

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

WHEATLAND INDUSTRIES, LLC,)	
)	
Appellant,)	Case No. 08C 016
)	
v.)	DECISION AND ORDER
)	AFFIRMING THE DECISION OF
PERKINS COUNTY BOARD OF)	THE PERKINS COUNTY BOARD OF
EQUALIZATION,)	EQUALIZATION
)	
Appellee.)	

The above-captioned case was called for a hearing on the merits of an appeal by Wheatland Industries, LLC ("the Taxpayer") to the Tax Equalization and Review Commission ("the Commission"). The hearing was held in the Hampton Inn, 200 Platte Oasis Parkway, North Platte, Nebraska, on July 30, 2009, pursuant to an Order for Hearing and Notice of Hearing issued May 29, 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.

Ronald L. Paschall, Comptroller of Wheatland Industries, LLC, was present at the hearing. George E. Clough appeared as legal counsel for the Taxpayer.

Richard H. Roberts, County Attorney for Perkins County, Nebraska, was present as legal counsel for the Perkins 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 actual value of the subject property as of January 1, 2008, is less than actual value as determined by the County Board. The issues on appeal related to that assertion are:

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

The actual value of the subject property on January 1, 2008.

**II.
FINDINGS OF FACT**

The Commission finds and determines that:

1. The Taxpayer has a sufficient interest in the outcome of the above captioned appeal to maintain the appeal.
2. The parcel of real property to which this appeal pertains ("the Subject Property") is described in the table below.
3. Actual value of the subject property placed on the assessment roll as of January 1, 2008, ("the assessment date") by the Perkins 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: Pt NE¼ (Tx Lots G H J K L M North Addit) Section 9, Township 10, Range 37, Perkins County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	In Total	In Total	In Total
Improvement	In Total	In Total	In Total
Total	\$17,923,476.00	\$14,626,373.00	\$15,578,682.00

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 May 29, 2009, set a hearing of the appeal for July 30, 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:

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Land value	In Total
Improvement value	<u>In Total</u>
Total value	<u>\$15,578,682.00.</u>

III. APPLICABLE LAW

1. Subject matter jurisdiction of the Commission in this appeal is over all questions necessary to determine taxable value. Neb. Rev. Stat. §77-5016(7) (Cum. Supp. 2008).
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 (Supp. 2007).

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 (Supp. 2007).
4. 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).
5. 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).

6. The presumption disappears if there is competent evidence to the contrary. *Id.*
7. 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).
8. 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).
9. "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).
10. 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).
11. 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 in this appeal is an ethanol plant. The dispute between the parties relates to the characterization of 2 day tanks, a denaturant tank, 2 blending tanks, a water cooling

tower, additional concrete for pads as real property, and an allocation of architectural and plant engineering to the contribution to value, made by those items by the County Board. The parties have stipulated to the adjustments which should be made to the County Board's determination of actual value if the day tanks, denaturant tank, blending tanks, water cooling tower, or any of those items are determined to be trade fixtures taxable as tangible personal property.

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., 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. The Property Tax Administrator testified that LB the language defining trade fixtures that was later incorporated into LB 334 conformed to administrative practice in incentive programs for determinations of exempt property and assessment of ethanol plants. The Property Tax Administrator also testified that the language in the bill codified the legal concept of trade fixtures. Transcript of Revenue Committee hearing March 8, 2007 LB 627. The rules and regulations of the Property Tax Administrator in effect at the time of her testimony required consideration of the three part test stated in Northern Natural to determine if an item was a fixture. See 350 Neb. Admin. Code ch 10 §001.01a (01/03/07). Trade fixtures were property of a tenant. See *Bishop Buffets, Inc., v. Westroads, Inc.*, 202 Neb. 171, 274 N.W.2d 530 (1979).

As now defined in statute, 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, all fixed assets other than land and buildings, 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. The first definition, “implements used in an operation or activity”, includes machinery or tools. Machinery has been defined. A tool may be defined as an "implement or object used in performing an operation or carrying on work of any kind... something which serves as a means to an end: an instrument by which something is effected or accomplished." *Webster's Third New International Dictionary*, Merriam-Webster, Inc., 2408 (2002).

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

The day tanks are 155,814 gallon welded steel tanks. (3:6). The tanks receive 200 proof alcohol from an adjacent corn distilling facility. The tanks are specialized with monitoring equipment and an internal vapor control system. The 200 proof alcohol is held at the day tanks for testing. If the alcohol fails testing, corrections may be made through a pumping system. When the alcohol in the day tanks passes inspection it is pumped to the final blending tanks. The final blending tanks are 541,420 gallon welded steel tanks. (E3:6). The final blending tanks are also specialized with monitoring equipment and an internal vapor system. In transit from the day tanks to the final blending tanks, denaturant and anti corrosion chemicals are added to the 200 proof alcohol. The denaturant is stored in a 90,989 gallon welded steel tank. After arrival at the final blending tanks, what is now denatured 200 proof alcohol, ethanol, is again tested and corrected. If the ethanol fails testing, corrections may be made through a pumping system. The tanks do not transmit forces, motion, or energy one to the other in some predetermined manner and to some desired end and cannot be considered machinery. The tanks are clearly part of the physical resources necessary to the operation of an ethanol plant as is the land on which it is situated. Clearly that factor alone is insufficient to determine whether the tanks are equipment. 200 proof alcohol is not processed in the day tanks; it is held for testing, and if it needs correction is removed and returned to the tanks. The 200 proof alcohol is held in the day tanks until it can be transferred to the final blending tanks. Denaturant is added as the 200 proof alcohol is transferred from the day tanks to the final blending tanks. Ethanol, 200 proof alcohol with

denaturant and an anti corrosion additive, is not processed in the final blending tanks. Ethanol is tested and if corrections are needed it is circulated through pumps outside the tanks. After the ethanol passes testing at the final blending tanks it may be transferred for shipping. The final blending tanks have a capacity of 1,082,840 gallons. The day tanks have a capacity of 311,628 gallons. The capacity of the final blending tanks is nearly three times the capacity of the day tanks. Clearly the final blending tanks have a storage function for the finished product.

Apparently the only function of the denaturant tank is storage. The day tanks and final blending tanks also have a storage function. Storage is not a function that comes with the functions of machinery or equipment. The day tanks, denaturant tank, and final blending tanks are not machinery or equipment.

The additional concrete for the fermentation tanks consists of four 5 foot thick concrete pads under fermentation tanks. (E3:6). Serving as a base for a tank is not a function of machinery or equipment. The concrete pads under the fermentation tanks are not machinery or equipment.

A photograph of the cooling tower was received as Exhibit 7 at page 3. The cooling tower cools water that is used to maintain desired temperatures in the process of converting corn to 200 proof alcohol. That is the only evidence before the Commission.

The Taxpayer has not met its burden to show that the decision of the County Board characterizing the day tanks, denaturant tank, blending tanks, cooling tower, or concrete pads as real property was unreasonable or arbitrary. It is unnecessary to consider any reallocation of the architectural and plant engineering expense.

**V.
CONCLUSIONS OF LAW**

1. The Commission has subject matter jurisdiction in this appeal.
2. The Commission has jurisdiction over the parties to this appeal.
3. The Taxpayer has not produced competent evidence that the County Board failed to faithfully perform its official duties and to act on sufficient competent evidence to justify its actions.
4. The Taxpayer has not adduced sufficient, clear and convincing evidence that the decision of the County Board is unreasonable or arbitrary and the decision of the County Board should be affirmed.

**VI.
ORDER**

IT IS ORDERED THAT:

1. The decision of the County Board determining actual value of the subject property as of the assessment date, January 1, 2008, is affirmed.
2. Actual value, for the tax year 2008, of the subject property is:

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Land value	In Total
Improvement value	<u>In Total</u>
Total value	<u>\$15,578,682.00.</u>

3. The County Assessor may make any allocation of the total value stated above necessary to comply with the provisions of section 77-1303 of Nebraska Statutes.

4. This decision, if no appeal is timely filed, shall be certified to the Perkins County Treasurer, and the Perkins County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Cum. Supp. 2008).
5. Any request for relief, by any party, which is not specifically provided for by this order is denied.
6. Each party is to bear its own costs in this proceeding.
7. This decision shall only be applicable to tax year 2008.
8. This order is effective for purposes of appeal on October 22, 2009.

Signed and Sealed. October 22, 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. One Standard of review is 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 decisions 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