

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

KAAPA ETHANOL, LLC,)	
)	
Appellant,)	Case No 06C-023
)	
v.)	DECISION AND ORDER AFFIRMING
)	THE DECISION OF THE KEARNEY
KEARNEY COUNTY BOARD OF)	COUNTY BOARD OF EQUALIZATION
EQUALIZATION,)	
)	
Appellee.)	

The above-captioned case was called for a hearing on the merits of an appeal by KAAPA Ethanol, LLC ("the Taxpayer") to the Tax Equalization and Review Commission ("the Commission"). The hearing was held in the Holiday Inn Express, 508 2nd Avenue, Kearney, Nebraska, on August 16, 2007, pursuant to an Order for Hearing and Notice of Hearing issued April 2, 2007. Commissioners Wickersham, Warnes, and Salmon were present. Commissioner Wickersham presided at the hearing.

Charles Woodside, General Manager of the Taxpayer was present at the hearing. William E. Peters appeared as legal counsel for the Taxpayer.

David G. Wondra, County Attorney for Kearney County, Nebraska, appeared as legal counsel for the Kearney County Board of Equalization ("the County Board").

The Commission took statutory notice, received exhibits and heard testimony.

The Commission is required by Neb. Rev. Stat. §77-5018 (Cum. Supp. 2006) to state its final decision and order concerning an appeal, with findings of fact and conclusions of law, on the record or in writing. The final decision and order of the Commission in this case is as follows.

**I.
ISSUES**

The Taxpayer has asserted that actual value of the subject property as of January 1, 2006, is less than actual value as determined by the County Board. The issues on appeal related to that assertion are:

Whether the decision of the County Board determining actual value of the subject property is unreasonable or arbitrary; and

The actual value of the subject property on January 1, 2006.

**II.
FINDINGS OF FACT**

The Commission finds and determines that:

1. The Taxpayer has a sufficient interest in the outcome of the above captioned appeal to maintain the appeal.
2. The parcel of real property to which this appeal pertains is described as Lots 1- 4 Golden Energy Addition, Minden, Kearney County, Nebraska ("the subject property").
3. Actual value of the subject property placed on the assessment roll as of January 1, 2006, ("the assessment date") by the Kearney County Assessor, value as proposed in a timely protest, and actual value as determined by the County Board is shown in the following table:

Case No. 06C-023

Description: Lots 1- 4 Golden Energy Addition, Minden, Kearney County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$ 2,094,865.00	\$ 827,380.00	\$ 2,094,865.00
Improvement	\$42,965,490.00	\$12,760,438.00	\$42,965,490.00
Total	\$45,060,355.00	\$13,587,818.00	\$45,060,355.00

4. An appeal of the County Board's decision was filed with the Commission.
5. The County Board was served with a Notice in Lieu of Summons and duly answered that Notice.
6. An Order for Hearing and Notice of Hearing issued on April 2, 2007, set a hearing of the appeal for August 16, 2007, at 8:00 a.m. CDST.
7. An Affidavit of Service which appears in the records of the Commission establishes that a copy of the Order for Hearing and Notice of Hearing was served on all parties.
8. Actual value of the subject property as of the assessment date for the tax year 2006 is:

Land value	\$ 2,094,865.00
Improvement value	<u>\$42,965,490.00</u>
Total value	<u>\$45,060,355.00.</u>

**III.
APPLICABLE LAW**

1. Subject matter jurisdiction of the Commission in this appeal is over issues raised during the county board of equalization proceedings. *Arcadian Fertilizer, L.P. v. Sarpy County Bd. of Equalization*, 7 Neb.App. 655, 584 N.W.2d 353, (1998).

2. “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.” Neb. Rev. Stat. §77-112 (Reissue 2003).
3. 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 section 77-1371, (2) income approach, and (3) cost approach. Neb. Rev. Stat. §77-112 (Reissue 2003).
4. Use of all of the statutory factors for determination of actual value is not required. All that is required is use of the applicable factors. *First National Bank & Trust of Syracuse v. Otoe Cty.*, 233 Neb. 412, 445 N.W.2d 880 (1989).
5. “Actual value, market value, and fair market value mean exactly the same thing.” *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).
6. Taxable value is the percentage of actual value subject to taxation as directed by section 77-201 of Nebraska Statutes and has the same meaning as assessed value. Neb. Rev. Stat. §77-131 (Reissue 2003).

7. All taxable real property, with the exception of qualified agricultural land and horticultural land, shall be valued at actual value for purposes of taxation. Neb. Rev. Stat. §77-201(1) (Cum. Supp. 2006).
8. Real property includes all land, buildings, fixtures, and improvements. Neb. Rev. Stat. §77-103 (Reissue 2003).
9. Whether an item is a fixture is determined by consideration of three factors (1) whether the item is actually annexed to real property or something appurtenant to real property (2) appropriation of the item to the use or purposes of that part of the realty with which it is connected and (3) the intention of the party making the annexation to make the item a permanent accession to the freehold. *Northern Natural Gas Co. v. State Bd. of Equalization and Assessment*, 232 Neb. 806, 443 N.W.2d 249 (1989).
10. A presumption exists that the County Board has faithfully performed its duties and has acted on competent evidence. *Omaha Country Club v. Douglas County Bd. of Equalization*, 11 Neb.App. 171, 645 N.W.2d 821 (2002).
11. The presumption that a county board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action 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. *Omaha Country Club v. Douglas County Bd. of Equalization*, 11 Neb.App. 171, 645 N.W.2d 821 (2002).
12. The presumption in favor of the county board may be classified as a principle of procedure involving the burden of proof, namely, a taxpayer has the burden to prove

that action by a board of equalization fixing or determining valuation of real estate for tax purposes is unauthorized by or contrary to constitutional or statutory provisions governing taxation. *Gordman Properties Company v. Board of Equalization of Hall County*, 225 Neb. 169, 403 N.W.2d 366 (1987) (citations omitted)

13. The Commission can grant relief only if there is clear and convincing evidence that the action of the County Board was unreasonable or arbitrary. See, Neb. Rev. Stat. §77-5016 (8) (Cum. Supp. 2006), and e.g. *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb.App. 171, 645 N.W.2d 821 (2002).
14. "Clear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved." *Castellano v. Bitkower*, 216 Neb. 806, 812, 346 N.W.2d 249, 253 (1984).
15. A decision is "arbitrary" when it is made in disregard of the facts and circumstances and without some basis which could lead a reasonable person to the same conclusion. *Phelps Cty. Bd. of Equal. v. Graf*, 258 Neb 810, 606 N.W.2d 736, (2000).
16. A decision is unreasonable only if the evidence presented leaves no room for differences of opinion among reasonable minds. *Pittman v. Sarpy Cty. Bd. of Equal.*, 258 Neb 390, 603 N.W.2d 447, (1999).
17. The County Board need not put on any evidence to support its valuation of the property at issue unless the taxpayer establishes the Board's valuation was unreasonable or arbitrary. *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 168, 580 N.W.2d 561, 566 (1998).

18. A Taxpayer, who only produced evidence that was aimed at discrediting valuation methods utilized by county assessor, failed to meet the burden of proving that value of property was not fairly and proportionately equalized or that valuation placed upon property for tax purposes was unreasonable or arbitrary. *Beynon v. Board of Equalization of Lancaster County*, 213 Neb. 488, 329 N.W.2d 857 (1983).
19. Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued. *Lincoln Tel. and Tel. Co. v. County Bd. Of Equalization of York County*, 209 Neb. 465, 308 N.W.2d 515 (1981).

IV. ANALYSIS

The subject property is a highly improved commercial parcel. Improvements include an ethanol plant, an office building, and a residence. An Appraiser for the Taxpayer estimated its actual value utilizing the cost approach. (E2:26). An Appraiser for the County testified that he used a version of the cost approach blended to identify estimated costs of various items based on cost tables supplied by Marshall & Swift and actual cost to construct information. One significant difference between the use of the cost approach by the two appraisers is determinative. The Taxpayer's Appraiser excluded all items considered to be "processing equipment" of the ethanol plant from his appraisal of real property. The appraiser for the County included those items as fixtures in the valuation relied on by the County Board for its determination of actual value.

The law of fixtures is complicated and occasionally counter intuitive. Whether an item is a fixture or removable personalty may depend on the relationship of the parties, i.e. landlord tenant, vendor vendee, mortgagee, mortgagor or other creditor. See, *The Fixtures Doctrine; Was It Ever Really the Law?*, Ronald W. Polston, *Whittier Law Review*, (1995). In this instance the parties with differing points of reference are the Taxpayer and the County Board and the issue is the determination of whether an item is a fixture and taxable as real property. All real property is subject to taxation unless exempted. *Neb. Const*, Art VIII §§ 1 and 2. Real property includes land, buildings, and fixtures. *Neb. Rev. Stat. §77-103* (Reissue 2003). Fixtures are those items of property that have become a part of real property. Whether an item of property has become a part of real property is determined by consideration of three factors (1) whether the item is actually annexed to real property or something appurtenant to real property (2) appropriation of the item to the use or purposes of that part of the realty with which it is connected and (3) the intention of the party making the annexation to make the item a permanent accession to the freehold. *Northern Natural Gas Co. v. State Bd. of Equalization and Assessment*, 232 Neb. 806, 443 N.W.2d 249 (1989). The three factor analysis stated in *Northern Natural* is restated in rules and regulations promulgated by the Property Tax Administrator. 350 Neb. Admin. Code, ch 10, §001.01A (05/05).

The Taxpayer's Appraiser excluded from his consideration of the value of the real property all items he considered to be "processing equipment". The Taxpayer's Appraiser considered all items used in a processing sequence that begins with grinding of corn in a hammer mill, includes fermentation of the ground corn for the production of alcohol, and ends with the storage after addition of a denaturing chemical. Photos show pipes, vats, vessels,

tanks, and supporting structures that were considered to be “processing equipment” by the Taxpayer’s Appraiser. The Taxpayer’s Appraiser considered tanks on concrete foundations used for storage of the finished denatured ethanol product to be fixtures and therefore real property. Other tanks on concrete foundations were considered “processing equipment” because they stored the chemical used to denature the alcohol. Another item excluded by the Taxpayer’s Appraiser is the cooling tower. The foundation, floor, wall, plumbing, and electrical items associated with the cooling tower were considered real property by the Taxpayer’s Appraiser. (E2:53). The cooling tower separate from the listed items was considered to be personal property “as it is designed to protect the ethanol processing from overheat with a back up chiller should the cooling tower fail”. (E2:39) The picture at page 39 of Exhibit 2, leaves little doubt that the cooling tower is a substantial item on a foundation whose removal without damage would be a substantial and costly effort. The Taxpayer’s Appraiser also testified that removal of the “processing equipment” would affect actual value of the remaining property. The testimony of the Taxpayer’s Appraiser was that the value of the buildings would become salvage value and that the value of the buildings would be reduced. Neb. Rev. Stat. §77-5016(8) (Cum. Supp. 2006). The Commission is without evidence with which to make determinations of the character of items excluded from an actual value estimate by the Taxpayer's Appraiser based on the factors described in *Northern Natural, Supra*. It is the Taxpayer's burden to prove that the decision of the County Board was unreasonable or arbitrary. The Taxpayer has not shown that any item characterized as “processing equipment” by its Appraiser is not in fact a fixture based on the factors described in *Northern Natural*,

Supra. The Taxpayer has failed to show that the decision of the County Board was unreasonable or arbitrary on an item by item basis.

The sole remaining question is whether all items considered to be "processing equipment" should be excluded. Many authorities hold that any and all machinery essential to the proper functioning of a plant, mill, or similar manufacture is a fixture or is presumed to be a fixture regardless of the manner by which it is annexed to the realty. 35A *Am. Jur. 2d*, Fixtures §89 (2007).

A directive issued by the Property Tax Administrator on April 13, 2006, advises that the three factor test described in *Northern Natural, Supra*, should be followed to determine whether an item is real or personal property. *Property Tax Administrator Directive 06-2*. The directive is in accord with rules and regulations promulgated by the Property Tax Administrator. See, 350 Neb. Admin. Code, ch 10, §001.01A (05/05). The Taxpayer, however, produced evidence that the exclusion of "processing equipment" from consideration as real property would be consistent with practices in other Counties, the Department of Revenue, the Property Tax Administrator, and the Department of Property Assessment and Taxation. In addition the appraisal report states that the "the appraisal is to take into consideration the Nebraska Department of Property Assessment and Taxation jurisdiction, the department's rules regulations and guidelines to follow regarding the appraised market value of real estate and personal property under the departments guidelines for reporting market value of ethanol plants. The application of the department's guidelines, indicate that the processing equipment could be considered as personal property for taxation purposes." (E2:2). There is no evidence that the Taxpayer's Appraiser applied the three factor test described in *Northern*

Natural, Supra, or the rules and regulations of the Property Tax Administrator to make his determination that “processing equipment” was personal property rather than a fixture taxable as real property. A County Assessor is bound by statute to follow the directives, rules and regulations, orders, and instructions of the Property Tax Administrator. Neb. Rev. Stat. §77-1311 (3) (Supp. 2005) and Neb. Rev. Stat. §77-1330 (1) (Cum. Supp. 2004). The Taxpayer’s Appraiser was not bound by the directives, rules and regulations, orders, and instructions of the Property Tax Administrator but here there was no explanation of how a determination could be made that “processing equipment” was personal property and not a fixture without consideration of the three factor test described in *Northern Natural, Supra*, or the Property Tax Administrator’s rules and regulations.

The Nebraska Supreme Court in *Rother v. Dohrse*, 122 Neb. 259, 240 N.W. 296 (1932), recognized that a boiler belonging to a tenant that was removable at termination of a lease remained personal property even though part of its use was to furnish heat for the building. In this case the “processing equipment” has a common ownership with the land and the rule announced in *Rother* is not applicable.

There is evidence that the Taxpayer intended to have the “processing equipment” treated as personal property for purposes of taxation. Tax treatment is not however one of the factors described in *Norther Natural Supra*.

A per se determination that an item denominated as “processing equipment” is not a fixture without consideration of the factors prescribed by *Northern Natural, Supra*, cannot be adopted by the Commission.

The Taxpayer presented testimony that a bill was passed during the 2007 session of the Nebraska Legislature defining "trade fixtures" and directing the taxation of "trade fixtures" as personal property. See, 2007 Neb. Laws, LB 334, §§13 and 14. The Taxpayer suggests that "trade fixtures" as defined by the Legislature would include all of the items considered to be "processing equipment" at the subject property. The Legislature's definition of trade fixtures was not made retroactive to January 1, 2006, the date at issue in this proceeding. Further there is limited evidence with which to evaluate a claim that any item that the Taxpayer's Appraiser considered to be "processing equipment" is in fact "processing equipment" or a "trade fixture" however those terms might be defined.

The Taxpayer's contention that items of property that are "processing equipment" must always be excluded from taxation as real property under current law is not supported by any binding authority known to the Commission. The Taxpayer may be correct that the law in Nebraska should be changed so that "processing equipment" or "trade fixtures" cannot be considered fixtures and a part of real property without consideration of the factors stated in *Norther Natural, Supra*, but that is something the Commission cannot do. See, *MAPCO v. State Bd. of Equalization and Assessment*, 238 Neb. 565, 471 N.W.2d 734 (1991).

The Taxpayer has not shown in fact or in law that any item of property the County Board might have included in its valuation of the real property comprising the subject property should be excluded. There is no basis for adoption of the estimate of actual value of the subject property determined by the Taxpayer's Appraiser excluding items considered by him to be "processing equipment" without consideration of the factors stated in *Northern Natural, Supra*.

There has been no showing by clear and convincing evidence that the decision of the County Board was unreasonable or arbitrary.

**V.
CONCLUSIONS OF LAW**

1. The Commission has subject matter jurisdiction in this appeal.
2. The Commission has jurisdiction over the parties to this appeal.
3. The Taxpayer has not adduced sufficient, clear and convincing evidence that the decision of the County Board is unreasonable or arbitrary and the decision of the County Board should be affirmed.

**VI.
ORDER**

IT IS ORDERED THAT:

1. The decision of the County Board determining taxable value of the subject property as of the assessment date, January 1, 2006, is affirmed.
2. Actual value of the subject property for the tax year 2006 is:

Land value	\$ 2,094,865.00
Improvement value	<u>\$42,965,490.00</u>
Total value	<u><u>\$45,060,355.00.</u></u>

3. This decision, if no appeal is timely filed, shall be certified to the Kearney County Treasurer, and the Kearney County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Cum. Supp. 2006).
4. Any request for relief, by any party, which is not specifically provided for by this order is denied.
5. Each party is to bear its own costs in this proceeding.
6. This decision shall only be applicable to tax year 2006.
7. This order is effective for purposes of appeal on September 18, 2007.

Signed and Sealed. September 18, 2007.

Wm. R. Wickersham, Commissioner

Nancy J. Salmon, Commissioner

William C. Warnes, Commissioner

SEAL

ANY PARTY SEEKING REVIEW OF THIS ORDER MAY DO SO BY FILING A PETITION WITH THE APPROPRIATE DOCKET FEES IN THE NEBRASKA COURT OF APPEALS. THE PETITION MUST BE FILED WITHIN THIRTY DAYS AFTER THE DATE OF THIS ORDER AND MUST SATISFY THE REQUIREMENTS OF STATE LAW CONTAINED IN NEB. REV. STAT. §77-5019 (CUM. SUPP. 2006). IF A PETITION IS NOT TIMELY FILED, THIS ORDER BECOMES FINAL AND CANNOT BE CHANGED.