

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

DARNALL RANCH, INC.,)	
)	
Appellant,)	Case No. 08P 004
)	
v.)	DECISION AND ORDER
)	REVERSING THE DECISION OF
BANNER COUNTY BOARD OF)	THE BANNER COUNTY BOARD OF
EQUALIZATION,)	EQUALIZATION
)	
Appellee.)	

The above-captioned case was called for a hearing on the merits of an appeal by Darnall Ranch, Inc. ("the Taxpayer") to the Tax Equalization and Review Commission ("the Commission"). The hearing was held in the Scottsbluff Hampton Inn, 301 W Hwy 26, Scottsbluff, Nebraska, on June 8, 2010, pursuant to an Order for Hearing and Notice of Hearing issued March 30, 2010. Commissioner Wickersham, Chairperson of the Commission, was the presiding hearing officer. Commissioner Warnes was absent. Commissioner Wickersham, as Chairperson, designated Commissioners Wickersham, Salmon, and Hotz as a panel of the Commission to hear the appeal. Commissioner Hotz was excused. Commissioner Salmon was present. The appeal was heard by a quorum of a panel of the Commission.

Gary Darnall, President of Darnall Ranch, Inc., was present at the hearing. Robert M. Brenner appeared as legal counsel for the Taxpayer.

James L. Zimmerman, County Attorney for Banner County, Nebraska, was present as legal counsel for the Banner 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 (Reissue 2009). The final decision and order of the Commission in this case is as follows.

**I.
ISSUES**

Whether fencing is taxable tangible personal property or a fixture taxable as real property.

**II.
FINDINGS OF FACT**

The Commission finds and determines that:

1. The Taxpayer has a sufficient interest in the outcome of the above captioned appeal to maintain the appeal.
2. The parcel of personal 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 Banner County Assessor, value as proposed in a timely protest, and actual value as determined by the County Board is shown in the following table:

Case No. 08P 004

Description: Fencing, Banner County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Total	\$11,751.00	\$0	\$11,751

4. A contract for sale and purchase of land was entered into on November 15, 2007, between James K. Myers and Joanne M. Hallick, Co-Trustees of both the Kenneth G. Myers Trust and Margaret L. Meyers Trust as Seller and Darnall Ranch, Inc., as Buyer. (E4:2).
5. The sale and purchase price was allocated between land \$83,840 and fences \$13,160. (E4:2).
6. A Form 521 was submitted with the deed conveying the purchased land to Darnall Ranch, Inc., showing land only and excluding fences from the purchase price. (E5:1).
7. The Form 521 was rejected by the register of deeds and the deed was not recorded. (E6:1).
8. A Form 521 was submitted showing a total sale of \$97,000 allocating \$13,160 to non real property and the balance to real estate at \$83,840. (E9:1).
9. The deed conveying the purchased lands to Darnall Ranch, Inc., was recorded February 7, 2008. (E30:1).
10. Darnall Ranch Inc., filed a Nebraska Personal Property Tax Return on May 1, 2008. (E10).
11. The Nebraska Personal Property Tax Return filed by Darnall Ranch, Inc., on May 1 2008, did not include fences. (E10).
12. The Banner County Assessor filed a Nebraska Personal Property Tax Return for Darnall Ranch, Inc. (E32: 12 & 13).
13. The Nebraska Personal Property Tax Return filed by the Banner County Assessor for Darnall Ranch, Inc., listed fence purchased in 2007 at a cost of \$13,160. (E32:12& 13).

14. On September 23, 2008, the Banner County Assessor gave notice to Darnall Ranch, Inc., of a failure to file a personal property tax return. (E24:1).
15. Darnall Ranch, Inc., protested the actions of the Banner County Assessor on October 10, 2008. (E26:1).
16. The protest was delivered to the Banner County Clerk on October 15, 2008. (E25:2).
17. Notice of hearing the protest was given on October 30, 2008. (E27:1).
18. The protest of Darnall Ranch, Inc., was heard by the Banner County Board of Equalization on November 18, 2008. (E13:2).
19. The protest of Darnall Ranch, Inc., was decided by the Banner County Board of Equalization on December 2, 2008. (E15:2).
20. An appeal of the Banner County Board of Equalization's decision was filed with the Commission on December 31, 2008. (Case File).
21. An Order for Hearing and Notice of Hearing issued on March 30, 2010, set a hearing of the appeal for June 8, 2010, at 10:00 a.m. MDST.
22. 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.
23. The subject property as of the assessment date for the tax year 2008 was not taxable as personal property.

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) (Reissue 2009).

2. Personal property is defined as all property other than real property and franchises. Neb. Rev. Stat. §77-104 (Reissue 2009).
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, and all property used in the generation of electricity using wind as the fuel source, including, but not limited to, that listed in subsection (9) of section 77-202. The term intangible personal property includes all other personal property, including money. Neb. Rev. Stat. §77-105 (Cum. Supp. 2008).
4. Real property is defined as “(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 (Reissue 2009).

5. A presumption exists that the County Board has faithfully performed its duties and has acted on competent evidence. *City of York v. York County Bd. Of Equalization*, 266 Neb. 297, 64 N.W.2d 445 (2003).
6. The presumption in favor of the county board may be classified as a principle of procedure involving the burden of proof, namely, a taxpayer has the burden to prove that action by a board of equalization, fixing or determining valuation of real estate for tax purposes, is unauthorized by or contrary to constitutional or statutory provisions governing taxation. *Gordman Properties Company v. Board of Equalization of Hall County*, 225 Neb. 169, 403 N.W.2d 366 (1987).
7. The presumption disappears if there is competent evidence to the contrary. *Id.*
8. The order, decision, determination, or action appealed from shall be affirmed unless evidence is adduced establishing that the order, decision, determination, or action was unreasonable or arbitrary. Neb. Rev. Stat. §77-5016 (8) (Cum. Supp. 2008).
9. Proof that the order, decision, determination, or action appealed from was unreasonable or arbitrary must be made by clear and convincing evidence. See, e.g., *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb.App. 171, 645 N.W.2d 821 (2002).
10. "Clear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved." *Castellano v. Bitkower*, 216 Neb. 806, 812, 346 N.W.2d 249, 253 (1984).
11. A decision is "arbitrary" when it is made in disregard of the facts and circumstances and without some basis which could lead a reasonable person to the same conclusion. *Phelps Cty. Bd. of Equal. v. Graf*, 258 Neb 810, 606 N.W.2d 736 (2000).

12. A decision is unreasonable only if the evidence presented leaves no room for differences of opinion among reasonable minds. *Pittman v. Sarpy Cty. Bd. of Equal.*, 258 Neb 390, 603 N.W.2d 447 (1999).

IV. ANALYSIS

The subject property is a fence surrounding a parcel of real estate purchased by the Taxpayer in 2007. When the deed transferring the purchased real estate to the Taxpayer was first offered for filing it was accompanied by a Form 521 pursuant to section 76-214 of Nebraska Statutes indicating that the property had been acquired for \$83,840 excluding fencing value. (E5). The register of deed rejected the filing believing that the documentary stamp tax due pursuant to section 76-901 was not properly determined. The deed was reoffered for filing accompanied by a form 521 declaring that part of the purchase price should be allocated to non real property with a value of \$13,160. (E9). The County Assessor on review of the form 521 reasoned that if the purchase included non real property with a value of \$13,160, that the non real property acquired was personal property and should be subject to taxation pursuant to sections 77-1201 through 77-1283. A declaration on a Form 521 used to determine the documentary stamp tax to be paid and other functions, does not, however, determine the character of the transferred property for taxation. Whether property is taxable as real or personal property is governed by the applicable definitions of real and personal property and the decisions of Nebraska's Supreme Court.

As noted above the definition of real property for purposes of taxation included fixtures. Fixtures are those items of property, improvements, that have become a part of real property. Whether an item of property, an improvement, 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 (1/3/07).

The fence is clearly attached to the land. (E40). The fence serves to keep livestock on or off the area it encloses and therefore serves a function that must be present for use of the land. The Taxpayer's President testified that the Taxpayer does not intend to remove the fence. The intent of the Taxpayer to make the items a permanent part of the real estate may be inferred from the nature of the article affixed, the relation and situation of the party making the annexation, and the purpose or use for which the annexation has been made. *Northern Natural Gas Co. v. State Bd. of Equalization and Assessment*, 232 Neb. 806, 443 N.W.2d 249 (1989). The fence is permanently affixed to the land and is a fixture.

However, not all fixtures are real property for purposes of taxation. The statutory definition of real property includes fixtures but excepts "trade fixtures." Neb. Rev. Stat. §77-103 (Reissue 2003). "Trade fixtures" are "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.” Neb. Rev. Stat. §77-105 (Reissue 2009). “Trade fixtures” are personal property. Neb. Rev. Stat. §77-105 (Reissue 2009). 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. 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 pertains 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., 2002, 1354. 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 the language defining trade fixtures in LB 627 that was later incorporated into LB 334 conformed

to administrative practice for incentive program exempt property determinations, and assessment of ethanol plants. The Property Tax Administrator also testified that the language in the bill also 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 (Reissue 2009). The second definition of equipment, 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., 200, 2408.

With the foregoing definitions in mind the Commission can now turn to a consideration of the first factor. Can the fence be considered machinery or equipment? The fence has no

moving parts and is not used in manufacturing or carrying on of work. The fence is not machinery or equipment and cannot be a trade fixture taxable as personal property.

The fence is a fixture and not a trade fixture, the County Board's determination must be reversed.

**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 taxable value of the subject property as of the assessment date, January 1, 2008, is vacated and reversed.
2. The subject property was not taxable as taxable tangible personal property for the tax year 2008.

3. This decision, if no appeal is timely filed, shall be certified to the Banner County Treasurer, and the Banner County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Reissue 2009).
4. Any request for relief, by any party, which is not specifically provided for by this order is denied.
5. The Taxpayer's motion for an award of costs 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 July 28, 2010.

Nancy J. Salmon, Commissioner

SEAL

APPEALS FROM DECISIONS OF THE COMMISSION MUST SATISFY THE REQUIREMENTS OF NEB. REV. STAT. §77-5019 (REISSUE 2009), OTHER PROVISIONS OF NEBRASKA STATUTES, AND COURT RULES.

I concur in the result.

The analysis above considers two standards of review for review. One standard of review is stated as a presumption found in case law, the other is found as stated in statute. I do not believe consideration of two standards of review are required by statute or case law.

The Commission is an administrative agency of state government. See *Creighton St. Joseph Regional Hospital v. Nebraska Tax Equalization and Review Commission*, 260 Neb. 905, 620 N.W.2d 90 (2000). As an administrative agency of state government the Commission has only the powers and authority granted to it by statute. *Id.* The Commission is authorized by

statute to review appeals from decisions of a county board of equalization, the Tax Commissioner, and the Department of Motor Vehicles. Neb. Rev. Stat. §77-5007 (Supp. 2007). In general, the Commission may only grant relief on appeal if it is shown that the order, decision, determination, or action appealed from was unreasonable or arbitrary. Neb. Rev. Stat. §77-5016(8) (Cum. Supp. 2008).

The Commission is authorized to review decision of a county board of equalization determining taxable values. Neb. Rev. Stat. §77-5007 (Supp. 2007). Review of county board of equalization decisions is not new in Nebraska law. As early as 1903 Nebraska Statutes provided for review of County Board assessment decisions by the district courts. Laws 1903, c. 73 §124. The statute providing for review did not state a standard for that review. *Id.* A standard of review stated as a presumption was adopted by Nebraska's Supreme Court. See *State v. Savage*, 65 Neb. 714, 91 N.W. 716 (1902) (citing *Dixon Co. v. Halstead*, 23 Neb. 697, 37 N.W. 621 (1888) and *State v. County Board of Dodge Co.* 20 Neb. 595, 31 N.W. 117 (1887)). The presumption was that the County Board had faithfully performed its official duties and had acted upon sufficient competent evidence to justify its actions. See *id.* In 1959, the legislature provided a statutory standard for review by the district courts of county board of equalization, assessment decisions. 1959 Neb Laws, LB 55, §3. The statutory standard of review required the District Court to affirm the decision of the county board of equalization unless the decision was arbitrary or unreasonable or the value as established was too low. *Id.* The statutory standard of review was codified in section 77-1511 of the Nebraska Statutes. Neb. Rev. Stat. §77-1511 (Cum. Supp. 1959). After adoption of the statutory standard of review Nebraska Courts have held that the provisions of section 77-5011 of the Nebraska Statutes created a presumption that

the County Board has faithfully performed its official duties and has acted upon sufficient competent evidence to justify its actions. See, e.g., *Ideal Basic Indus. V. Nuckolls Cty. Bd. Of Equal.*, 231 Neb. 653, 437 N.W.2d 501 (1989). The presumption stated by the Court was the presumption that had been found before the statute was enacted.

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

The Tax Equalization and Review Commission was created in 1995. 1995 Neb. Laws, LB 490 §153. Section 77-1511 of the Nebraska Statutes was made applicable to review of county board of equalization assessment decisions by the Commission. *Id.* In 2001 section 77-1511 of Nebraska Statutes was repealed. 2001 Neb. Laws, LB 465, §12. After repeal of section 77-1511 the standard for review to be applied by the Commission in most appeals was stated in section 77-5016 of the Nebraska Statutes. Section 77-5016(8) requires a finding that the decision being reviewed was unreasonable or arbitrary. *Brenner v. Banner County Board of Equalization*,

276 Neb. 275, 753 N.W.2d 802 (2008). The Supreme Court has stated that the presumption which arose from section 77-1511 is applicable to the decisions of the Commission. *Garvey Elevators, Inc. V. Adams County Bd. of Equalization*, 261 Neb. 130, 621 N.W.2d 518 (2001).

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

defined, may however overcome the presumption that the county board of equalization faithfully discharged its duties and acted on sufficient competent evidence. In any event the statutory standard has been met and relief may be granted. Both standards of review are met in the fourth possibility and relief may be granted.

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

Wm R. Wickersham, Commissioner