 201 (1988). Even if recapture value assigned to another parcel could be used to indicate the actual value of another parcel, a prior years determinations may not be used for that purpose. The Taxpayer's

evidence of actual value is not clear and convincing evidence that the determination of the County Board was arbitrary or unreasonable.

The appraiser recommended that the Commission determine actual value to be \$248,000. E2). The recommendation of the appraiser was based on valuation of the subject property as excess land to an adjoining parcel owned by the Taxpayer and a residential acre valuation of \$6,200 per acre. (E2). The appraiser explained that the subject property should be treated as excess land because it lacked public access. While valuation as excess land may be reasonable, the basis for its valuation at \$6,200 per acre is not explained. A number of Exhibits were received pertaining to valuation. Those Exhibits, if explained, might support a determination that actual value of the subject property was \$6,200 per acre. The Exhibits are not explained. The Commission cannot determine that the unexplained Exhibits support the appraiser's recommendation. *See Kawasaki Motors Corp. v. Lancaster County Bd. of Equalization*, 7 Neb.App. 655, 658, 584 N.W.2d 63, 66(1998). An unsupported recommendation is not clear and convincing evidence that the determination of the County Board was arbitrary or unreasonable.

The County Assessor has classified the subject property as single family residential land. (E6:1). Lands classified as single family residential are those predominately used or intended to be used as a dwelling place or abode whether occupied by the owner, tenant or lessee and where occupancy is for a period of time usually year-a-round as opposed to transitory occupancy by a single family or two families. 350 Neb. Admin. Code, ch 10, §001.05A (3/15/09). There is no evidence that a dwelling has been placed on the subject property. The only access to the subject property is another parcel. The Taxpayer attempted unsuccessfully on three different occasions

to develop a well for a domestic water supply. There is no evidence that the Taxpayer intends to use the parcel as the site of a dwelling or that it could be used for that purpose.

The appraiser testified that the subject property was considered as excess land to an adjoining parcel. The adjoining parcel is used by the Taxpayer's brother for residential purposes. The use of an adjoining parcel is not one of the factors described in the section 001.05A of the rules and regulations pertaining to classification of real property described above. 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). The statutes do not contemplate the joint assessment of parcels. It is, of course, possible that the two parcels could have been combined and assessed as one parcel, but that was not done by the assessor. Instead two parcels are described in the assessment records. A part of the evidence makes clear that the assessor considered the parcels as separate because a determination was made that the subject property lacked access even though access could be found through the adjoining parcel if it was owned by the Taxpayer. A simple question is left unanswered by the evidence: If the subject property could be considered as excess land to the neighboring parcel why couldn't the neighboring parcel be considered as a source of access? Joint assessment of the parcels, is not provided for in statute or rules and regulations. Standing alone the subject property cannot be

classified as single family residential land as described in section 001.05A of the rules and regulations pertaining to classification of real property described above.

Classification can affect valuation of a parcel. The appraiser's recommendation based on a use classification of the subject property as single family residential is not clear and convincing evidence that the County Board's determination was arbitrary or unreasonable.

The County Board's determination of value is based on a recommendation that value be \$5,500 per acre. (E5:4). The basis for the recommendation to the County Board is not in evidence. The County Board is not, however, required to present evidence in support of its determination unless the Taxpayer shows that the County Board's decision was arbitrary or unreasonable. *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998). There is no basis for finding that the County Board's decision determining actual value of the subject property was arbitrary or unreasonable and its determination that actual value of the subject property was \$220,000 will not be disturbed.

The Taxpayer also asserts that taxable value of the subject property is not equalized with other similar parcels among the 18 identified in Exhibit 24 at pages 4 through 7 and for which property record cards were received as Exhibits 26 through 43. 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). 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). For reasons stated above the Commission has determined that actual value of the subject property is \$220,000. Assessed value of the subject property is \$220,000. (E1). The ratio of assessed value to actual value of the subject property is 1 ($\$200,000 \div \$200,000 = 1$).

Parcels described in Exhibits 26, 29, 30, 31, 32, 35, 36, 37, 38, 39, and 40 are assessed at their special value. Because special value is 75% of the value a parcel has solely for agricultural or horticultural purposes, assessed value determined on that basis cannot be compared to the assessment of the subject property based on 100% of its actual value for all uses and purposes.

Comparable properties share similar use (residential, commercial industrial, or agricultural), physical characteristics (size, shape, and topography), and location. *Property Assessment Valuation*, 2nd Ed., International Association of Assessing Officers, 1996 at 70 - 76. The parcels described in Exhibits 27, 28, 33, and 34 are all parts of an area from which sand and gravel has been excavated. The subject property is timbered grassland with some hay land. The parcels described in Exhibits 27, 28, 33, and 34, are not comparable to the subject property.

There is no evidence that actual values of the parcels described in Exhibits 41, 42, or 43, are less than or greater than the assessed values shown in their assessment records. Even if those parcels are similar or comparable to the subject property, the only evidence is that their ratios of assessed to actual value are 1 and therefore identical to the ratio of assessed value to actual value for the subject property. The assertion that the ratio of assessed value of the subject property to actual value of the subject property is not equalized with the ratio of assessed to actual value of other parcels assessed at actual value is not supported by the evidence.

A Taxpayer who is able 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 may obtain relief. *Newman v. County of Dawson*, 167 Neb. 666, 94 N.W.2d 47 (1959). The subject property is assessed at its actual value, several parcels presented by the Taxpayer as comparable to the subject property are assessed at special value, a value that is less than actual value. It is necessary to determine whether assessment of the subject property at actual value and the assessment of other parcels, if comparable to the subject property, at special value was the result of systematic will or failure of a plain duty and not mere error of judgement. The evidence does show that the parcels described in Exhibits 29, 30, 31, 35, and 36 should be inspected and their qualification for special valuation reviewed. The remaining question is whether the failure to make that inspection and review is the result of systematic will or a failure of plain duty. There is no evidence that the failure to inspect was the result of systematic will. If, however, the County Assessor had a plain legal duty to inspect or review the parcels described in Exhibits 29, 30, 31, 35, and 36 a basis for relief would exist. Once land has been qualified for special valuation it becomes disqualified for such valuation by (1) Written notification by the applicant or his or her successor in interest to the county assessor to remove such special valuation; (2) Except as provided in subsection (2) of section 77-1344, inclusion of the land within the corporate boundaries of any sanitary and improvement district, city, or village; or (3) The land no longer qualifying as agricultural or horticultural land. Neb. Rev. Stat. 77-1347.01 (effective 7/25 Cum. Supp. 2010). The only disqualifying circumstance that might have had application to the parcels described in Exhibits 3, 9, 29, 30, 35, or 36 would have been a finding

that the land no longer qualified as agricultural or horticultural land. The same conclusion would be drawn if section 77-1347 of Nebraska Statutes, prior to amendment in 2010, was considered. The County Assessor can determine at any time that a parcel is no longer qualified for special valuation. See, Neb. Rev. Stat. §77-1347.01 (Reissue 2009). Nothing in sections 77-1347 or 77-1347.01 requires annual or any other systematic review of the classification of lands for special valuation. Section 77-1311.03 of Nebraska Statutes enacted in 2007 does require a systematic review and inspection of each parcel of real property at least once each six years. The assessment year at issue in this appeal is 2010, three years into a six year cycle that would have begun with the enactment of Section 77-1311.03 of Nebraska Statutes. Rules and regulations of the Nebraska Department of Revenue Property Assessment Division do impose on the assessor a duty to continually verify, throughout the year, that all properties listed for special valuation assessment continue to qualify. 350 Neb. Admin. Code, ch 11, §006.03 (3/15/09). Agency regulations, properly adopted and filed with the Secretary of State of Nebraska, have the effect of statutory law. *Sunrise Country Manor v. Nebraska Dept. of Social Services*, 246 Neb. 726, 523 N.W.2d 499 (1994). Even if the County Assessor has failed to literally comply with the command of the cited rule, it must still be shown that a failure to examine qualification of the parcels described in Exhibits 29, 30, 31, 35, and 36 resulted in unequal assessment of the subject property.

The parcels described in Exhibits 29, 30, 35, and 36 were, prior to 2008, part of a larger parcel that was qualified for special valuation. As the parcels described in Exhibits 29, 30, 35, and 36 were severed from the larger parcel the new parcels remained qualified for special valuation. The property record file for the parcel described in Exhibit 29 shows that it was

created in 2008. The parcel was improved with a picnic area and pole barn placed on the property during tax year 2010. (E29). Because qualification of the parcel for special valuation was determined as of January 1, 2010, the improvements after that date are not a factor for consideration. The property record file for the parcel described in Exhibit 30 shows that it was created in 2009. (E30). The parcel was improved with a residence placed on the property during tax year 2010. (E30). Because qualification of the parcel for special valuation was determined as of January 1, 2010, the improvements after that date are not a factor for consideration. The property record file for parcel described in Exhibit 35 shows that the parcel was created in 2009 and that it was improved at time of sale with an uninhabitable residence. (E35). The parcel described in Exhibit 36 was created in 2008. (E36). The property record file shows that the parcel is unimproved. (E36).

A witness for the Taxpayer testified that he drove by the parcels described in Exhibits 29, 30, 35, and 36, and had not observed agricultural or horticultural uses. The frequency of the observations is not in evidence nor is there evidence that a viewing from the road would be a sufficient basis for determining whether or not agricultural or horticultural uses were or were not being made of the parcel or some part of it. Although a failure of the duty to continually verify the eligibility of the parcels for assessment at special value has been shown the evidence does not show that a review would have produced disqualification for the parcels described in Exhibits 29, 30, 35 and 36. Without a showing that a failure to verify resulted in assessment of parcels described in Exhibit 29, 30, 35, or 36 that is not uniform or proportionate, relief based on their assessment cannot be granted.

The parcels described in Exhibits 26 and 32 are adjoining parcels. An examination of the property record files shows that the parcels have common ownership. The appraiser testified that unimproved portions of the two parcels were used together for agricultural or horticultural purposes. There is evidence that assessment of the parcels described in Exhibits 26 and 32 using special valuation is appropriate. The appropriate assessment of the parcels described in Exhibits 26 and 32 does not provide a basis determining that the subject property has not been assessed correctly or that should be assessed at less than its actual value.

The parcel described in Exhibit 31 is adjacent to the subject property. The property record file received as Exhibit 31 shows that this parcel is 28.01 acres of unimproved land assessed at its special value. The parcel described in Exhibit 31 was once part of a larger parcel that had included crop land lying to the south. (E19). The larger parcel was deemed qualified for special valuation prior to the sale of the parcel described in Exhibit 31. The parcel described in Exhibit 31 had been sold in 2006. (E31:1). Qualification of the parcel described in Exhibit 31 was continued after sale.

At least 2.38 acres of the parcel described in Exhibit 31 are used for the production of hay. Over 11 acres of the land described in Exhibit 31 are classified as waste land. Waste land is a classification of agricultural land and horticultural land that can only be found if it is lying in or adjacent to and in common ownership or management with land used for agricultural or horticultural purposes. 350 Neb. Admin. Code, ch 14, §002.54 (0/15/09). At a minimum 13.38 acres of the 28.01 acre parcel described in Exhibit 31, are agricultural land and horticultural land. A parcel is agricultural land and horticultural land eligible for special valuation if it is used predominately for the production of agricultural and horticultural products or is waste land as

defined above. The Taxpayer's brother testified that the parcel described in Exhibit 31 he used for hiking. The evidence provided is not sufficient to find that the parcel described in Exhibit 31 is not agricultural land and horticultural land eligible for special valuation. The continued qualification of the parcel described in Exhibit 31 for assessment at its special value is not a basis for relief.

The prior discussion concerned equalization of the assessment of the subject property with parcels qualifying for special valuation. There is an additional potential basis for equalization relief based on the actual value rather than special value. As noted above there is evidence that the subject property is not properly classified for assessment purposes. "Misclassifying property may result, ... in a lack of uniformity and proportionality. In such an event the taxpayer is entitled to relief." *Beynon Farm Products Corporation v. Board of Equalization of Gosper County*, 213 Neb. 815, 819, 331 N.W.2d 531, 534 (1983). However as noted earlier in this order, there is no evidence that the County Board relied on the classification determined by the County Assessor and the County Board is not required to present evidence in this proceeding. Further, even if the Commission determined that the County Board relied on the classification of the subject property as determined by the County Assessor, a Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued. *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). The Taxpayer has not produced evidence of actual value. The Taxpayer has not met her burden to show that the subject property is overvalued in comparison to other similar parcels as a result of misclassification.

**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 not produced competent evidence that the County Board failed to faithfully perform its official duties and to act on sufficient competent evidence to justify its actions.
4. The Taxpayer has not adduced sufficient, clear and convincing evidence that the decision of the County Board is unreasonable or arbitrary and the decision of the County Board should be affirmed.

**VI.
ORDER**

IT IS ORDERED THAT:

1. The decision of the County Board determining actual value of the subject property as of the assessment date, January 1, 2010, is affirmed.
2. Actual value, for the tax year 2010, of the subject property is:

Case No. 10R 077

Land value	\$220,000.00
Total value	<u>\$220,000.00.</u>

3. This decision, if no appeal is timely filed, shall be certified to the Sarpy County Treasurer, and the Sarpy County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Reissue 2009).
 4. Any request for relief, by any party, which is not specifically provided for by this order is denied.
 5. Each party is to bear its own costs in this proceeding.
 6. This decision shall only be applicable to tax year 2010.
 7. This order is effective for purposes of appeal on March 16, 2011.
- Signed and Sealed. March 16, 2011.

Nancy J. Salmon, Commissioner

SEAL

APPEALS FROM DECISIONS OF THE COMMISSION MUST SATISFY THE REQUIREMENTS OF NEB. REV. STAT. §77-5019 (REISSUE 2009), OTHER PROVISIONS OF NEBRASKA STATUTES, AND COURT RULES.

I concur in the result.

The analysis above considers two standards of review for review. One standard of review is stated as a presumption found in case law the other is found as stated in statute. I do not believe consideration of two standards of review are required by statute or case law.

The Commission is an administrative agency of state government. *See Creighton St. Joseph Regional Hospital v. Nebraska Tax Equalization and Review Commission*, 260 Neb. 905, 620 N.W.2d 90 (2000). As an administrative agency of state government, the Commission has only the powers and authority granted to it by statute. *Id.* The Commission is authorized by statute to review appeals from decisions of a county board of equalization, the Tax

Commissioner, and the Department of Motor Vehicles. Neb. Rev. Stat. §77-5007 (Reissue 2009). In general, the Commission may only grant relief on appeal if it is shown that the order, decision, determination, or action appealed from was unreasonable or arbitrary. Neb. Rev. Stat. §77-5016(8) (Reissue 2009).

The Commission is authorized to review decision of a County Board of Equalization determining taxable values. Neb. Rev. Stat. §77-5007 (Reissue 2009). Review of County Board of Equalization decisions is not new in Nebraska law. As early as 1903, Nebraska Statutes provided for review of County Board assessment decisions by the district courts. Laws 1903, c. 73 §124. The statute providing for review did not state a standard for that review. *Id.* A standard of review stated as a presumption was adopted by Nebraska's Supreme Court. See, *State v. Savage*, 65 Neb. 714, 91 N.W. 716 (1902) (citing *Dixon Co. v. Halstead*, 23 Neb. 697, 37 N.W. 621 (1888) and *State v. County Board of Dodge Co.* 20 Neb. 595, 31 N.W. 117 (1887)). The presumption was that the County Board had faithfully performed its official duties and had acted upon sufficient competent evidence to justify its actions. *See id.* In 1959, the legislature provided a statutory standard for review by the district courts of county board of equalization, assessment decisions. 1959 Neb Laws, LB 55, §3. The statutory standard of review required the District Court to affirm the decision of the county board of equalization unless the decision was arbitrary or unreasonable or the value as established was too low. *Id.* The statutory standard of review was codified in section 77-1511 of the Nebraska Statutes. Neb. Rev. Stat. §77-1511 (Cum. Supp. 1959). After adoption of the statutory standard of review, Nebraska Courts have held that the provisions of section 77-5011 of the Nebraska Statutes created a presumption that the County Board has faithfully performed its official duties and has acted upon sufficient

competent evidence to justify its actions. *See, e.g. Ideal Basic Indus. V. Nucholls Cty. Bd. Of Equal.*, 231 Neb. 297, 437 N.W.2d 501 (1989). The presumption stated by the Court was the presumption that had been found before the statute was enacted.

Many appeals of decisions made pursuant to section 77-1511 were decided without reference to the statutory standard of review applicable to the district courts review of a county board of equalization's decision. *See, e.g. Grainger Brothers Company v. County Board of Equalization of the County of Lancaster*, 180 Neb. 571, 144 N.W.2d 161 (1966). In *Hastings Building Co., v. Board of Equalization of Adams County*, 190 Neb. 63, 206 N.W.2d 338 (1973), the Nebraska Supreme Court acknowledged that two standards of review existed for reviews by the district court; one statutory requiring a finding that the decision reviewed was unreasonable or arbitrary, and another judicial requiring a finding that a presumption that the county board of equalization faithfully performed its official duties and acted upon sufficient competent evidence was overcome. No attempt was made by the *Hastings* Court to reconcile the two standards of review that were applicable to the District Courts.

The Tax Equalization and Review Commission was created in 1995. 1995 Neb. Laws, LB 490 §153. Section 77-1511 of the Nebraska Statutes was made applicable to review of county board of equalization assessment decisions by the Commission. *Id.* In 2001, section 77-1511 of Nebraska Statutes was repealed. 2001 Neb. Laws, LB 465, §12. After repeal of section 77-1511, the standard for review to be applied by the Commission in most appeals was stated in section 77-5016 of the Nebraska Statutes. Section 77-5016(8) requires a finding that the decision being reviewed was unreasonable or arbitrary. *Brenner v. Banner County Board of Equalization*, 276 Neb. 275, 753 N.W.2d 802 (2008). The Supreme Court has stated that the presumption

which arose from section 77-1511 is applicable to the decisions of the Commission. *Garvey Elevators, Inc. V. Adams County Bd. of Equalization*, 261 Neb. 130, 621 N.w.2d 518 (2001).

The possible results from application of the presumption as a standard of review and the statutory standard of review are: (1) the presumption is not overcome and the statutory standard is not overcome; (2) the presumption is overcome and the statutory standard is not overcome; (3) the presumption is not overcome and the statutory standard is overcome; (4) and finally the presumption is overcome and the statutory standard is overcome. The first possibility does not allow a grant of relief, neither standard of review has been met. The second possibility does not therefore allow a grant of relief even though the presumption is overcome because the statutory standard remains. *See City of York v. York County Bd of Equal.*, 266 Neb. 297, 664 N.W.2d 445 (2003). The third possibility requires analysis. The presumption and the statutory standard of review are different legal standards, and the statutory standard remains after the presumption has been overcome. *See id.* The burden of proof to overcome the presumption is competent evidence. *Id.* Clear and convincing evidence is required to show that a county board of equalization's decision was unreasonable or arbitrary. *See, e.g. Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb.App. 171, 645 N.W.2d 821 (2002). Competent evidence that the county board of equalization failed to perform its duties or act upon sufficient competent evidence is not always evidence that the county board of equalization acted unreasonably or arbitrarily because the statutory standard of review remains even if the presumption is overcome. *City of York v. York County Bd of Equal.*, 266 Neb. 297, 664 N.W.2d 445 (2003). Clear and convincing evidence that a county board of equalization's determination, action, order, or decision was unreasonable or arbitrary, as those terms have been defined, may, however,

overcome the presumption that the county board of equalization faithfully discharged its duties and acted on sufficient competent evidence. In any event, the statutory standard has been met and relief may be granted. Both standards of review are met in the fourth possibility and relief may be granted.

Use of the presumption as a standard of review has been criticized. *See* G. Michael Fenner, *About Presumptions in Civil Cases*, 17 Creighton L. Rev. 307 (1984). In the view of that author, the presumption should be returned to its roots as a burden of proof. *Id.* Nebraska's Supreme Court acknowledged the difficulty of using two standards of review and classified the presumption in favor of the county board of equalization as a principle of procedure involving the burden of proof, namely, a taxpayer has the burden to prove that action by a board of equalization fixing or determining valuation of real estate for tax purposes is unauthorized by or contrary to constitutional or statutory provisions governing taxation. *See Gordman Properties Company v. Board of Equalization of Hall County*, 225 Neb. 169, 403 N.W.2d 366 (1987). Use of the *Gordman* analysis allows consideration of both the presumption and the statutory standard of review without the difficulties inherent in the application of two standards of review. It is within that framework that I have analyzed the evidence.

Wm. R. Wickersham, Commissioner