

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

VITALIX, INC.,)	
)	
Appellant,)	Case No. 08C 010
)	
v.)	DECISION AND ORDER
)	AFFIRMING THE DECISION OF
BOX BUTTE COUNTY BOARD OF)	THE BOX BUTTE COUNTY BOARD OF
EQUALIZATION,)	EQUALIZATION
)	
Appellee.)	

The above-captioned case was called for a hearing on the merits of an appeal by Vitalix, Inc. ("the Taxpayer") to the Tax Equalization and Review Commission ("the Commission"). The hearing was held in the Commission's Hearing Room on the sixth floor of the Nebraska State Office Building in the City of Lincoln, Lancaster County, Nebraska, on June 25, 2009, pursuant to an Order for Hearing and Notice of Hearing issued February 5, 2009 as amended by an Order dated March 20, 2009. Commissioners Wickersham, Salmon, and Hotz were present. Commissioner Wickersham was the presiding hearing officer. Commissioner Warnes was excused from participation by the presiding hearing officer.

The presence of a principal of Vitalix, Inc. at the hearing was waived. Gerard Forget III appeared as legal counsel for the Taxpayer.

Kathleen J. Hutchinson, County Attorney for Box Butte County, Nebraska, was present as legal counsel for the Box Butte 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 (Cum. Supp. 2008). The final decision and order of the Commission in this case is as follows.

**I.
ISSUES**

The Taxpayer has asserted all items comprising the subject property are trade fixtures taxable as personal property.

**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 property to which this appeal pertains ("the Subject Property") is described in the table below.
3. Actual value of the subject property as real property placed on the assessment roll as of January 1, 2008, ("the assessment date") by the Box Butte 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: Items listed for parcel 070168334, million gallon tank, a 32,800 square foot concrete slab, a 60 foot tall grain leg, 11 hopper tanks, and one overhead tank, Box Butte County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Improvement	\$897,051.00		\$326,116.00
Total	\$897,051.00	-0-	\$326,116.00

4. An appeal of the County Board's decision was filed with the Commission.
5. The County Board was served with a Notice in Lieu of Summons and duly answered that Notice.
6. An Order for Hearing and Notice of Hearing issued on February 5, 2009, as amended by an Order issued on March 20, 2009, set a hearing of the appeal for June 25, 2009, at 9:00 a.m. CDST.
7. 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.
8. Actual value of the subject property as of the assessment date for the tax year 2008 is:

Case No. 08C 010

Improvement value \$326,116.00

Total value \$326,116.00.

III. APPLICABLE LAW

1. Subject matter jurisdiction of the Commission in this appeal is over issues raised during the county board of equalization proceedings. *Arcadian Fertilizer, L.P. v. Sarpy County Bd. of Equalization*, 7 Neb.App. 655, 584 N.W.2d 353 (1998).
2. Real property shall mean: (1) All land; (2) All buildings, improvements, and fixtures, except trade fixtures; (3) Mobile homes, cabin trailers, and similar property, not

registered for highway use, which are used, or designed to be used, for residential, office, commercial, agricultural, or other similar purposes, but not including mobile homes, cabin trailers, and similar property when unoccupied and held for sale by persons engaged in the business of selling such property when such property is at the location of the business; (4) Mines, minerals, quarries, mineral springs and wells, oil and gas wells, overriding royalty interests, and production payments with respect to oil or gas leases; and (5) All privileges pertaining to real property described in subdivisions (1) through (4) of this section. Neb. Rev. Stat. §77-103 (Cum. Supp. 2008).

3. The term tangible personal property includes all personal property possessing a physical existence, excluding money. The term tangible personal property also includes trade fixtures, which means machinery and equipment, regardless of the degree of attachment to real property, used directly in commercial, manufacturing, or processing activities conducted on real property, regardless of whether the real property is owned or leased. The term intangible personal property includes all other personal property, including money. Neb. Rev. Stat. §77-105(Cum. Supp 2008).
4. Improvements on leased public lands shall be assessed, together with the value of the lease, to the owner of the improvements as real property. On or before March 1, following any construction thereof or any change in the improvements made on or before January 1, the owner of the improvements shall file with the county assessor an assessment application on a form prescribed by the Tax Commissioner. The taxes imposed on the improvements shall be collected in the same manner as in all other cases of collection of taxes on real property. Neb. Rev. Stat. 77-1374 (Cum. Supp. 2008).

5. 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).
6. 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).
7. The presumption disappears if there is competent evidence to the contrary. *Id.*
8. The order, decision, determination, or action appealed from shall be affirmed unless evidence is adduced establishing that the order, decision, determination, or action was unreasonable or arbitrary. Neb. Rev. Stat. §77-5016 (8) (Cum. Supp. 2006).
9. 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).
10. "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).
11. 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).

12. 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 supplemental protest in this appeal concerns that part of parcel 070168334 described as “Appurtenant Business Equipment (Trade Fixtures) excluding Warehouse Addition.” (E1). The “Warehouse Addition” is a 100 X 204 structure on a “Warehouse Parcel.” (E3:1). Taxation of the “Warehouse Addition” was raised in a protest filed March 28, 2008. (E3:3). The parties stipulated that the items to which the supplemental protest pertained are a million gallon tank, a 32,800 square foot concrete slab, a 60 foot tall grain leg, 11 hopper tanks, and one overhead tank. The Taxpayer asserts that those five items are trade fixtures and therefore tangible personal property not taxable as real property.

The Commission may determine any question raised in the proceeding upon which an order, decision, determination, or action appealed from is based. Neb. Rev. Stat. §77-5016 (7) (Cum. Supp. 2008). The supplemental protest of the Taxpayer raised one issue, the classification for taxation of five items for purposes of taxation. The Taxpayer contends that the items are trade fixtures taxable as tangible personal property pursuant top Section 77-103 and 77-105 of Nebraska Statutes. It is acknowledged by both parties that a million gallon tank, a 32,800 square foot concrete slab, a 60 foot tall grain leg, 11 hopper tanks, and one overhead tank are on lands leased from the City of Alliance. Section 77-1374 of Nebraska Statutes requires assessment of

improvements on leased public land, with the value of the lease to the owner of the improvements.

TAXATION OF IMPROVEMENTS ON LEASED PUBLIC LANDS

“Improvements on leased public lands shall be assessed, together with the value of the lease, to the owner of the improvements as real property. On or before March 1, following any construction thereof or any change in the improvements made on or before January 1, the owner of the improvements shall file with the county assessor an assessment application on a form prescribed by the Tax Commissioner. The taxes imposed on the improvements shall be collected in the same manner as in all other cases of collection of taxes on real property.” Neb. Rev. Stat. §77-1374 (Supp. 2007). Prior to the passage of LB 1063, improvements on leased public lands were taxed as personal property. Neb. Laws 1992, LB 1063 §111. Improvements taxable as personal property included buildings and fixtures. See, *Offut Housing Company v. County of Sarpy*, 160 Neb. 320, 70 N.W.2d 382 (1955). A rationale for the change in characterization of improvements on leased public lands from personal to real property is apparent from the context of LB 1063. Prior to the passage of LB 1063 real property other than agricultural land and horticultural land and personal property were valued for taxation with reference to the same base actual value. After the passage of LB 1063 real property other than agricultural land and horticultural land is valued for taxation based on actual value while taxable tangible personal property is taxed on its net book value. Neb. Rev. Stat. §77-201(5) (Cum. Supp. 2008). Net book value is determined based on its adjusted basis and depreciation of its adjusted basis over time. Neb. Rev. Stat. §77-120 (Reissue 2003). Net book value of personal property can only decline over time and becomes 0 at the end of its assigned life. Id. Changing the

characterization of improvements which included buildings and fixtures from personal to real property placed their valuation for taxation on the same basis as other similar improvements on fee lands. The County Board characterized the million gallon tank, a 32,800 square foot concrete slab, a 60 foot tall grain leg, 11 hopper tanks, and one overhead tank as fixtures. Fixtures are clearly included in the definition of improvement for purposes of Section 77-1374 of Nebraska Statutes. *Offut*, Supra. The Legislature has, however, for purposes of taxation, determined that “trade fixtures,” as defined in statute, should be classified and assessed as tangible personal property. Neb. Rev. Stat. §77-103 and 77-105 (Cum. Supp. 2008). It is necessary therefore to determine whether the five items are fixtures or trade fixtures.

**CLASSIFICATION OF FIVE ITEMS AS TRADE FIXTURES
AS DEFINED IN SECTION 77-105 OF NEBRASKA STATUTES**

Prior to January 1, 2008, real property was defined as “(1) All land; (2) All buildings, improvements, and fixtures; (3) Mobile homes, cabin trailers, and similar property, not registered for highway use, which are used, or designed to be used, for residential, office, commercial, agricultural, or other similar purposes, but not including mobile homes, cabin trailers, and similar property when unoccupied and held for sale by persons engaged in the business of selling such property when such property is at the location of the business; (4) Mines, minerals, quarries, mineral springs and wells, oil and gas wells, overriding royalty interests, and production payments with respect to oil or gas leases; and (5) All privileges pertaining to real property described in subdivisions (1) through (4) of this section.) Neb. Rev. Stat 77-103 (Reissue 2003). Fixtures were the point at which the tectonic plates of “real property” and “tangible personal property” met. Fixtures were items that, except for accession to real property, would be

considered “tangible personal property.” Accession was determined based on factors described in *Northern Natural Gas Co. v. State Bd. of Equalization and Assessment*, 232 Neb. 806, 443 N.W.2d 249 (1989).

In 2007, the statutory definition of real property was changed so that “trade fixtures” were excluded from that classification. 2007 Neb. Laws, LB 334, §13. “Trade fixtures” were included in the definition of tangible personal property and became part of that property classification. LB 334 defined trade fixtures for purposes of taxation as “machinery and equipment, regardless of the degree of attachment to real property, used directly in commercial, manufacturing, or processing activities conducted on real property, regardless of whether the real property is owned or leased.” 2007 Neb. Laws, LB 334, §14. The Legislature’s definition of “trade fixture” was codified in Section 77-105 of Nebraska Statutes. As defined in Section 77-105 of Nebraska Statutes “trade fixtures” have three characteristics 1) they are machinery and/or equipment; 2) they are used directly in commercial manufacturing or processing activities on real property; and 3) they may or may not be attached to real property.

In any attempt to determine whether an item is a “trade fixture” a determination must be made that it is machinery or equipment. Neither term was defined in LB 334. The Commission has not found a definition for either term in statute or rules and regulations of the Tax Commissioner or Property Tax Administrator that would pertain to the classification of items for property taxation. Machinery can be defined as “a functional unit of the means and appliances by which a desired result is obtained.” *Webster’s Third New International Dictionary*, Merriam-Webster, Inc., p. 1354 (2002). A machine is defined as “an assemblage of parts that are usu. Solid bodies but include in some cases fluid bodies or electricity in conductors and that transmit

forces, motion and energy one to the another in some predetermined manner and to some desired end. An instrument or a lever designed to transmit or modify the application of power, force or motion.” Supra p. 1353. Equipment can be defined as “the physical resources serving to equip a person or thing (1): the implements (as machinery or tools) used in an operation or activity (2): all of the fixed assets other than land and buildings of a business enterprise.” Id. The second definition of equipment would include all fixtures. The Legislature did not classify all fixtures as tangible personal property. Only those fixtures which are machinery and equipment used directly in commercial, manufacturing, or processing activities may be trade fixtures and deemed tangible personal property. Neb. Rev. Stat. §77-105 (Cum. Supp 2008). The second definition is broader than the meaning of equipment that can be derived from its context in Section 77-105 of Nebraska Statutes and will not be considered further.

With the foregoing definitions in mind the Commission can now turn to a consideration of the first factor, whether each of the five items which the Taxpayer asserts are trade fixtures and therefore tangible personal property can be considered machinery or equipment.

The million gallon tank is on the 32,000 square foot concrete slab. Clearly the concrete slab cannot be considered machinery or equipment. The tank is used for the storage of molasses to be used in production of a cattle supplement. (E11:143). The tank was built for inventory management. (E11:143). Installation of the tank did not increase production capacity. (E11:143). The tank does not transmit forces, motion, or energy and cannot be considered a machine. A tank storing a wet product used in production serves the same function as a warehouse that stores dry products used in production. A million gallon storage tank on a concrete slab is not a tool or implement and cannot be considered equipment.

The only evidence of the construction and function of the 60 foot tall grain leg, 11 hopper tanks, and overhead tank are photographs (Exhibit 21) and statements of counsel. The photographs do not show the use or function of the 60 foot tall grain leg, 11 hopper tanks or overhead tanks as part of a process. The unsupported assertions of attorneys during court proceedings do not establish the facts asserted unless the other appropriate parties stipulate to such facts. *Schroeder v. Barnes*, 5 Neb.App. 811, 565 N.W.2d 749 (1997). Photographs and assertions of counsel are an insufficient basis for a determination that the decision of the County Board concerning classification of the 60 foot tall grain leg, 11 hopper tanks, and overhead tank was unreasonable or arbitrary.

CLASSIFICATION OF FIVE ITEMS AS FIXTURES AT COMMON LAW

The law of fixtures is complicated and occasionally counter intuitive. Whether an item is a fixture or removable personalty may depend on the relationship of the parties, i.e. landlord/tenant, vendor/vendee, mortgagee/mortgagor or other creditor. See, *The Fixtures Doctrine; Was It Ever Really the Law?*, Ronald W. Polston, Whittier Law Review (1995). Fixtures are those items of property that have become a part of real property. Whether an item of property has become a part of real property is determined by consideration of three factors: (1) whether the item is actually annexed to real property or something appurtenant to real property, (2) appropriation of the item to the use or purposes of that part of the realty with which it is connected, and (3) the intention of the party making the annexation to make the item a permanent accession to the freehold. *Northern Natural Gas Co. v. State Bd. of Equalization and Assessment*, 232 Neb. 806, 443 N.W.2d 249 (1989). The three factor analysis stated in *Northern*

Natural is restated in rules and regulations promulgated by the Property Tax Administrator. 350 Neb. Admin. Code, ch 10, §001.01A (05/05).

The evidence is that the 32,000 square foot concrete pad is used as a base for a million gallon storage tank. The only evidence of attachment of the 60 foot tall grain leg, 11 hoppers and overhead bin are photographs showing them sitting on concrete pads on real estate. (E30). All of the items apparently play a part in the manufacturing activity. The intent of the Taxpayer to make the items a permanent part of the real estate may be inferred from the nature of the article affixed, the relation and situation of the party making the annexation, and the purpose or use for which the annexation has been made. *Northern Natural Gas Co. v. State Bd. of Equalization and Assessment*, 232 Neb. 806, 443 N.W.2d 249 (1989). In this case the items are on leased land. The lease is dated December 17, 2004. (E14:347). The lease commenced April 1, 2004, and is for a term of 30 years. (E14:344). The lease provides for removal of alterations or additions to the premises if consent had been given for the addition or alteration. (E14:344). The lease expressly contemplates use of land adjacent to certain buildings for the placement of unloading facilities, storage of supplies and equipment directly related to the tenant's business, and for construction of grain and feed handling facilities used in the tenant's business. (E14:343). The Taxpayer has shown that it has a right to remove the items at the end of the lease. If the useful life of an item does not extend beyond the term of a lease any right of removal would be meaningless. Useful lives of the million gallon tank, 32,000 square foot tank, the 60 foot tall grain leg, 11 hoppers and overhead bin are unknown. The Taxpayer has also leased, as shown in an addendum to the December 14, 2004 lease, a 20,400 square foot parcel on which it has constructed a warehouse. (E14:350). The warehouse is used for the manufacture of products

using molasses from the tank. The photographs indicate that the other items are also used in conjunction with the manufacture of products on the leased land. The warehouse was constructed in 2005 at a cost exceeding \$578,000. (E20:5). The long term lease, an investment of over \$578,000 in a 20 x 104 building on leased land used in conjunction with the million gallon tank, 32,000 square foot tank, the 60 foot tall grain leg, 11 hoppers and overhead bin, evidence intent to permanently affix the items to the real estate.

Improvements on leased land have often been deemed trade fixtures and therefore personal property at common law. See, e.g. *Bishop Buffets, Inc., v. Westroads, Inc.* 202 Neb. 171, 274 N.W.2d 530 (1979). As noted above, the Legislature has for purposes of taxation enacted a specific definition of trade fixtures which does not consider whether the item being classified is on leased land.

The Taxpayer has not produced clear and convincing evidence that the million gallon tank, 32,000 square foot tank, the 60 foot tall grain leg, 11 hoppers and overhead bin are not fixtures as determined by the County Board.

Because the County Board's decision is affirmed it is unnecessary to consider the possible conflict between the provisions of Sections 77-105 and 77-1374 of Nebraska Statutes.

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 the classification and actual value of the subject property as of the assessment date, January 1, 2008, is affirmed.
2. Actual value, for the tax year 2008, of the subject property is:

Case No. 08C 010

Improvement value \$326,116.00

Total value \$326,116.00.

3. This decision, if no appeal is timely filed, shall be certified to the Box Butte County Treasurer, and the Box Butte County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Cum. Supp. 2008).
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 2008.
7. This order is effective for purposes of appeal on October 1, 2009.

Signed and Sealed. October 1, 2009.

Nancy J. Salmon, Commissioner

Robert W. Hotz, Commissioner

SEAL

APPEALS FROM DECISIONS OF THE COMMISSION MUST SATISFY THE REQUIREMENTS OF NEB. REV. STAT. §77-5019 (CUM. SUPP. 2006), OTHER PROVISIONS OF NEBRASKA STATUTES, AND COURT RULES.

I concur in the result.

The majority has considered two standards of review for its review of the County Board's decision. of review one stated as a presumption the other stated in statute. I do not believe consideration of two standards of review is 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. Nucholls Cty. Bd. Of Equal.*, 231 Neb. 297, 437 N.W.2d 501 (1989). The presumption stated by the Court was the presumption that had been found before the statute was enacted.

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

The Tax Equalization and Review Commission was created in 1995. 1995 Neb. Laws, LB 490 §153. Section 77-1511 of the Nebraska Statutes was made applicable to review of county board of equalization assessment decisions by the Commission. *Id.* In 2001 section 77-1511 of Nebraska Statutes was repealed. 2001 Neb. Laws, LB 465, §12. After repeal of section 77-1511 the standard for review to be applied by the Commission in most appeals was stated in section 77-5016 of the Nebraska Statutes. Section 77-5016(8) requires a finding that the decision being reviewed was unreasonable or arbitrary. *Brenner v. Banner County Board of Equalization*, 276 Neb. 275, 753 N.W.2d 802 (2008). The Supreme Court has stated that the presumption which arose from section 77-1511 is applicable to the decisions of the Commission. *Garvey Elevators, Inc. V. Adams County Bd. of Equalization*, 261 Neb. 130, 621 N.W.2d 518 (2001).

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

standard has been met and relief may be granted. Both standards of review are met in the fourth possibility and relief may be granted.

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

Wm R. Wickersham, Commissioner