

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Aventine Renewable Energy Holdings, Inc.,
Appellant,

v.

Hamilton County Board of Equalization,
Appellee.

Case No: 10C 100

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

For the Appellant:

Bartholomew L. McLeay,
Kutak Rock LLP

For the Appellee:

Michael H. Powell,
Hamilton County Attorney

This appeal was heard before Commissioners Robert W. Hotz and Thomas D. Freimuth. Commissioner Hotz writing the opinion of the Commission, Commissioner Freimuth concurring in part, and dissenting in part.

I. THE SUBJECT PROPERTY

The Subject Property is a commercial parcel located in Hamilton County. As of the effective date of January 1, 2010, the parcel was improved with a partially-constructed ethanol production facility known as the Aurora West Facilities. The legal description of the parcel is found at Exhibit 1:1.

II. PROCEDURAL HISTORY

The Hamilton County Assessor (Assessor) determined that the Subject Property was real property and determined the assessed value of the Subject Property at \$40,176,435 for tax year 2010. Aventine Renewable Energy Holdings, Inc. (Aventine) protested this assessment to the Hamilton County Board of Equalization (County Board) and requested a determination that the real property of the Subject Property have an assessed value of \$1,460,000, and that the tangible personal property of the Subject Property have an assessed value of \$14,535,000. The County Board determined that the taxable value of the Subject Property was \$40,176,435 for tax year

2010.¹ The Taxpayer appealed the decision of the County Board to the Tax Equalization and Review Commission (Commission).

Prior to the hearing, the parties exchanged exhibits and submitted a Pre-Hearing Conference Report, as ordered by the Commission. The Commission held a hearing on September 27, 2011.

The Commission subsequently entered an interlocutory order, sua sponte, on August 15, 2013.² The reason for the order was to determine whether the Commission had jurisdiction to determine the issues on appeal, in light of the fact that a previous order had been issued by a federal bankruptcy court that may have determined whether the Commission had jurisdiction to determine the actual value of the Subject Property.³ The Commission finds that on February 28, 2010, less than two months after the effective date of this appeal, the owners of the Subject Property concluded a Title 11 bankruptcy. The Commission has reviewed applicable orders from the bankruptcy court and concludes that the bankruptcy court did not determine the actual value or tax obligation of the Appellant for tax year 2010. The Commission therefore finds that it has subject matter jurisdiction to hear this appeal.⁴

III. STANDARD OF REVIEW

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

That presumption remains until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence adduced on appeal to the contrary. From that point forward, the reasonableness of the valuation fixed by the board of

¹ E1:1.

² See Case File.

³ Under federal law, a bankruptcy court may determine the actual value of real property and tax obligations of a party so long as an administrative tribunal or agency has not already determined the value prior to the filing for bankruptcy. 11 U.S.C. §505(a)(2) (2010).

⁴ The doctrine of res judicata is a common law principle. The principle of res judicata was specifically extended to tribunals and administrative agencies in *Moulton v. Board of Zoning Appeals*, 251 Neb. 95, 101, 555 N. W. 2d 39, 45 (1996). The Commission is an intermediate appellate tribunal. *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 286, 753 N.W.2d 802, 812 (2008)

⁵ See, Neb. Rev. Stat. §77-5016(8) (2010 Cum. Supp.), and *Brenner*, 276 Neb. 275, 282-84, 753 N.W.2d 802, 811-812 (2008). "When an appeal is conducted as a 'trial de novo,' as opposed to a 'trial de novo on the record,' it means literally a new hearing and not merely new findings of fact based upon a previous record. A trial de novo is conducted as though the earlier trial had not been held in the first place, and evidence is taken anew as such evidence is available at the time of the trial on appeal." *Doe v. Board of Regents*, 283 Neb. 303, 317 (2012) (quoting *Koch v. Cedar Cty. Freeholder Bd.*, 276 Neb. 1009, 1019 (2009)).

⁶ *Brenner*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted).

equalization becomes one of fact based upon all the evidence presented. The burden of showing such valuation to be unreasonable rests upon the taxpayer on appeal from the action of the board.⁷

The order, decision, determination or action appealed from shall be affirmed unless evidence is adduced establishing that the order, decision, determination, or action was unreasonable or arbitrary.⁸ Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.⁹

A Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued.¹⁰ 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.¹¹ The Commission's Decision and Order shall include findings of fact and conclusions of law.¹²

IV. VALUATION

A. Law

Under Nebraska law,

[a]ctual 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.

“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.” “Actual value, market value, and fair

⁷ *Id.*

⁸ Neb. Rev. Stat. §77-5016(8) (2010 Cum. Supp.).

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

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

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

¹² Neb. Rev. Stat. §77-5018(1) (2012 Cum. Supp.).

market value mean exactly the same thing.”¹³ 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. All real property in Nebraska subject to taxation shall be assessed as of January 1. All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.

Real property is defined as:

(1) All land;

(2) All buildings, improvements, and fixtures, except trade fixtures;

...¹⁴

Agency regulations that are properly adopted and filed with the Secretary of State of Nebraska have the effect of statutory law.”¹⁵ Pursuant to its statutory authority to promulgate Rules and Regulations, the Nebraska Department of Revenue has defined the terms “building,” “improvement,” and “fixture.” A “building” is defined as, “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.”¹⁶ An “improvement” is defined as, “any addition made to real property, amounting to more than mere repairs, such as sidewalks, streets, sewers or utilities.”¹⁷ “Fixtures other than trade fixtures” are defined as

any item of property that is: annexed or physically attached to or incorporated into the real property; appropriated to the use of the real property to which it is annexed. If the property is a necessary or useful adjunct to the real property to which it is annexed, then it has been appropriated to the use or purpose of the real property; and intended to be annexed to the real property. Intention shall be inferred from the nature and extent of the annexation and appropriation, unless the owner of the item or the owner of the real property provides documentation that the intention is otherwise.¹⁸

¹³ *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).

¹⁴ Neb. Rev. Stat. § 77-103 (Reissue 2009).

¹⁵ *Smalley v. Nebraska Department of Health and Human Services*, 283 Neb. 544, 557, 811 N.W.2d 246, 256 (2012).

¹⁶ 350 Neb. Admin. Chapter 10 §001.01B (Rev. 3/15/09).

¹⁷ *Id.* at §001.01C.

¹⁸ *Id.* at §001.01A.

Tangible personal property is a distinct class of property.¹⁹ The test for determining whether property qualifies as tangible personal property for ad valorem tax purposes is contained in Nebraska Statute §77-105.²⁰

The term tangible personal property includes all personal property possessing a physical existence, excluding money. The term tangible personal property also includes trade fixtures, which means machinery and equipment, regardless of the degree of attachment to real property, used directly in commercial, manufacturing, or processing activities conducted on real property, regardless of whether the real property is owned or leased,...

We are not aware of any Nebraska court decisions defining machinery or equipment, nor have any applicable Rules and Regulations been adopted defining machinery or equipment in the context of ad valorem taxes. Under these circumstances, the Commission will interpret the statutes under general principles of statutory construction.²²

Machinery is defined as “a functional unit of the means and appliances by which a desired result is obtained.”²³ A machine is also defined as “an assemblage of parts that are usu[ally] solid bodies but include in some cases fluid bodies or electricity in conductors and that transmit forces, motion and energy one to another in some predetermined manner and to some desired end. An instrument or a lever designed to transmit or modify the application of power, force, or motion.”²⁴ Equipment is defined as “the physical resources serving to equip a person or thing

¹⁹ Neb. Rev. Stat. §77-201(5) (Reissue 2009).

²⁰ *Vandenberg v. Butler County Board of Equalization*, 796 N.W.2d 580, 584, 281 Neb. 437, 442 (2011). For ad valorem tax purposes, the *Northern Natural Gas* test has been overruled. See *Vandenberg v. Butler County Board of Equalization*, 796 N.W.2d 580, 281 Neb. 437 (2011). In *Vandenberg*, the Nebraska Supreme Court reviewed the statutory definition of trade fixtures and held that for ad valorem tax purposes the statutory definition found in Nebraska Statutes section 77-105 controlled. The Taxpayer appealed a determination by the County Assessor that an irrigation pump located on a parcel of leased farm land and attached to a case well with a cement cap and bolts, was personal property. The Nebraska Supreme Court stated that the issue in *Vandenberg* was whether the irrigation pump was a fixture and real property or a trade fixture and personal property. The Court held that Nebraska Statutes section 77-103 defined all fixtures as real property, while Nebraska Statutes section 77-105 defined all trade fixtures as personal property. (“While §77-103 provides that “fixtures” shall be taxed as real property, “trade fixtures” are taxable as personal property under §77-105”). While the Court held that the Commission had correctly determined that the irrigation pump was machinery as described in Nebraska Statutes section 77-105, the Court did not provide a definition of machinery or equipment. The Court held that Nebraska Statutes section 77-105 includes all trade fixtures in the definition of personal property.

²¹ Neb. Rev. Stat. 77-105 (Reissue 2009).

²² In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning. *Blaser v. County of Madison*, 285 Neb. 290, N.W.2d (2013) (citing *Bridgeport Ethanol v. Nebraska Dept. of Rev.*, 284 Neb. 291, 818 N.W.2d 600 (2012)). “Statutes relating to the same subject, although enacted at different times, are in pari materia and should be construed together.” *Mahnke v. State*, 276 Neb. 57, 751 N.W.2d 635 (2008). There is a “presumption that the Legislature intended a sensible rather than absurd result in enacting the statute.” *State v. Norman*, 282 Neb. 990, 997 (2012) (citations omitted). This requires a sensible construction that would effectuate the purpose of the statute instead of a literal meaning that would have the effect of defeating the legislative intent. *State v. Norman*, 282 Neb. 990, 997 (2012) (citations omitted).

²³ *Webster’s Third New International Dictionary*, MerriamWebster, Inc., 1354 (2002). The Commission’s Rules and Regulations give it the authority to consider and utilize *Webster’s Third New International Dictionary*. See NAC Title 442, Chapter 5, §031.03.

²⁴ *Webster’s Third New International Dictionary*, at 1353.

(1): the implements (as machinery or tools) used in an operation or activity (2): all of the fixed assets other than land and buildings of a business enterprise.”²⁵

B. Summary of the Evidence

The parties stipulated that the following items located at or on the Subject Property are items of real property: (1) land; (2) land improvements, consisting of, (a) rail spurs, rail grading, rail system, and rail works, (b) roadways, (c) overpass, (d) entry and service roads, (e) rock paving, (f) utilities, water line, and wells, (g) perimeter chain link fencing, and roads, and (h) a truck scale for weighing loaded and unloaded vehicles; (3) buildings, consisting of, (a) the Administration Building, and (b) the Maintenance Building; and (4) other related improvements consisting of, (a) plant site work, and (b) total site excavation.

The parties disputed whether the following items are real or personal property: (1) Main Processing Building; (2) Control Room and Lab; (3) Boiler Building; (4) Centrifuge Building; (5) Evaporator A Building; (6) Evaporator B Building; (7) DD&E Building; (8) Rail Load Out and Unloading Building; (9) DDGS Building; (10) Fermentation Building; (11) Grain Load Out and Unloading Building; (12) 3 steel welded Tanks at 192,000 gallons; (13) 2 steel welded tanks at 1,562,000 gallons; (14) one steel welded tank at 116,900 gallons; (15) one corrugated steel grain tank at 600,000 bushels; (16) one corrugated steel grain tank at 50,000 bushels; (17) one conveyor; (18) one grain leg at storage bins, 20,000 bushels per hour; and (19) one Cooling Tower foundation.

Aventine asserted that the walls and ceilings surrounding equipment or machinery used in the processing and manufacturing of ethanol are either housings for the equipment or machinery and trade fixtures taxable as personal property, or buildings that are also trade fixtures and taxable as personal property. The County Board asserted that these same walls and ceilings constitute buildings and are taxable as real property.

The Taxpayer submitted into evidence an appraisal of tangible assets as of February 28, 2010, completed by Jeff Briggs, a Director for American Appraisal (herein Briggs’ February 28, 2010, fresh start valuation).²⁶ The appraisal was completed as part of a bankruptcy proceeding associated with a Chapter 11 bankruptcy filing by the Taxpayer.²⁷ The Taxpayer also submitted

²⁵ *Id.*

²⁶ See, E52:32-118.

²⁷ *Id.*

into evidence the Taxpayer Form 10-K filed with the Securities and Exchange Commission for fiscal year 2010.²⁸

John Castle, interim Chief Executive Officer of Aventine, testified that he began his employment with Aventine in April, 2010, but was familiar with the progression of the facility, including its status as of January 1, 2010. He testified that in his opinion the construction of the Subject Property was 75% complete on January 1, 2010, and that as completed, the Subject Property is a 110 million gallon ethanol production facility.

Castle testified that he considered the fermentation tanks personal property because there is a process of blending occurring within the tanks, and that the conveyor, grain legs, and storage bins are also personal property because they are run by motors and contain gears. He testified that the walls and ceilings constructed around equipment at the production facility were an integral part of the processes providing protection from elements and climate control.

According to Castle, Aventine filed for bankruptcy in April, 2009. He testified that the fair market value for Aventine's assets was valued and set in an emergence, fresh start, or reset value as of February 28, 2010. He indicated that these values are found in Exhibit 37.

Brian Pasbrig, Plant Manager of the Subject Property, testified regarding his familiarity with the facility. He testified regarding the items he believed were present on the Subject Property as of January 1, 2010, and the ultimate role each constructed item had in the production of ethanol.

Pasbrig testified that as of January 1, 2010, the Centrifuge Building, DDGS Building, and one truck scale were not constructed or installed on the Subject Property. He further testified that the following items were all complete to a substantial degree as of January 1, 2010: the Main Processing Building, the Control Room and Lab, the Boiler Building, the Evaporator Buildings A and B, the DD&E Building, the Fermentation Building, the Hammer Mill Building, the Rail Load Out and Unloading Building, the Grain Load Out and Unloading Building, the steel welded tanks, the corrugated steel grain tanks, the fermentation tank, the shift tanks, the Cooling Tower Foundation, the bins, one truck scale, one rail scale, the grain legs, the loop track and rail lines, the chain link fence,²⁹ and some dirt work.³⁰

Pasbrig stated that he would not consider any of the items that require electricity in order to operate as being 100% complete on January 1, 2010, because the electricity to the plant was not

²⁸ E34.

²⁹ Pasbrig explained that the six foot chain link fence around the Subject Property was complete as of the date of assessment.

³⁰ E52:179. He testified that the loop track and some dirt work and sub track were complete as of the date of assessment.

connected and active. He gave his opinion that construction on the Subject Property site was 60% to 65% complete as of January 1, 2010.

Regarding the ethanol manufacturing process at the Subject Property, Pasbrig explained that corn is brought onto the property either by rail, truck, or a conveyor belt.³¹ Environmental standards require the grain to be loaded and unloaded in an area substantially surrounded by walls and a ceiling to control the dust associated with the process.³² He testified that this was the function of the Rail Load Out and Unloading Building. Similarly, some of the grain is transported to the production facility by truck, and walls and a ceiling were constructed for dust control in what Pasbrig described as a Grain Load Out and Unloading Building.³³

Pasbrig testified that although the DDGS Building was not present on January 1, 2010, once it was built, received grain was put in piles and stored for twenty-four hours in the DDGS Building before being loaded. The walls and a ceiling surround the piles to protect the grain from the elements.³⁴ Grain legs are then used to transfer the grain from the conveyor belt to a corrugated steel grain tank.³⁵ The corrugated steel grain tank receives the corn and stores it until it is distributed to smaller tanks which feed the grain to the hammer mill.³⁶ The grain handling process requires power and electric control for the equipment in the process, and several of these components are surrounded by walls and a ceiling in what is described as the DD&E Building.³⁷ Hammer mills are used to grind the corn into fine flour which is then removed from the building by a conveyor belt. The hammer mills are surrounded by walls and a ceiling in order to protect them from the elements in what is described as the Hammer Mill Building.³⁸

Pasbrig testified that the equipment in the Main Processing Building is used to extract the sugar from the corn, and that the walls and ceiling surrounding the equipment, described as the Main Processing Building, protects the equipment from the elements.³⁹ The main processing equipment is controlled by computer equipment surrounded by walls and a ceiling, described as the Control Room and Lab, in order to protect it from the weather.⁴⁰ The boilers provide steam

³¹ The 1,500 foot conveyor belt transports grain directly from a grain elevator to the production facility, as depicted in E52:178.

³² Depicted in E52:184 image 16.

³³ Depicted in E40:7.

³⁴ Depicted in E52:181 image 3.

³⁵ As depicted in Exhibit 52, page 185.

³⁶ Depicted in E52:185 image 19; and the smaller bins are shown in E40:5.

³⁷ Depicted in E52:186.

³⁸ Depicted in E52:188 image 29.

³⁹ Depicted in E52:189 image 35.

⁴⁰ Depicted in E52:189 described as the Control Room and LAM.

to separate starch from sugar and alcohol from mash, and the boilers are surrounded by walls and ceilings, described as the Boiler Building, in order to protect it from the weather.⁴¹ Centrifuges separate solids from liquids, and the centrifuges are surrounded by walls and ceilings, described as the Centrifuge Building,⁴² in order to protect the centrifuges from the weather and control the temperature.⁴³ Evaporators are used to thicken the liquid, and recover and reuse the evaporated product in the beginning of the process.⁴⁴ These evaporators are also surrounded by walls and a ceiling, described as Evaporator A Building and Evaporator B Building.

Pasbrig explained that yeast is added to the sugar in a tank to ferment the sugar and create alcohol. He described the Fermentation Building as containing a pump, heat exchanger, and cleaning system to facilitate this process.⁴⁵ Three steel welded tanks, at 192,000 gallons each,⁴⁶ are used to hold the ethanol for 18 hours, during which time the product is tested to ensure the purity of the alcohol. If the alcohol does not meet purity requirements, it is then recycled back through part of the process.⁴⁷ Finally, a Cooling Tower is used to collect water. The water cools in the tower, condenses, and is collected in a cooling basin which forms the foundation of the cooling tower.⁴⁸

Pasbrig asserted his opinion that the grain legs and conveyors were machinery because they have motors and gear boxes and are associated with equipment.⁴⁹ He testified that foundations used for tanks and other pieces of equipment are integral for the function of the equipment and should not be included as real property. He further testified that several pieces of equipment were constructed and installed before the walls and ceilings were erected surrounding them, including the boilers, centrifuges, electronic controls and power supplies, and hammer mills. He testified that if the equipment were to be moved, the walls and ceilings would need to be deconstructed first.

Jeff Briggs, a Director for American Appraisal, and an appraiser holding a Nebraska Certified General appraisal license, testified that he conducted a retrospective appraisal⁵⁰ of the

⁴¹ Depicted in E52:190 image 37.

⁴² Pasbrig testified that the centrifuges and the Centrifuge Building were not present on January 1, 2010.

⁴³ Depicted in E40:1.

⁴⁴ Depicted in E52:192.

⁴⁵ Depicted in E52:2.

⁴⁶ These tanks are described as TK6101, TK6102, and TK6103.

⁴⁷ Depicted in E56:6.

⁴⁸ Depicted in E52:193 image 50.

⁴⁹ *Id.*

⁵⁰ Exhibit 52:32-118 is Briggs' Summary Appraisal Report relating to the "Fair Value" of tangible assets of the Subject Property as of February 28, 2010.

“fair value”⁵¹ of all of the tangible assets of the Subject Property for purposes of evaluating the reasonableness of the emergence, fresh start,⁵² or reset value as of February 28, 2010, and that he also conducted a retrospective appraisal to determine the fair market value of select items of the Subject Property as of January 1, 2010.⁵³ Briggs’ February 28, 2010, valuation expresses a fresh start value allocation of Aventine assets of \$1,460,000⁵⁴ for real property and \$14,535,000⁵⁵ for personal property. Briggs’ January 1, 2010, opinion of value for “certain identified assets” located at the Subject Property was \$2,450,000,⁵⁶ including \$1,380,000⁵⁷ for land, and \$1,070,756⁵⁸ for improvements.⁵⁹

Briggs testified that both his opinion of “fair value” in his assessment of the reasonableness of the fresh start value as of February 28, 2010, and his opinion of the actual value of “certain identified assets” as of January 1, 2010, included significant economic obsolescence due to problems within the ethanol production market. Briggs testified that Aventine began building the Subject Property facility in 2007 and 2008, when the materials for construction were most expensive and corn prices were at their historical highest price. Briggs further testified that in 2008 the price of crude oil reduced significantly, which caused the value of ethanol to decrease drastically as well. He testified that by January 1, 2010, the market had started to rebound, but that the assets were still subject to a 93.5% economic obsolescence as of that date.⁶⁰ Briggs testified that he had made no determinations concerning whether disputed items should be classified as real property or as personal property (trade fixtures) under Nebraska law.

Kurt Johnson, Co-owner of the Aurora News Register, testified that the project manager for the construction of the Subject Property ethanol production facility stated during an interview that construction of the ethanol production facility was 80% complete as of January 1, 2010.

⁵¹ The Briggs “Fair Value” measurement was based upon “the price that would be received to sell an asset or paid to transfer a liability in an orderly transaction between market participants at the measurement date.” E52:41, quoting FASB ASC Section 820-10-35. See also FASB ASC Topic 820, Fair Value Measurements and Disclosures.

⁵² According to the Briggs Summary Appraisal Report, “[f]resh start accounting requires the allocation of the reorganization value to the entity’s assets in conformity with the standard regarding purchase price allocations, FASB ASC Topic 805, Business Combinations,” and “[s]ubsequent to emergence, the excess reorganization value, if any, is to be treated as goodwill in accordance with the FASB ASC Topic 350, Intangibles – Goodwill and Other.” E52:39.

⁵³ Exhibit 49 is Briggs’ Summary Appraisal Report of the “Actual Value” of the Subject Property retroactive to January 1, 2010. In Nebraska, for ad valorem tax purposes, “fair market value” has the same meaning as “actual value” or “market value.” *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).

⁵⁴ E52:37, 52:69, E52:85-86.

⁵⁵ E52:37, 52:69.

⁵⁶ E49:7, E49:38.

⁵⁷ E49:31.

⁵⁸ E49:35.

⁵⁹ The only buildings included as improvements were the Administration Building and the Maintenance Building. E49:17-19.

⁶⁰ See also E49:34, E52:37.

Chad Carlson, Vice President of Corporate Operations for Aurora Co-op, testified that Aurora Co-op and Aventine had an agreement and business transaction, described as a Master Cost Share Agreement, concerning the development of the Subject Property. Carlson testified that Aurora Co-op owns Lot 1, and sold Lots 5⁶¹ and 6,⁶² consisting of approximately 85 acres, to Aventine for \$1.14 million.⁶³ He described Lot 5 as 3 acres located in the southwest corner, and Lot 6 as the remaining 82 acres. He asserted that Aurora Co-op and Aventine shared the cost for creating the roads and railroad tracks. He further testified that Aventine's share of the overpass construction was \$1.23 million. Carlson testified that Aventine's share of the cost share agreement was \$4.636 million. His testimony regarding the final plan for the Subject Property ethanol production facility was made in reference to Exhibit 52.⁶⁴ Carlson also testified under cross examination that there was no active construction at the Subject Property from December of 2008 to March of 2010.

George Hohwieler, Chief Executive Officer and President of Aurora Co-op, testified that the Aurora Co-op was initially a partner with NE Energy Co-op. He testified that NE Energy Co-op was a successor entity of Aventine. He testified that Aurora Co-op owned a portion of NE Energy Co-op and supplied grain to the site for ethanol production and grain sale until Aventine agreed to build its own ethanol plant. Hohwieler asserted that there had been no recent ethanol production at the Subject Property facility, but that the rail lines and switches had been used by NE Energy LLC, and the rail lines were complete and fully operational as January 1, 2010. Hohwieler also testified that there was no active construction at the Subject Property from December of 2008 to March of 2010.

Darrel Stanard, an appraiser holding a Nebraska Certified General appraisal license, testified that he and Mark Stanard, also an appraiser holding a Nebraska Certified General appraisal license, appraised the Subject Property under a contract with the Assessor. Stanard testified that he and Mark Stanard determined at the time of the assessment that the Assessor should set the actual value of the Subject Property at \$40,176,435 for tax year 2010, including a construction completion percentage of 75%.⁶⁵ The Assessor assessed the Subject Property at that same

⁶¹ Lot 5 is shown to consist of 3.05 acres at Exhibit 2, page 164.

⁶² Lot 6 consists of 81.1225 acres per Exhibit 10, page 1. Lots 5 and 6 combined total 84.172 acres.

⁶³ E52:135.

⁶⁴ See Exhibit 52, pages 163-165.

⁶⁵ E52:8

value.⁶⁶ Aventine protested that assessment.⁶⁷ As part of the protest proceedings, Darrel Stanard was hired by the County Board to function as a referee coordinator on behalf of the County Board.⁶⁸ In his role as referee coordinator, Stanard concluded that the “Assessor used an acceptable mass appraisal practice in determining the partial assessment for 2010,” and that the “Final Coordinator Value Estimate” should again be \$40,176,436.⁶⁹ The County Board relied upon this same determination of value.⁷⁰

Subsequent to the protest, and prior to the hearing on this appeal, Stanard Appraisal Services was hired by the Assessor to provide an opinion of value of the Subject Property. Darrel Stanard testified that on review of the Subject Property, he and Mark Stanard arrived at a retrospective opinion of value for the Subject Property at \$29,810,000.⁷¹

Darrel Stanard testified that he had been involved in valuing the Subject Property for ad valorem tax purposes since tax year 2008, but that he had never performed a fee appraisal for an ethanol production facility. He determined that the Subject Property was 28% complete in 2008, 60% complete in 2009, and 75% complete in 2010.⁷² Darrel Stanard testified that he developed his opinion of value using the cost approach. He explained that he first valued each item of real property, and then determined the aggregate actual value of all items of real property. He then adjusted the actual value based upon the percent completion of the Subject Property facilities as a whole. He testified that in reaching his opinion of value he made no deductions for any economic obsolescence. Stanard also testified that he made no deductions for any physical depreciation because the Subject Property was not in use. He asserted that a *Marshall Valuation Service* appraisal guide supported his decision not to make deductions for any depreciation.

Mark Stanard testified that he and Darrel Stanard inspected the Subject Property in August of 2011. He asserted the highest and best use for the Subject Property was as an ethanol production facility, and that the Subject Property was zoned as “Industrial.”⁷³ He explained that his opinion of value was based upon the cost approach with cost data derived either from a *Marshall Valuation Service* appraisal guide or from reported actual costs of items. Mark Stanard also

⁶⁶ E52:8.

⁶⁷ E1:1, E:52:6.

⁶⁸ This is authorized by Neb. Rev. Stat. §77-1502.01.

⁶⁹ E1:2, E52:7.

⁷⁰ E1:1.

⁷¹ Exhibit 52:312-363 states the value at \$29,810,000 in a document with a cover page dated August 19, 2011.

⁷² E52:317. See also, E52:144.

⁷³ E52:311.

opined that the Subject Property had no physical depreciation. He asserted that *Marshall Valuation Service* depreciation tables should not be applied to the Subject Property because *Marshall Valuation Service* cost data is based upon an assumption that a property is in use and suffering depreciation from that use. He also agreed that there should be no economic obsolescence deduction because the property was not in operation.

Mark Stanard asserted that Briggs' 93.5% economic obsolescence adjustment was inappropriate for the market, and that in his opinion Briggs had merely looked at the bankruptcy value to determine economic obsolescence. He testified that because the Subject Property would again be operational in 2012 as an ethanol production facility, he must assume that the bankruptcy was the result of management decisions and not externalities measured as economic obsolescence.

Darrel Stanard opined that the grain legs and conveyor were not items of personal property under Nebraska Statutes Section 77-105 because, while they were machinery or equipment, they were not used as part of the manufacturing or processing activities at the Subject Property. He also testified that the fermentation tanks and Hammer Mill Building should be characterized as personal property. He opined that buildings could be personal property and that the level of attachment or presence of a permanent foundation was the dominant factor in his determination of whether certain items were personal property or real property.⁷⁴ He asserted that all the walls and ceilings surrounding machinery and equipment were buildings and real property.

C. Trade Fixtures

The definition of real property is controlled by Nebraska Statutes section 77-103. Personal property and trade fixtures are defined at Nebraska Statutes section 77-105.⁷⁵ Nebraska Statutes section 77-103(2) specifically states that trade fixtures are not real property. While the degree of attachment to the real property is a generally accepted factor in determining whether an item is personal property in other jurisdictions, Nebraska Statutes define trade fixtures as items of personal property regardless of the degree of attachment of the item.⁷⁶

⁷⁴ The Taxpayer offered deposition testimony from Darrel Stanard, wherein Stanard stated that the degree of attachment is the most important factor in determining whether an item is real property or personal property. Stanard's views regarding the degree of attachment are consistent with appraisal principles in most jurisdictions but are in conflict with Neb. Rev. Stat. § 77-105.

⁷⁵ See *Vandenberg v. Butler County Board of Equalization*, 281 Neb. 437, 796 N.W.2d 580 (2011).

⁷⁶ Neb. Rev. Stat. §77-105; See *Vandenberg v. Butler County Board of Equalization*, 281 Neb. 437, 796 N.W.2d 580 (2011).

Aventine has asserted that buildings, which are defined as real property, may also be trade fixtures under Nebraska Statutes section 77-105. Aventine asserts in the alternative that the walls and ceilings surrounding integral machinery and equipment used for the processing of ethanol at the Subject Property are not buildings, but housings for the machinery and equipment and part of the same.

Under Nebraska Statutes section 77-103(2), a single item is either a building or a trade fixture, but not both. The Court's reasoning in *Vandenburg v. Butler County Board of Equalization* is instructive.⁷⁷ When determining whether an irrigation pump was an item of real property or an item of personal property, the Court reasoned that the pump was either a fixture or a trade fixture, but not both.⁷⁸ It follows that the walls and ceilings surrounding machinery and equipment located on the Subject Property are either buildings, taxable as real property, or they are machinery and equipment, which are trade fixtures, and are taxable as personal property.

All of the described structures surrounding the hammer mills, evaporators, control equipment and lab, main processing equipment, fermentation tanks, boilers, and power and electronic components consist of walls and ceilings used to shelter machinery or equipment or provide an acceptable location for manufacturing as described by Pasbrig. This includes the Main Processing Building, Control Room and Lab, Boiler Building, Centrifuge Building, Evaporator A Building, Evaporator B Building, DD&E Building, DDGS Building, and Fermentation Building. The Commission finds that all of these structures, consisting of walls and ceilings designed to protect machinery and equipment from the elements are buildings and are real property.⁷⁹

Similarly, the structures used to store grain and alcohol, including the Rail Load Out and Unloading Building, Grain Load Out and Unloading building, 3 steel welded tanks at 192,000 gallons, 2 steel welded tanks at 1,562,000 gallons, one steel welded tank at 116,900 gallons, one corrugated steel grain tank at 600,000 bushels, and one corrugated steel tank at 50,000 bushels consist of walls and ceilings used to store grain, alcohol, or other derivatives of the ethanol

⁷⁷ 281 Neb. 437, 796 N.W.2d 580 (2011).

⁷⁸ *Id.* at 438, 796 N.W.2d at 581 (“The issue is whether the irrigation pump should be classified as a fixture and taxed as real property or a trade fixture and taxed as personal property, as defined by Neb. Rev. Stat. §77-105 (Reissue 2009).”) (“While §77-103 provides that ‘fixtures’ shall be defined as real property, ‘trade fixtures’ are taxable as personal property under §77-105.”)

⁷⁹ See NAC Title 350, Chapter 10, §001.01C. “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.”

manufacturing process and are designed to provide protection from the elements. The Commission finds that each of these structures is also real property.

The Cooling Tower Foundation supports a structure designed to allow water to cool and condense. This process requires an enclosed space, and the Cooling Tower Foundation supports and is an integral part of the walls and ceiling which enclose this space. The Commission finds that the foundation is part of the building, and is also real property.

None of the aforesaid structures meet the commonly accepted definitions of machinery or equipment; they do not transmit motion, energy or forces in some predetermined manner, and do not modify the application of force, power, or motion, nor are they implements or objects used to carry on the processing work.

Conversely, the grain legs and conveyors are items which transmit motion to move the grain. The Commission finds that the grain legs and conveyor meet the definition of machinery. Additionally, the conveyor transfers the grain to the storage bins from which the grain legs transfer the grain to the machinery which processes the ethanol. Both the conveyor and grain legs are used directly in the manufacturing or processing of ethanol. The Commission finds that the grain legs and conveyor are therefore trade fixtures and taxable as personal property.

D. Presumption and Burden of Persuasion

In this de novo proceeding, the County Board has presented evidence of the market value of the Subject Property that conflicts with the determination of value which was the basis for this appeal. The evidence of market value offered by the County Board in this proceeding is based upon the appraisal opinions of Darrel Stanard and Mark Stanard. We find that these value opinions alone constitute competent evidence to rebut the presumption in favor of the determination of value made by the County Board at the time of the protest proceeding.⁸⁰

Similarly, the Commission also finds that the Stanard appraisal also constitutes clear and convincing evidence that the County Board's determination was arbitrary or unreasonable. The only question left before the Commission is the actual value of the Subject Property based upon the best evidence.⁸¹

⁸⁰ JQH LaVista Conf. Ctr. v. Sarpy Cty. Bd. of Equal., 285 Neb. 120, 825 N.W.2d 447 (2013).

⁸¹See, *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283-84, 753 N.W.2d 802, 811 (2008) (citing *Ideal Basics Indus. v. Nuckolls Cty. Bd. Of Equal.*, 231 Neb. 653, 654-55, 437 N.W.2d 501, 502 (1989)).

E. Bankruptcy Appraisal and Form 10K

The Commission gives Briggs' February 28, 2010, fresh start valuation and Form 10K little probative weight because: (1) the opinions expressed in the document were superseded by additional appraisal work performed by the author of Briggs' February 28, 2010, fresh start valuation; and (2) a careful review of Briggs' February 28, 2010, fresh start valuation indicates that the opinion was constructed using appraisal practices which do not determine an opinion of actual value as required by Nebraska Statute.

Briggs' February 28, 2010, fresh start valuation indicates that the opinion contained therein relies upon the fair value of assets.⁸² However, a further review of Briggs' February 28, 2010, fresh start valuation indicates that while fair value was calculated for some tangible assets held by the Taxpayer during bankruptcy, the final value determination of these assets was assigned through appraisal practices best used to determine a going concern value for real property,⁸³ and not actual value as required by Nebraska Statute.⁸⁴

While fair market value was determined,⁸⁵ the allocation of value to each facility was based upon the economic value of the facility itself so that the total value of individual assets did not exceed a predetermined economic value of the facility.⁸⁶ Fresh start valuation requires an allocation of assets based on "purchase price allocations."⁸⁷ The allocations convert the fair or actual value of assets into some other type of value known as a fresh start or re-organization value.⁸⁸ For bankruptcy purposes, these re-organization values are useful since the purposes of a re-organization plan are to provide: (1) evidence of the debtor's continued viability; and (2) assurances that remaining creditors can be satisfied in their claims. However, this allocation makes fresh start and re-organization values less useful, if not irrelevant, in determining the actual value of real property for ad valorem purposes.

While the calculation of fresh start value began with a determination of the fair value of tangible assets for the company as a whole, that value, and with it the principles that make fair value an indicator of likely sale price, are abandoned. For example, while an initial fair value is

⁸² E52:36.

⁸³ See, Appraisal Institute, *The Appraisal of Real Estate*, at 29 (13th ed. 2008) (defining going concern value).

⁸⁴ See, Neb. Rev. Stat. §77-112 (Reissue 2009) (defining actual value for ad valorem real property taxes).

⁸⁵ E52:36.

⁸⁶ See, E52:43.

⁸⁷ See, E52:39 (citing FASB ASC Topic 805, Business Combination).

⁸⁸ See, E52:43.

required to determine the value of the property at its highest and best use,⁸⁹ once an aggregate fair value of all assets attributable to the debtor is determined, the allocation is no longer concerned with whether the fresh start value falls below the value of assets when sold on the open market for the highest and best use.⁹⁰ Instead, fresh start valuation values the real property at its current economic value to the current owner.⁹¹

Nebraska Statutes require that real property subject to taxation be valued at its actual value unless the real property meets the definition of agricultural or horticultural land, or historically significant real property.⁹² Nebraska Statutes section 77-112 defines “actual value”:

Actual value of real property for purposes of taxation means the market value of real property in the ordinary course of trade. 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. 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 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 consideration of the full description of the physical characteristics of the real property and an identification of the property rights being valued.

Briggs’ February 28, 2010, fresh start valuation instead determines the value of the Subject Property to the Taxpayer as a single asset in the larger holdings of a business entity.

Further, Briggs’ February 28, 2010, fresh start valuation treats “construction in progress” as personal property.⁹³ This does not comport with the statutory definition of personal property.⁹⁴ Real property is defined, in relevant part, as, “All buildings, improvements, and fixtures, except trade fixtures[.]”⁹⁵ There are no exceptions for partially constructed improvements or buildings. To construe the statute to mean that partially constructed improvements or buildings constitute real property would be unreasonable. The Bankruptcy Appraisal assigns a combined after depreciation value of \$42,659,000 to the items included in personal property as “construction in

⁸⁹ See, E52:41.

⁹⁰ See, E52:41.

⁹¹ See, E52:43

⁹² Neb. Rev. Stat. § 77-201 (Reissue 2009).

⁹³ See, E52:40.

⁹⁴ See, Neb. Rev. Stat. § 77-104 (Reissue 2009) (“The term personal property includes all property other than real property and franchises”).

⁹⁵ See, Neb. Rev. Stat. § 77-103(2) (Reissue 2009).

progress” located on both the Subject Property, and another plant owned by the Taxpayer.⁹⁶ Briggs’ February 28, 2010, fresh start valuation indicates that none of this value attributable to the Subject Property was assigned to the final opinion of actual value.⁹⁷

Given all of the foregoing, the Commission finds that Briggs’ February 28, 2010, fresh start valuation should be given little, if any, probative weight.

F. Analysis of Percentage Completion

Opinions of the percentage of completion of the construction of the Subject Property ethanol production facility on January 1, 2010, ranged from 60% to 85%. The County Board relied upon the opinions of Darrel Stanard and Mark Stanard that construction of the Subject Property was 75% complete as of that date. Brian Pasbrig asserted on behalf of Aventine that the Subject Property was only 60% to 65% complete, while John Castle opined the percentage completion was 75%. Jeff Briggs testified that a percentage completion of 80% would be reasonable. There was also testimony that Aventine’s project manager had suggested in a news interview that the percentage completion was 80%.

The percentage completion of a Subject Property is a subjective determination. In this appeal, the subjective opinions vary by 25% in relation to a facility that once fully constructed had an assessed valuation of more than \$40 million. The Taxpayer presented evidence of specific items of the Subject Property which were not completed as of January 1, 2010, but even if this testimony is given great weight the calculation is still subjective and not quantified. The Commission therefore finds that taken as a whole the evidence supports a conclusion that the Subject Property was 75% complete as of January 1, 2010.

G. Analysis of Disputed Items of Real Property

The Taxpayer produced evidence of the itemized actual value of the following components of the real property of the Subject Property, which, as noted above, both parties stipulated were real property: (1) land; (2) land improvements, consisting of (a) rail spurs, rail grading, rail system, and rail works, (b) roadways, (c) overpass, (d) entry and service roads, (e) rock paving, (f) utilities, water line, and wells, (g) perimeter chain link fencing, and roads, and (h) a truck scale for weighing loaded and unloaded vehicles; (3) buildings consisting of, (a) the

⁹⁶ See, E52:71.

⁹⁷ See, E52:60.

Administration Building, and (b) the Maintenance Building; and (4) other related improvements consisting of, (a) plant site work, and (b) total site excavation. The actual value of any other components of real property of the Subject Property are in dispute.

The opinion of value expressed by John Castle contained in Exhibit 37 is of a fresh start fair market value as of February 28, 2010, after Aventine emerged from bankruptcy. The opinion of value found in Jeff Briggs' fresh start valuation in Exhibit 52, pages 32-118, excludes items which the Commission finds in this order are items of real property.⁹⁸ The Commission finds that the following are also items of real property for which the Taxpayer did not express an itemized opinion of value: (1) Main Processing Building; (2) Control Room and Lab; (3) Boiler Building; (4) Centrifuge Building; (5) Evaporator A Building; (6) Evaporator B Building; (7) DD&E Building; (8) Rail Load Out and Unloading Building; (9) DDGS Building; (10) Fermentation Building; (11) Grain Load Out and Unloading Building; (12) 3 steel welded tanks at 192,000 gallons; (13) 2 steel welded tanks at 1,562,000 gallons; (14) one steel welded tank at 116,900 gallons; (15) one corrugated steel grain tank at 600,000 bushels; (16) one corrugated steel tank at 50,000 bushels; and (17) one Cooling Tower Foundation. These items, if constructed as of the assessment date, were included by both Briggs and Castle in aggregate opinions of value for all personal property.⁹⁹ Without an itemization of the value of each item, the Commission cannot determine taxable value for each of these disputed items.

The Commission finds that the opinion of value given by Darrel Stanard and Mark Stanard is the best evidence of taxable value for each of these items and that the total taxable value of the following items, before application of an adjustment for percentage completion, is \$15,076,873.¹⁰⁰

⁹⁸ See E37; E49.

⁹⁹ See E37; E52.

¹⁰⁰ All values are contained in the Stanard appraisal at E52:356-357. The Stanard appraisal describes each building listed on E52:356 as a numbered section. Exhibit 52, pages 339-342 described the buildings to which Stanard refers on E52:356.

Main Processing Building	\$3,380,216
Control Room and Lab	\$573,593
Boiler Building	\$1,797,769
Centrifuge Building	\$551,322
Evaporator A Building	\$366,069
Evaporator B Building	\$366,069
DD&E Building	\$490,854
DDGS Building	\$1,712,320
Fermentation Building	\$1,534,358
Rail Load Out and Unloading Building	\$1,173,678
Grain Load Out and Unloading building	\$452,175
3 steel welded tanks at 192,000 gallons	\$288,000 (\$96,000 x 3 tanks = \$288,000)
2 steel welded tanks at 1,562,000 gallons	\$1,562,000 (\$781,000 x 2 tanks = \$1,562,000)
Steel welded tank at 116,900 gallons	\$58,450
Corrugated steel grain tank at 600,000 bushels	\$570,000
Corrugated steel tank at 50,000 bushels	\$100,000
Cooling Tower Foundation	\$100,000
Total Disputed Items	\$15,076,873

H. Analysis of Disputed Items of Real Property

1. Economic Obsolescence

External or economic obsolescence can be determined by: (1) capitalizing the income or rent loss attributable to the negative influence; (2) comparing paired sales; (3) allocating market-extracted depreciation; or (4) using the breakdown method.

Briggs' determination that the Subject Property was affected by a 93.5% economic obsolescence factor appears to be inconsistent with previous assertions in his appraisal report regarding the ethanol market. Briggs' appraisal report quoted 2010 *Ethanol Industry Outlook*, published in February of 2010 that, "[t]his publication also stated that the ethanol industry saw a bleak economic outlook in 2009 turn optimistic by the beginning of 2010. Buoyed by a slowly recovering economy and rational behavior returning to energy commodity markets, ethanol

producers saw a return to profitability in the second half of 2009.”¹⁰¹ The credibility of Briggs’ opinion also appears to be contradicted by Aventine’s investment of an additional \$50,000,000 to complete construction of the ethanol facility; it would seem unreasonable for the Taxpayer to continue construction of a facility that, without even operating a single day, would be subject to 93.5% economic obsolescence. While Briggs cited to his February 28, 2010, fresh start valuation, a review of his previous appraisal does not demonstrate how he quantified the obsolescence.¹⁰²

Additionally, Briggs’ February 28, 2010, fresh start valuation indicates that economic obsolescence was allowed to decrease the value of the construction in progress below the amount for which the real property would sell on the open market.¹⁰³ Further, Briggs’ February 28, 2010 fresh start valuation assigned a 93% economic obsolescence for the Subject Property, but assigned a 50% economic obsolescence for another ethanol production facility located near the same city as the Subject Property, owned by the Taxpayer, and operating in the same market.¹⁰⁴ Briggs’ February 28, 2010 fresh start valuation assigned an economic obsolescence factor of as little as 11% to another of the Taxpayer’s production facilities.¹⁰⁵ Briggs’ February 28, 2010, fresh start valuation applied an economic obsolescence factor based on the business enterprise value of the Subject Property.¹⁰⁶ Business enterprise value is defined as the value of “all tangible and intangible assets of an established and operating business with an indefinite life.”¹⁰⁷ At issue in this case is only the actual value of real property. Briggs’ February 28, 2010, fresh start valuation also indicates that an additional economic obsolescence adjustment was made to storage tanks and construction in progress.¹⁰⁸ However, Briggs never indicates how he quantified this economic obsolescence or the numerical value of his assigned economic obsolescence.

In his retroactive appraisal for purposes of this hearing Briggs indicated that he relied upon his previous appraisal to determine the appropriate obsolescence. The Commission finds that the previous appraisal does not explain how the obsolescence was calculated or quantified. In the

¹⁰¹ E49:22.

¹⁰² E52:68 & 73.

¹⁰³ See, E52:66 (indicating that while Briggs set the floor value of other facilities owned by the Taxpayer at an amount equal to what the real property would sell for on the open market, with the Subject Property he determined his floor value by subtracting the cost to complete the real property from the sale price on the open market).

¹⁰⁴ See, E52:67.

¹⁰⁵ See, E52:67.

¹⁰⁶ See, E52:67.

¹⁰⁷ Appraisal Institute, *The Appraisal of Real Estate*, at 29 (13th ed. 2008).

¹⁰⁸ See, E52:67.

absence of adequate evidence of the basis of such a calculation, the Commission gives Briggs' 93.5% quantification of economic obsolescence little weight.

The Stanard appraisal provided itemized values for all items of disputed real or personal property.¹⁰⁹ However, the Commission has some concerns with the Stanard valuations. Based on the evidence received concerning the ethanol market, it is likely there was some economic obsolescence affecting the actual value of the Subject Property on the effective date of January 1, 2010. Both Darrel Stanard and Mark Stanard asserted that this obsolescence should not be applied to the Subject Property because the Subject Property was not in operation. The Commission finds this position is not supported by commonly accepted mass appraisal techniques. Prior to a commercial property being constructed or purchased, investors and owners will take into account local economic trends associated with the industry.¹¹⁰ It follows that these calculations could impact a property which is built, or substantially completed, but not in current operation.

However, Aventine has the burden to produce a clear and convincing quantification of the economic obsolescence, which we find it has not done.¹¹¹ The Commission finds that while the Subject Property may have been affected by economic obsolescence, a persuasive quantification of that alleged depreciation was not in evidence.

For the sake of completeness, the Commission has only that authority specifically conferred upon it by the Constitution of the State of Nebraska, the Nebraska State Statutes, or by construction necessary to achieve the purpose of the relevant provisions or act.¹¹² The Commission does not have equitable powers.¹¹³ Therefore, when presented with widely divergent expert opinions regarding a form of depreciation, in this case economic obsolescence, the Commission does not have the authority to split the difference as a matter of equity.

¹⁰⁹ E5:356-357.

¹¹⁰ *Property Assessment Valuation, 3rd Ed.*, International Association of Assessing Officers, 2010, at 73-79.

¹¹¹ See generally, *Beynon v. Board of Equalization of Lancaster County*, 213 Neb. 488, 329 N.W.2d 857 (1983) (holding that where a Taxpayer only attacks the credibility of the county, there is no relief).

¹¹² See, e.g., *Grand Island Latin Club v. Nebraska Liquor Control Commission*, 251 Neb. 61, 67, 554 N.W.2d 778, 782 (1996).

¹¹³ From the time of its inception in 1995 until 2001, the Commission was authorized by statute to hear appeals "as in equity." 1995 Neb. Laws LB 490, §153. This was the same language that had previously applied to valuation appeals heard by the district courts prior to the creation of the Commission. In 2001, the Legislature repealed the section of statute which had authorized the Commission to hear appeals "as in equity." See 2001 Neb. Laws LB 465, §12.

Physical Depreciation

Both Darrel Stanard and Mark Stanard asserted that the Subject Property should not receive an adjustment for physical depreciation because the property was not in operation. However, physical depreciation can occur from “the impact of elements.”¹¹⁴ The Commission agrees with the assertion that the *Marshall Valuation Service* depreciation tables are based on an assumption that the property is being used.¹¹⁵ However, the *Marshall Valuation Service* allows for adjustments to the effective age and depreciation assigned to a property based upon the level of use determined after an appraiser’s inspection.¹¹⁶ The Commission finds that it was arbitrary or unreasonable to not consider any physical depreciation for the Subject Property.

Briggs provided a calculation of physical depreciation for the real property.¹¹⁷ His appraisal report indicates that he used *Marshall Valuation Service* to determine the depreciation after adjustments for the level of use of each element.¹¹⁸ The Commission finds that Briggs’ opinion of the physical depreciation of these items is persuasive and should be applied to the determination of the valuation of the Subject Property. However, instead of using the weighted average of depreciation for all items of real property, as Briggs did, the Commission finds that it is more reasonable to directly apply Briggs’ determined depreciation for each item of real property.¹¹⁹ Therefore, the Commission finds that the replacement cost new of stipulated items of real property, after depreciation, is \$16,717,825:¹²⁰

¹¹⁴ *The Appraisal of Real Estate, 13th Ed.*, The Appraisal Institute (2008), pg 391.

¹¹⁵ See *Marshall and Swift Valuation*, Section 97 page 1-2 (March 2009).

¹¹⁶ *Id.*

¹¹⁷ E49:32.

¹¹⁸ *Id.*

¹¹⁹ Additionally, the Commission’s review of the Briggs’ appraisal report reveals a mathematical error. Briggs provided the cost detail for all items of real property within the scope of his work in Exhibit D of his appraisal report. E49:59-63. Briggs’ appraisal report consistently states that the replacement cost new before depreciation of all items of real property within his scope of work was \$17,267,450. See, E49:32,35, & 63. The Commission notes, however, that the sum of all items of real property before depreciation contained in Exhibit D actually totals \$17,522,848. (\$446,925 + \$224,164 + \$130,269 + \$483,492 + \$1,173,847 + \$1,962,742 + \$1,601,375 + \$1,151,694 + \$5,264,570 + \$3,893,135 + \$413,458 + \$143,366 + \$378,412 + \$112,048 + \$143,351 = \$17,522,848).

¹²⁰ The Commission determined the total replacement cost new less depreciation using the cost approach values of real property items found in Exhibit 49, pages 61-63, then applying Briggs’ determined physical depreciation found in Exhibit 49, page 32, after rounding the calculated physical depreciation to the nearest whole number. The Commission’s calculated physical depreciation for each listed item of real property is: Administration Building: \$446,925 x .0444 = \$19,843; Maintenance Building: \$224,164 x .0444 = \$9,953; Rail Spurs: \$3,750,350 x .0444 = \$166,516; Paved Interior Road Way: \$1,601,375 x 0 = \$0; Overpass: \$1,151,694 x .075 = \$86,377; Site Work: \$5,264,570 x .0444 = \$233,747; Excavation: \$3,893,135 x .0444 = \$172,855; Entry & Service Roads: \$413,458 x .1 = \$41,346; Rock Paving: \$143,366 x .1333 = \$19,111; Utility, Water Line & Wells: \$378,412 x .0667 = \$25,240; Perimeter Fencing: \$112,048 x .1176 = \$13,177; Truck Load Scales: \$143,351 x .1176 = \$16,858).

The Commission then calculated the replacement cost new less physical depreciation of each item included in Briggs’ appraisal and arrived at the totals presented in the included table. (Administration Building: \$446,925 - \$19,843 = \$427,082; Maintenance

Administration Building	\$ 427,082
Maintenance Building	\$ 214,211
Rail Spurs	\$ 3,583,834
Paved Interior Roadway	\$ 1,601,375
Overpass	\$ 1,065,317
Site Work	\$ 5,030,823
Excavation	\$ 3,720,280
Entry & Service Roads	\$ 372,112
Rock Paving	\$ 124,255
Utility, Water Line & Wells	\$ 353,172
Perimeter Fencing	\$ 98,871
Truck Load Scales	\$ 126,493
Total	\$16,717,825

I. Actual Value of Real Property Other Than Land

The Commission finds that the total actual value of all real property, other than land, at the Subject Property is \$23,846,024.¹²¹

J. Land Value

Briggs provided an opinion of value for the land component of the Subject Property of \$1,380,000.¹²² Briggs supported this opinion with alleged comparable sales after appropriate adjustments.¹²³

Building: \$224,164 - \$9,953 = \$214,211; Rail Spurs: \$3,750,350 - \$166,516 = \$3,583,834; Paved Interior Road Way: \$1,601,375 - \$0 = \$1,601,375; Overpass: \$1,151,694 - \$86,377 = \$1,065,317; Site Work: \$5,264,570 - \$233,747 = \$5,030,823; Excavation: \$3,893,135 - \$172,855 = \$3,720,280; Entry & Service Roads: \$413,458 - \$41,346 = \$372,112; Rock Paving: \$143,366 - \$19,111 = \$124,255; Utility, Water Line & Wells: \$378,412 - \$25,240 = \$353,172; Perimeter Fencing: \$112,048 - \$13,177 = \$98,871; Truck Load Scales: \$143,351 - \$16,858 = \$126,493).

The Commission then determined the total replacement cost new less depreciation value of all items of real property in Briggs' appraisal report: \$427,082 (Administration Building) + \$214,211 (Maintenance Building) + \$3,583,834 (Rail Spurs) + \$1,601,375 (Paved Interior Road Way) + \$1,065,317 (Overpass) + \$5,030,823 (Site Work) + \$3,720,280 (Excavation) + \$372,112 (Entry & Service Roads) + \$124,255 (Rock Paving) + \$353,172 (Utility, Water Line & Wells) + \$98,871 (Perimeter Fencing) + \$126,493 (Truck Load Scales) = \$16,717,825

¹²¹ (((\$15,076,873 + \$16,717,825) x .75 = \$23,846,024).

¹²² E49:31.

¹²³ E49:28-31.

The Stanard appraisal also provided an opinion of value for the land component of \$2,028,050.¹²⁴ The Stanard appraisal indicated that this value was based upon Hamilton County area recent sales and general knowledge of the Hamilton County market.¹²⁵ The report indicates that the data is maintained in the files of the appraiser.¹²⁶ While the Stanard appraisal report indicates the data was from Pierce County, Darrel Stanard testified there was an error in the appraisal report, and the report should have indicated Hamilton County instead.

Patricia Sandberg, Hamilton County Assessor, testified that the land value was determined by a joint effort between herself and the Stanards. She testified that the value was based upon a single sale in Hamilton County for more than \$16,000 per acre and her opinions of the market in Hamilton County. She testified that she called the Property Assessment Division of the Nebraska Department of Revenue to inquire about any possible comparable sales outside of Hamilton County, but that there were no sales showing \$25,000 per acre. She testified that she did not review any land sales before she made the valuation determination.

The Commission finds that it was arbitrary or unreasonable for the County Board to adopt the County Assessor's opinion of land value where the opinion was not based on actual market data. The Commission finds that Briggs opinion of value of \$1,380,000 is the best evidence of value of the land component.

V. CONCLUSION

The Commission finds that there is competent evidence to rebut the presumption that the County Board faithfully performed its duties and had sufficient competent evidence to make its determination. The Commission also finds that there is clear and convincing evidence that the County Board's determination was arbitrary or unreasonable.

For all of the reasons set forth above, the decision of the County Board is Vacated and Reversed.

¹²⁴ E52:355.

¹²⁵ *Id.*

¹²⁶ *Id.*

VI. ORDER

IT IS ORDERED THAT:

1. The Decision of the Hamilton County Board of Equalization determining the taxable value of the Subject Property for tax year 2010 is Vacated and Reversed.¹²⁷
2. The following items located on the Subject Property are Tangible Personal Property: (1) Grain Leg (2) Conveyor, (3) Hammer Mill Building, (4) Fermentation Tanks.
3. The taxable value of the Subject Property for tax year 2010 is:

Land	\$1,380,000
<u>Improvements</u>	<u>\$23,846,024</u>
Total	\$25,226,024

4. This Decision and Order, if no appeal is timely filed, shall be certified to the Hamilton County Treasurer and the Hamilton County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (2012 Cum. Supp.).
5. Any request for relief, by any party, which is not specifically provided for by this Decision and Order is denied.
6. Each Party is to bear its own costs in this proceeding.
7. This Decision and Order shall only be applicable to tax year 2010.
8. This Decision and Order is effective for purposes of appeal on July 31, 2014.

Signed and Sealed: July 31, 2014

SEAL

Robert W. Hotz, Commissioner

Appeals from any decision of the Commission must satisfy the requirements of Neb. Rev. Stat. §77-5019 (2012 Cum. Supp.) and other provisions of Nebraska Statutes and Court Rules.

¹²⁷ Taxable value, as determined by the County Board, was based upon the evidence at the time of the Protest proceeding. At the appeal hearing before the Commission, both parties were permitted to submit evidence that may not have been considered by the County Board at the protest proceeding.

Commissioner Freimuth, concurring in part and dissenting in part,

I concur with the majority opinion's finding that the \$29.81 million Stanard Appraisal received by the Commission in evidence during the hearing constitutes clear and convincing evidence that the County Board's \$40,176,435 Subject Property valuation for tax year 2010 is unreasonable or arbitrary. I also concur with the majority opinion's finding that the grain leg and conveyer situated on the Subject Property constitute personal property, and that the remainder of the assets under consideration constitute real property.

In the case where it is determined that the decision of County Board is unreasonable or arbitrary, the Commission must review the evidence and adopt the most reasonable estimate of actual value presented.¹²⁸ I would find that the County Board's \$29.81 million revised opinion of value offered at the hearing before the Commission is not persuasive because it does not adjust for economic obsolescence and thereby fails to sufficiently account for current market conditions as of January 1, 2010. Due to its adjustment for physical depreciation and economic obsolescence to account for current market conditions, I would also find that the Taxpayer's \$1,086,659 opinion with respect to the stipulated items of real property is the best evidence of value, and I concur with the majority opinion's finding that the best evidence of land value is the Taxpayer's \$1.38 million opinion.¹²⁹ I would further find that the County Board's \$15,076,873 revised replacement cost new opinion of value for the disputed items of real property referenced in the majority opinion is the best evidence of value because the Taxpayer did not offer any itemized valuation for these assets and because it approximates the post-bankruptcy fair value thereof less a 93.5% economic obsolescence adjustment to account for current market conditions. Thus, I would find that the total Subject Property actual value for tax year 2010 amounts to \$17,543,532 ($\$1,086,659 + \$15,076,873 + \$1,380,000 = \$17,543,532$ - herein also referred to as "\$17.5 million").

¹²⁸ See, *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted); *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002); *Garvey Elevators, Inc. v. Adams County Bd. of Equalization*, 261 Neb. 130, 621 N.W.2d 518 (2001).

¹²⁹ The Taxpayer's opinion with respect to the stipulated items of real property amounts to \$1,070,756 at E49:35, which is derived by applying a 93.5% economic obsolescence adjustment to a \$16,473,170 replacement cost new less depreciation amount. As discussed in the majority opinion, however, this \$16,473,170 amount is derived from a miscalculation and from a weighted average depreciation. Applying a 93.5% economic obsolescence adjustment to the majority opinion's \$16,717,825 revised replacement cost new less depreciation valuation amounts to \$1,086,659. This \$1,086,659 Taxpayer modified opinion with respect to the stipulated items of real property will be used herein rather than \$1,070,756.

For the following reasons, this \$17.5 million valuation of the Subject Property best reflects current market conditions as of the assessment date of January 1, 2010, including consideration of the adverse impact on value stemming from the distressed state of the ethanol industry and the national economic crisis that led to the Taxpayer's bankruptcy filing in April 2009: (1) it approximates the Subject Property's \$15.995 million land and tangible asset post-bankruptcy "fresh start" valuation as of February 28, 2010, which is derived under Chapter 11 of the U.S. Bankruptcy Code and which is included in the Taxpayer's Form 10-K filed with the United States Securities & Exchange Commission for the fiscal year ended December 31, 2010; and (2) it approximates the \$17.913 million enterprise value of the Subject Property derived from discounted cash flow analysis.

I. BACKGROUND

The Taxpayer, Aventine Renewable Energy Holdings, Inc., is a Delaware corporation organized in 2003 that is engaged in the business of corn-based/fuel-grade ethanol production and marketing.¹³⁰ The Taxpayer, through several subsidiaries, owns facilities located in Pekin, Illinois (herein referred to as "Pekin"), Mount Vernon, Indiana (herein referred to as "Mount Vernon"), and Aurora, Nebraska (the two separate facilities located in Aurora are referred to herein as "Nebraska" and "Aurora West" – the land and real property improvements associated with the Aurora West facility comprise the "Subject Property" at issue in this case). The Pekin and Nebraska facilities were in operation as of the assessment date on January 1, 2010, while the Mount Vernon and Aurora West facilities were under construction and non-operational at that time (as of the hearing date in September 2011, testimony disclosed that Aurora West remained under construction and non-operational).¹³¹

The Taxpayer filed for Chapter 11 bankruptcy protection on April 7, 2009.¹³² The real property assessment date in this matter is January 1, 2010.

II. THE TAXPAYER'S SEC FORM 10-K ASSET VALUATION

The Taxpayer is a corporate entity subject to United States Securities and Exchange Commission ("SEC") filing requirements. The Taxpayer's Form 10-K filed with the SEC for

¹³⁰ E34.2.

¹³¹ E52:39.

¹³² E34.2.

the fiscal year ended December 31, 2010, is instructive in terms of the key dates and chain of events referenced in this case. It states as follows in pertinent part:

On April 7, 2009 (the “Petition Date”), Aventine Renewable Energy Holdings, Inc. and all of its direct and indirect subsidiaries (collectively, the “Debtors”) filed voluntary petitions for relief under Chapter 11 of Title 11 of the United States Code (the “Bankruptcy Code”) with the U.S. Bankruptcy Court for the District of Delaware (the “Bankruptcy Court”). The Debtors filed their First Amended Joint Plan of Reorganization under Chapter 11 of the Bankruptcy Code on January 13, 2010 (as modified, the “Plan”). The Plan was confirmed by order entered by the Bankruptcy Court on February 24, 2010 (the “Confirmation Order”) and became effective on March 15, 2010 (the “Effective Date”), the date on which the Company emerged from protection under Chapter 11 of the Bankruptcy Code.

In accordance with Accounting Standards Codification (“ASC”) 852, *Reorganization* (“ASC 852”), we adopted fresh start accounting and adjusted the historical carrying value of our assets and liabilities to their respective fair values at the Effective Date. Simultaneously, the Company determined the fair value of its equity at the Effective Date. The Company selected an accounting convenience date proximate to the Effective Date for purposes of making the aforementioned adjustments to historical carrying values (the “Convenience Date”) because the activity between the Effective Date and the Convenience Date does not result in a material difference in the results. The Company selected a Convenience Date of February 28, 2010. As a result, the Company recorded fresh start accounting adjustments to historical carrying values of assets and liabilities as of February 28, 2010 using market prices, discounted cash flow methodologies based primarily on observable market information and, to a lesser extent, on unobservable market information, and other techniques.¹³³

The Taxpayer’s post-bankruptcy consolidated balance sheet contained in the Form 10-K filed with the SEC states that total “Stockholders’ Equity” amounted to \$219.923 million as of February 28, 2010.¹³⁴ This \$219.923 million amount is derived from a \$240 million total enterprise valuation discussed below in the Bankruptcy Appraisal section.¹³⁵

¹³³ E34:4.

¹³⁴ E34:10.

¹³⁵ E34:10 & E34:12 (E34:12 reflects the adjustments to the \$240 million total enterprise value that result in the \$219.923 million total “Stockholders’ Equity” amount contained in the Taxpayer’s Form 10-K post-bankruptcy consolidated balance sheet found at E34:10).

With respect to the asset portion of the Taxpayer's Form 10-K post-bankruptcy consolidated balance sheet, \$208.833 million is assigned as the post-bankruptcy total fair value of the property, plant and equipment located at the four above-noted facilities as of February 28, 2010.¹³⁶ This \$208.833 million post-bankruptcy fair value is the result of an approximate \$380 million write-down of the Taxpayer's \$587.1 million pre-bankruptcy balance statement valuation of property, plant and equipment (\$587.1 million pre-bankruptcy balance statement amount plus \$1.7 million reorganization adjustment less \$379.97 million "fresh start" adjustment = \$208.833 million).¹³⁷

The Taxpayer's Form 10-K states as follows in pertinent part regarding the use of the cost approach to value the Taxpayer's property, plant and equipment, including the land and improvement component that comprise the Aurora West facility (herein referred to as the "Subject Property") at issue in this case:

Property, plant and equipment was valued at fair value of approximately \$208.8 million as of February 28, 2010. The Company's management determined fair value. In establishing fair value for the vast majority of the Company's property, plant and equipment, the cost approach was utilized. The cost approach considers the amount required to replace an asset by constructing or purchasing a new asset with similar utility, then adjusts the value in consideration of all forms of depreciation as of the appraisal date as described below:

- Physical depreciation — the loss in value or usefulness attributable solely to use of the asset and physical causes such as wear and tear and exposure to the elements.
- Functional obsolescence — a loss in value is due to factors inherent in the asset itself and due to changes in technology, design or process resulting in inadequacy, overcapacity, lack of functional utility or excess operating costs.
- Economic obsolescence — loss in value by unfavorable external conditions such as economics of the industry or geographic area, or change in ordinances.

The cost approach relies on management's assumptions regarding current material and labor costs required to rebuild and repurchase significant components of the Company's property, plant and equipment along with assumptions regarding the age and estimated useful lives of its property, plant and equipment. After recording other assets and liabilities at their respective fair values, the balance of the enterprise value is allocated to the

¹³⁶ E34:10.

¹³⁷ E34:10 and E34:14.

various classes of property, plant and equipment based on the appraisal as adjusted for the factors indicated above, which resulted in a write-down of property, plant and equipment of approximately \$380.0 million. Factors contributing to the significant write-off of property, plant and equipment included:

- Uncompleted facilities are less marketable than operational facilities and were selling at a substantial discount to completed facilities;
- The plants require material capital contributions prior to experiencing any potential profits from production, and it was uncertain that the facilities would be completed if the Company did not have sufficient capital to fund completion. There was also uncertainty as to whether the costs to complete the plants could be materially greater than estimated by management; and
- There were significant start-up risks because both plants under construction had sat idle through an entire winter and were expected to sit idle through the 2010 winter which could result in issues causing the equipment to fail to operate effectively.¹³⁸

As discussed and charted below in the Bankruptcy Appraisal section, \$15.995 million of the Taxpayer's total \$208.833 million post-bankruptcy fair value of property, plant and equipment is attributable to the Aurora West facility's land and improvements at issue in this case (\$1.46 million land + \$14.535 million improvements = \$15.995 million).¹³⁹ As also discussed elsewhere herein, the Bankruptcy Appraisal's \$14.535 million valuation of the Subject Property's improvements component includes all of the real property improvements at issue in this case with the exception of a grain leg and conveyer, which the Commission has determined are personal property assets not subject to consideration hereunder.¹⁴⁰

III. THE TAXPAYER'S FEBRUARY 28, 2010 BANKRUPTCY APPRAISAL

A. Introduction

Pages 32 – 118 of Exhibit 52 contain the appraisal that is the foundation of the Taxpayer's post-bankruptcy "fair value" asset valuation referenced in the above-noted Form 10-K as of February 28, 2010 (herein referred to as the "Bankruptcy Appraisal"). American Appraisal Associates, Inc. ("American Appraisal") prepared the Bankruptcy Appraisal.

¹³⁸ E34:13 – E34:14 (emphasis added).

¹³⁹ E52:37.

¹⁴⁰ As indicated in the County Board's Revised Appraisal at page 356 of Exhibit 52, the grain leg is valued at \$57,400, and the conveyer is valued at \$760,000.

The Bankruptcy Appraisal contains an “Executive Summary” that states as follows at Exhibit 52, page 36:

The purpose of this valuation was to express an opinion of the fair values of the designated tangible assets, comprising real and personal property, as of February 28, 2010. It is our understanding that this value will be used to assist Aventine with the allocation of the reorganization value for financial reporting purposes related to the U.S. Bankruptcy Code in accordance with U.S. generally accepted accounting principles.

The Bankruptcy Appraisal also contains a “Purpose and Scope of Valuation” section that states as follows at Exhibit 52, page 38:

Aventine emerged from bankruptcy protection under Chapter 11 of the [Bankruptcy] Code on February 28, 2010. In accordance with Financial Accounting Standards Board (“FASB”) *Accounting Standards Codification* (“ASC”) Topic 852, Reorganizations, Aventine will allocate the court approved reorganization value among the various classifications of assets, based on assets' fair values, and among the Facilities [Pekin, Nebraska, Aurora West and Mount Vernon], to establish the initial basis of the subject tangible assets for fresh start accounting purposes.

B. Key Bankruptcy Appraisal Provisions

1. The Bankruptcy Appraisal states that its evaluation “did not identify any material intangible assets.”¹⁴¹
2. As a starting point, the Bankruptcy Appraisal assigned a \$240 million total enterprise value to the Taxpayer’s four facilities, which is the mid-point of the \$282.7 million value derived from income approach discounted cash flow analysis (sometimes referred to herein as “DCF”) and the “Similar Transactions” market approach value (\$212 million).¹⁴² The Taxpayer’s Form 10K filed with the SEC states that the DCF method assumed that Aurora West would become operational in the first quarter of 2012.¹⁴³
3. The Taxpayer’s post-bankruptcy consolidated balance sheet contained in the Form 10-K outlined above provides that total “Stockholders’ Equity” amounted to \$219.933 million as of February 28, 2010.¹⁴⁴ This \$219.933 million amount is derived from the

¹⁴¹ E52:36 and E52:38.

¹⁴² E52:55; E52:88 (Exhibit D of Bankruptcy Appraisal, which illustrates the derivation of the \$240 million enterprise value).

¹⁴³ E34:9

¹⁴⁴ E34:10.

Bankruptcy Appraisal's \$240 million total enterprise valuation of the Taxpayer's four facilities.¹⁴⁵

4. The Bankruptcy Appraisal relied on the DCF income approach to determine the following business enterprise values for each of the Taxpayer's facilities (\$282.7 total enterprise value): Pekin - \$197.5 million; Nebraska - \$27 million; Mount Vernon - \$37.1 million; and Aurora West - \$21.1 million.¹⁴⁶
5. Using the respective facility values contained in the above-noted DCF \$282.7 total enterprise value as the foundation, the Bankruptcy Appraisal allocated the \$240 million enterprise value on a pro rata basis to the Taxpayer's four facilities as follows: Pekin - \$169.669 million; Nebraska - \$22.922 million; Mount Vernon - \$31.496 million; and Aurora West - \$17.913 million ($\$21.1\text{M}/282.7\text{M} = .074637$; $\$240\text{M} \times .074637 = \17.913M).¹⁴⁷
6. After determining the \$240 million total enterprise value, the Bankruptcy Appraisal proceeds to state that the total fair value of the Taxpayer's land and improvements amounted to \$208.832 million as of February 28, 2010 (\$15.889 million designated as "Real Property" + \$192.943 million designated as "Personal Property" – see chart and discussion below for further discussion regarding clarification of the terms "Real Property" and "Personal Property" used in the Bankruptcy Appraisal).¹⁴⁸ As indicated above, this \$208.832 million amount is the same amount reported on the Taxpayer's Form 10-K consolidated balance statement under the asset category "[p]roperty, plant and equipment, net."¹⁴⁹
7. The Bankruptcy Appraisal sets forth the following table at page 37 of Exhibit 52 for purposes of illustrating the allocation of the Taxpayer's total \$208.832 million land and improvements valuation to each of its facilities as of February 28, 2010:¹⁵⁰

¹⁴⁵ E34:10 & E34:12 (E34:12 reflects the adjustments to the \$240 million total enterprise value that result in the \$219.923 million total "Stockholders' Equity" amount contained in the Taxpayer's Form 10-K post-bankruptcy consolidated balance sheet found at E34:10).

¹⁴⁶ E52:52; E52:55; E52:88.

¹⁴⁷ E52:55; E52:88.

¹⁴⁸ E52:69.

¹⁴⁹ E34:10. It is assumed that the difference between the \$208,832,000 amount used for total tangible assets in the Bankruptcy Appraisal at page 37 of Exhibit 52 as compared to the \$208,833,000 amount used in the Taxpayer's SEC Form 10-K filing found at pages 10 and 14 of Exhibit 34 stems from rounding.

¹⁵⁰ **Note:** The \$15.995 million fair value of Aurora West's "Total Tangible Assets" charted in the lower-right column should not be confused with the \$15.889 million total fair value of the Taxpayer's "Real Property" (i.e., land) at all facilities, which is charted in the column labeled "Real Property Fair Value".

Facility	Real Property	Personal Property	Total Tangible
	Fair Value	Fair Value	Assets Fair Value
	(\$000s)	(\$000s)	(\$000s)
Pekin	11,812	131,901	143,713
Nebraska	2,617	18,383	21,000
Mount Vernon	0	28,124	28,124
Aurora West (Subject Property)	1,460	14,535	15,995
TOTAL	15,889	192,943	208,832

8. As indicated in the majority opinion, a significant portion of the above-charted Aurora West “Personal Property” assets valued at \$14.535 million is real property for Nebraska ad valorem tax purposes rather than personal property. In other words, personal property items include only the grain leg and conveyer, so the post-bankruptcy \$14.535 million value covers essentially all real property improvements at issue in this case.¹⁵¹ Thus, in order to attempt to avoid confusion, the Bankruptcy Appraisal’s \$14.535 million valuation refers to the “improvement” or “improvement component” of the Aurora West facility. In contrast, the \$1.460 million balance of the total \$15.995 million Aurora West tangible asset fair valuation is referred to as “land” or “land component” herein.
9. The Bankruptcy Appraisal, as indicated in the Form 10-K outlined above, used the cost approach to derive the \$192.943 million total post-bankruptcy fair value of the Taxpayer’s improvement component at its four facilities, including the \$14.535 million valuation of Aurora West’s improvement (see middle column in chart above). The Bankruptcy Appraisal sets forth an explanation of this approach at Exhibit 52, pages 57 to 68. Additionally, charts that illustrate this cost approach, including the application of economic obsolescence, are found at Exhibit 52, pages 71 and 73 (Bankruptcy Appraisal Exhibits A and B). Finally, the Form 10-K includes cost approach explanation, which is set forth above.¹⁵²
10. Prior to deriving the total \$208.832 million post-bankruptcy “fresh start” fair value of the Taxpayer’s land and improvement component as of February 28, 2010, the Bankruptcy Appraisal determined that the Taxpayer’s pre-bankruptcy net book value of tangible

¹⁵¹As indicated previously, the County Board’s Revised Appraisal at page 356 of Exhibit 52 provides that the grain leg is valued at \$57,400, and the conveyer is valued at \$760,000.

¹⁵² E34:13 – E34:14.

assets (excluding land) amounted to \$587.7 million, which includes the cost of Aurora West's \$239,450,117 construction-in-progress ("CIP").¹⁵³ The Bankruptcy Appraisal derived this pre-bankruptcy net book value from the Taxpayer's "fixed asset accounting records."¹⁵⁴

11. The \$239,450,117 CIP amount represents the total cost of the Aurora West facility since the start of construction in 2007.¹⁵⁵ This amount (sometimes referred to herein as \$239.45 million) should not be confused with the post-bankruptcy "fresh start" \$240 million total enterprise fair value noted above, which includes all of the Taxpayer's four facilities.
12. According to the tables found at Exhibits A and B of the Bankruptcy Appraisal, the pre-bankruptcy \$587.7 million net book value is determined by subtracting the land values of each of the Taxpayer's facilities and the relatively minimal CIP values at the operational Pekin and Nebraska facilities (\$597,268,423 less [\$1,630,111 land + \$7,900,527 CIP] = \$587.7 million).¹⁵⁶ I note that this \$587.7 million net book value amount is consistent with the \$587.1 million pre-bankruptcy balance statement valuation of property, plant and equipment contained in the Taxpayer's Form 10-K outlined above (it is unclear regarding the source of the difference between the Bankruptcy Appraisal's \$587.7 pre-bankruptcy million valuation as compared to the Form 10-K's \$587.1 valuation).¹⁵⁷
13. In contrast to this pre-bankruptcy \$587.7 million "net book value" derived from the Taxpayer's fixed asset accounting records, the Bankruptcy Appraisal used the cost valuation approach in assigning an approximate \$686.49 million pre-economic obsolescence "fair value" to the Taxpayer's tangible assets (excluding land) for fresh-start accounting purposes under the U.S. Bankruptcy Code.¹⁵⁸ As disclosed on Exhibits A and B of the Bankruptcy Appraisal, this difference stems from the approximate \$100

¹⁵³ E52:61, E52:66 and E52:73. See discussion below in the section entitled "The Taxpayer's January 1, 2010 TERC Appraisal" regarding the distinction between "Construction in Progress" ("CIP") assets and "Construction in Place" assets. In a nutshell, for purposes of the TERC Appraisal, "Construction in Progress" ("CIP") assets include the non-stipulated assets, while "Construction in Place" assets include assets stipulated as real property by the Taxpayer and the County.

¹⁵⁴ E52:61.

¹⁵⁵ The Taxpayer's "TERC Appraisal" discussed below indicates that construction of the Aurora West facility began in 2007. See, E49:32.

¹⁵⁶ E52:71 and E52:73.

¹⁵⁷ E34:10 and E34:14. As indicated in the Form 10-K summary above, the Form 10-K's \$208.833 million post-bankruptcy fair value is the result of an approximate \$380 million write-down of the Taxpayer's \$587.1 million pre-bankruptcy balance statement valuation of property, plant and equipment (\$587.1 million pre-bankruptcy balance statement amount plus \$1.7 million reorganization adjustment less \$379.97 million "fresh start" adjustment = \$208.833 million).

¹⁵⁸ E52:57 – E52:68; E52:71 and E52:73.

million excess of the cost approach valuation of the operational facilities (Pekin and Nebraska) over the net book value of those same facilities.¹⁵⁹

14. The Bankruptcy Appraisal provides that the post-bankruptcy fair value of the Taxpayer's non-operational facilities (Aurora West and Mount Vernon) equals pre-bankruptcy net book value. In this regard, referencing the incomplete construction status of the Taxpayer's Aurora West and Mount Vernon facilities, the Bankruptcy Appraisal states as follows regarding the tangible asset valuation of such construction-in-progress ("CIP") at Exhibit 52, page 66: "Because CIP assets are assumed to represent new assets that have not been placed into active service, under the in-use premise it is reasonable to assume that the cost basis of these assets is a reasonable proxy for fair value."¹⁶⁰ Thus, while the Taxpayer's total tangible asset pre-bankruptcy fair value exceeded its net book value by approximately \$100 million (\$686.49 million vs. \$587.7 million) due to differences between fixed asset accounting and the cost approach involving the Pekin and Nebraska operational facilities, the post-bankruptcy fair value of Aurora West's improvement component for U.S. Bankruptcy Code purposes equaled the pre-bankruptcy \$239.45 million net book value prior to application of economic obsolescence reductions discussed below (similarly, the non-operational Mount Vernon facility's post-bankruptcy fair value equaled its pre-bankruptcy net book value prior to economic obsolescence reductions).¹⁶¹
15. The Bankruptcy Appraisal applies the following economic obsolescence adjustment to the Taxpayer's four facilities for purposes of reconciling the pre-bankruptcy \$587.7 million net book value (\$686.49 million cost approach fair value) with the \$240 million total enterprise value noted above: Pekin – 11%; Nebraska – 50%; Mount Vernon – 87%; and Aurora West – 93%.¹⁶² This procedure reduced the tangible asset valuation of Aurora West, excluding land, from \$239.45 million to \$16.453 million ($\$16.453\text{M}/\$239.45\text{M} = 7\%$ rounded = 93% reduction).¹⁶³ As indicated in the Form 10-K above, the Bankruptcy Appraisal applied a higher economic obsolescence penalty to

¹⁵⁹ E52:71 and E52:73.

¹⁶⁰ E52:66.

¹⁶¹ E52:71 and E52:73.

¹⁶² E52:67; E52:71 and E52:73.

¹⁶³ E52:71 and E52:73.

the non-operational facilities due to uncertainty associated with marketability, capital contribution requirements, cost of completion, and start-up risks.¹⁶⁴

16. In addition to these economic obsolescence adjustments associated with reconciliation of the pre-bankruptcy \$587.7 million net book value with the post-bankruptcy “fresh start” \$240 million total enterprise fair value, the Bankruptcy Appraisal applies “an additional reduction for economic obsolescence in order to reconcile to the opening balance sheet” dated as of February 28, 2010.¹⁶⁵ This procedure reduced the improvement component of Aurora West, excluding the land, by 12% from \$16.453 million to the \$14.535 million valuation charted above.¹⁶⁶ Thus, the Bankruptcy Appraisal applied a total 94% total economic obsolescence reduction to Aurora West’s improvement component (\$14.535M/\$239.450M = 6% = 94% total reduction).

IV. THE TAXPAYER’S JANUARY 1, 2010 TERC APPRAISAL

A. Introduction

American Appraisal also conducted the Taxpayer's “Actual Value” Appraisal dated as of January 1, 2010 (herein referred to as the “TERC Appraisal”). Jeff Briggs (ASA, MAI, MRICS), a director of American Appraisal’s U.S. real estate and related assets practice employed by the company since 2000, completed the TERC Appraisal assignment. Mr. Briggs, a certified general appraiser licensed in Nebraska and several other states, has substantial experience appraising complex properties in multiple industries.¹⁶⁷ Prior to joining American Appraisal in 2000, Mr. Briggs served in appraisal positions dating back to the 1980s, and he also served as a manager with the former Big 8 accounting firm Arthur Andersen LLP from 1996 – 1999.¹⁶⁸

B. Key TERC Appraisal Provisions

1. The TERC Appraisal notes significant adverse market conditions confronted by the Taxpayer as of the assessment date of January 1, 2010, including the Aurora West Subject Property, stemming from industry-specific factors and the national economic crisis.¹⁶⁹

¹⁶⁴ E34:13 – E34:14.

¹⁶⁵ E52:67.

¹⁶⁶ E52:67 - E52:69.

¹⁶⁷ E49:70 – E49:72.

¹⁶⁸ E49:72.

¹⁶⁹ E49:22 – E49:23.

2. Like the Bankruptcy Appraisal, the TERC Appraisal is consistent with the above-noted Form 10-K filed by the Taxpayer with the SEC for the fiscal year ended December 31, 2010. In this regard, the TERC Appraisal states that the total post-bankruptcy fair value of Aurora West's land and improvement component amounted to \$15.995 million.¹⁷⁰
3. The TERC Appraisal references the Bankruptcy Appraisal's application of a total 94% economic obsolescence penalty to the \$17,246,696 "Pre-Bankruptcy Gross Book Value" of the assets stipulated as real property (excluding land) by the Taxpayer and the County, resulting in a \$1,035,002 valuation thereof as of February 28, 2010.¹⁷¹
4. For Nebraska ad valorem tax year 2010 purposes, which values real property as of January 1, 2010, the TERC Appraisal derives the Taxpayer's \$1,070,756 asserted value of the Subject Property's stipulated real property assets (excluding land) by applying \$794,279 total physical depreciation and a 93.5% economic obsolescence penalty to the \$17,267,450 replacement cost new value derived from the cost approach.¹⁷²
5. As discussed previously in the majority opinion and at the outset of this opinion, due to a calculation correction and the use of itemized rather than weighted depreciation, \$1,086,659 rather than \$1,070,756 is used herein as the Taxpayer's opinion of value with respect to the stipulated items of real property.

VI. THE COUNTY BOARD'S REVISED APPRAISAL

The County Board submitted a revised appraisal for tax year 2010 at the hearing found at Exhibit 52 (herein sometimes referred to as the "County Board's Revised Appraisal"). This Revised Appraisal for the Subject Property indicates that the County Board's revised opinion of value for tax year 2010 amounted to \$29,810,000, including \$2,028,050 for the land component and \$27,780,903 for the improvement components.¹⁷³

The County Board's Revised Appraisal indicates that the value for tax year 2010 attributable to the Subject Property's improvement component is based on the cost approach.¹⁷⁴ This cost approach does not include any adjustment for economic obsolescence.¹⁷⁵

¹⁷⁰ E49:21.

¹⁷¹ E49:34.

¹⁷² E49:35. As discussed previously, the Bankruptcy Appraisal uses a two-step economic obsolescence adjustment process whereby the first step applied a 93% adjustment and the second step applied a 94% adjustment. Thus, I assume that the TERC Appraisal's use of a 93.5% adjustment is derived from averaging this two-step process.

¹⁷³ E52:358.

¹⁷⁴ E52:355.

The County testimony asserts that economic obsolescence is not applicable in this case in part because the Taxpayer's 2009 bankruptcy filing was possibly attributable to management rather than industry-specific and/or national economic crisis factors. Nonetheless, the County Board's Revised Appraisal states that the ethanol business confronted significant distress as late as 2009 due to industry-specific factors and the national economic crisis.¹⁷⁶ In this regard, the County Board's Revised Appraisal states as follows:

In 2008 when the United States went into a severe recession, the ethanol industry also had major financial problems. During the first half of 2008 the price of corn had increased to levels that reduced the profits of the ethanol plants to zero or created losses. Then in 2009 the price of ethanol fell and the price of corn fell. As the prices fell the ethanol plants that were locked into unfavorable futures contracts had severe financial losses. The financial downturn caused over 25% of the plants to financially fail. The losses also caused the banks to generally cut off credit to the industry.

. . .

The result has been that most construction of new ethanol plants has stopped. Plants that were under construction have had problems getting completed and plants that closed down during **2009-10** have had problems getting started again.¹⁷⁷

VII. ANALYSIS

A. Current Market Conditions - General

The Taxpayer asserted that its four facilities, including Aurora West, confronted distressed market conditions at the start of 2010 due to industry-wide factors and due to the national economic crisis, thereby necessitating an economic obsolescence adjustment under the cost approach. The Taxpayer further asserted that these factors caused its bankruptcy filing a few months prior to tax year 2010 valuation date of January 1, 2010.

General guidance with respect to consideration of current market conditions in the mass appraisal context is contained in *Property Assessment Valuation*, which is published by the International Association of Assessing Officers.¹⁷⁸ Addressing mass appraisal techniques such as the cost approach used by the County to value the Subject Property, *Property Assessment Valuation* states as follows:

¹⁷⁵ E52:357.

¹⁷⁶ E52:330.

¹⁷⁷ E52:330 (emphasis added). The County Board's Revised Appraisal also states that the sales comparison approach was not used for valuation purposes because "[a]ll of the sales were financially distressed" (E52:354).

¹⁷⁸ *Property Assessment Valuation*, 3rd Ed., International Association of Assessing Officers, 2010, at pgs. 73 - 83.

Although the structure of a mass appraisal model may be valid for many years, the model is usually recalibrated or updated every year. To update for short periods, trending factors may suffice. Over longer periods, as the relationships among the variables in market value change, complete market analyses are required. **The goal is for mass appraisal equations and schedules to reflect current market conditions.**¹⁷⁹

The New Jersey Tax Court stated as follows regarding consideration of “current market conditions” in a 2013 opinion that reduced the assessed value of the Borgata casino from \$2.26 billion to \$880 million in tax year 2009 and to \$870 million in tax year 2010 due to the adverse impact of the national economic crisis and increased gaming competition (the \$2.26 billion assessment stemmed from a reappraisal for tax year 2008):

The national economy began to soften in late 2007, primarily due to the subprime housing crisis. By October 1, 2008, the economy suffered a significant downturn triggered by the collapse of the mortgage markets and the failure of Bear Stearns and Lehman Brothers. The government-sanctioned bailout of Bear Stearns as a banking institution “too big to fail” set off alarms concerning the stability of the American banking system. The mid-September 2008 collapse of Lehman Brothers led to a sharp drop-off in the stock market and the beginning of the worst recession since the Great Depression.

In addition, the tourism industry faced a significant public stigma nicknamed the AIG effect. In 2008, American International Group, Inc., or AIG, a multinational insurance company, experienced a serious public relations backlash after it hosted a lavish corporate event during the height of the national economic crisis. The bad publicity caused other corporate entities to cancel events and to be more hesitant about hosting corporate functions at high-end resorts, such as the Borgata. These economic forces had a detrimental effect on the Borgata’s revenues. The stagnant national economy affected consumer confidence, inhibiting spending on luxuries and entertainment.

By October 1, 2009, the national economic condition had further deteriorated. According to one expert who testified at trial “as of October 1, 2009, the macro economy had entered into what many commentators termed a ‘New Normal,’ meaning that the developed nations would enter into a prolonged period of low growth, high unemployment and a need for de-leveraging. This would add to the uncertainty surrounding the gaming industry in general and in Atlantic City specifically, as of the valuation date.” Unemployment rates started to increase significantly

¹⁷⁹ *Property Assessment Valuation*, 3rd Ed., International Association of Assessing Officers, 2010, at p. 417-18 (emphasis added).

in 2008 and were still rising as of September 2009. This fact is significant because low unemployment rates are indicative of increased consumer spending on such discretionary items as gaming and entertainment. The perception that the nation's economic trouble was not a transitory downturn, but a long-term recalibration of the economy, was hardening among the public and participants in the financial markets as of the second valuation date.¹⁸⁰

The Illinois Court of Appeal stated as follows regarding consideration of “current market conditions” in a 2012 opinion affirming a lower court’s approval of a \$300,000 judicial foreclosure sale of commercial real estate secured by a note with a principal balance in the amount of \$824,540:

Our courts today face a similar situation as that faced by the court in [1937] *Levy* during the Great Depression, in that many properties were purchased during a time when real estate values greatly increased (referred to as “the real estate bubble”) **and those same properties plummeted in value after 2006 [and] continuing to the present.** Consequently, many property owners owe much more to the lenders than what the property is worth. While this fact is unquestionably tragic, the value of a given piece of property must be determined by considering all of the pertinent factors as they exist at the time of the sale, whether such sale is made in the open market or through a judicial sale as a result of a foreclosure action.¹⁸¹

The Nebraska Supreme Court has also recently considered “current market conditions” in the aftermath of the economic crisis. In *County of Lancaster v. Union Bank & Trust Co. (In re Estate of Craven)*, the Court upheld a ruling issued by the Lancaster County Court that the \$113,000 purchase price of property sold at an estate auction in a weak real estate market after the decedent’s death in 2008 stemmed from an arm’s length transaction and was the best evidence of value for inheritance tax purposes.¹⁸²

B. Current Market Conditions - Distressed Industries

For purposes of analyzing the Taxpayer’s assertion regarding insufficient consideration of current market conditions, I note that the County Board’s Revised Appraisal outlined above references industry-specific factors and the national economic crisis in terms of problems

¹⁸⁰ *Marina District Development Co., LLC v. City of Atlantic City*, DOCKET NOS. 008116-2009, 008117-2009, 003188-2010, 003194-2010, at pgs. 1 – 2, 8 – 9 (New Jersey Tax Court 2013).

¹⁸¹ *Sewickley, LLC v. Chicago Title and Trust Company*, 974 N.E.2d 397, at p. 406 (Court of Appeal of Illinois, First District, Second Division 2012) (emphasis added).

¹⁸² *County of Lancaster v. Union Bank & Trust Co. (In re Estate of Craven)*, 281 Neb. 122, 794 N.W.2d 406 (Neb. 2011).

confronting the ethanol business leading up to tax year 2010, including the statement that “[p]lants that were under construction have had problems getting completed and plants that closed down during **2009-10** have had problems getting started again.”¹⁸³

I also note that the above-referenced New Jersey Tax Court case considered the distressed state of the casino industry in Atlantic City due to increased competition and the economic crisis. Significantly, the Court stated as follows regarding the Defendant taxing authority’s appraisal that failed to adjust for economic obsolescence:

Defendant’s expert also used the cost approach to formulate an opinion of value for the subject property. Because the court concludes that the income approach is the most credible method for determining the true market value of the subject property, the court will not discuss the expert’s cost approach analysis at length. It is important to note, however, that defendant’s expert made no adjustment to her estimated depreciated cost new for economic obsolescence. She made the determination not to make an economic obsolescence adjustment based on her conclusion that the value she reached under the income approach exceeded the cost new of the subject property. She opined that this comparison supports the conclusion that the subject property is not subject to economic obsolescence. She ultimately concluded, under the cost approach, values of \$2,200,000,000 for tax year 2009 and \$2,019,000,000 for tax year 2010.¹⁸⁴

The New Jersey Tax Court proceeded to state as follows in finding that the Plaintiff’s income approach was superior to the cost approach:

In addition, the cost approach necessarily requires the difficult task of accurately measuring economic obsolescence. Given that so much of the value of a casino-hotel’s real property is tied to the earning potential of gaming operations, a credible analysis of economic conditions and the translation of those conditions into an appropriate measure of economic obsolescence are essential to reaching a reliable value under the cost approach. This is particularly true here, where the subject property underwent an expensive expansion approved shortly prior to drastic negative changes in the national economy and an expansion in regional competition. The court is not satisfied that, in light of the timing of construction and the changes in the economy and competitive environment, the cost approach would provide a more credible value determination than would the income approach. The court does not hold that the cost approach is inapplicable to the valuation of casino-hotels in New Jersey. It will suffice to hold that based on the record adduced at

¹⁸³ E52:330 (emphasis added). The County Board’s Revised Appraisal also states that the sales comparison approach was not used for valuation purposes because “[a]ll of the sales were financially distressed” (E52:354).

¹⁸⁴ *Marina District Development Co., LLC v. City of Atlantic City*, DOCKET NOS. 008116-2009, 008117-2009, 003188-2010, 003194-2010, at p. 45 (New Jersey Tax Court 2013).

trial, the income approach is the most reliable method through which to determine the true market value of the subject property on the relevant valuation dates.¹⁸⁵

With respect to distressed industry analysis, I also find instructive several cases from across the county.¹⁸⁶ For instance, in *National Sun Industries, Inc. v Ransom County*, the North Dakota Supreme Court discusses the application of economic obsolescence reductions ranging from 67% to 99% for property tax purposes in the case of a sunflower oil seed processing business that confronted industry-wide depression.¹⁸⁷

C. Current Market Conditions - Discounted Cash Flow (“DCF”) Analysis Merit

Similar to the concerns expressed by the New Jersey Tax Court in the above-referenced *Marina District Development Co., LLC v. City of Atlantic City* case, the U.S. Bankruptcy Court for the Northern District of Illinois has commented on the problems associated with the cost approach to value income-producing property and the consequent utility of the use of discounted cash flow analysis under the income approach, stating as follows:

The principal factual dispute between the parties concerns the value of the property, and the closely related question of the cash flow the property is likely to generate. Both the debtor and the bank presented expert appraisal testimony on these issues, and the experts agreed on the most appropriate valuation method: discounted cash flow. This technique — described in Leslie K. Beckhart, *No Intrinsic Value: The Failure of Traditional Real Estate Investment Methods to Value Income-Producing Property*, 66 S.Cal.L.Rev. 2251, 2285-2288 (1993) — operates basically in three steps. First, the appraiser estimates the cash flow that the property will generate each year of a several year holding period. Next, the appraiser determines the "reversionary" value of the property, at the end of the period, by capitalizing a stabilized income that the property is estimated to then produce. Finally, using an appropriate discount rate, the appraiser reduces the values derived in the first two steps to present values, and totals these values to arrive at the value of the property. See American Institute of Real Estate Appraisers, *The Appraisal of Real Estate* 487-518 (9th ed. 1987), for a fuller discussion of this method of valuation.

¹⁸⁵ *Marina District Development Co., LLC v. City of Atlantic City*, DOCKET NOS. 008116-2009, 008117-2009, 003188-2010, 003194-2010, at p. 55 (New Jersey Tax Court 2013).

¹⁸⁶ *National Sun Industries, Inc. v Ransom County*, 474 N.W.2d 502 (N.D. 1991); *Lake County v US Steel*, (Indiana Tax Court 2009 – Cause No. 49T 10-0703-TA-19); *Port of Umatilla v. Dep't of Revenue*, Nos. TC-MD 991438A, 010032A, 011214A, 2004 WL 367952 (Or. Tax Magistrate Div. Feb. 24, 2004); *Great Lakes Div. of Nat'l Steel Corp. v. City of Ecorse*, 576 N.W.2d 667 (Mich. Ct. App. 1998); *Wadena Saw Mills v. County of Wadena*, Nos. C5-92-236, C3-92-235, 1993 WL 512388 (Minn. Tax Dec. 8, 1993).

¹⁸⁷ *National Sun Industries, Inc. v Ransom County*, 474 N.W.2d 502, 508 (N.D. 1991).

The court accepts the discounted cash flow method of valuation. The Beckhart article persuasively argues for its superiority over alternative methods.¹⁸⁸

As noted above, the Taxpayer's Bankruptcy Appraisal states that its evaluation "did not identify any material intangible assets."¹⁸⁹ Thus, in light of the authority above and the evidence provided by both parties regarding the distressed state of the Taxpayer and the ethanol industry in general in 2010, I am persuaded that the Bankruptcy Appraisal's total \$17.913 million enterprise valuation of the Aurora West facility derived from discounted cash flow analysis is a useful sign of value because it effectively focuses on the Subject Property's real property at issue in the appeal rather than personal property and intangibles.¹⁹⁰ For the same reasons, I am also persuaded that the discounted cash flow approach used to derive the \$17.913 million enterprise valuation is a useful sign of current market conditions as of January 1, 2010.

D. Fair Value vs. Actual or Market Value

The Nebraska Court of Appeals has stated as follows regarding the definition of value for ad valorem taxation purposes: "Actual value, market value, and fair market value mean exactly the same thing."¹⁹¹ Additionally, the definition of "fair value" is: "In taxation, market value."¹⁹² Thus, I would find that the reference in the Taxpayer's Bankruptcy Appraisal and its TERC Appraisal to post-bankruptcy "fair" value is instructive regarding actual or market value for purposes of valuing the Subject Property as of January 1, 2010.

E. Construction-in-Progress Assets vs. Construction-in-Place Assets

The Taxpayer's TERC Appraisal, unlike its Bankruptcy Appraisal, distinguishes "Construction in Progress" ("CIP") assets from "Construction in Place" assets. As discussed previously, the Bankruptcy Appraisal uses "CIP" as an acronym for "Construction in Progress."¹⁹³ On the other hand, rather than using the acronym "CIP" or the term "Construction in Progress," the Taxpayer's TERC Appraisal uses the term "Construction in Place Break Out"

¹⁸⁸ *In re 203 NORTH LaSALLE STREET LIMITED PARTNERSHIP* 190 B.R. 567, 574 (Bkrtcy.N.D.Ill. 1995).

¹⁸⁹ E52:36 and E52:38.

¹⁹⁰ See generally, Fisher and Martin, *Income Property Valuation*, Dearborn Financial Publishing, Inc., 2004, at pgs. 2 -5 (discussion regarding components of business value, including real property, personal property and intangible assets).

¹⁹¹ *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).

¹⁹² *Glossary for Property Appraisal and Assessment*, International Association of Assessing Officers, 1997, at p. 151.

¹⁹³ E52:61, E52:66 and E52:73

to describe the improvement assets stipulated as real property by the Taxpayer and the County.¹⁹⁴ Thus, for purposes of the Taxpayer's TERC Appraisal, "Construction in Progress" ("CIP") assets include the non-stipulated assets, while "Construction in Place" assets comprise the real property improvement components subject to stipulation by the Taxpayer and the County.

Prior to application of its 75% percentage of completion adjustment, the County Board's Revised Appraisal values the non-stipulated real property improvement component in the amount of \$15,076,873 (see itemization in majority opinion).¹⁹⁵ As outlined below, this \$15,076,873 amount approximates the post-bankruptcy fair value of the non-stipulated real property improvement components after adjustment for economic obsolescence.

As discussed in the Bankruptcy Appraisal section above, the total pre-bankruptcy net book value of the property, plant and equipment at the Taxpayer's four facilities amounted to \$587.7 million, which includes the \$239,450,117 cost of the Aurora West facility expended since the start of construction in 2007. Additionally, as outlined in the TERC Appraisal section above, the "Construction in Place" pre-bankruptcy gross book value of the stipulated real property improvements at the Aurora West facility amounted to \$17,246,696, or \$1,086,659 after cost approach adjustments for physical depreciation and 93.5% for economic obsolescence.¹⁹⁶ Thus, the \$15,076,873 valuation of the non-stipulated assets contained in the County Board's Revised Appraisal approximates the "Construction in Progress" \$222,203,421 pre-bankruptcy gross book value thereof after application of a 93.5% economic obsolescence adjustment ($\$239,450,117 - \$17,246,696 = \$222,203,421$; $\$222,203,421 \times .065$ [93.5% EO] = \$14,443,222 post-bankruptcy fair value of "Construction in Progress" improvement components).

I note that this \$14,443,222 post-bankruptcy fair value of the non-stipulated assets approximates the post-bankruptcy \$14,222,000 "CIP" valuation referenced at Taxpayer Exhibit 37. Exhibit 37 is entitled "Aurora West Land & Construction Assets – Fair Value" and provides the following itemization: (1) "Land Value" - \$1,460,000; (2) "CIP Value – Excluding Land" - \$14,222,000; and (3) Stipulated Real Property "Breakout" Assets - \$1,035,022.

I would find that the Exhibit 37 reference to "CIP Value" in the amount of \$14,222,000 reflects the Taxpayer's non-itemized total post-bankruptcy valuation of the Subject Property

¹⁹⁴ See, E49:60.

¹⁹⁵ See, E52:356 – E52:357.

¹⁹⁶ E49:34 – E49:35.

assets that were **not** stipulated as real property by the Taxpayer and the County.¹⁹⁷ Thus, I would further find that the County Board's \$15,076,873 pre-percentage completion adjustment valuation of the non-stipulated assets sufficiently considers current market conditions as of January 1, 2010, for the reasons that it is itemized and it approximates the above-referenced \$14,443,222 and \$14,222,000 values that are adjusted to reflect economic obsolescence.¹⁹⁸

F. Conclusion

This Commissioner is mindful that the events surrounding the economic crisis adversely affected real estate values and commercial activity throughout the United States. In light of the Taxpayer's bankruptcy filing in 2009 and emergence therefrom after January 1, 2010, together with the evidence offered by both parties that the ethanol business confronted significant distress as late as 2010 due to industry-specific factors and the national economic crisis, I would find that the County's \$29.8 million opinion of value based on the cost approach is not the best evidence because it fails to include sufficient adjustment for economic obsolescence and thereby does not reflect current market conditions as of January 1, 2010.

The valuation requirements under the U.S. Bankruptcy Code are substantial and stringent. Similarly, the Form 10-K reporting requirements for companies like the Taxpayer under the 1934 Securities Exchange Act are demanding.

As outlined above, the Taxpayer's Bankruptcy Appraisal submitted in its Chapter 11 proceeding is consistent with its Form 10-K filed with the SEC for fiscal year 2010. These documents, and the valuations set forth thereon, will have real and significant consequences for the Taxpayer and its four facilities for purposes of dealing with the public, government authorities (SEC, Internal Revenue Service and State & Local entities), financial institutions, and current/prospective stakeholders.

American Appraisal, which authored the Bankruptcy Appraisal and the TERC Appraisal, has substantial experience valuing complex properties. Moreover, the Bankruptcy Appraisal and the TERC Appraisal are consistent with each other and with the Taxpayer's Form 10-K SEC filing.

¹⁹⁷ See, E49:60.

¹⁹⁸ As illustrated in the body of this opinion, the \$14,443,222 valuation of non-stipulated is derived using a 93.5% economic obsolescence adjustment. While the record is unclear, it appears that the \$14,222,000 "CIP Value – Excluding Land" valuation found at Taxpayer Exhibit 37 is derived using a 94% economic obsolescence adjustment as follows: $\$14,222,000 \div .06$ [94% EO] = \$237,033,033; $\$239,450,117$ [total construction-in-progress & construction-in-place] - $\$237,033,033$ = $\$2,416,784$ (compare to $\$2,495,002$ Exhibit 37 total valuation of land and stipulated real property assets).

Thus, I am persuaded that the Taxpayer's Bankruptcy Appraisal and the TERC Appraisal are useful valuation guides in this case.

Due to its effective date in close proximity to January 1, 2010, the Bankruptcy Appraisal's \$15.995 million total valuation (\$14.535 million tangible asset value + \$1.46 million land value) has merit. I am also persuaded that the Bankruptcy Appraisal's \$17.913 million income valuation of the Subject Property derived from discounted cash flow analysis that is referenced in the Taxpayer's Bankruptcy Appraisal and SEC Form 10-K is instructive in light of the *Marina District Development Co., LLC v. City of Atlantic City* and *In re 203 NORTH LaSALLE STREET LIMITED PARTNERSHIP* cases referenced above. Thus, in order to best reflect current market conditions as of January 1, 2010, I would find that the Subject Property's land and improvement components should be valued as follows:

Land:	\$ 1,380,000
Improvement (Stipulated Construction-in-Place):	\$ 1,086,659
Improvement (Non-stipulated Construction-in-Progress):	\$15,076,873
Total:	\$17,543,532

Thomas D. Freimuth, Commissioner