

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

CITY OF BLAIR AIRPORT AUTHORITY, )	)	
	)	
Appellant,	)	Case No. 09E 001
	)	
v.	)	DECISION AND ORDER
	)	REVERSING THE DECISION OF
WASHINGTON COUNTY BOARD OF )	)	THE WASHINGTON COUNTY BOARD
EQUALIZATION,	)	OF EQUALIZATION
	)	
Appellee.	)	
	)	

The above-captioned case was called for a hearing on the merits of an appeal by City of Blair Airport Authority ("the Airport") 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 January 21, 2010, pursuant to an Order for Hearing and Notice of Hearing issued October 26, 2009 as amended by an Order dated November 23, 2009. Commissioners Wickersham, Warnes and Hotz were present. Commissioner Wickersham was the presiding hearing officer.

Rod Storm, City Manager of City of Blair, was present at the hearing. Geoffrey C. Hall appeared as legal counsel for the Airport.

Edmond E. Talbot III, a Deputy County Attorney for Washington County, Nebraska, was present as legal counsel for the Washington County Board of Equalization ("the County Board").

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

The Commission waived its procedural rule requiring an appeal to be filed for each parcel and considered both parcels of the subject property in one appeal.

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 Airport has asserted that the subject property should be exempt from taxation. The issues on appeal related to that assertion are:

Whether the decision of the County Board, affirming the finding of the County Assessor that the subject property is taxable, was unreasonable or arbitrary.

## **II. FINDINGS OF FACT**

The Commission finds and determines that:

1. The Airport has a sufficient interest in the outcome of the above captioned appeal to maintain the appeal.
2. The parcels of real property to which this appeal pertains ("the Subject Property") are Lot 7 Nordstrom's second subdivision and Tax Lot 35 Section 30, Township 17, range 2, Washington County, Nebraska.
3. The County Assessor determined that the subject property was not being used for a public purpose and was subject to taxation.
4. The Airport protested.
5. The Assessor's recommendation was affirmed by the County Board.

6. An appeal of the County Board's decision was filed with the Commission.
7. The Tax Commissioner was served with a Notice in Lieu of Summons and did not exercise the statutory right to intervene.
8. The County Board was served with a Notice in Lieu of Summons and duly answered that Notice.
9. An Order for Hearing and Notice of Hearing issued on October 26, 2009, as amended by an Order issued on November 23, 2009, set a hearing of the appeal for January 21, 2010, at 3:00 p.m. CST.
10. 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.

### **III. APPLICABLE LAW**

1. Subject matter jurisdiction of the Commission in this appeal is over issues raised during the county board of equalization proceedings. Neb. Rev. Stat. 77-5016(7) (Reissue 2009).
2. “The property of the state and its governmental subdivisions shall constitute a separate class of property and shall be exempt from taxation to the extent such property is used by the state or governmental subdivision for public purposes authorized to the state or governmental subdivision by this Constitution or the Legislature. To the extent such property is not used for the authorized public purposes, the Legislature may classify such property, exempt such classes, and impose or authorize some or all of such property to be

subject to property taxes or payments in lieu of property taxes as provided by law;” Neb. Const. Art. VIII §2 (1).

3. “(1) The following property shall be exempt from property taxes:(a) Property of the state and its governmental subdivisions to the extent used or being developed for use by the state or governmental subdivision for a public purpose. For purposes of this subdivision, public purpose means use of the property (I) to provide public services with or without cost to the recipient, including the general operation of government, public education, public safety, transportation, public works, civil and criminal justice, public health and welfare, developments by a public housing authority, parks, culture, recreation, community development, and cemetery purposes, or (ii) to carry out the duties and responsibilities conferred by law with or without consideration. Public purpose does not include leasing of property to a private party unless the lease of the property is at fair market value for a public purpose. Leases of property by a public housing authority to low-income individuals as a place of residence are for the authority's public purpose; (b) Unleased property of the state or its governmental subdivisions which is not being used or developed for use for a public purpose but upon which a payment in lieu of taxes is paid for public safety, rescue, and emergency services and road or street construction or maintenance services to all governmental units providing such services to the property. Except as provided in Article VIII, section 11, of the Constitution of Nebraska, the payment in lieu of taxes shall be based on the proportionate share of the cost of providing public safety, rescue, or emergency services and road or street construction or maintenance services unless a general policy is adopted by the governing body of the

governmental subdivision providing such services which provides for a different method of determining the amount of the payment in lieu of taxes. The governing body may adopt a general policy by ordinance or resolution for determining the amount of payment in lieu of taxes by majority vote after a hearing on the ordinance or resolution. Such ordinance or resolution shall nevertheless result in an equitable contribution for the cost of providing such services to the exempt property; ...”. Neb. Rev. Stat §77-202 (Reissue 2009).

4. Leased public property, other than property leased for a public purpose is to be taxed or exempted from taxation as if the property was owned by the leaseholder. Neb. Rev. Stat. §77-202.11 (1) (Reissue 2009).
5. On or before March 1, the county assessor shall send notice to the state or to any governmental subdivision if it has property not being used for a public purpose upon which a payment in lieu of taxes is not made. Neb. Rev. Stat. §77-202.12(1) (Reissue 2009).
6. The state, governmental subdivision or lessee may protest the determination of the county assessor that the property is not used for a public purpose to the county board of equalization on or before April 1. Neb. Rev. Stat. §77-202.12(2) (Reissue 2009).
7. The county board of equalization shall issue its decision on the protest on or before May 1. Neb. Rev. Stat. §77-202.12(2) (Reissue 2009).
8. The decision of the county board of equalization may be appealed to the Tax Equalization and Review Commission on or before June 1. Neb. Rev. Stat. §77-202.12(3) (Reissue 2009).

9. “The primary or dominant use, and not an incidental use, is controlling in determining whether property is exempt from taxation.” *Doane College v. County of Saline*, 173 Neb. 8, 11, 112 N.W.2d 248, 250 (1961).
10. Incidental use is defined as a use other than the primary use and is so minor or secondary in nature as not to distract from the primary use. See 350 Neb. Admin. Code, ch. 15, §002.21 (3/09).
11. Holding of lots by a city for resale after foreclosure in satisfaction of special assessments levied in an improvement district is a public purpose. *City of Alliance v. Box Butte County Board of Equalization*, 265 Neb. 262, 656 N.W.2d 439 (2003).
12. Leasing of land for agricultural use is an incidental use when compared to use of the land for future expansion of an existing landfill and operation of monitoring wells adjacent to that landfill. *City of York, v. York County Board of Equalization*, 266 Neb. 311, 664 N.W.2d 456 (2003).
13. The holding of land by a city for future expansion of the municipal landfill is a public purpose. *City of York, v. York County Board of Equalization*, 266 Neb. 311, 664 N.W.2d 456 (2003).
14. Leasing of land for agricultural use is incidental when compared to use of the land for development as an industrial park. *City of York, v. York County Board of Equalization*, 266 Neb. 305, 664 N.W.2d 452 (2003).
15. The holding of land by a city for community development purposes, i.e. an industrial park, is a public purpose. *City of York, v. York County Board of Equalization*, 266 Neb. 305, 664 N.W.2d 452 (2003).

16. Lease of airport land for agricultural use was incidental when compared to use as a buffer zone as required by FAA assurances, federal legislation, and state law. *City of York, v. York County Board of Equalization*, 266 Neb. 297, 664 N.W.2d 445 (2003).
17. The holding of land by a city for airport use is a public purpose. *City of York, v. York County Board of Equalization*, 266 Neb. 297, 664 N.W.2d 445 (2003).
18. 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).
19. 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).
20. The presumption disappears if there is competent evidence to the contrary. *Id.*
21. 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. 2008).
22. 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).

23. "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).
24. 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).
25. 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).

#### **IV. ANALYSIS**

The two parcels comprising the subject property are owned and held by the City of Blair Airport Authority. Both parcels are improved with residences. The parcels are leased for residential use. Portions of both parcels lie within a no build ("buffer") zone on the west side of the airport runway. Both parcels were acquired as part of an airport improvement and expansion project that was partially funded with grant funds from the Federal government. The two parcels are larger than required because limiting the purchase to the necessary portions of the parcels would have left uneconomic remnants.

The authority of municipal airport authorities to purchase and hold parcels for airport purposes has been reviewed in *City of York v. York County Board of Equalization*, 266 Neb. 297, 664 N.W.2d 445 (2003). In *City of York*, the Court determined the primary use of land owned



by an airport authority within a buffer zone was for a public purpose. The *City of York* Court also determined that public use, as a buffer zone, was the primary use even though the land was also rented for agricultural use. In this case, land within a buffer zone is rented for residential use. The distinction does not make a difference in the analysis. The Airport is required to hold the land within the buffer zone to protect the runway. The use of that portion of each parcel within the buffer zone is for a public purpose. See *City of York*, Supra. The primary use of that portion of each parcel is for a public purpose. See *City of York*, Supra. “The primary or dominant use and not an incidental use, is controlling in determining whether property is exempt from taxation. *Doane College v. County of Saline*, 173 Neb. 8, 11, 112 N.W. 2d 248, 250 (1961). Incidental use is defined as a use other than the primary use and is so minor or secondary in nature as not to distract from the primary use. See 350 Neb. Admin Code, ch. 15, §002.01 (2001).” *City of York v. York County Board of Equalization*, 266 Neb, 297, 304, N.W.2d 445, 450-451 (2003). The portion of each parcel lying within the buffer zone is clearly exempt from taxation. The primary use of each parcel is for a public purpose and each parcel is exempt from taxation. See *City of York*, supra..

**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 Airport has produced competent evidence that the County Board failed to faithfully perform its official duties and did not act on sufficient competent evidence to justify its actions.
4. The Airport 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 that the subject property is taxable as of the assessment date January 1, 2009, is vacated and reversed.
2. The Subject property is not subject to tax for the tax year 2009.
3. This decision, if no appeal is timely filed, shall be certified to the Washington County Treasurer, and the Washington 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 June 2, 2010.

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Robert W. Hotz, Commissioner

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William C. Warnes, 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 (Supp. 2007). 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) (Cum. Supp. 2008).

The Commission is authorized to review decision of a county board of equalization determining taxable values. Neb. Rev. Stat. §77-5007 (Supp. 2007). 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. Nuckolls Cty. Bd. Of Equal.*, 231 Neb. 653, 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.

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Wm R. Wickersham, Commissioner