BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

GAS-N-SHOP, INC., A Nebraska Corporation, Appellant, vs. HALL COUNTY BOARD OF EQUALIZATION, Appellee.	)	CASE NO. 02C-44
	)	FINAL ORDER

Filed October 30, 2002

Appearances:

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Reynolds, Chair, for the Commission:

I.
STATEMENT OF THE CASE

Gas-N-Shop, Inc., purchased real property located in Hall County, Nebraska in April, 2000. The tract of land was improved. The Taxpayer razed the existing improvements and built a new convenience store and gas station under the Taxpayer's Gas-N-Shop brand. (E14:3). The facility is now designated by the Taxpayer as Store Number 75.

The new improvements include a lighted, 24-foot by 72-foot steel and aluminum canopy and a "walk-in/reach-in" cooler.

(E15:24). The Taxpayer did not remove the old underground fuel storage tanks, but continues to use those tanks to store various grades of gasoline for sale to its customers.

The Taxpayer contends the underground fuel storage tanks, canopy, and cooler (excluding ice equipment) are personal property. The Hall County Assessor, and after the protest, the Hall County Board of Equalization, concluded the referenced items are personal property. The Taxpayer timely filed an appeal of the Board's decision to the Commission.

The Commission called this matter for hearing on October 21, 2003. The hearing was held in the City of Lincoln, Lancaster County, Nebraska, pursuant to an Amended Notice of Hearing issued September 18, 2003. Commissioners Hans, Lore, Wickersham, and Reynolds heard the appeal. Commissioner Reynolds, Chair, presided at the hearing.

The Parties stipulated at the hearing that the actual or fair market value of the land component of the subject property was $84,500 as of the January 1, 2002, assessment date. The Parties further stipulated that the value of the improvements which are not at issue was $188,500. The Parties determined that the actual or fair market value of the items at issue was:

Underground fuel storage tanks	$36,000
Canopy	$29,500
Cooler	$26,500
Total	$92,000

II.
ISSUE

The only issue before the Commission is whether the underground fuel storage tanks, the canopy, and the cooler (excluding ice equipment) are personal property.

III.
FINDINGS OF FACT

1. The Taxpayer is the owner of the real property and of the property at issue.
2. The highest and best use 'as improved' of the subject property is as a convenience store/gas station.
3. The Taxpayer failed to adduce evidence of the number, age, size, condition, type of materials used or type of construction employed for the underground fuel storage tanks.
4. The Taxpayer failed to adduce any evidence of the costs of installation or removal of any of the three items.
5. The Taxpayer failed to adduce any evidence of the impact on actual or fair market value of removal of the three items.

6. The primary purpose of the underground fuel storage tanks is storage of motor fuels for sale to retail customers.

7. The primary purpose of the canopy is to provide shelter for retail customers as required by the Gas-N-Shop and Phillips 66 brand imaging.

8. The primary purpose of the walk-in/reach-in cooler is to provide storage of beer and other cold beverages for sale to retail customers.

IV.
PRINCIPLES OF LAW

The burden of proof consists of two elements: the burden of production and the burden of persuasion. The burden of production requires the Appellant to make a prima facie case. The burden of persuasion is a party's obligation to introduce evidence that persuades the factfinder, to the prescribed degree of belief, that each particular proposition of fact is true. *Schneider v. Chavez-Munoz,* 9 Neb.App. 579, 595 - 596, 616 N.W.2d 46,58 (Neb.App. 2000).

The burden of production in this appeal requires the Appellant to adduce evidence (1) that the decision of the Board was incorrect, and (2) that the Board's decision was unreasonable and arbitrary. The burden of production for the "unreasonable or arbitrary" standard requires the Appellant to adduce evidence (1) that the Board failed to faithfully perform its official duties;

or (2) that the Board failed to act upon sufficient competent evidence in making its decision. The burden of persuasion requires the Appellant to prove each of the required elements by clear and convincing evidence. Neb. Rev. Stat. §77-5016(7)(Cum. Supp. 2002, as amended by 2003 Neb. Laws, L.B. 291, §9). *Garvey Elevators v. Adams County Bd.*, 261 Neb. 130, 136, 621 N.W.2d 518, 523-524 (2001).

V.
ANALYSIS

The Taxpayer filed a hearing brief. The Taxpayer's brief alleges the items at issue are personal property based primarily on two Nebraska Supreme Court cases.

Taxpayer cites first *Green Tree Financial Servicing v. Sutton*, 264 Neb. 533, 650 N.W.2d 228 (2002). The lender in *Green Tree* held a security interest in a manufactured home. The issue in *Green Tree* is when a security interest is perfected in a manufactured home, which at the time was defined by law as a motor vehicle. *Green Tree* does not apply.

The Taxpayer also cites *Metropolitan Life Insurance v. Reeves* as authority for the proposition that the intent of the annexing party to make the article a permanent accession to the realty is the controlling factor. If true, then intent is a subjective factor in determining whether property is a fixture.

The property owner in *Metropolitan Life* took out a first and second mortgage on real property. A contractor built a grain storage facility on the property after the loans were made and the mortgages given. The contract for the storage facility construction provided that the facility would not become part of the real property until after full payment had been made. The property owner defaulted on the mortgages and the mortgage holder foreclosed. The trial court held that the grain storage facility was a fixture subject to the first and second mortgages. The contractor filed suit. The question was one of lien priority, and the Court construed the contracts accordingly. *Metropolitan Life* does not apply.

A.
OVERVIEW

The Commission must determine whether a particular piece of property is a "fixture," i.e., real property, under a three-part test. An item is 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." *Id.*

Intent is the critical factor. "The other two factors, annexation and appropriation to the use of the realty, have value

primarily as evidence of such intention." *Id.* Intent 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 held that permanent accession may be intended where the real property owner incorporates personal property into the real property. *Id.*, at 821.

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.*

B.
HIGHEST AND BEST USE

The highest and best use of a property is integral to the *Northern Natural* test. "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.

The Board was the only Party to adduce evidence of highest and best use. The Board's Appraiser concluded:

"Continued commercial retail use of the subject improvements is physically, legally and financially feasible, and is considered to be the maximally productive use of the subject property. The subject was constructed in 2001 as a convenience store/gas station and will provide an economic income stream well into the future. Therefore the subject's highest and

best use, as improved, would be its continued utilization as a commercial retail convenience store/gas station."

(E15:36).

C.
UNDERGROUND FUEL STORAGE TANKS

i.
ANNEXATION

The Taxpayer's corporate name is "Gas-n-Shop," a name which suggests that gasoline is for sale. The Taxpayer's Chief Operating Officer confirmed that dispensing gasoline for retail sale is an integral part of the corporations operations. Fuel storage tanks, in this case underground fuel storage tanks, are essential to the retail sale of gasoline. The first question is whether those tanks are annexed to the real property.

Northern Natural asks whether removal would cause harm to the realty or to the item to be removed. *Northern Natural*'s removal test requires consideration of (1) the change in market value as a result of the condition; (2) the amount of time and cost required to repair the condition; and (3) the hazard or dislocation caused by the condition. *Id.* at 820, 258.

The Taxpayer failed to adduce any evidence of the number, age, size, condition, type of materials used or type of construction employed for the underground fuel storage tanks.

These underground fuel storage tanks, regardless of age or quantity, are subject to regulations. Damage to the property caused by removal of the underground fuel storage tanks must be determined indirectly.

The Nebraska State Fire Marshal has an affirmative duty to promulgate and enforce rules and regulations governing storage and use of flammable liquids. Neb. Rev. Stat. §81-502 (Cum. Supp. 2002). The Fire Marshal's regulations require that installation of new underground storage tanks meet performance standards. Title 159, Neb. Admin. Code, ch. 4. The Fire Marshall's regulations also provide that after December 22, 1998, all existing underground fuel storage tanks must comply with those new performance standards; be upgraded to comply with those performance standards; or be closed. Title 159 Neb. Admin. Code, ch. 5, §001. (11/01).

The Taxpayer's underground fuel storage tanks were in use on January 1, 2002. Those tanks are therefore subject to Title 159, and accordingly must comply with the performance standards adopted by the Fire Marshall.

The Fire Marshall's performance standards recognize three types of underground fuel storage tanks: cathodically protected steel tanks; fiberglass-reinforced plastic tanks; and steel-fiberglass-reinforced plastic-composite. Title 159, ch.4, §002. (11/01). The Taxpayer failed to adduce evidence regarding the

type of underground fuel storage tanks at issue. For purposes of this analysis, it will be assumed that the Taxpayer's underground fuel storage tanks are cathodically protected steel tanks.

The Fire Marshal's regulations require that cathodically steel underground fuel storage tanks be covered with two feet of backfill or one foot of backfill covered with a slab or reinforced concrete at least four inches thick. Title 159 Neb. Admin. Code, ch. 4, §004.05. When subjected to traffic, the underground fuel storage tanks must be covered by at least three feet of backfill or eighteen inches of backfill covered by six inches of reinforced concrete or eight inches of asphaltic concrete. Title 159, Neb. Admin. Code, ch. 4, §004.05. Any tanks subject to floating must also be anchored.

The Taxpayer's Chief Operating Officer alleged that underground fuel storage tanks must be removed if the tanks are closed. Permanently closing the underground fuel storage tanks would require the Taxpayer to provide thirty-days notice to the State Fire Marshall. The tanks must then be emptied and cleaned. Title 159, Neb. Admin. Code, ch. 10, §002.01 (11/01). The accumulated liquids and sludge must be handled in accordance with the Fire Marshal's regulations. Closure must be done by a licensed and certified person. Title 159, Neb. Admin. Code, ch. 3, §001 (11/01).

Removing the underground fuel storage tanks would require the removal of surface materials (concrete), excavation of backfill material "to expose undisturbed native soils at the base of the excavation." Title 159, Neb. Admin. Code, ch. 10, §003.05A (11/01). All pipes and lines must also be excavated by trenching and exposing the entire length of line. Title 159, Neb. Admin. Code, ch. 10, §003.06A (11/01). The base of the excavation, and all lines must be inspected for contamination. Title 159, Neb. Admin. Code, ch. 10, §003.05B (11/01). If contamination is present, additional steps must be taken. Title 159, Neb. Admin. Code, ch. 10, §003.05C (11/01). The tanks would then need to be lifted out, placed on special trucks, and removed. The resulting pit or pits would need to be filled in and the concrete replaced.

Gas-N-Shop intends to continue selling gasoline to its retail customers. The removal of the underground fuel storage tanks would result in a significant reduction in the actual or fair market value of a gas station and convenience store which could no longer sell gasoline.

The *Northern Natural* test regarding annexation requires consideration of the amount of time and cost required to repair the condition and consideration of the hazard or dislocation caused by the condition. If the property was sold for a similar use without underground fuel storage tanks, a significant amount

of time and money would be expended to install new underground fuel storage tanks, or to repair the holes where the tanks were located.

The underground fuel storage tanks are an integral part of the Taxpayer's business. Removal of those tanks would cause harm to the realty. Removal of those tanks would be contrary to the highest and best use and would also reduce the actual or fair market value of the real property. Significant amounts of time and money would be required to repair the condition if the tanks were removed. Significant amounts of time and money would be needed to remediate the hazard or dislocation caused by the removal of the tanks. These findings require the Commission to conclude that a gas station's underground fuel storage tanks are annexed to the real property.

ii.
APPROPRIATION

The "appropriation" element of *Northern Natural* holds that if the chattel is a necessary or useful adjunct then the chattel is appropriated to the use of the real property. The underground fuel storage tanks are not merely necessary or useful, those tanks are an integral part of the Taxpayer's use of the real property. The underground fuel storage tanks are appropriated to the Taxpayer's use of its real property.

iii.
INTENT

Northern Natural determines intent based on an objective standard.

> "The intention of the party making the annexation 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 annexation has been made."

Id. at 818, 257.

The underground fuel storage tanks are integral to the property's highest and best use as a convenience store/gas station. The Taxpayer owns both the underground fuel storage tanks and the land in which the tanks have been buried. The underground fuel storage tanks have been embedded at least five feet below the surface of the ground. Annexation has been made to achieve highest and best use.

iv.
CONCLUSION

The Taxpayer's underground fuel storage tanks might be removed from the Taxpayer's property without damage to the tanks. The realty, however, would be damaged. The process of removing the tanks and repairing the damage would be contrary to the property's highest and best use, and would be slow and apparently

expensive. The tanks are annexed to the Taxpayer's real property. Those tanks, an integral part of the property's use, are also appropriated to the use of the real property. The Taxpayer's underground fuel storage tanks constitute fixtures, and therefore must be assessed as real property under *Northern Natural*.

D.
THE CANOPY

The Taxpayer erected a new, lighted canopy over the fuel pumps in 2001. [The Taxpayer's Chief Operating Officer testified that a new canopy was not built after the property was acquired. However, the photograph of the property prior to improvement shows three separate canopies. (E14:1). The photograph after the improvements shows a significantly larger, single canopy. (E15:26)].

The Taxpayer's Chief Operating Office testified that Gas-N-Shop Store Number 75 is co-branded with Phillips 66. (E15:28). Phillips 66 sets standards for its licensees. The lighted canopy appears to be required under the Phillips 66 standards, although the Taxpayer failed to adduce this agreement.

The Taxpayer's Chief Operating Officer also testified the lighted canopy is also provided for the shelter and protection of the Taxpayer's customers who are purchasing gasoline.

The canopy is 24-feet by 72-feet in size. The canopy is made of steel and aluminum with light weight I-beams. The canopy is affixed to the Taxpayer's real property by six metal columns. Each of the columns is bolted to and set in a concrete foundation approximately six inches deep.

i.
ANNEXATION OF THE CANOPY

The *Northern Natural* test for annexation of a fixture requires consideration of the harm caused by removal of the property. *Northern Natural*'s removal test requires consideration of damage to the realty or damage to the item being removed. Damage is measured by (1) the change in market value as a result of the condition; (2) the amount of time and cost required to repair the condition; and (3) the hazard or dislocation caused by the condition. *Id.* at 820, 258.

The Taxpayer failed to adduce any evidence of the cost to install or the cost to remove the canopy. The Taxpayer failed to adduce any evidence of the weight or method of installation of the canopy. Removal would require the canopy be cut into sections and be removed from the property. The six supporting columns which are bolted to and set in a foundation of six-inches of concrete could be removed from the property. The Taxpayer, however, failed to adduce any evidence of the damage caused to the real property by the removal of the columns; the amount of

time and cost required to remove or repair the condition; or the hazard or dislocation caused by the condition.

Both Phillip 66 and Gas-N-Shop require canopies as part of gas station operations for the shelter and protection of customers and for their brand image. Removal of the required canopy would adversely impact the property's highest and best use and would have a significant impact on actual or fair market value, since the gas station would not be able to function without a gasoline supplier.

ii.
APPROPRIATION

The "appropriation" element of *Northern Natural* holds that if the chattel is a necessary or useful adjunct then the chattel is appropriated to the use of the real property. As noted above, if both Gas-N-Shop and Phillips 66 require canopies as part of the brand imaging, then the canopy is a necessary adjunct.

iii.
INTENT

The Taxpayer's intent in annexing the canopy can be inferred from the canopy's nature, the relation and situation of the annexation, the structure and mode of annexation, and the purpose or use for which annexation has been made. *Northern Natural*, at 818, 257. The canopy is a structure necessary to protect the

Taxpayer's customers from inclement weather. The Taxpayer owns the canopy and the canopy is bolted to and set in six inches of concrete. The canopy has been erected to satisfy the brand image of Phillips 66 and Gas-N-Shop. The canopy is necessary to the property's highest and best use.

iv.
CONCLUSION

Removing the canopy would be contrary to the property's highest and best use as a retail convenience store/gas station and would reduce the actual or fair market value of the real property. The canopy is bolted to and set in a foundation made of concrete to a depth of six inches. The canopy is annexed to the real property. The canopy is also appropriated to the use to which the property is put, as it is required by both Gas-N-Shop and Phillips 66 brand imaging. The canopy is a fixture and must be assessed as real property under *Northern Natural*.

E.
THE "WALK-IN/REACH IN" COOLER

The Taxpayer built the "walk-in/reach in" cooler new in 2001. The cooler, excluding ice equipment, is an L-shaped structure approximately forty feet wide by fifteen feet deep. The cooler was built using four foot by seven foot panels which

are six-inches thick. The walls are sealed and bolted to the convenience store's concrete floor.

i.
ANNEXATION

The *Northern Natural* test for annexation of a fixture requires consideration of the harm caused by removal of the property. *Northern Natural*'s removal test requires consideration of damage to the realty or damage to the item being removed. Damages are measured by (1) the change in market value as a result of the condition; (2) the amount of time and cost required to repair the condition; and (3) the hazard or dislocation caused by the condition. *Id.* at 820, 258.

The Parties stipulated that the actual or fair market value of the walk-in/reach-in cooler was $26,500 as of the assessment date. The Taxpayer failed to adduce any evidence of the cost to install or the cost to remove the walk-in/reach-in cooler. The Taxpayer failed to adduce any evidence of the impact on actual or fair market value of the subject property if the cooler was removed. The Taxpayer failed to adduce any evidence regarding damage to the cooler is the seals were broken, the bolts removed, and wall sections taken down.

The Taxpayer's Chief Operating Officer testified that sales of beer and other cold beverages were an integral part of the Gas-N-Shop operation. Twenty-percent of the available floor

space is consumed by the cooler. [Floor area of 40-feet x 70-feet = 2,800 sq. ft.. Cooler area of 15-feet x 40-feet = 600 sq. ft. (E15:25)]. If twenty-percent of the store is devoted to the sale of refrigerated goods then the retail convenience store/gas station must receive a financial benefit. Removing the walk-in/reach-in cooler would be contrary to the property's highest and best use and would adversely impact the property's actual or fair market value.

ii.
APPROPRIATION

The "appropriation" element of *Northern Natural* holds that if the chattel is a necessary or useful adjunct then the chattel is appropriated to the use of the real property. The walk-in/reach-in cooler is not merely a useful adjunct, it is an integral part of the Store's operations. The walk-in/reach-in cooler is appropriated to the property's use as a convenience store.

iii.
INTENT

The Taxpayer's intent in annexing the walk-in/reach-in cooler can be inferred from the nature of the annexation, the relation and situation of the annexation, the structure and mode of annexation, and the purpose or use for which annexation has

been made. *Northern Natural,* at 818, 257. The walk-in/reach-in cooler is bolted to the concrete floor of the building and sealed to prevent loss of cold air. The walk-in/reach-in cooler consumes twenty percent of the floor space of the retail convenience store/gas station, and is used to store and provide access to cold milk, pop, beer and other products. Sale of these items is integral to the property's highest and best use. The Taxpayer's intent from an objective perspective is to make the walk-in/reach-in cooler a permanent part of the real property.

iv.
CONCLUSION

The walk-in/reach-in cooler is an integral part of the Taxpayer's operations. Removing the cooler would be contrary to the property's highest and best use and would adversely impact the property's actual or fair market value. The walk-in/reach-in cooler is bolted to the concrete floor of the convenience store, and sealed to prevent escape of cold air. The walk-in/reach-in cooler is a fixture which must be assessed as real property under *Northern Natural.*

F.
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 underground fuel storage tanks, the canopy, and the cooler satisfy the regulations using the analysis set forth above.

G.
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 facets of fixture analysis which were not expressly addressed in *Northern Natural*. *Powell* addresses annexation by noting the 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).

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). *Powell* states 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 commercial fixture issues that must be considered. This public policy consideration is the interest in preserving property as a functional whole, not only in the owner's best interest but also because it "encourages conservation and intelligent utilization of resources." *Powell*, section 652(3).

The underground fuel storage tanks, the canopy, and the walk-in/reach-in cooler, are all fixtures under the tests described in *Powell.* Those items must therefore be assessed and valued as real property.

H.
THE SUBJECT PROPERTY AS "BUILDINGS"

The Hall County Assessor determined that the underground fuel storage tanks, the canopy, and the cooler were 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 the underground fuel storage tanks and the cooler are designed for "storage" of products available for retail sale. 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 canopy is designed for shelter, and likewise is a "building" and must be assessed as real property.

VI.
CONCLUSIONS OF LAW

1. The Commission has jurisdiction over both the Parties and the subject matter of this appeal.
2. The Board's decision is presumed to be correct. The Board is presumed to have faithfully performed its official duties. The Board is also presumed to have acted upon sufficient competent evidence to justify its action. These presumptions remain in effect until there is competent evidence to the contrary presented. If such evidence is presented, the presumption disappears. From that point on, the reasonableness of the Board's decision is one of fact based upon all the evidence presented. The taxpayer bears the burden of showing the Board's decision to be unreasonable. *Garvey Elevators, Inc. v. Adams County Board of Equalization*, 261 Neb. 130, 136, 621 N.W.2d 518, 523 (2001).
3. Removing the underground fuel storage tanks, the canopy, and the walk-in/reach-in cooler would be contrary to the property's highest and best use, and would adversely impact the real property's actual or fair market value.

4. The Taxpayer has objectively manifested an intent to annex the underground fuel storage tanks as permanent fixtures to its real property.

5. The Taxpayer has objectively manifested an intent to annex the canopy as a permanent fixture to its real property.

6. The Taxpayer has objectively manifested an intent to annex the walk-in/reach-in cooler as permanent fixture to its real property.

7. The Taxpayer has failed to demonstrate by clear and convincing evidence that the Board's decision was incorrect, and either unreasonable or arbitrary. The Board's decision must accordingly be affirmed.

VII.
ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. The Hall County Board of Equalization's Order determining that the underground fuel storage tanks, canopy and cooler are real property is affirmed.

2. The Taxpayer's real property located at 2223 South Locust, in the City of Grand Island, Hall County, Nebraska, shall be valued as follows for tax year 2002:

Land	$ 84,000
Improvements	$189,000
Tanks	$ 36,000
Canopy	$ 29,500
Cooler	$ 26,500
Total	$365,000

3. Any request for relief by any Party not specifically granted by this order is denied.

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

5. This decision shall only be applicable to tax year 2002.

6. Each party is to bear its own costs in this matter.

IT IS SO ORDERED.

Dated this 30th day of October, 2003.

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Robert L. Hans, Commissioner

_____
Susan S. Lore, Commissioner

_____
Wm. R. Wickersham, Vice-Chair

_____
SEAL *Mark P. Reynolds*, Chair