

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

KAAPA ETHANOL, L.L.C.,)	
)	
Appellant,)	Case No. 07P-002
)	
v.)	DECISION AND ORDER
)	REVERSING THE DECISION OF
KEARNEY COUNTY BOARD OF)	THE KEARNEY COUNTY BOARD OF
EQUALIZATION,)	EQUALIZATION
)	
Appellee.)	

The above-captioned case was called for a hearing on the merits of an appeal by KAAPA Ethanol, L.L.C. ("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 March 3, 2009, pursuant to an Order for Hearing and Notice of Hearing issued December 17, 2008. Commissioners Wickersham, Warnes, Salmon, and Hotz were present. Commissioner Wickersham was the presiding hearing officer.

Charles Woodside, the Chief Executive Officer of KAAPA Ethanol, L.L.C., was present at the hearing. William E. Peters and Daniel L. Lindstrom appeared as legal counsel for the Taxpayer.

David G. Wondra, County Attorney for Kearney County, Nebraska, was present as legal counsel for the Kearney 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. 2006). 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, 2007, is less than taxable value as determined by the County Board. The issues on appeal related to that assertion are:

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

The taxable value of the subject property on January 1, 2007.

**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 personal property to which this appeal pertains ("the Subject Property") is described in Exhibit 9.
3. Actual value of the subject property placed on the assessment roll as of January 1, 2007, ("the assessment date") by the Kearney County Assessor, value as proposed in a timely protest, and actual value as determined by the County Board is shown in the following table:

Description: Items as identified in Exhibit 9 pages 32 & 33

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$25,327,386.00	\$685,366.00	\$25,327,386.00
Improvement	\$	\$	\$
Total	\$25,327,386.00	\$685,386.00	\$25,327,386.00

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 December 17, 2008, set a hearing of the appeal for March 3, 2009, at 9:00 a.m. CST.
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. The personal property described in Exhibit 9 pages 32 & 33 subject to valuation as personal property, the factors necessary for its valuation, and its taxable value for the tax year 2007 is:

Asset #	Description	Acquired	Cost	Recovery Period	Depreciation Factor	Taxable Value
28	Lab Equipment	2003	\$98,117	7	.4288	\$42,073
29 33 34 35	Shop Equipment	2003	\$60,758	7	.4288	\$26,053
32	Forklift	2003	\$19,723	7	.4288	\$8,457
65	Trackmobile	2004	\$80,850	5	.4165	\$33,674
71	Signs for Plant	2004	\$3,783	5	.4165	\$1,576

Asset #	Description	Acquired	Cost	Recovery Period	Depreciation Factor	Taxable Value
75	Press Set H-Frame	2004	\$3,123	5	.4165	\$1,301
80	VOC Emissions Monitor	2004	\$8,105	5	.4165	\$3,376
82	Skidsteer w/ Sweepster	2004	\$28,361	5	.4165	\$11,812
93	Pivot w/ Pit Pump	2004	\$57,764	7	.5513	\$31,845
94	Pivot w/ Pit Pump	2004	\$57,764	7	.5513	\$31,845
100	Gator JD Tractor	2004	\$9,392	7	.5513	\$5,178
104	Field Communications 375	2004	\$4,001	5	.4165	\$1,666
106	Moisture Analyzer Microwave	2004	\$11,598	5	.4165	\$4,831
109	Skidsteer Cab	2004	\$7,760	7	.5513	\$4,278
119	Telehandler Forklift w/boom	2005	\$69,000	7	.7016	\$48,410
122	Pallet Racks in Stor Bldg	2005	\$1,386	7	.7016	\$972
125	Tractor JD 4630	2005	\$13,250	7	.7016	\$9,296
126	Mower Outback BC2402H	2005	\$1,680	7	.7016	\$1,179
127	Shredder Rhino SE	2005	\$10,900	7	.7016	\$7,647
132	Lodestar Lift for Centrifuge	2005	\$6,871	7	.7016	\$4,821
136	Dozer Degelman 3400	2005	\$7,300	7	.7016	\$5,122

Asset #	Description	Acquired	Cost	Recovery Period	Depreciation Factor	Taxable Value
58	938 Caterpillar Wheel Loader	2005	\$163,062	7	.7016	\$114,404
141	Caterpillar Loader	2006	\$191,500	7	.8929	\$170,990
143	Camera System for Fence	2006	\$35,546	5	.85	\$30,214
164	Fume Hood for Lab	2006	\$6,458	5	.85	\$5,489
293	Pallet Racks for Warehouse	2006	\$1,546	5	.85	\$1,314
294	Sulfate Tester	2006	\$24,014	5	.85	\$20,412
25	Office Equip - Phone Sys	2003	\$10,812	7	.4288	\$4,636
26	Office Furniture	2003	\$38,850	7	.4288	\$16,659
31 84	Computer Equipment	2003	\$61,355	5	.2499	\$15,333
68	Office Furn - Addl Pieces	2004	\$3,853	7	.5513	\$2,124
81	PC Dell Asset 2517	2004	\$1,825	5	.4165	\$760
96	Office Furn Addl Steel Case items	2004	\$1,785	7	.5513	\$984
90	Network Wiring Adds	2004	\$1,714	5	.4165	\$714
99	Display for DWGS Loadout	2004	\$1,783	5	.4165	\$743
111	Filing Cabinet FP w/media Cool	2004	\$1,319	7	.5513	\$727

Asset #	Description	Acquired	Cost	Recovery Period	Depreciation Factor	Taxable Value
114	Filing Cabinet FP	2004	\$1,264	7	.5513	\$697
161	Terminal Server	2006	\$14,929	5	.85	\$12,690
162	SQL Ser	2006	\$14,929	5	.85	\$12,690
163	PC Projector for Bd Rm	2006	\$2,303	5	.85	\$1,958
57	Testing Equip for Grain	2003	\$3,244	5	.2499	\$811
Total			\$1,143,577			\$699,761

**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) (Supp. 2007).
2. Tangible personal property, not including motor vehicles registered for operation on the highways of this state, shall constitute a separate and distinct class of property for purposes of property taxation, shall be subject to taxation, unless expressly exempt from taxation, and shall be valued at its net book value. Neb. Rev. Stat. §77-201 (Cum. Supp. 2006).
3. The term tangible personal property includes all personal property possessing a physical existence, excluding money. The term intangible personal property includes all other personal property, including money. Neb. Rev. Stat. §77-105 (Reissue 2003).

4. Tangible personal property which is not depreciable tangible personal property as defined in section 77-119 shall be exempt from property tax. Neb. Rev. Stat. 77-202 (d)(4) Cum. Supp. 2006).
5. Depreciable tangible personal property shall mean tangible personal property which is used in a trade or business or used for the production of income and which has a determinable life of longer than one year. Neb. Rev. Stat. §77-119 (Reissue 2003).
6. (1) Net book value of property for taxation shall mean that portion of the Nebraska adjusted basis of the property as of the assessment date for the applicable recovery period in the table set forth in this subsection. Net book value as a percent of Nebraska adjusted basis shall be calculated using the one-hundred-fifty-percent declining balance method, switching to straight line, with a one-half-year convention.

NET BOOK VALUE AS A PERCENT OF NEBRASKA ADJUSTED BASIS

Year	Recovery Period (in years)					
	3	5	7	10	15	20
1	75.00	85.00	89.29	92.50	95.00	96.25
2	37.50	59.50	70.16	78.62	85.50	89.03
3	12.50	41.65	55.13	66.83	76.95	82.35
4	0.00	24.99	42.88	56.81	69.25	76.18
5		8.33	30.63	48.07	62.32	70.46
6		0.00	18.38	39.33	56.09	65.18
7			6.13	30.59	50.19	60.29
8			0.00	21.85	44.29	55.77
9				13.11	38.38	51.31
10				4.37	32.48	46.85
11				0.00	26.57	42.38
12					20.67	37.92
13					14.76	33.46
14					8.86	29.00
15					2.95	24.54
16					0.00	20.08
17						15.62

18	11.15
19	6.69
20	2.23
21	0.00

(2) The applicable recovery period for any item of property shall be determined as follows:

- (a) Three-year property shall include property with a class life of four years or less;
- (b) Five-year property shall include property with a class life of more than four years and less than ten years;
- (c) Seven-year property shall include property with a class life of ten years or more but less than sixteen years;
- (d) Ten-year property shall include property with a class life of sixteen years or more but less than twenty years;
- (e) Fifteen-year property shall include property with a class life of twenty years or more but less than twenty-five years; and
- (f) Twenty-year property shall include property with a class life of twenty-five years or more.

(3) Class life shall be based upon the anticipated useful life of a class of property and shall be determined by the Property Tax Administrator under the Internal Revenue Code.

(4) One-half-year convention shall be a convention which treats all property placed in service during any tax year as placed in service on the midpoint of such tax year.

(5) The percent shown for year one shall be the percent used for January 1 of the year following the year of acquisition of the property. Neb. Rev. Stat. §77-120 (reissue 2003).

7. Nebraska adjusted basis shall mean the adjusted basis of property as determined under the Internal Revenue Code increased by the total amount allowed under the code for depreciation or amortization or pursuant to an election to expense depreciable property under section 179 of the code. Neb. Rev. Stat. §77-118 (Reissue 2003).
8. All tangible personal property in this state subject to taxation shall be assessed as of January 1 at 12:01 a.m., which assessment shall be used as a basis of taxation until the next assessment. A complete list of all taxable tangible personal property held or owned on the assessment date shall be made as follows:
 - (1) Every person shall list all his or her taxable tangible personal property as defined in section 77-105 having tax situs in the State of Nebraska
 - (2) The taxable tangible personal property of a minor child shall be listed by the following: (a) His or her guardian; (b) if he or she has no guardian, by his or her parent, if living; and (c) if neither parent is living, by the person having such property in charge;
 - (3) The taxable tangible personal property of any other person under guardianship, by his or her guardian or, if he or she has no guardian, by the person having charge of such property;
 - (4) The taxable tangible personal property of a person for whose benefit it is held in trust, by the trustee, and of the estate of a deceased person, by the personal representative or administrator;
 - (5) The taxable tangible personal property of corporations the assets of which are in the hands of a receiver, by such a receiver;

- (6) The taxable tangible personal property of corporations, by the president or the proper agent or officer thereof;
 - (7) The taxable tangible personal property of a firm or company, by a partner, limited liability company member, or agent thereof;
 - (8) The taxable tangible personal property of manufacturers and others in the hands of an agent, by and in the name of such agent; and
 - (9) All leased taxable tangible personal property shall be reported, by itemizing each article, by lessor as owner or lessee as agent. Neb. Rev. Stat. §77-1201 (Reissue 2003).
9. Every person required by section 77-1201 to list and value taxable tangible personal property shall list such property upon the forms prescribed by the Tax Commissioner. The forms shall be available from the county assessor and when completed shall be signed by each person or his or her agent and be filed with the county assessor. The forms shall be filed on or before May 1 of each year. Neb. Rev. Stat. §77-1229(1) (Cum. Supp. 2006).
10. (3) Any valuation added to a personal property return or added through the filing of a personal property return, after May 1 and on or before July 31 of the year the property is required to be reported, shall be subject to a penalty of ten percent of the tax due on the value added.
- (4) Any valuation added to a personal property return or added through the filing of a personal property return, on or after August 1 of the year the property is required to be reported, shall be subject to a penalty of twenty-five percent of the tax due on the value added.

(5) Interest shall be assessed upon both the tax and the penalty at the rate specified in section 45-104.01, as such rate may from time to time be adjusted by the Legislature, from the date the tax would have been delinquent until paid. Neb. Rev. Stat. §77-1233.04 (3)(4) & (5).

11. The county board of equalization shall meet for the purpose of reviewing and deciding written protests filed pursuant to this section beginning on or after June 1 and ending on or before July 25 of each year. ... Protests regarding tangible personal property shall be signed and filed on or before the last date for filing the form required by section 77-1229 Neb. Rev. Stat. §77-1502(1) (Cum. Supp. 2006).
12. 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).
13. 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).
14. The presumption disappears if there is competent evidence to the contrary. *Id.*
15. 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).

16. Proof that the order, decision, determination, or action 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).
17. "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).
18. 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).
19. 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).
20. A corporate officer or other representative of an entity, must be shown to be familiar with the property in question and have a knowledge of values generally in the vicinity to be qualified to offer an opinion of value. *Kohl's Dept. Stores v. Douglas County Bd. of Equal.*, 10 Neb.App. 809, 638 N.W.2d, 881 (2002).
21. 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).
22. 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).

23. 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. *Josten-Wilbert Vault Co. v. Board of Equalization for Buffalo County*, 179 Neb. 415, 138 N.W.2d 641 (1965).

IV. ANALYSIS

The Taxpayer filed a Nebraska Personal Property Return as shown in Exhibit 9 pages 28 through 36. The Taxpayer protested the Nebraska Personal Property Return it filed and appealed a County Board determination that the Return as filed by the Taxpayer was correct. The Taxpayer contends that the items described as processing equipment, catwalks, grain handling equipment, stroke ram/vac for heat exchangers, diesel tank including containment and other items shown in Exhibit 9 on pages 32 & 33 were characterized as fixtures to real estate by the County Assessor and their contribution to actual value was included in the County Assessor's determination of actual value for the parcel of real property owned by the Taxpayer described in Case No. 07C-051. Actual value for the Taxpayer's parcel of real property as characterized and valued by the County Assessor was protested. The County Assessor's characterizations and determination of actual value were affirmed by the County Board. The Taxpayer asserts that when the County Board affirmed the County Assessor's characterizations of the items listed as processing equipment, catwalks, grain handling equipment, stroke ram/vac for heat exchangers, diesel tank including containment and other items shown in Exhibit 9 on pages 32 & 33 as

fixtures valued as real property, it should have removed those items from taxation as personal property. In this appeal the Taxpayer continues to contend that the proper characterization of the items described as processing equipment, catwalks, grain handling equipment, stroke ram/vac for heat exchangers, diesel tank including containment and other items shown in Exhibit 9 on pages 32 & 33 are personal property, but if those items are deemed fixtures that the Taxpayer's Nebraska Personal Property Return should be modified. For reasons stated below the Commission determines that the items described as processing equipment, catwalks, grain handling equipment, stroke ram/vac for heat exchangers, diesel tank including containment and other items as shown in Exhibit 9 pages 32 & 33 are fixtures taxable as real estate and that the Taxpayer's personal property should be listed and valued as stated in this order.

The Nebraska Legislature has adopted a statute defining "trade fixtures" and directing the taxation of "trade fixtures" as personal property. See, 2007 Neb. Laws, LB 334, §§13 and 14. "Trade fixtures" as defined by the Legislature could include all of the items considered to be "processing equipment" at the subject property. The Legislature's definition of trade fixtures became effective July 1, 2007. The assessment date for this proceeding is January 1, 2007. The provisions of LB 334 do not affect characterization of the personal property or fixtures described in this appeal.

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). In this appeal the parties with differing points of reference are the Taxpayer and the County Board and the issue is the determination of whether an item is a fixture and taxable as

real property. All real property is subject to taxation unless exempted. *Neb. Const*, Art VIII §§ 1 and 2. As of January 1, 2007, real property as defined in statute included land, buildings, and fixtures. *Neb. Rev. Stat. §77-103* (Reissue 2003). 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 three-factor analysis is also described and analyzed in Directive 06-02 issued by the Property Tax Administrator.

A witness for the Taxpayer, qualified and acting as an appraiser for the State of Nebraska Property Assessment Division of the Department of Revenue, (“State Appraiser”) testified that he had used the three-factor test to determine that property like the items described under the heading processing equipment, catwalks, grain handling equipment, stroke ram/vac for heat exchangers, and diesel tank including containment as shown in Exhibit 9 pages 32 & 33 were personal property. The State Appraiser stated his conclusion that items used as “processing equipment” were all personal property. The State Appraiser considered all items used in a processing sequence that begins with grinding of corn in a hammermill, includes fermentation of the ground corn for the production of alcohol, and ends with the storage after addition of a

denaturing chemical to be “processing equipment” and therefore personal property. The State Appraiser testified that he believed his conclusion that “processing equipment” was personal property was a conclusion also reached by other county assessors. The State Appraiser also testified that in his opinion items of “processing equipment” would be modified or replaced over time because of changes in technology and normal wear and tear. The State Appraiser indicated that occasionally “processing equipment” of one ethanol plant was sold to another producer or moved. The State Appraiser testified that two identical items used for the removal of grain from a pit to an elevated conveyor belt “legs” were characterized in one instance as a fixture to real property and in another as processing equipment. Both items were on foundations and affixed to the ground with bolts, and both items lifted material from a pit to a conveyor belt. The only differences appear to be where they were located in the plant, the material lifted, and whether the State Appraiser believed they functioned as part of the processing sequence. The State Appraiser testified that if the boilers shown in Exhibit 2 at page 45 were in an office building or apartment building he would consider them to be fixtures. The State Appraiser also testified that because the boilers were used to produce heat for a fermentation process he considered them to be “processing equipment” and therefore personal property. In the same vein the Taxpayer’s Appraiser testified that the cooling towers shown on page 47 of Exhibit 2 would be considered fixtures if associated with an office building or apartment complex but had been characterized as personal property for purposes of his appraisal because they functioned as part of the fermentation process and were therefore processing equipment. The opinions of the State Appraiser and Taxpayer’s Appraiser are seemingly based on a belief that the function of an item determines its characterization as a fixture taxable as real property or as personal property to be

taxed separately. The Taxpayer's Appraiser also testified that another appraiser who was a recognized expert in the valuation of ethanol plants would consider the "processing equipment" to be fixtures. The basis for that view is unknown. Whether function is a consideration in the determination of the characterization of an item as a fixture taxable as real property or as personal property to be taxed separately is a question of law rather than appraisal practice

The three-factor test described in *Northern Natural* and the rules and regulations of the Property Tax Administrator requires consideration of the following: (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).

There is evidence that the "processing equipment" is annexed to real property. There is evidence that "processing equipment" is appropriated to the use of the realty to which it is connected. The intent of the Taxpayer to make a permanent annexation to the freehold is inferred from the scale, complexity, integration of functions, and apparent permanence of the improvements as a whole. Clearly, removal of the "processing equipment" would leave other improvements such as the grain receiving silos, processed ethanol storage tanks, processing building, cook building, grain handling building, fermentation building, truck scales, cooling tower foundation, foundations for various items of "processing equipment," pump building, boiler building, and grain receiving building without purpose and with limited utility. Many authorities hold that any and all machinery essential to the proper functioning of a plant, mill, or

similar manufacture is a fixture or is presumed to be a fixture regardless of the manner by which it is annexed to the realty. *35A Am. Jur. 2d, Fixtures* §89 (2007). The fact that various items may be replaced as technology changes or ordinary wear and tear dictates replacement, or that a plant may be sold and moved does not support a finding that the Taxpayer intends something other than a permanent annexation of the “processing equipment” to the freehold.

The evidence is that various items of “processing equipment,” which the Taxpayer asserts are personal property, are fixtures taxable as real estate. The Commission has examined the evidence and concludes that the individual items of taxable tangible personal property of the Taxpayer as of January 1, 2007 and their taxable values are as set out in paragraph 8 of the findings of fact above.

**V.
CONCLUSIONS OF LAW**

1. The Commission has subject matter jurisdiction in this appeal.
2. The Commission has jurisdiction over the parties to this appeal.
3. The Taxpayer has produced competent evidence that the County Board failed to faithfully perform its official duties and to act on sufficient competent evidence to justify its actions.
4. The Taxpayer has adduced sufficient, clear and convincing evidence that the decision of the County Board is unreasonable or arbitrary and the decision of the County Board should be vacated and reversed.

**VI.
ORDER**

IT IS ORDERED THAT:

1. The decision of the County Board determining actual value of the subject property as of the assessment date, January 1, 2007, is vacated and reversed.
2. Taxable value of for the tax year 2007 of the personal property described in Exhibit 9 pages 32 & 33 subject to valuation as personal property and its taxable value is:

Asset #	Description	Taxable Value
28	Lab Equipment	\$42,073
29 33 34 35	Shop Equipment	\$26,053
32	Forklift	\$8,457
65	Trackmobile	\$33,674
71	Signs for Plant	\$1,576
75	Press Set H-Frame	\$1,301
80	VOC Emissions Monitor	\$3,376
82	Skidsteer w/ Sweepster	\$11,812
93	Pivot w/ Pit Pump	\$31,845
94	Pivot w/ Pit Pump	\$31,845
100	Gator JD Tractor	\$5,178
104	Field Communications 375	\$1,666
106	Moisture Analyzer Microwave	\$4,831
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119	Telehandler Forklift w/boom	\$48,410
122	Pallet Racks in Stor Bldg	\$972
125	Tractor JD 4630	\$9,296

Asset #	Description	Taxable Value
126	Mower Outback BC2402H	\$1,179
127	Shredder Rhino SE	\$7,647
132	Lodestar Lift for Centrifuge	\$4,821
136	Dozer Degelman 3400	\$5,122
58	938 Caterpillar Wheel Loader	\$114,404
141	Caterpillar Loader	\$170,990
143	Camera System for Fence	\$30,214
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161	Terminal Server	\$12,690
162	SQL Ser	\$12,690
163	PC Projector for Bd Rm	\$1,958
57	Testing Equip for Grain	\$811
Total		\$699,761

3. This decision, if no appeal is timely filed, shall be certified to the Kearney County Treasurer, and the Kearney County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Cum. Supp. 2006).
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 2007.
7. This order is effective for purposes of appeal on June 25, 2009.

Signed and Sealed. June 25, 2009.

Nancy J. Salmon, Commissioner

Robert W. Hotz, Commissioner

William C. Warnes, 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.

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