

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

Green Plains, Inc.,  
Appellant,

v.

Merrick County Board of Equalization,  
Appellee.

Case No: 15A 0021

Decision and Order Reversing  
County Board of Equalization

Background

1. The Subject Property is an enclosure used for the temporary storage of grain situated on real estate described as: Archer Village lots 4, 5, 6, 7, and 8, Block 13 and Tax Lot 9 56-4MI-CCFD, 20-14-7, Merrick County, Nebraska (the Subject Property).
2. The Merrick County Assessor (the County Assessor) assessed the Subject Property at \$314,630 for tax year 2015.
3. The Taxpayer protested this value to the Merrick County Board of Equalization (the County Board) and requested an assessed value of \$14,630 for tax year 2015.
4. The County Board determined that the taxable value of the Subject Property was \$314,630 for tax year 2015.
5. The Taxpayer appealed the determination of the County Board to the Tax Equalization and Review Commission (the Commission).
6. A Single Commissioner hearing was held on August 4, 2016, at the Hamilton County Courthouse, Aurora, Nebraska, before Commissioner Nancy J. Salmon.
7. Angela Madathil, Attorney, was present at the hearing for the Taxpayer.
8. Lynelle Homolka, Merrick County Attorney, was present for the County Board.

Applicable Law

9. All real property in Nebraska subject to taxation shall be assessed as of the effective date of January 1.<sup>1</sup>
10. The Commission’s review of the determination of the County Board of Equalization is de novo.<sup>2</sup>
11. When considering an appeal a presumption exists that the “board of equalization has faithfully performed its official duties in making an assessment and has acted upon

<sup>1</sup> See, Neb. Rev. Stat. §77-1301(1) (Reissue 2009).

<sup>2</sup> See, Neb. Rev. Stat. §77-5016(8) (2014 Cum. Supp.), *Brenner v. Banner Cty. Bd. of Equal.*, 276 Neb. 275, 286, 753 N.W.2d 802, 813 (2008). “When an appeal is conducted as a ‘trial de novo,’ as opposed to a ‘trial de novo on the record,’ it means literally a new hearing and not merely new findings of fact based upon a previous record. A trial de novo is conducted as though the earlier trial had not been held in the first place, and evidence is taken anew as such evidence is available at the time of the trial on appeal.” *Koch v. Cedar Cty. Freeholder Bd.*, 276 Neb. 1009, 1019 (2009).

sufficient competent evidence to justify its action.”<sup>3</sup> That presumption “remains until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence adduced on appeal to the contrary. From that point forward, the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon all the evidence presented. The burden of showing such valuation to be unreasonable rests upon the taxpayer on appeal from the action of the board.”<sup>4</sup>

12. 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.<sup>5</sup>
13. Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.<sup>6</sup>
14. A Taxpayer must introduce competent evidence of actual value of the Subject Property in order to successfully claim that the Subject Property is overvalued.<sup>7</sup>
15. The Commission’s Decision and Order shall include findings of fact and conclusions of law.<sup>8</sup>

#### Findings of Fact & Conclusions of Law

16. The sole issue in this appeal involves whether or not a grain storage enclosure on the Subject Property constitutes real property or personal property.
17. The parties apparently have little dispute as to the use and construction of the enclosure. The submitted information indicates that the Taxpayer has constructed and utilized what it calls a temporary grain bunker designed to allow the Taxpayer to temporarily store grain until it is used or sold by the Taxpayer. The bunker is comprised of walls which are 5 feet in height and 6 feet wide. The walls are anchored to the ground with stakes and can be moved from one location to another. Grain is stored within the walls and is ultimately covered with a large tarp. The Taxpayer contends that the bunker is temporary and was not intended to be permanently affixed to the property. The County Board takes the position that the bunker has not actually been moved since its erection, and that it is a part of the real property.
18. Real property is defined as:
  - (1) All land;
  - (2) All buildings, improvements, and fixtures, except trade fixtures;

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<sup>3</sup> *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted).

<sup>4</sup> *Id.*

<sup>5</sup> Neb. Rev. Stat. §77-5016(9) (2014 Cum. Supp.).

<sup>6</sup> *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

<sup>7</sup> 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).

<sup>8</sup> Neb. Rev. Stat. §77-5018(1) (2014 Cum. Supp.).

19. Further guidance on the definition of “real property” can be found in agency regulations that are properly adopted and filed with the Secretary of State of Nebraska. These regulations have the effect of statutory law.<sup>10</sup> 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.”<sup>11</sup> An “improvement” is defined as, “any addition made to real property, amounting to more than mere repairs, such as sidewalks, streets, sewers or utilities.”<sup>12</sup> “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.<sup>13</sup>

20. Tangible personal property is a distinct class of property.<sup>14</sup> The test for determining whether property qualifies as tangible personal property for ad valorem tax purposes is contained in Nebraska Statute §77-105.<sup>15</sup>

21. 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...<sup>16</sup>

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<sup>9</sup> Neb. Rev. Stat. § 77-103 (Reissue 2009).

<sup>10</sup> *Smalley v. Nebraska Department of Health and Human Services*, 283 Neb. 544, 557, 811 N.W.2d 246, 256 (2012).

<sup>11</sup> 350 Neb. Admin. Chapter 10 §001.01B (Rev. 3/15/09).

<sup>12</sup> *Id.* at §001.01C.

<sup>13</sup> *Id.* at §001.01A.

<sup>14</sup> Neb. Rev. Stat. §77-201(5) (Reissue 2009).

<sup>15</sup> *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.

<sup>16</sup> Neb. Rev. Stat. 77-105 (Reissue 2009).

22. As noted above, the grain storage enclosure consists of 5' by 6' walls staked to a dirt floor (the floor is essentially covered with lime substance that requires periodic reworking). The enclosure has no roof as the grain is covered with a large tarp. At least some of the walls are periodically moved to allow access to the grain located within the walls.
23. Under Nebraska law, a building constitutes real property and 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."<sup>17</sup> In this instance, the enclosure can be easily moved from one location to another. It is not fastened or bolted to any kind of concrete or other solid structure. It does not have a roof, other than the movable tarp covering the grain.
24. The Commission determines that the factors listed in the previous paragraph indicate the grain storage enclosure is personal property. The Taxpayer properly reported it as such on its Personal Property Tax Return.
25. The Taxpayer has produced competent evidence that the County Board failed to faithfully perform its duties and to act on sufficient competent evidence to justify its actions.
26. The Taxpayer has adduced clear and convincing evidence that the determination of the County Board is arbitrary or unreasonable and the decision of the County Board should be vacated.

ORDER

IT IS ORDERED THAT:

1. The Decision of the County Board of Equalization determining the taxable value of the Subject Property for tax year 2015 is Vacated and Reversed.
2. The taxable value of the Subject Property for tax year 2015 is:

Land	\$14,630
<u>Improvements</u>	<u>\$</u>
Total	\$14,630

3. This Decision and Order, if no further action is taken, shall be certified to the Merrick County Treasurer and the Merrick County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (2014 Cum. Supp.).
4. Any request for relief, by any party, which is not specifically provided for by this Decision and Order is denied.
5. Each Party is to bear its own costs in this proceeding.
6. This Decision and Order shall only be applicable to tax year 2015.
7. This Decision and Order is effective on August 11, 2016.

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<sup>17</sup> 350 Neb. Admin. Chapter 10 §001.01B (Rev. 3/15/09).

Signed and Sealed: August 11, 2016

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Nancy J. Salmon, Commissioner