

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

VITALIX INC.,	)	
	)	
Appellant,	)	Case No. 07C-024
	)	
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 January 31, 2008 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 excused. Gerard Forget 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 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 denying an application for exemption of the subject property from taxation is unreasonable or arbitrary; and

Whether the subject property is exempt from taxation.

**II.  
FINDINGS OF FACT**

The Commission finds and determines that:

1. The Taxpayer has a sufficient interest in the outcome of the above captioned appeal to maintain the appeal.
2. The parcel of real property to which this appeal pertains ("the Subject Property") is Improvements on leased land building and fixtures Parel # 070168334, Box Butte County, Nebraska.
3. An application for exemption of the subject property from taxation was filed by the Taxpayer.
4. The Assessor recommended disapproval.
5. The Assessor's recommendation was affirmed by the County Board.

6. The Tax Commissioner was served with a Notice in Lieu of Summons and did not exercise the statutory right to intervene.
7. An appeal of the County Board's decision was filed with the Commission.
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 January 31, 2008, 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.
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. *Arcadian Fertilizer, L.P. v. Sarpy County Bd. of Equalization*, 7 Neb.App. 655, 584 N.W.2d 353 (1998).
2. “Notwithstanding Article I, section 16, Article III, section 18, or Article VIII, section 1 or 4, of this Constitution or any other provision of this Constitution to the contrary: (1) 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 except as provided by law; (2) the Legislature by general law may classify and exempt from taxation property owned by and used exclusively for agricultural and horticultural societies and property owned and used exclusively for educational, religious, charitable, or cemetery purposes, when such property is not owned or used for financial gain or profit to either the owner or user....”

*Neb. Const., Art. VIII, § 1.*

3. “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).*
4. “(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 (Supp. 2005).

5. Improvements on leased public lands shall be assessed, together with the value of the lease, to the owner of the improvements. Neb. Rev. Stat. §77-1374 (Supp 2007).

6. 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).
7. 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).
8. The presumption disappears if there is competent evidence to the contrary. *Id.*
9. 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).
10. 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).
11. "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).
12. 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).

13. 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 subject property consists of a warehouse, a fertilizer tank, concrete slab, LG leg, 60', 10 hopper tanks, 1 hopper tank, and overhead tanks. (E2:133 & 134). The warehouse is located on a 20,400 square foot tract leased from the City of Alliance. (E5:350). The warehouse and its relationship to other buildings leased by the Taxpayer from the City of Alliance (“the City”) can be seen on a drawing received as Exhibit 2 at page 138.

The warehouse was built in 2004, and first appears on the tax rolls for the year 2005. (E2:133). Construction of the warehouse was financed with a Community Development Block Grant, an LB 840 grant, and a conventional loan from a bank. (E5:298-306). The Community Development Block Grant funds originated with the State of Nebraska and resulted in a forgivable loan from the City to the Taxpayer of \$160,000. (E5:298). The loan from Community Development Block Grant funds would be forgiven if the Taxpayer created jobs as required in §7.08 of the memorandum of understanding. (E5:299). The LB840 Grant funds are also forgivable. (E5:298). Repayment of the loans was secured by deeds of trust, assignment of rents, security agreements and guaranties. (E5:352-401).

Property of the state and its governmental subdivisions is exempt from taxation to the extent used or being developed for use by the state or governmental subdivision for a public purpose. Neb. Rev. Stat. §77-202(1)(a) & (b) (Cum. Supp. 2006). The Taxpayer asserted that

the land and warehouse are exempt from taxation pursuant to Neb. Rev. Stat. §77-202(1)(a)(i), in a protest to the County Board dated June 7, 2007. (E1). The Taxpayer's protest was denied because the County Board believed the warehouse and fixtures were properly assessed pursuant to Sections 77-103 and 77-1374 of Nebraska Statutes. (E1). Section 77-1374 provides for the assessment of improvements on leased public lands to the owner of the improvements as real property. The Taxpayer's protest and the County Board's determination are both based on a different assumption concerning ownership of the warehouse: If the warehouse is owned by the City of Alliance it could be exempt pursuant to Section 77-202(1)(a)(i) of Nebraska Statutes as claimed by the Taxpayer; If the warehouse is owned by the Taxpayer it is to be assessed pursuant to Section 77-1374 of Nebraska Statutes.

The parties submitted a stipulation reciting that the "parcel of land with the appurtenant structures (buildings 3000, 3001, 3101 and the "Warehouse Addition") is owned in fee simple by the City of Alliance, Nebraska." What is clear from the record before the Commission is that the land on which the warehouse is situated is owned by the City of Alliance. There is no evidence in the record that the land has been assessed to the Taxpayer. If only the land is described as the "Warehouse Addition" for purposes of the stipulation, the stipulation conforms to the evidence. If "Warehouse Addition" also refers to the warehouse constructed in 2004, it is contrary to the evidence. A stipulation of the parties will be respected and enforced so long as the stipulation is not contrary to public policy or good morals. *Mischke v. Mischke*, 253 Neb. 439, 571 N.W.2d 248 (1997). Morals are not at stake in this proceeding, however public policy as expressed in Section 77-1374 of Nebraska Statutes is at stake. The parties cannot, to avoid taxation, stipulate to facts that are contrary to the evidence.



The City leases other buildings it owns to the Taxpayer with a Building and Grounds Lease. (E5:342 -349). The Building and Grounds lease explicitly describes the leased buildings by identifying number. (E5:342-349). An addendum to the Building and Grounds Lease describes the tract on which the warehouse is located and acknowledges that the Taxpayer has placed a building on the tract. (E5:350). Paragraph 8 of the Building and Grounds Lease allows the Taxpayer to make alterations or additions to the premises. (E5:344). Other airport building leases between the City of Alliance and other parties do not contain a similar provision. (E5:62-145).

A deed of trust to the commercial bank granted by the Taxpayer conveys land leased by the City to the Taxpayer as identified in the addendum to the Building and Grounds Lease. (E352-358). The land belonged to the City. The warehouse on that tract could not have been collateral for the bank loan to the Taxpayer if it was owned by the City. A bank officer noted a deficiency in the lease concerning improvements to the land leased from the City to the Taxpayer. (E7:2). It is clear the bank was lending to the Taxpayer and wanted collateral even if it was a building on leased land. The deed of trust to the bank can only pertain to the warehouse.

The Taxpayer granted a deed of trust to the City of Alliance describing the tract leased by the City to the Taxpayer. (E5:363). Only if there was something more than the Taxpayer's leasehold interest in the land would the deed of trust have any effect. It had effect because the Taxpayer owned a warehouse on land leased from the city.

The Taxpayer has included the warehouse building as item 24, in a list of property denominated "Property Tax Listing - Federal Tax Basis." (E11:5). The warehouse was constructed by the Taxpayer on lands leased from the City of Alliance with the proceeds of two

loans from the City and a commercial bank loan. The City of Alliance lent money secured by a deed of trust to the Taxpayer believing that the Taxpayer was the owner of the warehouse. The commercial bank lent money to the Taxpayer secured by a deed of trust believing the Taxpayer owned the warehouse and could pledge it as collateral. The evidence is clear that the Taxpayer was to construct the warehouse, own it, and pay for it with cash or performance of loan forgiveness standards. For the year 2007, the Taxpayer included the warehouse in a listing of depreciable assets. There is no evidence that the Taxpayer has conveyed its interest in the warehouse to the City or anyone else.

A stipulation that is contrary to the evidence and with the object of avoidance of taxation and the mandate of Section 77-1374 of Nebraska Statutes is not binding on the Commission. See, *Miller v. Commercial Contractors Equipment*, 14 Neb.App. 606, 711 N.W.2d 893 (2006). The warehouse building was owned by the Taxpayer as of the assessment date and was subject to taxation pursuant to Section 77-1374 of Nebraska Statutes.

Improvements on leased public lands are subject to taxation pursuant to Section 77-1374 of Nebraska Statutes unless exempt. Property that is not owned by the State or one of its political subdivisions is exempt from taxation if owned by a charitable, religious, cemetery, or educational organization and used exclusively for charitable religious, cemetery, or educational purposes and other restrictions. Neb. Rev. Stat. §77-202 (d)(Cum. Supp 2008). To obtain the benefits of exemption from taxation an organization or society seeking a tax exemption provided for in subdivisions (1)(c) and (d) of section 77-202 for any real or tangible personal property, except cemetery purposes, shall apply for exemption to the county assessor on or before December 31 of the year proceeding the year for which the exemption is sought on forms

prescribed by the Tax Commissioner. Neb. Rev. Stat. §77-202.01(1) (Supp. 2007). An application may be filed as late as June 30 if the December 31 deadline is waived. Neb. Rev. Stat. §77-202.01(2) (Supp. 2007). There is no evidence that an application for exemption pertaining to the warehouse building was ever filed. The first claim of exemption shown in the record is the Taxpayer's protest filed June 24, 2008. (E4). The Taxpayer's protest was filed on a form 422. The Tax Commissioner has promulgated form 451 to be used if an application for exemption from taxation is sought. A waiver of the December 31 filing deadline was not sought nor did the County Board make a finding of good cause excusing a filing after December 31 as required by law. Neb. Rev. Stat. §77-202(2) (Supp 2007).

Property of the state or one of its governmental subdivisions is exempt from taxation to the extent used or being developed by the state or a governmental subdivision for a public purpose. Neb. Rev. Stat. §77-202(1) (Supp. 2007). The Commission finds that the warehouse building is owned by the Taxpayer. The fact that the warehouse building was constructed as part of an economic development initiative, arguably a public purpose, does not qualify it for exemption pursuant to Section 77-202(1) because it was owned by a private entity as of January 1, 2007.

The County Board did not have jurisdiction to consider the Taxpayer's exemption claim. Further consideration of the Taxpayer's exemption claim is unnecessary.

## **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 that the subject property is taxable as of the assessment date January 1, 2007, is affirmed.
2. 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).
3. Any request for relief, by any party, which is not specifically provided for by this order is denied.
4. Each party is to bear its own costs in this proceeding.
5. This decision shall only be applicable to tax year 2007.

6. This order is effective for purposes of appeal on October 1, 2009.

Signed and Sealed. October 1, 2009.

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Nancy J. Salmon, Commissioner

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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.

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Wm R. Wickersham, Commissioner