

TO: MEMBERS OF THE COMMITTEE ON REVENUE

FROM: GEORGE KILPATRICK, COMMITTEE COUNSEL

RE: LR 114 (JANSSEN) - BURDEN OF PROOF AND STANDARD OF REVIEW FOR APPEALS TO TERC

DATE: NOVEMBER 13, 2007

**Background for LR 114** In the 2007 Legislative Session, two bills were introduced to change the burden of proof with regard to county board of equalization cases appealed to the Tax Equalization and Review Commission (LBs 294 & 332). Representatives of taxpayers, especially large, commercial taxpayers, expressed frustration with the current standard of review. That standard requires appellants to prove that the decision of the county board was "unreasonable or arbitrary." In many cases there is no record kept of the county board proceedings, no opinion stating the reasons for the decision, and a limited time to present evidence. This makes proving that the county board was arbitrary or unreasonable more difficult.

Unsatisfied that the solution to the problem was contained in either proposed bill, the Revenue Committee killed both bills and sought introduction of LR 114. LR 114 contemplates a more thorough analysis of the protest and appeal process. It seeks to examine the county board of equalization process to see if improvements there may mitigate any perceived unfairness of the "unreasonable or arbitrary" standard. On the other hand, if the standard of review were to be lowered for appeals, how could the TERC handle the volume of cases to be decided at that level?

Three specific questions are mentioned in LR 114 itself: (1) what should the county process consist of? (2) should there be a record maintained of the county proceedings? and (3) given the answers to (1) & (2), what should the local level of appeal provide by way of training, procedure, and transcription to assure a fair process? In the alternative, should the TERC be given more resources to assure a fair original process?

**Problem, what problem?** The Revenue Committee, in introducing LR 114, sought to define a different problem than was presented by LBs 294 and 332. While last session's bills defined the problem as "*The standard of review for the TERC in reviewing appeals from the county board of equalization is too high,*" LR 114 defines the problem as "*At least some taxpayers do not receive a fair review of their assessment at any stage in the process.*"

If taxpayers do not always receive a fair review, at least three factors could help explain why. First, there is so little time to hear protests. The deadline for protests is June 30 and all protests must be resolved by July 25<sup>th</sup>. Larger counties may act to extend the date to August 10<sup>th</sup>, but that still means that there are only forty days between the protest deadline and the deadline for resolving these protests. County board members work part-time and have other business to attend to during that time.

Second is expertise. County board members are not required to be trained in appraisal and no special training is provided. Third is politics. Elected county board members may be more concerned about the needs of individual voters than industrial or commercial taxpayers. Even if this is not true, the appearance may be inescapable. When inventing a different system, attention must be paid to addressing these factors.

**Possibilities** LR 114 research begins with a review of a survey done by the International Association of Assessment Officials (IAAO) in 2000 covering administrative practices in all 50 states and the District of Columbia. In this survey, employees of IAAO interviewed state officials in each state on administrative practices for property tax, including who reviews the assessment made by the assessor and appeal procedures thereafter. From these results, states can be categorized into groups and prevailing practices determined. In summary:

In ten states, including Nebraska, South Dakota, Colorado and Missouri, the county board is the original place for resolving disputes over value. In nearly all of those instances, an appeal of the county decision can be made to a state board (like TERC) before judicial review. In Missouri, the local board is not only the county board, but includes the assessor and surveyor. Decisions are appealed to district court in Missouri.

In thirty five states, a local board, separate from the county board, hears protests in the first instance. Unlike those states where the county board hears protests, in eighteen of these states plus the District of Columbia, any appeal is to district court. This group includes Wyoming. In fifteen states, including Iowa, the appeal is to a state board before judicial review. South Carolina uses a third approach where an Administrative Law Judge hears appeals from decisions of the local assessment board.

In four states, including Kansas, protests are heard by a state board first, and then appealed to district court.

Two states did not respond to the survey.

Stated another way, Nebraska is in the minority by requiring the county board to hear protests of valuation. Two-thirds of the states have a separate, local appeals panel. Here is where the consensus stops.

The IAAO survey asked what the qualifications for the local appeals board were, but not all states responded in detail. With regard to those that did respond, appointment and qualifications run the gamut. For example:

In Arkansas, members of the county board of equalization must all be property owners;  
In California, they must have five years of professional experience (professional experience not defined);

In Florida, the board consists of three county commissioners and two school board members;

In Georgia, the members can be anyone, but must have 40 hours of state training and 8 hours of annual, continuing education;

In Iowa, the local board consists of one farmer, one real estate broker, and one registered architect;

In Ohio, it is the county auditor, county treasurer, and president of the county commissioners;

In Oklahoma, it is one county commissioner and two non office holding county residents;

In Texas, they must be county residents with state training;

In Virginia, the local board consists of three to five landowners, selected by the circuit court and trained by State Department of Taxation; and finally

In Wyoming, no particular qualification or training is required.

**If Nebraska were to move to the mainstream**, that would mean that we would not eliminate local jurisdiction of assessment protests in the first instance. We would, however, replace the county board as the body to make this decision. Assuming that the goal of creating a separate appeals panel is to insulate decisions from politics, this separate "county board of equalization" could be qualified professionally, such as licensed appraisers, or could be ordinary citizens trained by the state in appraisal and procedural due process. Such a change would help resolve the factors regarding politics and the expertise of the reviewing body.

Depending on who is selected for the county board of equalization, this change could also alleviate the time factor. For example, if the members were still only available part time, there would still be little time to resolve protests. If they were employed full time by the county to hear protests throughout the seven-week period, the time factor would also be addressed. If this approach were followed, a case could be made that the decisions of the new county boards of equalization deserve deference and the need for changes in the burden of proof before TERC would be lessened.

**What about the cost?** County board members are not separately compensated for serving on the county board of equalization. Anything that would result in a new local appeal board will increase the cost of hearing protests. Even though the new county board of equalization members would serve only for part of the year, they would have to be compensated and any state organized training would increase the cost and time commitment. Costs could perhaps be reduced for small population counties if the same panel for the county board of equalization served in more than one county, sort of like a circuit court.

Notwithstanding some of these efficiency ideas, such a change will create additional cost to be borne by the counties, individually or in groups, or perhaps shared by the state. The following page shows estimates by the Legislative Fiscal Office of the cost of three possible reforms. The possible costs range from \$600,000 if ten regional boards were created and trained, making full use of referees, to \$1 million if 93 separate county boards of equalization were created and trained.

**Nebraska could move away from the majority** and eliminate county boards of equalization altogether. If all protests were filed with the TERC, it would have to be larger and meet in panels throughout most of the year. Currently, the TERC hears about 1,000 valuation appeals each year. The number of original protests filed with the county board is at least ten times that amount. The following page shows that estimates of the cost to state taxpayers of tripling the TERC would be about \$1 million annually. Extensive use of referees could add an additional \$450,000 in costs. This approach would address all three factors mentioned above, but would mean that local governments would be setting budgets based on valuations determined before most protests are resolved.

## Cost Options for LR114

### 1) County Boards

Educational Expenses:	\$549/class * 3 classes = \$1,647/person \$1,647 * 3 person board * 93 boards ~ \$460,000	\$460,000 (Local Expense)
Hearing Expenses: (\$21 = average of appraiser 1 and 2 wage)	18,000 cases * .5hrs/case = 9,000 case hours 9,000 * 3 person board * \$21/hr ~ \$570,000	\$570,000 (Local Expense)
		<u><u>\$1,030,000</u></u>

### 2) Referees with Regional Boards

Referee Expense:	18,000 cases * .25hrs/case = 4,500 case hours 4,500 case hours * \$100/hr appraiser ~ \$450,000	\$450,000 (Local Expense)
Educational Expenses:	\$549/class * 3 classes = \$1,647/person \$1,647 * 3 person board * 10 boards ~ \$50,000	\$50,000 (Local Expense)
Hearing Expenses: (assuming 80% referee success)	3,600 cases * .5hrs/case = 1,800 case hours 1,800 * 3 person board * \$21/hr ~ \$115,000	\$115,000 (Local Expense)
	*This option would likely need to include an amount for travel expenses as well - this amount is unknown	<u><u>\$615,000</u></u>

### 3) Referees with appeals to TERC

Referee Expense:	18,000 cases * .25hrs/case = 4,500 case hours 4,500 case hours * \$100/hr appraiser ~ \$450,000	\$450,000 (Local Expense)
TERC Expense (assuming 80% referee success)	Triple the number of TERC commissioners and other variable costs associated with the agency ~ \$1,000,000 (cost would be in addition to current appropriation)	\$1,000,000 (State Expense)
		<u><u>\$1,450,000</u></u>

**On October 9<sup>th</sup> and November 1<sup>st</sup>**, a group of persons interested in LR 114 met in Senator Janssen's office to discuss these possibilities. These persons included two representatives from the Department of Revenue, four representing taxpayers involved in valuation disputes, three representing counties, and one representing the Nebraska Tax Research Council.

At these meetings, another possible approach was developed which calls for the county assessor to hear disputes first while changing the property tax calendar to allow more time for resolution of protests. This approach would generate little, if any, additional cost. Essentially, the protest and appeal procedure would be changed as follows:

*March 15<sup>th</sup>* – County assessors would complete the initial assessment of all real property in the county, complete the abstract, and forward it to the Tax Equalization and Review Commission for purposes of intercounty equalization. Currently, this date is March 19<sup>th</sup>, so this would accelerate this deadline by four days.

*March 31<sup>st</sup>* – The Property Assessment and Taxation Division would provide its reports and opinions of the level of value. Currently, this date is April 10, so ten days are provided by this change.

*April 1<sup>st</sup> - April 25<sup>th</sup>* – Tax Equalization and Review Commission performs the intercounty equalization process. On April 25<sup>th</sup>, the TERC would issue its orders to counties, if any. Currently, this takes place between April 7<sup>th</sup> and May 15<sup>th</sup> so this proposal would begin the process one week earlier and shorten it by two weeks.

*May 1<sup>st</sup>* – The counties recertify the abstract and post all values on a website so they would be available to any taxpayer.

*May 10<sup>th</sup>* – Notice of any change is mailed to the taxpayer. Currently this date is June 1 so this change opens up three additional weeks for the local review process to occur.

*May 31<sup>st</sup>* - The new deadline for filing for a formal review by the county assessor. This is one month earlier than the protest deadline currently. It would also be the same date as the personal property review period. The group decided to call this process a “formal review” by the county assessor. By inventing a new term, the county board of equalization would still hear “protests” and the TERC would still hear “appeals”.

*May 1<sup>st</sup> - August 10<sup>th</sup>* – Review period. The county assessor would have the opportunity to review the assessment and correct mistakes instead of the county board of equalization. The only changes which could be made during this period would be pursuant to the individual review process.

Currently, this period runs only from June 1 to July 25. July 26<sup>th</sup> through August 10<sup>th</sup> is a period of time for counties to petition the TERC for a class or subclass adjustment after the protest hearings. This process would be eliminated under this proposal because the group felt that this two week period would be better spent hearing disputes than county petitions. Altogether, the first review period would be greatly expanded, from about 7 weeks to 13. Also eliminated would be provisions allowing certain counties to extend the period to August 10 by foregoing county petitions. All counties would have a review period lasting until August 10.

Also, the group agreed the suggestion that protests be heard by the county assessor rather than the county board. The county assessor already has assessment training and

is employed full-time doing assessment. Changing this authority will increase the level of expertise of the persons hearing disputes and the amount of time each day to schedule hearings. It may or may not address the political factor. According to the IAAO survey, 27 states reported that the first level of review is with the assessor, either informally or formally, including Colorado, Kansas, Missouri, and Wyoming. This occurs regardless of the level of review that is next; local board, county board, or a state agency.

*August 20<sup>th</sup>* – The values are certified to local governments for purposes of budget and levy setting. This is the current date for valuation certification. Currently, the county board must complete its work by July 25<sup>th</sup> (unless it votes to extend the period to August 10) to allow the county petition process and certify final values for local governments by August 20. Under this proposal, it is the county assessor's decisions that result in the values used by local governments when setting budgets.

*September 10<sup>th</sup>* - As is currently true with decisions of the county board of equalization, this would be the deadline for appealing the decision of the assessor. Unlike the current process, an appeal could be filed with *either* the county board of equalization or directly with the TERC. If filed with the county, as most will be, the filing would be called a protest. If filed directly with the TERC, it would be an appeal. Filing with the county board would still be free to the taxpayer and the county board decision could still be appealed to the TERC. Filing directly with the TERC would save a step in the process, but would require the filing fee and risk the possible taxing of costs.

Currently, county assessors are empowered to appeal decisions of the county board of equalization to the TERC. The group discussed this and decided to recommend allowing the reverse. County boards would be authorized to appeal decisions of the county assessor to the TERC. The deadline would also be September 10<sup>th</sup>.

*December 31<sup>st</sup>* – Deadline for the county boards of equalization to decide protests. Appeals of these decisions must be filed within 45 days of the decision by the county board, so the appeal deadline would depend on how quickly the county board resolves the particular issue.

**Returning to where we started** Finally, many members of this group still prefer to see a lower standard of review and burden of proof for those cases that reach the TERC, regardless of the pathway chosen. What these representatives want is merely the burden to prove a different value by the greater weight of the evidence. On the other hand, there was concern expressed that granting no deference to the county decisions would stimulate more appeals than TERC could handle within its current number of commissioners and budget. A dramatic increase in appeals could ultimately result in increased costs to the state if TERC were expanded or forced to use more mediators or special masters.

A possible compromise might be to require a slightly higher standard of *clear and convincing evidence* to prove that the decision of the assessor or county board was unsupported, while requiring only a greater weight of the evidence to prove a different, correct value. Such a standard of review and burden of proof could be as follows:

"In all appeals, except those arising under section 77-1606, the commission may dismiss an appeal or cross appeal if the appellant presents no evidence to show that the order, decision, determination, or action appealed from is without sufficient basis. The order, decision, determination, or action appealed from shall be affirmed unless clear and convincing evidence establishes that the order, decision, determination, or action was without sufficient basis and, in the case of an appeal of the value of the property, the greater weight of the evidence establishes a different taxable value."

**On November 13<sup>th</sup>** the Revenue Committee met and discussed the issues posed by LR 114 and earlier versions of this report. The Committee subsequently expanded the study even more by discussing at length the problems with the protest process in Douglas County this year. There was general agreement that it is impossible for any county board to hear and resolve 10,700 protests in a thoughtful manner. There were doubts expressed that even with the expanded protest period proposed by the working group, it might be impossible to grant this volume of protests a meaningful hearing even if the county assessor spent every minute of every day reviewing these protests.

**First**, the Committee discussed the possibility of dividing protests into a sort of small claims division versus larger disputes. Most valuation or equalization protests for homes would be small disputes, as would some of the agricultural land and commercial properties. Disputes over large industrial properties or shopping malls would not. Dollars of assessed value or dispute amounts thresholds could be set uniformly or separately for all three major classes of real estate. The thresholds should be set so that the overwhelming majority of protest would fall in the small category.

**Second**, the process for resolving all protests, both small and large, would be switched to a state agency. It could be part of Revenue, the Tax Equalization and Review Commission, or perhaps a separate body. This service could be contracted since the work would be highly seasonal.

**Third**, the forms for filing a protest would require far more information. If it were a valuation case, the protester would have to find at least three sales of comparable properties that demonstrate that the protester's property is overvalued. There would also be a blank for the taxpayer to indicate that something about the description is incorrect, justifying a lower value. Currently all that is required is a statement of what the taxpayer feels the property should be assessed and that requirement would remain.

If the protest were an equalization case, the taxpayer would have to show three nearby comparable properties that are assessed at a lower ratio to actual value. Exemption, greenbelt, homestead exemption and other types of cases would each have a separate form requiring the appropriate information or, as an alternative, not be eligible for small dispute resolution.

**Fourth**, all filings would be done electronically, either from a home computer or from a kiosk available in the county assessor's office. If the screen were filled out completely and the protest finished, the taxpayer would hit send and his or her information would be immediately available to both the county assessor and the state reviewing entity. These protest form requirements would be the same for both the large and small disputes. If the required information is not correctly and completely filled in by the protester by the

protest deadline, there would be no protest. The Committee discussed the need for volunteers or county personnel to help with the filing at the local offices.

For both small and large protests, the county assessor would also file his or her response electronically posting it for both the protestor and the state reviewing agency to see. The assessor could, of course, agree with the protestor in whole or in part, resulting in a settlement and ending the protest at that point.

Small protests would be resolved based on the filings alone without a hearing. A state employee would view the protest, comparables, the response, and whatever else is filed electronically and make a decision on the record alone. The decision could be appealed to TERC and the TERC decision would also be based on the record.

Large protests would be resolved after a hearing. The protestor would pay a filing fee of \$100 to \$200 at the time of the hearing to help mitigate the cost to the state of staffing the reviewing agency. Live testimony and experts would be allowed. Again the decision could be appealed to the TERC on the record.

In addition to the filing fee, the state agency could be financed by diverting part of the documentary stamp tax to the purpose or increasing the rate of tax. Currently, the documentary stamp tax rate is \$2.25 per one thousand dollars. Fifty cents is retained by the county, \$1.20 is for the Affordable Housing Trust Fund, \$0.25 is for the homeless Shelter Assistance Fund, and \$0.30 to the Behavioral Health Services Fund.

**Concluding thoughts** It should be kept in mind that these changes are divisible to a great extent. In other words, the Committee could choose to expand the protest period and retain the county board of equalization as the body that hears the protests. It could retain the county board as the reviewing body for some protests, but not others. Also, changes in the standard of review/burden of proof could be adopted or rejected independent of any of the other changes proposed.