

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Cheema Investments, LLC,
Appellant,

v.

Dawson County Board of Equalization,
Appellee.

Case No: 18C 0021

Decision and Order
Reversing the Determination of the
Dawson County Board of Equalization

For the Appellant:
Kuldip Singh, Member
Pro Se

For the Appellee:
Kurt McBride,
Deputy Dawson County Attorney

This appeal was heard before Commissioners Robert W. Hotz and James D. Kuhn.

I. THE SUBJECT PROPERTY

The Subject Property is a commercial parcel located in Dawson County improved with a 2,733 square foot convenience store. The legal description and property record card for the Subject Property are found at Exhibit 2:17-2:31.

II. PROCEDURAL HISTORY

The Dawson County Assessor determined that the assessed value of the Subject Property was \$385,300 for tax year 2018.¹ Cheema Investments, LLC (the Taxpayer) protested the assessment to the Dawson County Board of Equalization (the County Board) and requested an assessed valuation of \$125,000.² The County Board determined that the taxable value of the Subject Property for tax year 2018 was \$385,300.³

The Taxpayer appealed the decision of the County Board to the Tax Equalization and Review Commission (the Commission). The Commission issued an Order for Hearing and Notice of Hearing scheduling a hearing for July 22, 2019, but subsequently continued the hearing to September 10, 2019, without extending the deadlines for the parties to exchange exhibits

¹ Exhibit 1. The total of the land and building components listed on the decision is \$385,300, but the total, as listed by the Taxpayer on the protest form, is \$352,681. However, on an incomplete protest form, found at Exhibit 2:20, the Taxpayer listed the total as \$385,300, and the County Assessor's Annual Assessment Summary also indicates an assessment for tax year 2018 of \$385,300. Exhibit 2:17.

² Exhibit 1.

³ *Id.*

established in the Order for Hearing and Notice of Hearing.⁴ The Commission held a hearing on September 10, 2019, with Commissioner Hotz presiding. Prior to the hearing, the parties exchanged exhibits and submitted a Pre-Hearing Conference Report, as ordered by the Commission. Exhibit 1 was admitted without objection. The parties stipulated to the admission of Exhibit 2. Exhibits 3 through 5 were marked, but these exhibits were not provided to the County Board by the deadline established in the Commission’s Order for Hearing and they were not received as evidence.

III. STANDARD OF REVIEW

The Commission’s review of a determination by a county board of equalization is de novo.⁵ When the Commission considers an appeal of a decision of a county board of equalization, a presumption exists that the board has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action.⁶

That presumption remains until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence adduced on appeal to the contrary. From that point forward, the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon all the evidence presented. The burden of showing such valuation to be unreasonable rests upon the taxpayer on appeal from the action of the board.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.⁸ Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.⁹

The Taxpayer must introduce competent evidence of the actual value of the Subject Property in order to successfully claim that the Subject Property is overvalued.¹⁰ The County Board need

⁴ See case file.

⁵ Neb. Rev. Stat. § 77-5016(8) (Reissue 2018), *Brenner v. Banner County Bd. Of Equal.*, 276 Neb. 275, 286, 753 N.W.2d 802, 813 (2008). “When an appeal is conducted as a ‘trial de novo,’ as opposed to a ‘trial de novo on the record,’ it means literally a new hearing and not merely new findings of fact based upon a previous record. A trial de novo is conducted as though the earlier trial had not been held in the first place, and evidence is taken anew as such evidence is available at the time of the trial on appeal.” *Koch v. Cedar County Freeholder Bd.*, 276 Neb. 1009, 1019 (2009).

⁶ *Brenner* at 283, 811 (Citations omitted).

⁷ *Id.*

⁸ Neb. Rev. Stat. § 77-5016(9) (Reissue 2018).

⁹ *Omaha Country Club v. Douglas County Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

¹⁰ Cf. *Josten-Wilbert Vault Co. v. Bd. of Equal. for Buffalo County*, 179 Neb. 415, 138 N.W.2d 641 (1965) (determination of actual value); *Lincoln Tel. and Tel. Co. v. County Bd. Of Equal. of York County*, 209 Neb. 465, 308 N.W.2d 515 (1981) (determination of equalized taxable value).

not put on any evidence to support its valuation of the property at issue unless the Taxpayer establishes the County Board's valuation was unreasonable or arbitrary.¹¹

In an appeal, the Commission may determine any question raised in the proceeding upon which an order, decision, determination, or action appealed from is based. The Commission may consider all questions necessary to determine taxable value of property as it hears an appeal or cross appeal.¹² The Commission may also take notice of judicially cognizable facts and general, technical, or scientific facts within its specialized knowledge, and it may utilize its experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to it.¹³ The Commission's Decision and Order shall include findings of fact and conclusions of law.¹⁴

IV. APPLICABLE LAW

Under Nebraska law,

Actual value is the most probable price expressed in terms of money that a property will bring if exposed for sale in the open market, or in an arm's length transaction, between a willing buyer and a willing seller, both of whom are knowledgeable concerning all the uses to which the real property is adapted and for which the real property is capable of being used. In analyzing the uses and restrictions applicable to real property the analysis shall include a full description of the physical characteristics of the real property and an identification of the property rights valued.¹⁵

Actual value may be determined using professionally accepted mass appraisal methods, including, but not limited to, the (1) sales comparison approach using the guidelines in Neb. Rev. Stat. § 77-1371, (2) income approach, and (3) cost approach.¹⁶ Actual value, market value, and fair market value mean exactly the same thing.¹⁷ Taxable value is the percentage of actual value subject to taxation as directed by Neb. Rev. Stat. § 77-201 and has the same meaning as assessed value.¹⁸ All real property in Nebraska subject to taxation shall be assessed as of January 1.¹⁹ All

¹¹ *Bottorf v. Clay County Bd. of Equal.*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).

¹² Neb. Rev. Stat. § 77-5016(8) (Reissue 2018).

¹³ Neb. Rev. Stat. § 77-5016(6) (Reissue 2018).

¹⁴ Neb. Rev. Stat. § 77-5018(1) (Reissue 2018).

¹⁵ Neb. Rev. Stat. § 77-112 (Reissue 2018).

¹⁶ *Id.*

¹⁷ *Omaha Country Club* at 180, 829 (2002).

¹⁸ Neb. Rev. Stat. § 77-131 (Reissue 2018).

¹⁹ Neb. Rev. Stat. § 77-1301(1) (Reissue 2018).

taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.²⁰

V. FINDINGS OF FACT

Kuldip Singh, a member of the Taxpayer, Cheema Investments LLC, testified on its behalf. Singh testified that the correct square footage of the Subject Property is 2,733 square feet. The Taxpayer bought the Subject Property from Bosselman Pump and Pantry (Bosselman) on January 3, 2017, for \$225,000. According to Singh, the parties to the sale broke this price into components of \$125,000 for real property and \$100,000 for personal property, which included shelving, coolers, cash registers, a canopy, and four underground storage tanks (USTs) used to store gasoline for consumer purchases. The sale was negotiated by attorneys. The parties to the sale, Bosselman and the Taxpayer, each owned multiple convenience stores; the Taxpayer owned 22 convenience stores in Nebraska.

In both 2018 and 2019, the Taxpayer reported the personal property, including “fuel pumps,” on the personal property schedules it submitted to the County Assessor.²¹ Singh, who completed and signed the forms on behalf of the Taxpayer, testified that he was using the word “pumps” to refer to the USTs because the pump and the tank are part of the same unit. The 2018 personal property return, to which the schedule including “fuel pumps” was attached, was signed by John Phillip Moore, the Dawson County Assessor.²²

The County Board did not call any witnesses in support of its decision, but it offered exhibits. The exhibits include a copy of the County Assessor’s Property Record File (PRF) for the Subject Property,²³ which includes the assessment history,²⁴ a commercial property record detailing construction information and building components,²⁵ a sketch of the dimensions of the Subject Property,²⁶ photographs of the Subject Property,²⁷ cost approach worksheets finding a “total appraised value” of \$390,415,²⁸ and a second set of cost approach worksheets finding a “total

²⁰ Neb. Rev. Stat. § 77-201(1) (Reissue 2018).

²¹ Exhibit 2:11-2:15.

²² Exhibit 2:13. Moore was present at the hearing before the Commission, but he was not called as a witness by either party.

²³ Exhibit 2:17-31.

²⁴ Exhibit 2:17.

²⁵ Exhibit 2:18.

²⁶ Exhibit 2:19.

²⁷ Exhibit 2:20-22.

²⁸ Exhibit 2:23-26, printed March 29, 2018.

appraised value” of \$399,335.²⁹ Finally, the PRF includes a summary page including the following information:

Land Value ³⁰	\$43,095
Improvement Value	[blank]
Value – Cost	[blank]
Value – Income	\$385,300
Value – Sales Comp.	\$390,000
Final Value	[blank]

Below this table is an income approach worksheet containing the following information:

Units of Size/SF ³¹	2600
Economic Rent/Unit	\$19.50
Annual Economic Rent	\$50,700
Vac. & CR Loss	5
Total Expen. (Excl. Tax)	20
Cap Rate	8
Tax Load	2
Comments	10

At the bottom of this page is a handwritten note dated 3-12-18 and initialed “MS.” The note says, “Delete sale PP claimed is excessive [illegible] is real property.”³²

The two cost approaches included with the PRF come to different conclusions of value because they use different square footage amounts for the Subject Property. We give greater weight to the square footage indicated by Singh’s testimony and most of the documents in the PRF as being 2,733.³³ The amount of physical depreciation applied by the County Assessor is 26.5%.³⁴ However, according to the Marshall & Swift Valuation Service costing guidelines (Marshall), physical depreciation for a 36-year-old Class D commercial building of average

²⁹ Exhibit 2:27-30, printed July 1, 2019.

³⁰ All information in this table is from Exhibit 2:31.

³¹ All information in this table is from Exhibit 2:31.

³² Exhibit 2:31.

³³ Exhibit 2:23, 2:24, and 3:31 each list the square footage as 2,600. However, Singh’s testimony is supported by Exhibits 2:18, 2:19, 2:27, and 2:28.

³⁴ Exhibit 2:24.

quality is 79%, not 26.5%.³⁵ This significant depreciation error alone would typically account for a substantial decrease in assessed value. The County Board's cost approach treats the USTs and the canopy as real property, valued at \$43,310 and \$22,090 respectively.³⁶

The County Board's exhibits also include an "Equalization Study TERC Case Cheema." The first page lists seven properties in Lexington, Nebraska.³⁷ These properties range in year built from 1966 to 1998 and in square footage from 2,733 to 3,560. The total assessed values range from \$248,265 to \$630,605, and the listed assessed values of the improvements range from \$196,121 to \$352,681; despite being the smallest in size, the Subject Property has the highest value for improvements.³⁸ Lot values range from \$36,750 to \$405,980; the Subject Property has the second lowest lot value at \$43,095. There is also a column labeled "WL," which appears to be the total assessed value divided by the square footage of the improvement. If the "WL" values were calculated in the same manner for the Subject Property as for the other properties,³⁹ the "WL" would be \$140.98, which is the median among the listed properties.

The second page of the "Equalization Study" lists the seven properties from Lexington and an additional five properties: three located in Cozad and two located in Gothenburg, which are other cities in Dawson County.⁴⁰ According to the 2018 Reports and Opinions of the Property Tax Administrator, Lexington, Cozad, Gothenburg, and the surrounding rural area make up a single commercial valuation group within Dawson County.⁴¹ A property listed as "Cubbys" in Gothenburg has the highest square footage and highest total assessed value of the thirteen properties. The values for the Subject Property are listed correctly and the "WL" is listed at \$140.98.

The third page of the "Equalization Study" lists the same 12 properties as the previous page along with one other property; this additional property has the lowest square footage of the 13 and the improvement value is listed at \$2,161,816.⁴² A property built in 1982 is listed with square footage of 3,560, total assessed value of \$302,095, lot value of \$36,750, improvement

³⁵ The Subject Property was built in 1981, per Exhibit 2:18, According to the appropriate sections of Marshall, a Class D convenience store of average quality has a life expectancy of 35 years. Accordingly, its depreciation is 79%, not 26.5%. See Marshall, sec. 97, page 11, and sec. 97, page 24.

³⁶ Exhibits 2:25-26.

³⁷ All information in this paragraph about the properties in Lexington is drawn from Exhibit 2:32.

³⁸ The values for Subject Property appear to have been entered in the table incorrectly. Based on the PRF and the County Board's decision, the correct value for the improvements would be \$342,205 and the total assessed value would be \$385,300.

³⁹ Total assessed value \$385,300 divided by square footage of \$2,733.

⁴⁰ All information in this paragraph is drawn from Exhibit 2:33.

⁴¹ 2018 Reports and Opinions of the Property Tax Administrator, Dawson County, pages 12-13.

⁴² Exhibit 2:34. We assume from the context that this is a clerical error.

value of \$265,345, and “WL” of \$84.86.⁴³ By contrast, the Subject Property was built in 1981, has square footage of 2,733, total assessed value of \$385,300, improvement value of \$342,205, and “WL” of \$140.98.⁴⁴

The County Board’s exhibits include PRFs for 12 of the 13 properties listed in the Equalization Study; the property listed as #6 on Exhibit 2:34 is not included. Most of these PRFs include a page showing assessment history, a sketch of the property, a partial cost approach, a summary page with an income approach worksheet, and a photograph of the property. In many of the PRFs, the assessment history ends before tax year 2018. Some of the summary pages include values from a cost approach, an income approach, a sales comparison approach, and a final value; but others do not include one or more of the three approaches to value.

The method for reconciling the approaches is inconsistent. For eight out of the twelve comparable properties for which property record files were received, the “final value” indicated on the summary page is simply the value indicated by the cost approach. For three of the twelve, the final value is set somewhere in between the values indicated by the cost approach, the income approach, and a sales comparison approach not otherwise detailed in the exhibits. For example, property #9, 609 Plum Creek Parkway, has no cost approach value listed (despite the inclusion of a cost approach in the exhibit⁴⁵). The income approach value is listed at \$556,000 and the sales comparison value is listed at \$552,000. The cost approach value is not listed on the summary page, but it is listed on the cost approach analysis elsewhere in the property record file at \$554,750. The final value is listed at \$554,000, the average of the values indicated by the income approach and the sales comparison approach.

The income approaches in the PRFs use rental rates ranging from \$10.25 per square foot to \$32 per square foot; this entire range of rental values can be found within properties located in Lexington. Vacancy and collection loss rates are listed at either 5% or 10% without any discernable pattern based upon location. Expense rates range from 20% to 24%. Capitalization rates range from 9.5% to 11%.

The remainder of the County Board’s exhibits are a “Sales Study TERC Case Cheema” with supporting PRFs. None of the sales listed are from Dawson County.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Exhibit 2:78-79.

VI. ANALYSIS

We begin with a presumption that the County Board has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action. That presumption remains until competent evidence to the contrary is presented, at which point it disappears.

In this appeal, we find ample evidence to rebut the presumption in favor of the County Board's action. First is the sale itself. A single sale may in some instances constitute evidence of market value.⁴⁶ Despite the note in the County Board's exhibits suggesting the sale should be disregarded, the evidence tends to indicate that the sale was an arm's-length transaction because it was negotiated by attorneys, and the sale was between parties with experience in the market for convenience stores. Significantly, the sale was made less than a year before the effective date of the assessment. The Taxpayer's testimony that items of personal property included in the sale, such as shelving, cash registers, USTs, and fuel pumps, were deemed to be worth \$100,000 by both buyer and seller is not effectively rebutted by an unexplained and unsupported note that "PP claimed is excessive."

An owner who is familiar with his property and knows its worth is permitted to testify as to its value.⁴⁷ A corporate officer or president is not, as such, qualified to testify as to value of corporate property. In order to qualify, he or she must be shown to be familiar with the property and have a knowledge of values generally in the vicinity.⁴⁸ Singh is a member of the Taxpayer Cheema Investments LLC. Singh's testimony demonstrated that he is familiar with the Subject Property and with values for similar properties generally in the vicinity. His opinion of value for the real property coincides with the portion of the sale price allocated to real property: \$125,000.

The evidence presented does not support the County Board's opinion of value. The cost approach uses depreciation of 26.5% where Marshall indicates that the amount should be 79%. The County Board offered no explanations for this discrepancy. The value set by the County Board matches the value indicated by the income approach,⁴⁹ but comparison of this income approach with the other income approaches shown in the exhibits demonstrate that the work was

⁴⁶ *Firethorn Inv. v. Lancaster County Bd. of Equalization*, 261 Neb. 231, 240, 622 N.W.2d 605, 611 (2001).

⁴⁷ *U. S. Ecology v. Boyd County Bd. Of Equal.*, 256 Neb. 7, 16, 588 N.W.2d 575, 581 (1999).

⁴⁸ *Kohl's Dept. Stores v. Douglas County Bd. of Equal.*, 10 Neb.App. 809, 813 - 814, 638 N.W.2d 877, 881 (2002) (Citations omitted).

⁴⁹ Exhibit 2:31: square footage 2,600; rental rate \$19.50 per square foot; 5% vacancy and collection losses; 20% expenses; and loaded capitalization rate of 10%.

performed incorrectly. “In fee simple valuations, all rentable space is estimated at market rent levels. Any rent attributed to specific leases is disregarded in the income analysis.”⁵⁰ The twelve income approach analyses in the record do not use market level estimates for rent; they use widely differing rents ranging from \$10.25 per square foot to \$32 per square foot. This cannot be explained by differing commercial markets because all of the properties being valued by these income approaches are located in the same valuation group and the entire range of rents from \$10.25 to \$32 is found in the properties located in Lexington.⁵¹ Accordingly, we find that the income approach values listed within the County Board’s documents are not reliable indicators of value of the Subject Property.

We also disagree with the County Board’s use of “WL” values per square foot as appropriate measures of equalized value. These “WL” values were calculated by dividing the total value of the parcel by the square footage of the buildings, which produce misleading results. According to the “Equalization Study TERC Case Cheema” document offered by the County Board, the Subject Property had the median “WL” value among the seven convenience store properties in Lexington. But the properties have significant differences in land values. For example, the Subject Property has a land value of \$43,095, but Property #12, a convenience store fourteen years newer than the Subject Property, has a land value of \$405,980. Because “WL” is calculated by dividing total assessed value by the value of the improvements, Property #12 has a “WL” of \$215.59, compared with the Subject Property’s “WL” of \$140.98.⁵² However, the per square foot assessed value of the improvements on the Subject Property is \$125.21⁵³ and the per square foot value of the improvements on Property #12 is only \$76.79.⁵⁴ Applying this method of comparison to all of the County Board’s comparables, the Subject Property has the highest per square foot value of the seven Lexington properties despite being the second oldest. Moreover, this “WL” method, relied upon by the County Board, that did not first extract the value of the lot before determining the per square foot value of the improvement has no support in the appraisal or assessment literature.⁵⁵

⁵⁰ Appraisal Institute, *The Appraisal of Real Estate* 447 (14th ed. 2013).

⁵¹ 2018 Reports and Opinions of the Property Tax Administrator, Dawson County, pages 12-13.

⁵² See Exhibit 2:94, “Tract in NW ¼ SE ¼ 2.66A (Includes value from ref cards #3724-240199081 and #3760-240178777).”

⁵³ $\$342,205 \div 2,733 = \125.21 .

⁵⁴ $\$224,625 \div 2,925 = \76.79 .

⁵⁵ “Although a total property value estimate may be derived in the sales comparison or income capitalization approach without separating land and improvement values, it may be necessary to estimate land value separately to isolate the value the land contributes to the total property. In the cost approach, the value of the land must be estimated and stated separately.” Appraisal Institute, *The Appraisal of Real Estate* 43 (14th ed. 2013).

In sum, all of the approaches to value offered by the County Board are either flawed, or else they are unsupported by competent evidence.⁵⁶

The Taxpayer argued that the USTs were personal property instead of real property. If the USTs are real property, then it is appropriate for the County Board to consider their value in determining the assessed value of the Subject Property. But if they are tangible personal property, as the Taxpayer asserts, then they must only be taxed as personal property, and their value should not be considered in determining the value of the Subject Property.⁵⁷

In support of the position that the USTs are tangible personal property, the Taxpayer presented evidence that (1) both the Taxpayer and Bosselman understood the USTs to be personal property under the terms of the 2017 sale of the Subject Property; (2) the Taxpayer reported the USTs as personal property on its personal property tax returns for 2018 and 2019, and paid personal property taxes on the USTs for tax year 2018; and (3) the USTs meet the definition of “tangible personal property” found at Neb. Rev. Stat. § 77-105.

Because the Taxpayer’s supporting documents were not timely exchanged with the County Board, the evidence to support the Taxpayer’s claim that both Cheema and Bosselman understood the USTs to be personal property is limited to Singh’s testimony, but that testimony was not rebutted by any evidence adduced by the County Board. The Taxpayer asserts that \$100,000 of the \$225,000 purchase price of the Subject Property was for personal property, but other information in the record is inconsistent with that total. The 2018 personal property schedule includes the fuel pumps,⁵⁸ coolers, shelving, cash register and scan system, and a sign, but the net book taxable value is listed as \$60,375.⁵⁹ The same items are identified on the 2019 personal property schedule with a net book value of \$46,856.⁶⁰ The 2018 schedule is signed by the Dawson County Assessor, John Phillip Moore. The note dated 3-12-18 indicates that the personal property claimed as a portion of the sale price was deemed excessive.⁶¹ Thus, the Taxpayer’s claim about the exact portion of the \$225,000 sale price that covered personal property is contradicted by other information in the record. Similarly, the Taxpayer’s use of the

⁵⁶ For example, the sales comparison approaches, including the Subject Property at Exhibit 2:31, did not include any evidence of sales comparables.

⁵⁷ This double taxation issue is addressed below.

⁵⁸ As explained earlier, Singh testified that he used the term “fuel pumps” to describe the USTs and the above ground pumps as a single unit.

⁵⁹ Exhibit 2:15.

⁶⁰ Exhibit 2:12.

⁶¹ See Exhibit 2:31.

term “fuel pumps” to refer to both the above ground pumps and the USTs creates confusion as to what was actually claimed on the personal property returns.

Whatever the intentions of the parties in relation to the 2017 sale, and regardless of what the Taxpayer reported on his personal property return for 2018, the question of whether a specific item is real property or tangible personal property is a matter of law. Prior to 2007, Neb. Rev. Stat. § 77-103 provided, in part: “Real property shall mean: (1) All land; (2) All buildings, fixtures, and improvements[.]”⁶² Nebraska courts applied a three-factor test to determine whether an item constitutes a fixture.⁶³

To determine whether an item constitutes a fixture, [the Nebraska Supreme Court] looks at three factors: (1) actual annexation to the realty, or something appurtenant thereto, (2) appropriation to the use of purpose of that part of the realty with which it is connected, and (3) the intention of the party making the annexation to make the article a permanent accession to the freehold.⁶⁴

Due to the degree to which the USTs are annexed to the Subject Property – buried in the ground under concrete – the USTs would likely be considered fixtures under this rule. In 2007, however, the Legislature enacted LB 334, which changed the definition of “real property” found at Neb. Rev. Stat. § 77-103 as follows: “Real property shall mean: (1) All land; (2) All buildings, ~~fixtures, and improvements, and fixtures, except trade fixtures~~[.]”⁶⁵ The same legislative bill modified Neb. Rev. Stat. § 77-105 as follows:

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.⁶⁶

The effect of these simultaneous amendments was to reclassify certain items of property that would previously have been “fixtures,” which are real property, as “trade fixtures,” which are

⁶² See Neb. Rev. Stat. § 77-103 (Reissue 2003).

⁶³ See, e.g., *Northern Natural Gas Co. v. State Bd. of Equal.*, 232 Neb. 806, 443 N.W.2d 249 (1989).

⁶⁴ *Northern Natural Gas* at 817, 257.

⁶⁵ See 2007 Neb. Laws LB 334, § 13. This statute has been further amended since 2007, but none of the amendments are material to this appeal.

⁶⁶ Emphasis added. See 2007 Neb. Laws LB 334, § 14. This statute has been further amended since 2007, but none of the amendments are material to this appeal.

tangible personal property. In *Vandenberg v. Butler County Bd. of Equalization*,⁶⁷ the Nebraska Supreme Court addressed the application of the three-part test and § 77-105 to an irrigation pump “used to move water from a well to a pivot system in order to irrigate the crops[.]”⁶⁸ The Court held that “§ 77-105 clearly controls the issue of classifications of fixtures for taxation purposes. Accordingly, the three-part test does not apply to taxation determinations of this nature.”⁶⁹

It follows that we must apply § 77-105 to determine whether the USTs constitute tangible personal property. Singh testified that the USTs were used in the course of the Taxpayer’s business, which is a commercial activity conducted on real property. The record is not sufficiently developed for us to conclude that the USTs contain mechanical elements and qualify as machinery, so we must consider whether the USTs constitute “equipment.”

Section 77-105 does not define “equipment.” Following the direction of Neb. Rev. Stat. § 77-101 relating to all statutes dealing with taxation, we also find no definition for “equipment.”

Since we have found no definition of the term “equipment” in the applicable tax statutes, we therefore look to the plain meaning of the term from persuasive authority.⁷⁰

According to Black’s Law Dictionary, “equipment” means:

Furnishings, or outfit for the required purposes. Whatever is needed in equipping, the articles comprised in an outfit, equipage. Under U.C.C., goods include “equipment” if they are used or bought for use primarily in business ... or if the goods are not included in the definitions of inventory, farm products or consumer goods. U.C.C. § 9-109(2).⁷¹

According to U.C.C. § 9-102,

(33) “Equipment” means goods other than inventory, farm products, or consumer goods.

...

(44) “Goods” means all things that are movable when a security interest attaches. The term includes (i) fixtures, (ii) standing timber that is to be cut and removed under a conveyance or contract for sale, (iii) the unborn young of animals, (iv)

⁶⁷ *Vandenberg v. Butler County Bd. of Equalization*, 281 Neb. 437, 796 N.W.2d 580 (2011).

⁶⁸ *Vandenberg* at 441, 583.

⁶⁹ *Vandenberg* at 442, 584.

⁷⁰ See, for example, *Katskee v. Blue Cross/Blue Shield of Nebraska*, 245 Neb. 808, 515 N.W.2d 645 (1994) (finding that dictionary definitions may be at least persuasive authority).

⁷¹ *Black’s Law Dictionary*, 537 (6th ed. 1990).

crops grown, growing, or to be grown, even if the crops are produced on trees, vines, or bushes, and (v) manufactured homes.

The comment to § 9-102 provides, in part:

4. Goods—Related Definitions.

a. “Goods”; “Consumer Goods”; “Equipment”; “Farm Products”; “Farming Operation”; “Inventory”. The definition of “goods” is substantially the same as the definition in former section 9-105. This article also retains the four mutually-exclusive “types” of collateral that consist of goods: “Consumer goods”; “equipment”; “farm products”; and “inventory”. The revisions are primarily for clarification.⁷²

The classes of goods are mutually exclusive. For example, the same property cannot simultaneously be both equipment and inventory. In borderline cases—a physician's car or a farmer's truck that might be either consumer goods or equipment—the principal use to which the property is put is determinative. Goods can fall into different classes at different times. For example, a radio may be inventory in the hands of a dealer and consumer goods in the hands of a consumer. As under former article 9, goods are “equipment” if they do not fall into another category.⁷³

...

In general, goods used in a business are equipment if they are fixed assets or have, as identifiable units, a relatively long period of use, but are inventory, even though not held for sale or lease, if they are used up or consumed in a short period of time in producing a product or providing a service.⁷⁴

Although we recognize that the definitions found in U.C.C. Chapter 9 are intended to govern secured transactions, the definitions are useful to derive general principles about “equipment” as it is used in commerce. All goods are equipment if they are not consumer goods, farm products, or inventory. The USTs are clearly not farm products, nor are they consumer goods because the Taxpayer did not use or buy them “primarily for personal, family, or household purposes.” “Implicit in the definition [of “inventory”⁷⁵] is the criterion that the sales or leases [of the inventory] are or will be in the ordinary course of business.”⁷⁶ USTs are not sold or leased in the ordinary course of the Taxpayer’s business operating a convenience store. Additionally, “goods used in a business are equipment if they are fixed assets or have, as identifiable units, a relatively

⁷² Emphasis added.

⁷³ Emphasis added.

⁷⁴ Emphasis added.

⁷⁵ See U.C.C. § 9-102(48).

⁷⁶ U.C.C. § 9-102, comment at 4.a.

long period of use, but are inventory, even though not held for sale or lease, if they are used up or consumed in a short period of time in producing a product or providing a service.” The USTs are “fixed assets” and “have, as identifiable units, a relatively long period of use.”

For the foregoing reasons, we find that the USTs are equipment used directly in commercial activities conducted on real property, and thus, they are trade fixtures under Neb. Rev. Stat. § 77-105. The degree of their attachment to the real property, which would have supported their classification as fixtures prior to the 2007 amendment to Neb. Rev. Stat. §§ 77-103 and 77-105, is irrelevant under the current and controlling law.⁷⁷

Although the County Board assessed the Subject Property at the value indicated by the income approach, the income approach in the PRF is fundamentally flawed and is not an accurate indicator of value. Since nine of the twelve comparable properties were assessed at the value indicated by the cost approach, the best indication of value available in the record for the Subject Property is the outcome of the cost approach. However, we find there is clear and convincing evidence that the cost approach must be adjusted by correcting the square footage, by applying depreciation according to Marshall, and by removing the value attributable to the USTs, which are not taxable as real property under Neb. Rev. Stat. § 77-105. As explained above, we are persuaded that the evidence indicates that the square footage of the Subject Property is 2,733, that the correct depreciation to be applied is 79%, and that the value of the USTs should not be included as real property. Therefore, the taxable value of the Subject Property for tax year 2018 should be \$162,199.⁷⁸

VII. CONCLUSION

The Commission finds that there is competent evidence to rebut the presumption that the County Board faithfully performed its duties and had sufficient competent evidence to make its

⁷⁷ As a result of this finding, the issue of double taxation will also be resolved. The Taxpayer will pay personal property tax on the USTs and they will not be subject to tax as real property.

⁷⁸ Total building area = 2,733 square feet. Total base cost = \$138.29 per square foot. Total base value = \$377,947. 79% physical depreciation = \$298,578. Replacement cost new less depreciation = \$79,369. Depreciated improvements = \$9,475. Outbuilding value minus UST values = \$30,260. Total Improvements value = \$119,104. Land value = \$43,095. Total taxable value = \$162,199.

determination. The Commission also finds that there is clear and convincing evidence that the County Board's decision was arbitrary or unreasonable.

For all of the reasons set forth above, the decision of the County Board should be vacated and reversed.

VIII. ORDER

IT IS ORDERED THAT:

1. The decision of the Dawson County Board of Equalization determining the taxable value of the Subject Property for tax year 2018 is vacated and reversed.
2. The taxable value of the Subject Property for tax year 2018 is \$162,199.
3. This Decision and Order, if no appeal is timely filed, shall be certified to the Dawson County Treasurer and the Dawson County Assessor, pursuant to Neb. Rev. Stat. § 77-5018 (Reissue 2018).
4. Any request for relief, by any party, which is not specifically provided for by this Decision and Order is denied.
5. Each party is to bear its own costs in this proceeding.
6. This Decision and Order shall only be applicable to tax year 2018.
7. This Decision and Order is effective for purposes of appeal on January 15, 2021.⁷⁹

Signed and Sealed: January 15, 2021

Robert W. Hotz, Commissioner

SEAL

James D. Kuhn, Commissioner

⁷⁹ Appeals from any decision of the Commission must satisfy the requirements of Neb. Rev. Stat. § 77-5019 (Reissue 2018) and other provisions of Nebraska Statutes and Court Rules.