BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

CHRISTINE L. FLESNER, Clay County Assessor, Appellant, vs. CLAY COUNTY BOARD OF EQUALIZATION, and GEORGE BROS. PROPANE & FERTILIZER CORP., Appellees.	)	CASE NO. 02C-109 FINDINGS AND ORDERS

Filed July 22, 2003

Appearances:

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Before: Commissioners Hans, Lore, Wickersham and Reynolds.

Reynolds, Chairman, for the Commission.

SUMMARY OF DECISION

The Commission vacates and reverses the decision of the Clay County Board of Equalization which determined that twelve 29,000 gallon, petroleum-grade steel storage tanks and the steel secondary containment structure were personal property rather than real property.

I.
NATURE OF THE CASE

George Bros. Propane & Fertilizer Corp., ("the Taxpayer") owns a commercial bulk fertilizer operation located in Clay County, Nebraska. The Taxpayer filed a protest with the Clay County Board of Equalization ("the Board") alleging that twelve 29,000 gallon "petroleum-grade steel" storage tanks were personal rather than the real property. The Taxpayer therefore requested that the storage tanks be removed from the real property tax rolls. The Board granted the protest. The Board further directed that the Clay County Assessor ("the Assessor") remove a steel containment structure which is 10,296 cubic feet in size from the real property tax rolls and be assessed instead as personal property. The Assessor appeals from each of these decisions.

II.
EVIDENCE BEFORE THE COMMISSION

The Commission took notice of the Commission's Case File as authorized by Neb. Rev. Stat. §77-5016(5) (Cum. Supp. 2002, as amended by 2003 Neb. Laws, L.B. 291, §9). The Commission also received without objection Exhibits 1 through 4, 6 through 30, 36 through 38, and 41 through 64. Exhibits 31 through 35 and 65 and 66 were withdrawn. The Commission sustained objections to the receipt of Exhibits 5, 39 and 40.

The Commission heard and considered the testimony of the Clay County Assessor, the President of the George Bros. Propane & Fertilizer Corp., and a member of the Clay County Board of Supervisors. The Commission also heard and considered the closing statements made by counsel.

III.
ISSUES BEFORE THE COMMISSION

Neb. Rev. Stat. §77-5016(7) (Cum. Supp. 2002, as amended by 2003 Neb. Laws., L.B. 291, §9) provides that the Commission's jurisdiction is limited to those questions raised before the County Board of Equalization and to those issues sufficiently related in content and context to be deemed the same question at both levels. *Arcadian Fertilizer v. Sarpy County Bd. of Equal.*, 7 Neb. App. 499, 505, 583 N.W.2d 353, 357 (1998). The Taxpayer protested the Assessor's determination that the twelve 29,000 gallon petroleum grade steel storage tanks were real property. The Board determined that those storage tanks were personal property.

The record does not conclusively establish that the Taxpayer protested the Assessor's determination that the steel containment structure was real property. The Board, however, clearly directed the Assessor to remove that property from the real property assessment rolls.

Assuming without deciding that the Commission has subject matter jurisdiction over the steel containment structure, the issues presented are (1) whether the steel containment structure is personal property or real property; and (2) whether the twelve 29,000 gallon petroleum-grade steel storage tanks are personal property or real property.

IV.
STANDARD OF REVIEW

The Assessor, in order to prevail, is required to demonstrate by clear and convincing evidence that (1) the decision of the Board was incorrect; and, (2) the decision of the Board was unreasonable or arbitrary. (Neb. Rev. Stat. §77-5016(7)(Cum. Supp. 2002, as amended by 2003 Neb. Laws, L.B. 291, §9). The Supreme Court has determined that the "unreasonable or arbitrary" standard requires clear and convincing evidence that the County Board of Equalization either (1) failed to faithfully perform its official duties; or (2) that the County Board of Equalization failed to act upon sufficient competent evidence in making its decision. *Garvey Elevators v. Adams County Bd.*, 261 Neb. 130, 136, 621 N.W.2d 518, 523-524 (2001). The Assessor, once this initial burden has been satisfied, must then demonstrate by clear and convincing evidence that the Board's final determination was unreasonable. *Garvey Elevators v. Adams County Bd.*, 261 Neb. 130, 136, 621 N.W.2d 518, 523-524 (2001).

V.
FINDINGS OF FACT

The Commission, in determining cases, is bound to consider only that evidence which has been made a part of the record before it. No other information or evidence may be considered. Neb. Rev. Stat. §77-5016(3) (Cum. Supp. 2002, as amended by 2003 Neb. Laws, L.B. 291, §9). The Commission may, however, evaluate the evidence presented utilizing its experience, technical competence, and specialized knowledge. Neb. Rev. Stat. §77-5016(5)(Cum. Supp. 2002, as amended by 2003 Neb. Laws, L.B. 291, §9).

From the pleadings and the evidence contained in the record before it, the Commission finds and determines as follows:

A.
PROCEDURAL FINDINGS

1. The Taxpayer is the owner of record of a commercial bulk fertilizer operation located in the Village of Sutton, Clay County, Nebraska.
2. Operation of the commercial bulk fertilizer operation is subject to regulation by the Nebraska Department of Environmental Quality ("the NDEQ"). See, generally, 198 Neb. Admin. Code (2002).
3. The Clay County Assessor ("the Assessor") proposed valuing twelve 29,000 gallon storage tanks located on the subject

property as real property as of January 1, 2002 ("the assessment date"). (E1).

4. The Taxpayer timely filed a protest of the Assessor's determination and requested that the subject property be valued as personal property. (E1).
5. The Board granted the protest as to the twelve "petroleum-grade" 29,000 gallon storage tanks. The Board further directed that the Assessor remove the steel containment structure from the real property tax rolls and assess that improvement as personal property. (E1).
6. The Assessor timely filed an appeal of the Board's decisions to the Commission. (Appeal Form).
7. The Commission served a Notice in Lieu of Summons on the Board on September 12, 2002.
8. The Board filed an Answer out of time with leave of the Commission on December 26, 2002.
9. The Commission also served a Notice in Lieu of Summons on the Taxpayer on September 12, 2002.
10. The Taxpayer timely filed an Answer on September 25, 2002.
11. The Commission issued an Order for Hearing and Notice of Hearing on April 10, 2003.
12. The Notice of Hearing set the matter for a hearing on the merits of the appeal for June 30, 2003.

B.
SUBSTANTIVE FINDINGS AND FACTUAL CONCLUSIONS

1. The Taxpayer is the owner of record of a tract of land approximately 4.26 acres in size which is legally described as PT W½NW¼, Section 11, Township 7, Range 5, Clay County, Nebraska. (E13).
2. The tract of land is improved with a number of components, including twelve 29,000 gallon storage tanks erected within a steel containment structure ("the subject property").
3. The 29,000 gallon steel storage tanks, the steel containment structure and the other improvements, are integral parts of the Taxpayer's commercial bulk fertilizer operation.
4. The Assessor, in tax year 2001, determined that the twelve "petroleum-grade" steel storage tanks were real property. (E13).
5. Prior to that time the storage tanks were listed on the Taxpayer's Personal Property Tax returns. (E9:2 - Taxpayer's 2000 Personal Property Tax Return showing 8 storage tanks purchased in 1997 and 4 storage tanks purchased in 1999; E10:2 - Taxpayer's 1999 Personal Property Tax Return showing 8 storage tanks purchased in 1997; E11:3 - Taxpayer's 1998 Personal Property Tax Return showing 8 storage tanks purchased in 1997).
6. The Assessor testified that records for tax year 2001 had been reviewed and updated resulting in the discovery of the

Taxpayer's 12 storage tanks and the classification of those tanks by the Taxpayer as personal rather than real property.

7. The Taxpayer did not list the steel containment structure as personal property on the personal property tax return filed with the Assessor prior to tax year 2002. (E8; E9; E10; E11).

8. The Taxpayer's President couldn't recall whether the steel containment structure was listed as real or depreciable personal property on the Corporation's federal tax returns. Those federal tax returns were not made a part of the record.

9. Operation of the subject property as a commercial bulk fertilizer facility requires the Taxpayer to comply with Title 198 of the Nebraska Administrative Code.

10. The Taxpayer, pursuant to 198 Neb. Admin. Code, ch. 5 (2002), hired an engineer to design plans for the secondary containment structure and for the steel storage tanks. These plans were submitted to and approved by the NDEQ.

11. After approval by the NDEQ, the Taxpayer leveled the land in preparation for construction of the steel containment structure.

12. The Taxpayer, in order to level the land had three-feet of clay hauled onto the site, and had that clay compacted. A wooden frame was then built which has a perimeter 18-inches

larger than the required secondary steel containment structure. The wooden frame was then filled with sand to a depth of ten inches. The Taxpayer then placed one-and-one-half inches of pea gravel on top of the sand within the wooden frame to keep the sand in place.

13. The Taxpayer then purchased 50,000 pounds of steel plates. The steel plates were four feet by ten feet in size. The plates were then welded in place on the containment site, and within the wooden frame, to form an open box. The box is eighty-eight feet in width, thirty-nine feet in depth, and three feet tall, and has a total volume of 10,296 cubic feet. The sides of this box, a steel containment structure, are reinforced with metal braces.

14. The steel containment structure was designed in compliance with the rules and regulations of the NDEQ. Pursuant to those regulations, the containment structure must be capable of holding 110% of the contents of one full tank, plus six inches of rain, without leaking or overflowing. 198 Neb. Admin. Code ch. 5 (2002).

15. The primary purpose of the steel containment structure is storage of hazardous materials in case of a leak. The structure is designed to store the hazardous materials while preventing ground and groundwater contamination until the material can be removed without harm to the environment.

16. The Taxpayers' stated intent, as testified to by its President, is to minimize its tax liability. Such intent is not relevant for purposes of determining the status of the steel containment structure as a "fixture."
17. The steel containment structure can only be used on its present site.
18. The steel containment structure must be in place for use of the premises as a storage site for bulk liquid fertilizer.
19. The Taxpayer's President testified he didn't intend to move the steel containment structure.
20. The steel containment structure is a "fixture" within the meaning of Neb. Rev. Stat. §77-103 (Cum. Supp. 2002).
21. The steel containment structure is designed for storage and is an edifice enclosing a space within its walls.
22. Structures which are designed for storage are "buildings." 350 Neb. Admin. Code, ch. 10, 001.01B (2002).
23. "Buildings" are real property. 350 Neb. Admin. Code, ch. 10, § 001.01B. (2002).
24. The steel containment structure, as either a fixture or as a building, is real property, not personal property.
25. The steel containment structure is also a "building" as that term is defined in 350 Neb. Admin. Code, ch. 10, § 001.01B. (2002).

26. The “petroleum-grade” steel storage tanks each have a capacity of 29,000 gallons. The walls, ceilings and floors are made of one-quarter inch steel. When full, the storage tanks each hold between 145 and 150 tons of liquid fertilizer. The types of liquid bulk fertilizer stored by the Taxpayer include (1) 10-34-0 (10% Nitrogen, 34% Phosphate, 0% Potash, which weighs approximately 11.7 pounds per gallon); and, (2) 10-28-0 (10% Nitrogen, 28% Phosphate, 0% Potash, which weighs approximately 10.5 pounds per gallon). Similar liquid fertilizers with different ratios of chemicals may be available. The weight per gallon will vary depending on the particular mix requested.

27. The Taxpayer’s President testified that the economic life of the “petroleum-grade” steel storage tanks was between 25 and 30 years. The Taxpayer’s president later testified that the economic life of the steel storage tanks at issue was between 15 and 20 years.

28. Eight of the storage tanks were purchased by the Taxpayer in 1997. (E9:2).

29. Four of the storage tanks were purchased by the Taxpayer in 1999. (E9:2).

30. The storage tanks were built in Kansas City, Kansas, and then transported individually by truck to the subject property using specially equipped vehicles. A crane was

then used to erect the storage tanks on the subject property.

31. The storage tanks have been in continuous use since their installation and are used in the day-to-day operation of Taxpayer's bulk commercial fertilizer business.

32. The storage tanks are structures used for the storage of agricultural fertilizer, which in turn, is held for purposes of sale.

33. Each of the storage tanks is individually anchored to the steel containment structure "to prevent floatation or instability in the event of a release into the containment structure." 198 Neb. Admin. Code, ch. 5, § 007. (2002).

34. The Taxpayer has complied with these regulatory requirements, signifying its continuing intention to adapt and use the storage tanks and the steel containment structure as a functioning part of its business.

35. Structures which are designed for storage are "buildings." 350 Neb. Admin. Code, ch. 10, §001.01B (2002).

36. "Buildings" are real property. 350 Neb. Admin. Code, ch. 10, § 001.01B. (2002).

37. The Taxpayer's stated intent, as testified to by its President, its to minimize tax liability. Such intent is not relevant for purposes of determining the status of the

29,000 gallon petroleum grade steel storage tanks as "fixtures."

38. The twelve 29,000 gallon petroleum-grade steel storage tanks are "fixtures" as that term is defined in Neb. Rev. Stat. §77-103 (Cum. Supp. 2002).

39. The twelve 29,000 gallon petroleum grade storage tanks in this action are real property, not personal property.

40. The Assessor has adduced sufficient clear and convincing evidence to overcome the statutory presumption in favor of the Board.

41. The decisions of the Board were incorrect, unreasonable and arbitrary.

42. The decisions of the Board must be vacated and reversed.

VI.
ANALYSIS

The issues before the Commission are (1) whether the Board was incorrect and either unreasonable or arbitrary in determining that the subject storage tanks are personal property, rather than real property; and (2) whether the Board was incorrect and either unreasonable or arbitrary in determining that the steel containment structure is personal property rather than real property. The applicable law includes Neb. Rev. Stat. §77-103(2) (Cum. Supp. 2002) which defines real property as "(a)ll buildings, fixtures, and improvements."

A.
THE SUPREME COURT TEST

The Nebraska Supreme Court has provided controlling guidance on the question of whether improvements are real or personal property. The Court has held that the determination of whether a particular piece of property is a "fixture," i.e., real property, is governed by a three-part test. An item will be deemed a fixture if there is "(1) actual annexation to the realty, or something appurtenant thereto, (2) appropriation to the use or purpose of that part of the realty which it is connected, and (3) the intention of the party making the annexation to make the article a permanent accession to the freehold." *Northern Natural Gas Co. v. State Bd. Of Equalization and Assessment,* 232 Neb. 806, 814, 443 N.W. 2d 249, 257 (1989).

The Court in *Northern Natural* made it clear, however, that the intention element is the most important factor. "The other two factors, annexation and appropriation to the use of the realty, have value primarily as evidence of such intention. *Id.* The requisite intention, according to the Court, can be "inferred from the nature of the articles affixed, the relation and situation of the party making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation has been made." *Id.*

The *Northern Natural* Court, in assessing the "intent" examined whether the owner of the personalty would be annexing the personalty to real property which the personalty's owner owned in fee simple, or, to realty in which the personalty's owner had less than an ownership interest in. For purposes of this analysis, the *Northern Natural* court opined that the owner's intent could be inferred, for example, from whether the personalty's owner had a mere easement or leasehold interest in the realty in which the personalty was annexed. It would be more likely that a permanent accession was intended where the personalty was incorporated into realty also owned by the personalty's owner. By contrast, where the personalty was annexed into realty not also owned by the personalty's owner, intention to permanently annex could not be inferred, since in such situations, the owner would be "parting with title" to the personalty annexed to land owned by another. *Northern Natural, supra*, at 821.

The property at issue in this appeal, twelve 29,000 gallon "petroleum grade" steel storage tanks and the steel containment structure, are owned by the Taxpayer, and situated on the Taxpayer's property. It is therefore more likely that the Taxpayer in this case intended permanent accession.

The Taxpayer, however, contends that it lacked the requisite intent, and that therefore, the subject property is personal

property. The Taxpayer adduced evidence from its President, as well as certain tax returns, which it contends demonstrates an "intent" to have the property valued as personal property. The record establishes that the "intent" testified to related to a specific intent to minimize tax liability. If such intent was relevant, there would be no property subject to real property taxation, as all taxpayers have a desire to minimize their tax liability.

The intent described by the Taxpayer through its evidence, however, is not the intent described by *Northern Natural.* The Supreme Court in that case defined the requisite intent as an intent to make the article a "permanent accession to the freehold." This type of intent is inferred from "the nature of the articles affixed, the relation and situation of the party making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation has been made." *Id.*, at 818, 257.

The uncontroverted evidence establishes that the steel containment structure and twelve steel storage tanks were improvements made to a commercial bulk fertilizer operation which had been in operation for 36-years as of the assessment date. This steel containment structure was required pursuant to 198 Neb. Admin. Code, ch. 2, § 007(2002). The Taxpayer had the ability to utilize old storage tanks, but rather chose to

purchase the new tanks, and erect them within the steel containment structure on or before January 1, 1999, as required by 298 Neb. Admin. Code, ch. 2, § 007.02 (2002). The fact that the Taxpayer made these improvements demonstrates an unequivocal intent to continue operating as a commercial bulk fertilizer operation. The Taxpayer's President also testified that he didn't intend to move the steel containment structure or the storage tanks. The intent to annex the steel containment structure and the twelve 29,000 gallon, "petroleum-grade" steel storage tanks to the property is clear.

This conclusion is supported by the remaining elements defined by the *Northern Natural* Court. The remaining elements consist of a two-part analysis. For the first element, the actual annexation factor, *Northern Natural* considered whether removal of the item would cause harm to the realty or to the item to be removed. To quantify the types of harm that would be relevant to this analysis, *Northern Natural* weighed three factors: "(a) any change in the market value of the land as a result of the condition; (b) the amount of time and the cost required to repair the condition; and (c) the hazard or dislocation caused by the condition." *Northern Natural*, *supra*, at 819.

For the second factor, appropriation to the realty, *Northern Natural* analyzed "the relationship between the article and the

use which is made of the realty to which the article is attached . . . (i)f the chattel is a necessary or useful adjunct to the realty, then it may be said to have been appropriated to the use or purpose of the realty to which it was affixed. " *Northern Natural,* at 820, 258. Conversely, the Court reasoned that "(i)f the chattel is attached for a use which does not enhance the value of the land, it is generally deemed not to become a part of the land." *Id.*

The first test, annexation, requires an analysis based on three factors: "(a) any change in the market value of the land as a result of the condition; (b) the amount of time and the cost required to repair the condition; and (c) the hazard or dislocation caused by the condition." *Id.,* at 819, 258.

The Taxpayer's commercial bulk fertilizer operation has been active since 1966. The Taxpayer purchased eight "petroleum-grade," 29,000 gallon steel storage tanks in 1997, and four more in 1999. (E9:2). Each tank is twenty-nine feet tall, and when full weighs between 145 and 150 tons. When empty, the storage tanks weigh less than 44,000 pounds. The storage tanks were fabricated in Kansas City, Kansas, and trucked to their current location on special trucks.

The storage tanks are placed on individual "pads" located within the steel containment structure. (E15: photo A-11). The storage tanks are anchored to prevent instability as required by

198 Neb. Admin. Code, ch. 10, § 007 (2002). The anchors are attached to the secondary containment structure. This steel containment structure weighs 50,000 pounds. The secondary containment structure is an open steel box which has a volume of 10,296 cubic feet.

The steel containment structure was erected on site. Site preparation for the steel containment structure required a leveling of the land; transportation to and compaction of three-feet of clay on the site; and the addition of a wood frame eighteen inches larger than the steel containment structure. This wood frame was then filled with sand to a depth of ten inches. One-and-one-half inches of pea gravel was then placed on top of the sand located within the wooden frame to keep the sand in place.

The steel storage tanks cost $10,000 each, for a total investment of $120,000. The record does not include the cost of the site preparation and development; the cost of construction of the secondary steel containment structure (welded over together over a three-week period using 'sweat equity'); or the costs of erection of the "petroleum grade" steel storage tanks using a crane.

The record contains clear and convincing evidence that the site preparation; development; construction of the steel secondary containment structure; acquisition; and erection of the

steel storage tanks enhances the value of the property as a site for a commercial bulk fertilizer operation. Removal of the steel containment structure and the twelve 29,000 gallon steel storage tanks would adversely impact the value of the property as a site for a commercial bulk fertilizer operation. In fact, based on the requirements of 198 Neb. Admin. Code, removal of these structures without replacement with similar structures would render the property useless as a site for a commercial bulk fertilizer operation. The removal would also leave three feet of clay and sand and pea gravel which might have to be removed to allow an alternative use of the land.

The first part of the "annexation" test under *Northern Natural*, however, requires consideration of the change in the market value of the land as a result of the condition. This question, in turn, hinges on a determination of "highest and best use." "Highest and best use" is defined as:

> "The reasonably probable and legal use of vacant land or an improved property, which is physically possible, appropriately supported, financially reasonable, and that results in the highest value. The four criteria the highest and best use must meet are legal permissibility, physical probability, financial feasibility, and maximum profitability."

Dictionary of Real Estate Appraisal, 3rd Ed., Appraisal Institute, 1998, p. 171.

The analysis of "highest and best use" requires the following:

> ". . . land is first valued as though vacant and available to be developed to its highest and best use; the ultimate conclusions of highest and best use analysis are based on the highest and best use of the property as improved. Thus a parcel of land may have one highest and best use as though vacant, and the existing combination of the site and improvements may have a different highest and best use as improved. Existing improvements have a value equal to the amount they contribute to the site, or they may penalize value, often by an amount equal to the cost to remove them from the site. If the existing improvements do not develop the site to its highest and best use, the improvements are worth less than their cost. . . Thus the improvements that constitute the highest and best use add the greatest value to the site."

The Appraisal of Real Estate, 12th Ed., The Appraisal Institute, 2002, p. 353.

Often, however, "there may be little if any question of possible change in the property's use at the date of valuation

because the market is significantly built up and properties are being sold on the basis of their continued use." *Id.*, at p. 306.

Neither party adduced evidence regarding highest and best use. The continued operation of the commercial bulk fertilizer operation for more than 35 years, and compliance with the January 1, 1999, NDEQ deadline for improvements for such operations, demonstrates that at least in the Taxpayer's opinion, the highest and best use of the land as if vacant is as a commercial bulk fertilizer operation. By the same analysis, the "highest and best use as improved" would also be as a commercial bulk fertilizer operation. The removal of the site improvements, the steel containment structure, the steel storage tanks and the related improvements would, therefore, adversely impact the market value of the land.

The second part of the "actual annexation factor" test requires a determination of the amount of time and the cost required to repair the condition, that is, the state of the land after removal of the improvements. The Taxpayer's President testified generally concerning both the land and improvements. However no evidence was adduced concerning the cost of leveling the land or the costs of acquisition, hauling and compaction of the clay. Similarly, no evidence was adduced concerning the cost of acquisition, hauling and placement of the sand or gravel.

The cost of reversing this site preparation is not a matter of record. Reversing this site preparation, if the highest and best use of the property is as a commercial bulk fertilizer operation, would be unnecessary and wasteful.

Finally, the third test regarding the annexation element requires a determination of the hazard or dislocation caused by the condition. No evidence was adduced concerning what if any hazards or dislocation would arise as a result of the removal of the steel containment structure and the removal of the twelve steel storage tanks. Again, however, if the highest and best use is as a commercial bulk fertilizer operation, then removal of the structures would cause dislocation, and such dislocation would be unnecessary.

The steel containment structure, and the twelve 29,000 gallon "petroleum grade" steel storage tanks, are "annexed" to the Taxpayer's real property, as the term "annexed" is defined in *Northern Natural.* This annexation supports the determination that the Taxpayer intended to make the structures permanent accessions to the freehold.

The steel containment structure and the twelve 29,000 gallon, steel storage tanks also satisfy the second test from *Northern Natural.* That test, the question of whether Taxpayer has appropriated the structures to that part of the realty to which it is connected, is easily answered. The storage tanks are

actively engaged in storing and in holding for sale commercial bulk fertilizer. In this regard the storage tanks appear to be not just an accessory or useful part of the realty, but a mandatory part of it. The Taxpayer could not utilize the storage tanks without the containment structure and could not store liquid fertilizer for sale without the steel storage tanks. These structures are not just of mere utility to Taxpayer, but are essential to Taxpayer's use of the property as a site for the sale of bulk liquid fertilizer.

The record further establishes that by means of physical annexation, e.g., by dedicated siting, the structures are "fixtures." Taxpayer's intent is also demonstrated by its annexation of the storage tanks to property owned in fee simple by Taxpayer.

The steel containment structure, and the twelve 29,000 gallon storage tanks, are "fixtures" under the standards announced in *Northern Natural.*

B.
APPLICABLE REGULATIONS

The rules and regulations of the Department of Property Assessment and Taxation define a "fixture" using the same test as that enunciated in *Northern Natural.* The regulations define a "fixture" as any item of personal property that has been:

> 001.01C(1) Annexed or physically attached to or incorporated into the real property;
>
> 001.01C(2) Applied or adapted to the use or purpose of the real property to which it is attached;
>
> 001.01C(3) Intended to be annexed to the real property. Intention shall be inferred from the nature and extent of the annexation and adaptation, unless the owner of the real property provides documentation that the intention is otherwise.

350 Nebr. Admin. Code, ch. 40, § 001.01C (2002). The steel containment structure, and the twelve 29,000 gallon steel storage tanks, using the same analysis as that applied above, are real property.

C.
PERSUASIVE AUTHORITY

Powell on Real Property, a treatise on the issue of real property, in Vol. 8, Section 652(1), (Richard Roy Belden Powell, published by Matthew Bender, June, 1998 rel.) discusses the traditional three-part fixture analysis first articulated in *Teaff v. Hewitt*, 1 Ohio St. 511 (1853), and later adopted in *Northern Natural*, *supra*. *Powell*, however, also discusses specific facets of fixture analysis which were not expressly

referenced in *Northern Natural.* Among these precepts, on the specific area of annexation, *Powell,* at section 652(1), points to a trend to minimize the importance of a finding of actual, physical annexation. *Powell* states that "annexation is no longer an absolute necessity . . . (m)any courts are willing to find there has been a sufficient constructive annexation even though actual physical attachment is not present." *Powell*, section 652(1). Elsewhere in this section *Powell* points out that "many courts have found heavy machines held in place by their own weight to be sufficiently connected to the real estate as a fixture." *Powell* at section 652(2). The treatise cites a Pennsylvania doctrine initially adopted in *Voorhis v. Freeman*, 2 Watts & Serg 116 (Pa. 1841), called the "assembled economic unit doctrine," which suggests that "machines in a production or manufacturing plant are regarded under this theory to be so crucial to the essential nature of the realty, the Pennsylvania courts are willing to view unattached items that are part of the full manufacturing package as constructively annexed to the real estate." *Powell,* section 652(2). *Powell*, noting that a boiler in a factory met the annexation, and ultimately, the fixture test, because it was bolted to the realty, noted that "(i)t is easiest to satisfy the mechanical approach suggested by the annexation factor if the item is cemented, bolted, or welded into

place, so that the realty and the fixture are united." *Powell*, section 652(2).

Powell also addresses the other two accepted "fixture test" factors. On the intent factor, *Powell* instructs that it is *objective* intent, rather than subjective intent, that must be measured. *Powell* suggests the application of a reasonable person standard in ascertaining intent. The treatise asks "(w)ould the ordinary reasonable person validly assume that the article in question belongs to and is a part of the real estate on which it is located . . . " *Powell,* section 652(1). Thus, for instance, in a contest between a tenant and a landowner regarding whether an item is a fixture, "a tenant's intent in affixing a chattel he owns to the real estate he is leasing is generally presumed to be just the opposite of the affixing chattel owner who also owns the real estate where the item is attached;" the presumption does not attach where the chattel is affixed to land not owned by the affixing party. *Powell*, section 652(4).

Powell, on the adaption factor, directs the inquiry to whether the personalty is "indispensable, integrally related, a necessary accessory, and essential" to the realty, in determining whether the personalty is in fact a "fixture." *Powell*, section 652(3). As *Powell* points out, there is an underlying governmental public policy rationale applicable to industrial plant fixture issues that should be considered. This public

policy consideration is the interest "in preserving [a plant] as a functional whole, [this] not only being in the owner's interest but also because it "encourages conservation and intelligent utilization of resources." *Powell*, section 652(3).

The Commission also notes that other jurisdictions have had the opportunity to address the issue of what constitutes a "fixture." For example, the Maryland Court of Appeals has held that whether an item is a fixture "depends principally on the object and purpose of the annexation, whether it was for the permanent and substantial improvement of the building . . . or merely for a temporary purpose . . ." *Comptroller of the Treasury, Retail Sales Tax Division v. Steuart Investment Company*, 312 Md. 1, 3, 537 A. 2d 607, 609 (1988). Much like the storage tanks at issue before the Commission, the storage tanks in *Comptroller* were large storage and processing tanks weighing thousands of pounds, even when empty. They were sited for an extended period of time on foundations, enjoyed a useful life of many decades, and yet were found to be fixtures, *even though they were not bolted or welded to their concrete foundations*. Taxpayer's storage tanks meet all of the *Comptroller* fixture tests.

D.
THE SUBJECT PROPERTY AS "BUILDINGS"

The Clay County Assessor determined that the subject property was in fact real property. This determination was made pursuant to her official duties. The assessment of real and personal property within the State of Nebraska is governed by both the Nebraska Constitution and by Nebraska State Law. (*See, e. g.,* Neb. Const. art. VIII, §1, and Neb. Rev. Stat. §77-102, *et seq.* (Reissue 1996)).

The county assessor is specifically required to ". . . (o)bey all rules and regulations made under Chapter 77 and the instructions sent out by the Property Tax Administrator." Neb. Rev. Stat. §77-1311(2) (Cum. Supp. 2002).

The Nebraska Administrative Code, Title 350, in Chapter 10, as it existed in July, 2002, when the Board heard this protest, provided:

> "001.01B Building shall mean a structure designed for habitation, shelter, storage, trade, manufacture, religion, business, education and the like. A structure or edifice enclosing a space within its walls, and usually, but not necessarily, covered with a roof."

Properly adopted and filed agency regulations have the effect of statutory law. *Schmidt v. State*, 255 Neb. 551, 559 - 560, 586 N.W.2d 148, 153-154 (1998)(Citations omitted).

Here, the uncontroverted evidence establishes that both the steel containment structure and the storage tanks are designed for "storage." Both types of structures are therefore "buildings" as that term is defined under the rules and regulations of the Department of Property Assessment and Taxation. The structures are, accordingly, real property, and must be valued as such.

E.
ACTUAL OR FAIR MARKET VALUE OF THE PROPERTY

The Taxpayer's protest challenged the valuation of the subject property based on its classification as real property. The Taxpayer asserted that if valued as personal property, the value of the property would be significantly reduced. State law supports this assertion, since the value of personal property is the "net book value" of that property. See, e.g., Neb. Rev. Stat. §77-1233.02(Cum. Supp. 2002).

The only evidence of value adduced by the Taxpayer is that of net book value. (E1). That evidence, in light of the Commission's determination that the subject property is real property, is not relevant. Real property is to be valued at actual or fair market value. Neb. Rev. Stat. §77-201(1)(Cum. Supp. 2002). The only evidence of actual or fair market value is that adduced by the Assessor.

The Assessor determined that the actual or fair market value of the land component of the subject property was $9,915. (E13). The Taxpayer did not protest this value. (E1). The Assessor determined that the actual or fair market value of all of the real property improvements was $312,220. (E13). The improvements were valued using the Cost Approach. (E14). The Cost Approach is a professionally accepted mass appraisal methodology recognized by statute. Neb. Rev. Stat. §77-112(Cum. Supp. 2002). This statute does not require use of all the specified factors, but requires use of applicable statutory factors, individually or in combination, to determine actual value of real estate for tax purposes. *Schmidt v. Thayer County Bd. of Equalization*, 10 Neb.App. 10, 18, 624 N.W.2d 63, 69 - 70 (2001).

The calculations used to determine value under the Cost Approach are set forth in Exhibit 14. The calculations used to determine the value of the storage tanks and steel containment structure are found on Exhibit 14, page 4. This evidence of value, made in compliance with state law, and based on a professionally accepted mass appraisal methodology, is clear and convincing evidence of the actual or fair market value of the subject property as real property as of the assessment date.

The Commission must therefore find and determine that the actual or fair market value of the subject property is that

amount determined by the Assessor. The property must therefore be valued accordingly for tax year 2002.

F.
CONCLUSION

The steel containment structure and the twelve 29,000 gallon storage tanks are real property, whether classified as fixtures or as buildings. The decision of the Board was, therefore, incorrect. Furthermore, the decision of the Board was both unreasonable and arbitrary in that the decision was contrary to law (the rules and regulations of the Department of Property Assessment and Taxation); and in that all other "buildings" were assessed as real property. Finally, as noted above, it is not clear from the record that the Board was presented with the question of whether the steel containment structure was real or personal property.

The Board's decision as to the twelve 29,000 gallon "petroleum grade" steel storage tanks must, therefore, be vacated and reversed. Assuming without deciding that the Board had subject matter jurisdiction over the steel containment structure, the decision to remove that structure from the real property assessment rolls must be vacated and reversed. Should a determination be made that the Board lacked subject matter jurisdiction, the Commission is specifically authorized to hear and determine appeals of "any other decision of a county board of

equalization." Neb. Rev. Stat. §77-5007(10)(Cum. Supp. 2002). The Commission has subject matter jurisdiction over the Board's decision directing the Assessor to remove the steel containment structure from real property tax rolls. Since the Board's decision was incorrect, unreasonable and arbitrary, that decision must also be vacated and reversed.

VII.
CONCLUSIONS OF LAW

A.
JURISDICTION

Jurisdiction of the Tax Equalization and Review Commission is set forth in Neb. Rev. Stat. §77-5007 (Cum. Supp. 2002.).

B.
SUBSTANTIVE CONCLUSIONS OF LAW

The Commission, from the entire record before it, concludes as a matter of law that it has jurisdiction over both the parties and the subject matter of this appeal.

VIII.
ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED as follows:

1. That the decision of the Clay County Board of Equalization which granted Taxpayer's protest as to the twelve 29,000 gallon "petroleum grade" steel storage tanks is vacated and

reversed. Therefore, these storage tanks shall be returned to the real property tax rolls for tax year 2002.

2. That the decision of the Clay County Board of Equalization which directed that the Taxpayer's steel containment structure be removed from the real property tax rolls and assessed as personal property is vacated and reversed. Therefore this structure shall be returned to the real property tax rolls for tax year 2002.

3. That Taxpayer's real property, including the twelve tanks and the steel containment structure and the related real property, shall be valued as follows for tax year 2002:

Land	$ 9,915
Improvements	$312,220
Total	$322,135

4. That any request for relief by any party not specifically granted by this order is denied.

3. That this decision, if no appeal is filed, shall be certified to the Clay County Treasurer, and the Clay County Assessor, pursuant to Neb. Rev. Stat. §77-5016(7)(Cum. Supp. 2002, as amended by 2003 Neb. Laws, L.B. 291, §9).

4. That this decision shall only be applicable to tax year 2002.

5. That each party is to bear its own costs in this matter

IT IS SO ORDERED.

Dated this 22nd day of July, 2003.

_____
Robert L. Hans, Commissioner

_____
Susan S. Lore, Commissioner

_____
Wm. R. Wickersham, Vice-Chair

Seal _____
Mark P. Reynolds, Chair