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PII COMPLIANT

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IN THE DISTRICT COURT OF SEWARD COUNTY KANSAS
CIVIL DEPARTMENT

ARKALON ETHANOL, LLC, Plaintiff, v. BOARD OF COUNTY COMMISSIONERS OF SEWARD COUNTY, KANSAS, Defendant.	)	Case No. SW-2023-CV-5

TAXPAYER'S TRIAL BRIEF

This case involves a *de novo* tax appeal pursuant to K.S.A. 74-2426(c)(4)(B) of appraisals performed by the Seward County Appraiser for the tax years of 2018, 2019, and 2020 of an ethanol plant located east of Liberal, Kansas, at 8664 Road P, Liberal, Kansas (the "**Arkalon Processing Plant**"), that produces ethanol and ethanol co-products. The purpose of this appeal is to determine whether the Seward County Appraiser correctly classified and valued the Arkalon Processing Plant for *ad valorem* taxation purposes. Attached hereto as Exhibit A is a list of equipment that are actually disputed by the parties. The items on this list shall be collectively referred to hereafter as the "**Disputed Items**."

The Arkalon Processing Plant contains commercial and industrial machinery and equipment ("CIME") that is used to process corn that is delivered to the Arkalon Processing Plant. Each day, approximately 9.5 billion kernels of unprocessed corn are transferred from grain storage

silos by conveyors to a hammermill which grinds the corn into a fine flour. The flour is mixed with water and enzymes in a slurry tank to produce a "mash," which is run through an array of processing equipment, including a cook tank, in which the mash is heated to break down the corn starches into fermentable sugars, liquefaction tanks, a methanator feed tank, into a batch process fermentation tank in which yeast is added to the mash, on into a beer well. The "beer" is pumped into distillation equipment, whole stillage tanks, run through centrifuges, pumped into thin stillage tanks, corn oil extraction equipment, a syrup tank, a molecular sieve, and then to tanks for subsequent blending to specifications. If Arkalon is filling an order to produce ethanol for domestic use, then denaturant is added to the product before it is loaded into railcars. If Arkalon is filling an order for export, then denaturant is not added.

The kernel of corn from the nearby field has now traveled through the labyrinth of complex machinery and equipment at the Arkalon plant, and the components of that kernel went their separate ways, perhaps part of it to Europe as motor vehicle fuel, part of it as corn oil and distillers grains to fatten cattle in vast commercial feedyards in southwest Kansas and the Oklahoma and Texas panhandles, and part of it as carbon dioxide molecules pumped over 90 miles to the Borger oil field to assist in recovering oil from a declining field.

The Disputed Items Are Commercial and Industrial Machinery and Equipment that Are Exempt Pursuant to K.S.A. 79-223

The CIME used to process this corn into ethanol and ethanol co-products was acquired by Arkalon because, *inter alia*, of the state legislature enacting K.S.A. 79-223, which created a property tax exemption for CIME. K.S.A. 79-223 was made effective in 2006 and created an exemption for any CIME that was either acquired after June 30, 2006, or transported into this state after June 30, 2006. This exemption applies to property classified under Subclass (5) of Class 2 of Section 1 of Article 11 of the constitution of the state of Kansas. K.S.A. 79-223(d)(2). This

subclass of property is defined under the Kansas Constitution to include CIME that is tangible personal property that is used to produce income or is depreciated or expensed for IRS purposes. Kan. Const. Art. 11, Sec. 1, Class 2, Subclass 5; *In re Equalization Appeal of Wedge Log-Tech, L.L.C./Pioneer Wireline Servs.*, 48 Kan. App. 2d 804, 805 (2013). Therefore, intangible property and real property are not included.

The Effect of the Enactment of K.S.A. 79-261

After K.S.A. 79-223 was enacted, Kansas courts were left to make their own determinations regarding what constituted CIME. *See In re Equalization Appeal of Coffeyville Resources Nitrogen Fertilizers, L.L.C.,* No. 107,705 2013 WL 4046403, 2013 Kan. App. Unpub. LEXIS 726 (Kan.App. 2013) (unpublished); *In re Equalization Appeal of Coffeyville Resources Nitrogen Fertilizers, L.L.C.*, No. 117,045 2018, WL 4655648, 2018 Kan. App. Unpub. LEXIS 739 (Kan.App. 2018) (unpublished). However, eight years after the enactment of K.S.A. 79-223, the Kansas legislature enacted K.S.A. 79-261, which set forth codified standards for how property should be classified as CIME. First, K.S.A. 79-261 makes it clear that the purpose of that section is to "codify the original legislative intent of the 2006 law exempting from ad valorem taxation commercial and industrial machinery and equipment purchased, leased or transported into the state after June 30, 2006, pursuant to K.S.A. 79-223, and amendments thereto." K.S.A. 79-261(a)(1). The legislative intent in passing K.S.A. 79-223 is explicitly set forth in K.S.A. 79-223(a), which states:

> It is the purpose of this section to promote, stimulate, foster and encourage new investments in commercial and industrial machinery and equipment in the state of Kansas, to contribute to the economic recovery of the state, to enhance business opportunities in the state, to encourage the location of new businesses and industries in the state as well as the retention and expansion of existing businesses and industries and to promote the economic stability of the state by maintaining and providing employment opportunities, thereby

> contributing to the general welfare of the citizens of the state, by exempting from property taxation all newly purchased or leased commercial and industrial machinery and equipment, including machinery and equipment transferred into this state for the purpose of expanding an existing business or for the creation of a new business.

K.S.A. 79-261 further outlines the analysis that appraisers are required to implement when classifying property as CIME. First, "the county appraiser shall conform to the definitions of real and personal property in Kansas law and to the factors set forth in the personal property guide devised or prescribed by the director of property valuation pursuant to K.S.A. 75-5105a(b), and amendments thereto." K.S.A. 79-261(b)(1). This subsection makes it clear that the appraiser must first look to the definitions real and personal property in Kansas law as well as the factors set forth in the personal property guide devised by the director of property valuation of the State of Kansas ("PVD Guide"). K.S.A. 79-102 defines "real property" to include "not only the land itself, but all buildings, fixtures, improvements, mines, minerals, quarries, mineral springs and wells, rights and privileges appertaining thereto." In relevant part, K.S.A. 79-102 defines "personal property" to include "every tangible thing which is the subject of ownership, not forming part or parcel of real property . . . ." These definitions are extremely ambiguous, and the courts have wrestled for decades with how to define what a "fixture" is. *Atchison, Topeka & Santa Fe Ry. v. Morgan*, 42 Kan. 23, 27-28 (1889). Under the common law there is no single statement or operative definition of the term "fixture" that is applicable to all situations. *Kan. City Millwright Co., Inc. v. Kalb*, 221 Kan. 568, 664, modified 221 Kan. 752, 564 P.2d 1280 (1977).

Taking advantage of this ambiguity, the County appraiser in this case classified nearly all of the processing equipment located at the Arkalon Processing Plant as fixtures and, as a result, concluded that Arkalon would not receive the benefit of the exemptions pursuant to K.S.A. 79-223 for the vast majority of the equipment located thereon. However, in doing this, the County

has demonstrated that it failed to fully adhere to K.S.A. 79-261 and Kansas common law. After all, resting on the ambiguity is insufficient under K.S.A. 79-261(b). K.S.A. 79-261(b) requires the appraiser "**to conform . . . to the factors set forth in the [PVD Guide].**" K.S.A. 79-261(b)(1) (emphasis added). The statute then provides that if the proper classification of CIME is not clearly determined, then the appraiser "shall consider the following:

> (A) The annexation of the machinery and equipment to the real estate;
> (B) the adaptation to the use of the realty to which it is attached and determination whether the property at issue serves the real estate; and
> (C) the intention of the party making the annexation, based on the nature of the item affixed; the relation and situation of the party making the annexation; the structure and mode of annexation; and the purpose or use for which the annexation was made."

K.S.A. 79-261(b)(2).

It is important to note that the language of the three-part fixture law test as it was stated in prior case decisions (*i.e., In re Equalization Appeals of Total Petroleum*, 28 Kan. App. 2d 295, 299-300 (2000); *Stalcup v. Detrich*, 27 Kan. App. 2d 880, 886 (2000); *Board of Education v. Porter*, 234 Kan. 690, 695 (1984)) was changed with the enactment of K.S.A. 79-261. Specifically, the adaptation portion of the test was changed from "adaptation to the use of that part of the realty with which it is attached" to "the adaptation to the use of the realty to which it is attached **and determination whether the property at issue serves the real estate**". *Compare Stalcup v. Detrich*, 27 Kan. App. 2d 880, 886 (2000), *with* K.S.A. 79-261(b)(2)(B) (emphasis added). Furthermore, the intent portion of the test added "based on the nature of the item affixed; the relation and situation of the party making the annexation; the structure and mode of annexation; and the purpose or use for which the annexation was made." *Compare Stalcup v. Detrich*, 27 Kan. App. 2d 880, 886 (2000), *with* K.S.A. 79-261(b)(2)(C). Moreover, the statute added other factors and requirements that had not previously been made a part of the test. First, the statute added that "The basic factors for clarifying items as real or personal property are their **designated**

use and purpose." K.S.A. 79-261(b)(3). The statute also noted that the classification determinations for each item must be done on a "**case-by-case basis**." *Id.* Last and just as important, the statute noted that "**All three parts of the three-part fixture test must be satisfied for the item to be classified as real property**." *Id.* Prior to the enactment of K.S.A. 79-261, none of this bolded language had ever been incorporated into any of the prior rulings by Kansas courts in applying the three-part fixture test.

The addition of this language was important because courts had previously waffled in the implementation of the three-part fixture test and applied the test differently based on the different circumstances in prior cases. Courts previously had done more of a weighing test based on the totality of the circumstances to determine whether property was more like real property than personal property. *See Atchison, T. & S. F. R. Co. v. Morgan*, 42 Kan. 23 (1889); *In re Equalization Appeals of Total Petroleum*, 28 Kan. App. 2d 295 (2000); *Stalcup v. Detrich*, 27 Kan. App. 2d 880 (2000); *Board of Education v. Porter*, 234 Kan. 690 (1984). The addition of this language demonstrates that K.S.A. 79-261 changed how CIME should be classified and made it more clear how the three-part fixture test should be applied by courts in the future. The statute indicates that the legislature intended for appraisers to focus more on how the property was ***used*** and the ***purpose*** of the property, that the legislature wanted appraisers to consider whether the property ***serves the real estate*** or some other function; and that the legislature intended for any ambiguous situations to result in the taxpayers benefitting from the exemption for CIME pursuant to K.S.A. 79-223. Considering this language had never previously been incorporated in prior decisions of Kansas courts, that appears to be the only reason why this language would have been added based upon known rules of statutory construction.

K.S.A. 79-261 also states that appraisers must "conform to . . . the factors set forth in the [PVD Guide]." K.S.A. 79-261(b)(1). The PVD Guide has published extensive analysis regarding how appraisers should classify property as either real property or personal property as well as examples to help illustrate how property should be classified. For example, the 2018 PVD Guide references the tests set forth in K.S.A. 79-261, including the three-part fixture test. 2018 PVD Guide, pp. vi-vii. Regarding the three-part fixture test, the PVD Guide emphasizes in bolded language that "**[t]he answer must be "YES" to all three questions before it can be said that personal property has become a fixture and thus part of the real property."** PVD Guide, p. vii. The PVD Guide also references a Kansas Court of Appeals case that dealt with an oil refinery that was no longer in operation: *In re Equalization Appeals of Total Petroleum, Inc.*, 28 Kan. App. 2d 295 (2000). The PVD Guide then moves onto its guidance to appraisers regarding how appraisers should apply the three-part fixture law test.

With regard to annexation, the PVD Guide states:

> **Annexation of the machinery and equipment to the real estate:** How is the item under consideration physically annexed to the real property? Would removing the item cause a reduction in the fair market value of the realty? If so, the item may tend to be viewed as part of the real property. Would the item, once removed, require a significant amount of time or cost to restore the realty to its original condition? If so, the item may tend to be viewed as part of the real property. 2018 PVD Guide, p. vii.

With regard to adaptation, the PVD Guide states:

> **Adaptation to the use of the realty to which it is attached:** In the adaptability test, **the focus is on whether the property at issue serves the real estate or a production process.** For example, a boiler that heats a building is considered real property, but **a boiler that is used in the manufacturing process is considered personal property.** 2018 PVD Guide, pp. vii-viii (emphasis added).

With regard to intention, the PVD Guide states:

> **Intent of the party making the annexation:** Intent is based on the nature of the item affixed; the relation and situation of the party making the annexation; the

> structure and mode of annexation; and the purpose or use for which the annexation was made.
>
> In other words, look at the objective data garnered from the first two tests, or from independent documents (documents prepared for purposes other than for a hearing on the issue of whether the property is real or personal). For example, a lease or financing agreement may reveal intent. 2018 PVD Guide, p. viii.

The PVD Guide has also followed the additions made by the enactment of K.S.A. 79-261 and provides the following classification guidance:

> When classifying property for assessment purposes, the appraiser should examine all relevant factors and criteria. The information source, its applicability to the Kansas property tax laws and whether it can be used as a credible authority on appeal are all relevant factors to consider.
> The basic factors for clarifying items as real or personal property are their designated use and purpose. The determination of whether property is real or personal must be made on a case-by-case basis. All three parts of the three-part fixture test must be satisfied for the item to be classified
> as real property. *K.S.A. 2015 Supp. 79-261(b)(3).*

2018 PVD Guide, p. viii. The PVD Guide further states the following guidance:

> Normally, the land and permanent structures on the land, mechanical and other features within the structure with a designed use for the safety and comfort of the occupants, and permanent land improvements added for the utilization of the land are considered real estate.
>
> **Items directly used for and whose primary purpose is for a manufacturing process are normally considered personal property**. Personal property, by definition, includes all machinery and equipment, furniture, and inventory.

2018 PVD Guide, p. viii (emphasis added). The PVD Guide next sets forth a number of items that would ordinarily be considered real property:

> **IMPROVEMENTS TO LAND NORMALLY CONSIDERED REAL PROPERTY**
> Ordinarily include:
> Retaining walls, piling and mats for general improvement of the site, private roads, paved areas, culverts, bridges, viaducts, subways, tunnels, fencing, reservoirs, dikes, dams, ditches, canals, private storm and sanitary sewers, private water lines for drinking, sanitary and fire protection, fixed wharves and docks, permanent standard gauge railroad tracks, and yard lighting.
>
> **BULDING COMPONENTS NORMALLY CONSIDERED REAL PROPERTY**

> Structural and other improvements to buildings, including:
> Foundation, walls, floors, roof, insulation, stairways, catwalks, partitions, loading and unloading platforms and canopies, systems designed for occupant comfort such as heating, lighting, air conditioning, ventilating, sanitation, fixed fire protection, plumbing

It is important to note that none of the items that are at issue in this case are included in the above lists. There is no reference to storage tanks in the above lists. There is no inclusion of process tanks. Clearly, the language and factors set forth in the PVD Guide indicate that appraisers are mandated to consider the use of the property at issue to determine whether the property at issue serves the real estate or serves a manufacturing or production process. If the item serves a production process, then the property should be classified as personal property.

Finally, the PVD Guide provides a number of examples for how property is classified. Below are some examples that indicate that the PVD Guide aligns with Arkalon's conclusions and Arkalon's experts' conclusions:

Category	**Item**
Building Components	
Air Conditioning-Central	Real
Air Conditioning-Package with Duct Work	Real
Air Conditioning-Wall/Window Unit	Personal
Cold Storage-Built-In (where they are the primary function of the structure)	Real
Cold Storage-Movable (knock down type)	Personal
Cold Storage-Display Type	Personal
Cold Storage-Free Standing	Personal
Refrigeration Equipment	Personal
Door-Automatic (Magic Carpet)	Real
Elevator.	Real
Escalator	Real
Dumbwaiter	Real
Man Lift	Real
Sidewalk Lift	Real
Franklin Stove	Personal
Free Standing Fireplace	Personal
Sprinkler System	Real

Boiler (used primarily to supply heat for bldg.)	Real
Boiler (used primarily to supply power for mfg.)	Personal
Machinery and Equipment Covers	Personal
Generator	Personal
Hopper Scales	Personal
Loading-Unloading Systems	Personal
Yard Items	
Parking Lot Lighting	Real
Scale-Platform	Personal
Scale-Houses	Real
Scale-Axle Drive-On	Real
Sign-Business (attached to building)	Personal
Sign (free standing)	Personal
Sign-Advertising (billboard)	Personal
Tower-Radio Station	Personal
Tower-Television Station	Personal
Tower-Communication (citizens band)	Personal
Tower-Cable TV	Personal
Docks and Bulkheads	Real
Fencing (security or privacy)	Real
Trackage	Real
Tunnel (pedestrian)	Real

2018 PVD Guide, pp. x-xi.

Special Items	
Batch Plant-Structure	Real
Batch Plant-Equipment	Personal
Portable Standing Building & Yard Item	Personal
Silo	Real
Tank-Storage	Personal
Tank-Used in Processing	Personal
Grain Elevator	Real
Wind Generator	Personal
Solar Energy Panel	Real
Windmill	Personal
Automotive Services	
Pump	Personal
Tank-Above Ground, Vertical	Personal
Tank-Above Ground, Horizontal	Personal
Tank-Underground	Personal
Lift	Personal
Compressor	Personal
Service Station Yard Lighting	Real

2018 PVD Guide, p. xi.

Category	**Item**
Bowling Lanes	
Lane and Return	Personal
Pinspotter	Personal
Car Washes	
Equipment	Personal
Related Plumbing, Piping & Wirin	Real
. . .	
Indoor Theatres	
Equipment	Personal
Seats	Personal
Outdoor Theaters	
Screen	Real
Speaker, Post, Underground Wiring	Personal
Concession Stand & Other Permanent Bldgs.	Real

2018 PVD Guide, p. xii.

Perhaps most importantly, especially when factoring in the previous decision of *Total Petroleum* that was issued prior to the enactment of K.S.A. 79-261, the PVD Guide provided the following guidance regarding how refining plants should be classified:

Category	**Item**
Refining Plants	
Oil Storage Tanks	Personal
Piping (above ground)	Personal
Loading Rack (frame and canopy)	Real

2018 PVD Guide, p. xiii. If the County's position was correct, then why would the PVD Guide have provided this guidance? None of the County's positions follow or align with any of the PVD Guides after the enactment of K.S.A. 79-261. Therefore, the County has failed to adhere to K.S.A. 79-261.

The County is appearing to argue that the County Appraiser is not required to follow the PVD Guides when making classification determinations. However, that is not the conclusion that Kansas appellate courts have drawn. In fact, those courts have routinely looked to the PVD Guides for guidance. However, Kansas courts have determined that the PVD Guides are more than just guides. "As an administrative regulation, the Guide has the force and effect of law." *All. Well Serv. v. Pratt Cty.*, 61 Kan. App. 2d 454, 476 (2022) (citing *In re Tax Appeal of City of Wichita*, 277 Kan. 487, 495 (2004)). In the 2018 *Coffeyville Resources* case, the Kansas Court of Appeals specifically held:

> The PVD Guide is written pursuant to K.S.A. 2017 Supp. 79-505(a), which requires the director of property valuation to "adopt rules and regulations or appraiser directives prescribing appropriate standards for the performance of appraisals in connection with ad valorem taxation in this state." County appraisers must follow the guidelines in the performance of their duties. K.S.A. 2017 Supp. 79-1456(a). The "boiler in a building" example provides that "a boiler that heats a building is considered real property, but a boiler that is used in the manufacturing process is considered personal property."

In re Equalization Appeal of Coffeyville Res. Nitrogen Fertilizers, L.L.C., 2018 Kan. App. Unpub. LEXIS 739, at *39. Specifically, K.S.A. 79-1456(a) states: "The county appraiser shall follow the policies, procedures and guidelines of the director of property valuation in the performance of the duties of the office of county appraiser. If the director has developed and adopted methodologies to value specific types of property, the county appraiser shall be required to follow such methodologies." K.S.A. 79-505(a) states, "The director of property valuation shall adopt appraiser directives prescribing appropriate standards for the performance of appraisals in connection with ad valorem taxation in this state." The County failed to reference any of thise anywhere in its pretrial brief likely because the County realizes that it completely counters the County's own arguments that cases decided before any of these statutes were even created should control instead. The PVD Guides demonstrate the legislature's intent in enacting its CIME

exemptions and how these CIME should be classified. This is demonstrated by the fact that the Kansas Court of Appeals has applied these statutes and specifically used the analysis provided in the PVD Guides in making classification determinations. *In re Equalization Appeal of Wedge Log-Tech, L.L.C./Pioneer Wireline Servs.*, 48 Kan. App. 2d 804, 816-17 (2013) (holding that the legislature authorized the PVD to implement the PVD Guides and the classification analysis in those guides controlled); *In re Equalization Appeal of Coffeyville Res. Nitrogen Fertilizers, L.L.C.*, 2018 Kan. App. Unpub. LEXIS 739, at *39. The Kansas Court of Appeals made clear in 2013 that it disagrees with the county's position that it is the role of the courts "to implement shifts in ad valorem tax policy in Kansas." *In re Wedge Log-Tech, L.L.C./Pioneer Wireline Servs.*, 48 Kan. App. 2d at 816-17. The Court of Appeals then held:

> The PVD has historically classified wireline equipment as schedule 5 commercial and industrial machinery and equipment. If the County desires to change the historical classification of wireline equipment from schedule 5 property to schedule 2 property, the proper avenue is ***either promulgation of the change through the appropriate PVD guides*** or through statutory changes made by the legislature.

Id. at 817 (emphasis added). Therefore, contrary to what the County is asserting, the Court of Appeals believes that the PVD Guides ***are authoritative*** and have the ***force and effect of law***.

In addition to K.S.A. 79-261 and the PVD Guides, there are three cases that have already been decided in Kansas that are directly analogous to the Arkalon Processing Plant. Those cases involved tax appeals by Coffeyville Resources Nitrogen Fertilizers, L.L.C. of a nitrogen fertilizer plant and by Dodge City Cooperative Exchange of a grain elevator. *In re Dodge City Coop. Exch. v. Bd. Of Cnty. Comm'rs*, 62 Kan. App. 2d 391 (2022); *In re Equalization Appeal of Coffeyville Resources Nitrogen Fertilizers, L.L.C.*, No. 107,705 2013 WL 4046403, 2013 Kan. App. Unpub. LEXIS 726 (Kan.App. 2013) (unpublished); *In re Equalization Appeal of Coffeyville Resources Nitrogen Fertilizers, L.L.C.*, No. 117,045 2018, WL 4655648, 2018 Kan. App. Unpub.

LEXIS 739 (Kan.App. 2018) (unpublished). The Arkalon Processing Plant utilizes similar grain handling equipment that would be owned by a grain elevator and has processing equipment similar to other types of batch processing plants like a nitrogen fertilizer plant.

In *Dodge City Coop. Exch. v. Bd of Cnty. Comm'rs*, 62 Kan. App. 2d 391 (2022), the Kansas Court of Appeals held that various types of grain handling equipment was personal property because it did not satisfy the annexation portion of K.S.A. 79-261. *Dodge City Coop. Exch.*, 62 Kan. App. 2d at 404-05. Specifically, the Kansas Court of Appeals noted that, just because all of the equipment was large and bolted to fixtures, it did not mean that the equipment became affixed to the real estate with the requisite degree of permanency to satisfy the annexation portion of K.S.A. 79-261(b)(3). In that case, witnesses testified that equipment was designed to be removable and capable of being removed by unbolting them from their foundations. *Dodge City Coop. Exch.*, 62 Kan. App. 2d at 402-03. The ruling in this case even prompted the PVD to issue an addendum to account for this change and all appraisers have since changed the way that that they classify grain elevators:

> Using Kansas' three-part fixture law, the appellate court determined much of the elevator's CIME was not sufficiently annexed to the realty to be classified as fixtures. The Court considered the degree of permanency of the CIME and other details surrounding an item's physical attachment and removability. Much of the CIME was large integral parts of the grain handling operation that were bolted to the grain storage bins. Following is a general list of the equipment cited in the order. It seems logical that other CIME items can be viewed as natural extensions to the list below and be classified as personal property as well (i.e. vertical elevator conveyor leg).
>
> - Conveyors - Aeration components
> - Spouting - Connecting bridges
> - Transitions - Temperature monitoring equipment
> - Gates - Loadout system modules and components

Grain Elevator Appraisal Guide, p. 155, https://www.ksrevenue.gov/pdf/2024KSGrainElevatorGuide.pdf.

Despite the Arkalon Processing Plant having almost identical equipment to the equipment described in that case and that case having been published more than two years ago, the County still continues to classify all of Arkalon's grain handling equipment as real property. *Dodge City Coop. Exch.*, 62 Kan. App. 2d at 402-05.

The other cases that have analogous situations to this one are the two *Coffeyville Resources* cases. Though these cases involved appeals for tax years prior to the enaction of K.S.A. 79-261, the analysis in these cases are helpful in this case because the analysis appears to follow K.S.A. 79-261 even though it does not directly cite to it. In addition, each of these cases involved a batch-style processing plant, similar to an ethanol plant, and these cases also involved the testimony of the same engineer that will be testifying on behalf of the County in this case. In the *Coffeyville Resources* case decided in 2013 ("**Coffeyville I**"), the Kansas Court of Appeals noted that, even though it was relying entirely on common law, it did not believe that the factors set forth in *In re Equalization Appeals of Total Petroleum, Inc.*, 28 Kan. App. 2d 295 (2000) should be strictly applied in the same manner as *Total Petroleum* in *Coffeyville I* because the case was factually distinguishable. *Coffeyville I*, 2013 Kan. App. Unpub. LEXIS 726, at *12. The Court of Appeals noted that the fact that this plant was presently operating while the oil refinery in *Total Petroleum* had shut down and the refinery itself had been removed meant that the cases were factually distinguishable. *Id.* (citing *Total Petroleum*, 28 Kan. App. 2d at 296-97. However, the Court of Appeals could not make an ultimate determination in *Coffeyville I* because the County in that case had attempted to present the 699 assets together as one "single, huge machine" instead of individual assets. *Id.* at *13. This was likely because, the County's expert, Mr. James Watson, found that all of the disputed equipment was a part of the manufacturing process and were interconnected with other equipment that was a part of the process, and therefore, each of the items

constituted real property for purposes of *ad valorem* taxation. *In re Equalization Appeal of Coffeyville Resources Nitrogen Fertilizers, L.L.C.,* No. 117,045 2018, WL 4655648, 2018 Kan. App. Unpub. LEXIS 739, at *3-4 (Kan.App. 2018) (unpublished) ("**Coffeyville II**"). Because of this, the factfinder had lumped all of these individual pieces of equipment into one grouping, and the factfinder failed to consider each asset individually and apply the test to each individual asset. *Coffeyville I,* 2013 Kan. App. Unpub. LEXIS 726, at *13. Therefore, the Court of Appeals remanded this case to make findings of fact regarding the individual assets. *Id.*

On remand, the Board of Tax Appeals then considered each of the 699 assets and found that all but 17 of the assets should be classified as personal property. The County appealed the ruling to the Court of Appeals. *In re Equalization Appeal of Coffeyville Resources Nitrogen Fertilizers, L.L.C.,* No. 117,045 2018, WL 4655648, 2018 Kan. App. Unpub. LEXIS 739 (Kan.App. 2018) (unpublished) ("**Coffeyville II**"). In *Coffeyville II*, the Kansas Court of Appeals applied the common law three-part fixture test to the operating facility and affirmed BOTA's ruling that the County and Mr. James Watson had failed to correctly classify 682 of the 699 assets at the batch processing plant that were in dispute in that case. In its analysis of the County's contention on appeal, the court reaffirmed its rejection of treating individual items of CIME as a single, huge machine. The court noted that in the original COTA decision, COTA had "relied on County expert Watson's testimony that under the adaptation prong of Total Petroleum the entire facility was adapted to the land and the land adapted to the facility, so it must all be treated as real property. That theory was rejected in CRNF I." *Coffeyville II,* 2018 Kan. App. Unpub. LEXIS 739, at *20.

The Kansas Court of Appeals then applied a thorough analysis of the common law three-part fixture test. With regard to annexation, the Court of Appeals found that there were two

questions that needed to be answered. First, courts should consider whether an individual item is removable and whether its removal would cause damage to the underlying real estate. *Id.* at *30-31. Second, courts should consider whether the property can be readily replaced. *Id.* at *31. The Court of Appeals found that the batch processing equipment was not annexed because it was not attached to the land in a permanent manner; it was only bolted into place and was readily movable once the bolts were removed from the equipment's foundations. *Id.* at *31-32. The county in that case attempted to argue what Seward County is arguing in this case: that removing each of these items could not be done without lengthy costly effort and each of these items would not be removed because they were "integral parts of the plant." *Id.* at *32-33. However, the Court of Appeals correctly shut down the county's argument in that case, noting that the "County's argument is focused on the 'single, huge machine' theory. It would be costly and time consuming to remove all of the assets from the property. But the analysis should be focused on each individual asset." *Id.* at *33. The county in *Coffeyville II* also attempted to argue that the assets had become constructively annexed to the land by virtue of the assets comprising "a necessary integral, or working part of some other object which is attached. Constructive annexation to the realty occurs when removal leaves the personal property unfit for use so that it would not of itself and standing alone be well adapted for general use elsewhere." *Id.* at *33 (quoting 35A Am. Jur. 2d, Fixtures § 10). The county in that case further argued that Watsons's testimony combined with another person's testimony "established that removal or failure of an asset would render the principal part of the fertilizer plant unfit for use and that the assets 'are primarily of limited, specialized uses in refineries and similar plants.'" *Id.* However, the Court of Appeals disagreed, noting that the plant had several different sections that could be operated while other parts of the plant were shut down. *Id.* at *33-34. In any event, the Court of Appeals noted that the analysis should be focused

on the individual asset itself, and just because the loss of an asset might "render the plant inoperable, the testimony established that the assets would be fit for use in other plants, and for other purposes." *Id.* at *34. The Court of Appeals last noted that Kansa case law has never held that assets used in a production process become constructively annexed by virtue of incorporation into a production process. *Id.* Therefore, the processing equipment failed to satisfy the annexation test because the mere use of an asset in a large plant or manufacturing process does not render it annexed to the land. *Id.* at *34-35.

With regard to the common law adaptation prong, the Court of Appeals considered whether the asset was adapted "to the use of that part of the realty with which it is attached." *Id.* at *35. The Court of Appeals noted that there a couple of ways to satisfy this prong. The first inquiry is if the asset itself "is adapted to fit the land." *Id.* The second inquiry is if the asset was "meant to benefit the land itself, as opposed to benefitting some other interest." *Id.* (citing *A. T. & S. F. R. Rld. Co. v. Morgan*, 42 Kan. 23, Syl. ¶ 3, 21 P. 809 (1889)).

With regard to the first inquiry of the adaptation test, the Court of Appeals considered whether any of the individual assets were specially designed for this specific tract of realty, and the Court of Appeals concluded that they were not adapted to the land because the equipment were "off-the-shelf" and could be used in a variety of manufacturing applications. *Id.* at *35. In addition, the Court of Appeals noted that BOTA had concluded that none of the equipment were specially "'designed to fit the subject land nor is there any rational reason to believe these assets could not easily be re-tasked in another location.'" *Id.* at *36. Furthermore, BOTA rejected the idea that the equipment's concrete foundations were part of the assets. *Id.* at *36-37. The Court of Appeals then rejected the county's argument that BOTA was incorrect in its conclusions, noting that foundations do not render a piece of equipment adapted to the real estate. *Id.* at *37 (noting

the assets in *Stalcup v. Detrich*, 27 Kan. App. 2d 880, 886-87 (2000) and *Board of Education v. Porter*, 234 Kan. 690, 695-96 (1984) were attached to concrete foundations and were not considered adapted to the land by virtue of these foundations). Because the evidence showed that the assets could be used on any piece of land, given the proper foundation, and they could be used to make other products, the adaptation test was not satisfied. *Id.*

With regard to the second inquiry of the adaptation test, the Court of Appeals considered whether the assets were "meant to benefit the land itself, or some other interest." *Morgan*, 42 Kan. at 29. In *Morgan*, the court found that a boiler used to pump a well to provide water for the steam engines was personal property because the boiler was installed to serve the function of the railroad rather than to provide water for the real estate itself. *Id.* at *37-39 (citing and quoting *Morgan*, 42 Kan. at 29-30). Therefore, the pump, the boiler, and the boiler house were all determined to be personal property because they did not satisfy the adaptation test. *Id.* at *38-39. To further explain this second inquiry, the Court of Appeals noted the "boiler in the building" example set forth in the PVD Guide. *Id.* at *39. The Court of Appeals in *Coffeyville II* held:

> The PVD Guide is written pursuant to K.S.A. 2017 Supp. 79-505(a), which requires the director of property valuation to 'adopt rules and regulations or appraiser directives prescribing appropriate standards for the performance of appraisals in connection with ad valorem taxation in this state.' County appraisers must follow the guidelines in the performance of their duties. K.S.A. 2017 Supp. 79-1456(a). The 'boiler in a building' example provides that "a boiler that heats a building is considered real property, but a boiler that is used in the manufacturing process is considered personal property."

Coffeyville II, at *39. The county in *Coffeyville II* attempted ot argue this "boiler in the building" example was not persuasive here because all of the assets serve the purpose of improving the land rather than "some general manufacturing operation that could be conducted anywhere." *Id.* at *39-40 (quoting the county's argument). However, the Court of Appeals rejected this argument, because, "as already discussed, there is nothing special about the assets that make them unfit for

use in other operations. Additionally, there is nothing unique about the land that requires the assets to remain there. . . . [T]he assets could have been erected in some other location, and that there was nothing about the land that made it the only place the plant could operate." *Id.* at *40. Therefore, the Court of Appeals found that this inquiry also failed the adaptation test.

Finally, with regard to intent, the Court of Appeals in *Coffeyville II* considered the intention of the party making the annexation. *Id.* However, the county in that case failed to appropriately brief it, so the Court of Appeals considered the county's argument abandoned regarding intent. The Court of Appeals then proceeded to uphold BOTA's finding that Mr. James Watson's conclusions regarding 682 of the 699 assets were incorrect under the common law three-part fixture test. *Id.* at *47. It is important to note that many of the County's arguments that have been presented and likely will be presented were directly rebutted by *Coffeyville II*, so this case is directly tied to that case as a result.

The Disputed Items Are Personal Property Pursuant to K.S.A. 79-261

Arkalon's position is that the Disputed Items are personal property. The vast majority of the Disputed Items are capable of being removed and are in fact designed to be removed. In addition, all of the Disputed Items serve the production process of manufacturing ethanol and ethanol co-products. In addition, the process equipment are "off-the-shelf" pieces of equipment that are capable of being removed and used in other processing plants. None of the equipment was specially designed for this specific location. Lastly, it was intended for the Disputed Items to be commercial and industrial machinery and equipment rather than a part of the real estate.

Arkalon's counsel contracted with two experts to prove its position and to review the classification determinations made by the County's expert in classification, James Watson. Crown Appraisals, Inc. ("Crown Appraisals") produced an appraisal by Jeffrey L. Berg and Megan

Sheeley. Stancil & Co. provided an appraisal review of the Roger Hornsby and James Watson appraisals by Kathryn Spletter. Arkalon's experts are both appraisers, but Kathryn Spletter with Stancil & Co. is also an engineer. Based on their reports, Crown Appraisals and Stancil & Co. arrived at very similar conclusions of value in terms of real property. The two experts slightly differed on the classification of certain items, but for the most part, their classification determinations were substantially similar. Their ultimate conclusions are described below:

Fair Market Value of Taxable Real Property of the Arkalon Processing Plant			
Year	**Value according to County Assessment**	**Crown Revised**	**Stancil Revised**
2018	$91,223,050	$25,450,000.00	$24,588,071.00
2019	$91,223,050	$28,545,000.00	$24,902,501.00
2020	$100,488,000	$29,880,000.00	$25,388,717.00

Arkalon's ultimate request of this Court is to follow K.S.A. 79-261 and the PVD Guides, which have had substantially similar directives regarding classifications for two decades. Arkalon is not asking for any expansion of the law. Arkalon requests that this Court ultimately determine that the County failed to "conform to the definitions of real and personal property in Kansas law and to the factors set forth in the personal property guide devised or prescribed by the director of property valuation pursuant to K.S.A. 75-5105a(b), and amendments thereto." K.S.A. 79-261(b)(1). After all, contrary to what the County is trying to argue, "[a]s an administrative regulation, the Guide has the force and effect of law." *All. Well Serv. v. Pratt Cty.*, 61 Kan. App. 2d 454, 476 (2022) (citing *In re Tax Appeal of City of Wichita*, 277 Kan. 487, 495 (2004)). The Court will see through the evidence being presented that, similar to the cases in *Dodge City Coop., Coffeyville I,* and *Coffeyville II*, the County has improperly classified all of the Disputed Items, and the classifications and valuations performed by Crown Appraisals should be the determination of the Court as to the fair market value of the real property at the Arkalon Processing Plant.

RESPECTFULLY SUBMITTED BY:

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Exhibit A

	Description	Classification by Hornsby & Company	Classification by Crown Appraisals
	Plant Equipment:		
1	HAMMER MILL PACKAGE	Real	Personal
2	COOK WATER PRE-HEATER	Real	Personal
3	COOK WATER PUMP	Real	Personal
4	METHANATOR COOLER	Real	Personal
5	METHANATOR FEED PUMP (OUT OF SERVICE/OBSOLETE)	Real	Personal
6	BLENDER & FEED SCREW PACKAGE	Real	Personal
7	SLURRY #1 AGITATOR	Real	Personal
8	SLURRY #1 PUMP	Real	Personal
9	SLURRY #2 AGITATOR	Real	Personal
10	SLURRY #2 PUMP	Real	Personal
11	COOK TUBE #1 AGITATOR	Real	Personal
12	COOK TUBE #2 AGITATOR	Real	Personal
13	HYDROHEATER	Real	Personal
14	BOILER FEED PUMP #1	Real	Personal
15	BOILER FEED PUMP #2	Real	Personal
16	BOILER FEED PUMP #3	Real	Personal
17	DA COIL #1 RECIRC PUMP	Real	Personal
18	DA COIL #2 RECIRC PUMP	Real	Personal
19	FLASH VESSEL PUMP	Real	Personal
20	LIQUIFACTION TANK #1 AGITATOR	Real	Personal
21	LIQUIFACTION TANK #2 AGITATOR	Real	Personal
22	LIQUIFACTION PUMP #1	Real	Personal
23	LIQUIFACTION PUMP #2	Real	Personal
24	YEAST FEED PUMP	Real	Personal
25	ALPHA AMYLASE MIX PUMP	Real	Personal
26	SLURRY ENZYME PUMP #1	Real	Personal
27	SLURRY ENZYME PUMP #2	Real	Personal
28	SWING ENZYME PUMP	Real	Personal
29	GLUCO AMYLASE MIX PUMP	Real	Personal
30	GLUCO ENZYME PUMP #1	Real	Personal
31	GLUCO ENZYME PUMP #2	Real	Personal
32	YEAST ENZYME PUMP	Real	Personal
33	BLEND PUMP	Real	Personal

34	FERMENTER #1 AGITATOR	Real	Personal
35	FERMENTER #1 COOLER	Real	Personal
36	FERMENTER #1 PUMP	Real	Personal
37	FERMENTER #2 AGITATOR	Real	Personal
38	FERMENTER #2 COOLER	Real	Personal
39	FERMENTER #2 PUMP	Real	Personal
40	FERMENTER #3 AGITATOR	Real	Personal
41	FERMENTER #3 COOLER	Real	Personal
42	FERMENTER #3 PUMP	Real	Personal
43	FERMENTER #4 AGITATOR	Real	Personal
44	FERMENTER #4 COOLER	Real	Personal
45	FERMENTER #4 PUMP	Real	Personal
46	FERMENTER #5 AGITATOR	Real	Personal
47	FERMENTER #5 COOLER	Real	Personal
48	FERMENTER #5 PUMP	Real	Personal
49	FERMENTER #6 AGITATOR	Real	Personal
50	FERMENTER #6 COOLER	Real	Personal
51	FERMENTER #6 PUMP	Real	Personal
52	FERMENTER #7 AGITATOR	Real	Personal
53	FERMENTER #7 COOLER	Real	Personal
54	FERMENTER #7 PUMP	Real	Personal
55	FERMENTER DRAIN PUMP #1	Real	Personal
56	FERMENTER DRAIN PUMP #2	Real	Personal
57	FERMENTER DRAIN PUMP #3	Real	Personal
58	FERMENTER DRAIN PUMP #4	Real	Personal
59	BEER WELL AGITATOR	Real	Personal
60	BEER WELL DISCHARGE PUMP	Real	Personal
61	YEAST TANK #1 COOLER	Real	Personal
62	YEAST PUMP #1	Real	Personal
63	YEAST TANK #2 COOLER	Real	Personal
64	YEAST PUMP #2	Real	Personal
65	CO2 SCRUBBER INTERNALS PACKAGE	Real	Personal
66	CO2 SCRUBBER BOTTOMS PUMP	Real	Personal
67	EVAP #1 PUMP	Real	Personal
68	EVAP #2 PUMP	Real	Personal
69	EVAP #3 PUMP	Real	Personal
70	EVAP #4 PUMP	Real	Personal

71	STEAM COND RECEIVER PUMP	Real	Personal
72	EVAP #5 PUMP	Real	Personal
73	EVAP #6 PUMP	Real	Personal
74	EVAP #7 PUMP	Real	Personal
75	EVAP #8 PUMP	Real	Personal
76	PROCESS COND RECIEVER PUMP	Real	Personal
77	SYRUP DRAW PUMP	Real	Personal
78	DRAIN PUMP	Real	Personal
79	BEER BOTTOMS PUMP	Real	Personal
80	BEER COLUMN INTERNALS PACKAGE	Real	Personal
81	SIDE STRIPPER INTERNALS PACKAGE	Real	Personal
82	SIDE STRIPPER PUMP	Real	Personal
83	190 PROOF VACUUM COND	Real	Personal
84	RECITIFIER BOTTOMS PUMP	Real	Personal
85	RECTIFIER INTERNALS PACKAGE	Real	Personal
86	RECTIFIER INTERNALS PACKAGE	Real	Personal
87	VENT CONDENSER #1	Real	Personal
88	VENT CONDENSER #2	Real	Personal
89	REFLUX PUMP	Real	Personal
90	FUSEL DRAW PUMP	Real	Personal
91	VACUUM PUMP #1	Real	Personal
92	VACUUM PUMP #2	Real	Personal
93	REGEN CONDENSER #1	Real	Personal
94	REGEN CONDENSER #2	Real	Personal
95	REGEN COOLER	Real	Personal
96	REGEN PUMP #1	Real	Personal
97	REGEN PUMP #2	Real	Personal
98	SIEVE FEED ECON	Real	Personal
99	200 PROOF PRODUCT PUMP	Real	Personal
100	200 PROOF COOLER	Real	Personal
101	SIEVE VAPORIZER	Real	Personal
102	WHOLE STILLAGE AGITATOR	Real	Personal
103	CENTRI UGE FEED PUMP	Real	Personal
104	CENTRIFUGE PACKAGE #1	Real	Personal
105	CENTRIFUGE PACKAGE #2	Real	Personal
106	CENTRATE PUMP #1	Real	Personal
107	CENTRATE PUMP #2	Real	Personal

108	E-VAP FEED PUMP	Real	Personal
109	SYRUP TANK AGITATOR	Real	Personal
110	A&B DRYER SYRUP PUMP	Real	Personal
111	DRYER A SYSTEM	Real	Personal
112	DRYER B SYSTEM	Real	Personal
113	SIEVE FEED PUMP	Real	Personal
114	FLOATING ROOF PACKAGE	Real	Personal
115	TANK FARM VALVE AND VENT	Real	Personal
116	ETHANOL TRANSFER PUMP	Real	Personal
117	ETHANOL LOADOUT PUMP	Real	Personal
118	FUEL ADDITIVE PUMP	Real	Personal
119	DENATURANT PUMP	Real	Personal
120	ETHANOL LOADOUT PACKAGE	Real	Personal
121	DENATURANT UNLOADING PUMP	Real	Personal
122	LOADOUT FLARE PACKAGE	Real	Personal
123	DEAERATOR PACKAGE	Real	Personal
124	RTO PACKAGE	Real	Personal
125	CONVENTIONAL BOILER PACKAGE	Real	Personal
126	COOLING TOWER PUMP #1	Real	Personal
127	COOLING TOVVER PACKAGE	Real	Personal
128	COOLING TOWER PUMP #2	Real	Personal
129	COOLING TOWER PUMP #3	Real	Personal
130	COOLING TOWER PUMP #4	Real	Personal
131	CHILLER PUMP	Real	Personal
132	SAFETY SHOWER AND EYEWASH PACKAGE	Real	Personal
133	R.O. PRODUCT PUMP	Real	Personal
134	METHANATOR PACKAGE (OUT OF SERVICE/OBSOLETE)	Real	Personal
135	PROCESS SUMP PUMP #1	Real	Personal
136	PROCESS SUMP PUMP #2	Real	Personal
137	DRYER AREA SUMP	Real	Personal
138	DISTILATION SUMP PUMP	Real	Personal
139	SCRUBBER BI-SULFITE PUMP	Real	Personal
140	TANK FARM SUMP PUMP	Real	Personal
141	PROCESS WATER PUMP	Real	Personal
142	50% NaOH PUMP	Real	Personal
143	CIP SCREEN	Real	Personal
144	CIP HEATER	Real	Personal

145	C.I.P.S. PUMP	Real	Personal
146	C.I.P.F. PUMP	Real	Personal
147	WASTE NaOH PUMP	Real	Personal
148	Na01-1DIKE SUMP PUMP	Real	Personal
149	ACID VVASH PUMP	Real	Personal
150	AMMONIA PACKAGE	Real	Personal
151	LIQ ACID PUMP	Real	Personal
152	YEAST ACID PUMP #1	Real	Personal
153	YEAST ACID PUMP #2	Real	Personal
154	EVAP AND BEER ACID PUMP	Real	Personal
155	H2SO4 LIQ ACID	Real	Personal
156	H2SO4 EVAP AND BEER ACID	Real	Personal
157	ACiD DIKE SUMP PUMP	Real	Personal
158	ANTI-FOAM PUMP	Real	Personal
159	BEER/MASH EXCHANGER A	Real	Personal
160	BEER/MASH EXCHANGER B	Real	Personal
161	MASH COOLER A	Real	Personal
162	MASH COOLER B	Real	Personal
163	MOLECULAR SIEVE BREAD PACKAGE	Real	Personal
164	MOLECULAR SIEVE BREAD PACKAGE	Real	Personal
165	MINOR EQUIPMENT	Real	Personal
166	CHILLER PACKAGE	Real	Personal
167	ADDITIONAL CONVEYOR EQUIPMENT	Real	Personal
168	WETCAKE SCALE	Real	Personal
169	WETCAKE SCALE TICKET HOUSE	Real	Personal
170	RO PROCUCT PUMP - PC-10411	Real	Personal
171	PACKAGE FIRE PUMP STATION	Real	Personal
172	SMOKE AND HEAT DETECTION	Real	Personal
173	MONITORS	Real	Personal
174	COOK WATER TANK	Real	Mixed
175	METHANATOR TANK	Real	Mixed
176	LIQUIFACTION TANK #1	Real	Mixed
177	LIQUIFACTION TANK #2	Real	Mixed
178	FERMENTER #1	Real	Mixed
179	FERMENTER #2	Real	Mixed
180	FERMENTER #3	Real	Mixed
181	FERMENTER #4	Real	Mixed

182	FERMENTER #5	Real	Mixed
183	FERMENTER #6	Real	Mixed
184	FERMENTER #7	Real	Mixed
185	BEER WELL	Real	Mixed
186	WHOLE STILLAGE TANK	Real	Mixed
187	THIN STILLAGE TANK	Real	Mixed
188	SYRUP TANK	Real	Mixed
189	190 PROOF DAY TANK	Real	Mixed
190	200 PROOF TANIK	Real	Mixed
191	DENATURANT TANK	Real	Mixed
192	SODIUM BISULFITE TANK	Real	Personal
193	CIP TANK	Real	Personal
194	FLASH VESSEL	Real	Personal
195	STEAM COND RECIEVER	Real	Personal
196	SEIVE STEAM COND. FLASH TANK	Real	Personal
197	PROCESS CONDITION RECEIVER	Real	Personal
198	BEER COLUMN	Real	Personal
199	SIDE STRIPPER	Real	Personal
200	RECITIFIER COLUMN	Real	Personal
201	REFLUX TANK	Real	Personal
202	SIEVE BOTTLE #1	Real	Personal
203	SIEVE BOTTLE #2	Real	Personal
204	SIEVE BOTTLE #3	Real	Personal
205	SIEVE BOTTLE #4	Real	Personal
206	SIEVE BOTTLE #5	Real	Personal
207	SIEVE BOTTLE #6	Real	Personal
208	REGEN TANK	Real	Personal
209	200 PROOF FLASH RECIEVER	Real	Personal
210	200 PROOF FLASH VESSEL	Real	Personal
211	SIEVE VAPORIZER COND. RECEIVER	Real	Personal
212	COOK TUBE #1	Real	Personal
213	COOK TUBE #2	Real	Personal
214	SLURRY TANK #1	Real	Personal
215	SLURRY TANK #2	Real	Personal
216	ALPHA AMYLASE TANK #1	Real	Personal
217	ALPHA AMYLASE TANK #2	Real	Personal
218	GLUCO AMYLASE TANK #1	Real	Personal

219	GLUCO AMYLASE TANK #2	Real	Personal
220	BLEND TANK	Real	Personal
221	YEAST TANK #1	Real	Personal
222	YEAST TANK #2	Real	Personal
223	CENTRATE TANK #1	Real	Personal
224	CENTRATE TANK #2	Real	Personal
225	FUEL ADDITIVE TANK	Real	Personal
226	R.O. PRODUCT TANK	Real	Personal
227	50% NaOH TANK	Real	Personal
228	WASTE NaOH TANK	Real	Personal
229	ACID WASH TANK	Real	Personal
230	AMMONIA TANK	Real	Personal
231	SULFURIC ACID TANK	Real	Personal
232	CO2 SCRUBBER	Real	Personal
233	EVAP #1	Real	Personal
234	EVAP #2	Real	Personal
235	EVAP #3	Real	Personal
236	EVAP #4	Real	Personal
237	EVAP #5	Real	Personal
238	EVAP #6	Real	Personal
239	EVAP #7	Real	Personal
240	EVAP #8	Real	Personal
241	DISCHARGE BLOWDOWN TANK TS-10910	Real	Personal
242	WATER TREATMENT EQUIPMENT	Real	Personal
243	WATER TREATMENT BUILDING PROCESS WATER	Real	Personal
244	WATER TREATMENT BUILDING DELUGE SYSTEM	Real	Personal
245	WATER TREATMENT BUILDING PROCESS WATER	Real	Personal
246	SET COOK EQUIPMENT	Real	Personal
247	SET FERMENTATION EQUIPMENT	Real	Personal
248	SET DISTILLATION EVAPORATION EQUIPMENT	Real	Personal
249	SET ENERGY CENTER EQUIPMENT	Real	Personal
250	SET TANK FARM EQUIPMENT	Real	Personal
251	SET SITE EQUIPMENT	Real	Personal
252	INSTALL DRYER/TO SYSTEM	Real	Personal
253	ENERGY TEAM EQUIPMENT INSTALLATION	Real	Personal
254	SWITCHGEARS	Real	Personal
255	ELECTRICAL WIRES/CABLES	Real	Personal

256	DCS	Real	Personal
257	INSTRUMENT CABLING	Real	Personal
258	CABLE TRAYS	Real	Personal
259	LIGHTING FIXTURES	Real	Personal
260	INSTRUMENTS	Real	Personal
261	CONDUITS	Real	Personal
262	HEAT TRACES	Real	Personal
263	MOTORS	Real	Personal
264	INSTRUMENTATION	Real	Personal
265	TERMINATIONS	Real	Personal
266	MISC. ELECTRICAL	Real	Personal
267	ADDITIONAL ELECTRICAL EQUIPMENT	Real	Personal
268	ELECTRICAL LABOR SUBCONTRACTOR	Real	Personal
269	110 VOLT POWER	Real	Personal
270	ELECTRICAL	Real	Personal
271	TEMPORARY AND PERMANENT POWER	Real	Personal
272	ADDITIONAL CONDUIT AND LABOR	Real	Personal
273	10"" WATTS 909RPDA BACKFLOW PREVENTER	Real	Personal
274	INTAKE PIPE SCREENS	Real	Personal
275	DISCHARGE WATER PUMP	Real	Personal
276	EMISSIONS MONITORING SYSTEM	Real	Personal
277	ELECTRICAL FOR WASTE WATER PITS	Real	Personal
278	MISC ELECTRICAL	Real	Personal
279	MISC ELECTRICAL	Real	Personal
280	TURBINE CONDENSATE RETURN	Real	Personal
281	SIEVE BOTTLES	Real	Personal
282	MASH TRAIN UPGRADE	Real	Personal
283	PRECONDENSER	Real	Personal
284	REBUILD SCROLL FOR CENTRIFUGE	Real	Personal
285	SEIVES	Real	Personal
286	OIL EXTRACTION	Real	Personal
287	EMISSIONS MONITORING SYSTEM UPGRADE	Real	Personal
	Grain Handling Equipment:		
288	GRAIN HANDLING PACKAGE	Real	Personal
289	GRAIN HANDLING CONCEPTUAL DESIGN	Real	Intangible
290	GRAIN HANDLING ELECTRICAL DESIGN &	Real	Intangible

291	DDG DUST CONTROL SYSTEM	Real	Personal
292	GRAIN HANDLING MANAGEMENT	Real	Personal
293	BIN INDICATORS 4	Real	Personal
294	GRAIN HANDLING AND ADMININSTRATION	Real	Personal
295	GRAIN HANDLING EQUIP - SCALE TRUCK PROBE	Real	Personal
296	GRINDING EQUIPMENT	Real	Personal
297	GRAIN GROUND PILE	Real	Mixed
298	GRAIN GROUND PILE	Real	Mixed
299	GRAIN GROUND PILE	Real	Mixed
300	GRAIN GROUND PILE	Real	Mixed
301	GRAIN GROUND PILE TEMPERATURE PROBE	Real	Personal
302	GRAIN SOUTH LEG TRUNK REPLACEMENT	Real	Personal
	Equipment Piping:		
303	VALVES	Real	Personal
304	COOK AREA	Real	Personal
305	FERMENTATION AREA	Real	Personal
306	DISTILLATION EVAPORATION AREA	Real	Personal
307	ENERGY CENTER - PROCESS EQUIP.	Real	Personal
308	TANK FARM	Real	Personal
309	COOK AREA	Real	Personal
310	FERMENTATION AREA	Real	Personal
311	DISTILLATION EVAPORATION AREA	Real	Personal
312	ENERGY CENTER - PROCESS EQUIP.	Real	Personal
313	TANK FARM	Real	Personal
314	COOLING TOWER	Real	Personal
315	PLUMBING	Real	Personal
316	NATURAL GAS PIPE - DR11	Real	Personal
317	VALVES	Real	Personal
318	PIPE MATERIALS	Real	Personal
319	PROCESS PIPING AND EQUIPMENT INSTALLATIO	Real	Personal
320	MISC. MATERIALS AND EXTRA PIPING	Real	Personal
321	MISC. PIPING MATERIAL & INSTALLATION	Real	Personal
	Buildings:		
322	PROCESS PIPE INSULATION	Real	Personal
323	PROCESS TANK INSULATION	Real	Personal

324	PROCESS PIPE PAINT	Real	Personal
325	PROCESS TANK PAINT	Real	Personal
326	MISC. PROCESS INSULATION	Real	Personal
327	MISC. PROCESS PAINT	Real	Personal
	Land Improvements:		
328	PRELIMINARY SOIL TESTING	Real	Intangible
329	COMPACTION TESTING	Real	Intangible
330	TRAFFIC STUDY	Real	Intangible
331	DISCHARGE BOOSTER PUMPS	Real	Personal
332	PROCESS DESIGN	Real	Intangible
333	SURVEY	Real	Intangible

In re Equalization Appeal of Coffeyville Res. Nitrogen Fertilizers, L.L.C.

Court of Appeals of Kansas

August 9, 2013, Opinion Filed

No. 107,705

Reporter
2013 Kan. App. Unpub. LEXIS 726 *; 305 P.3d 47; 2013 WL 4046403

In the Matter of the EQUALIZATION APPEAL OF COFFEYVILLE RESOURCES NITROGEN FERTILIZERS, L.L.C. FOR THE YEAR OF 2008 IN MONTGOMERY, KANSAS

Notice: NOT DESIGNATED FOR PUBLICATION.

PLEASE CONSULT THE KANSAS RULES FOR CITATION OF UNPUBLISHED OPINIONS.

PUBLISHED IN TABLE FORMAT IN THE PACIFIC REPORTER.

Subsequent History: Review denied by In re Equalization Appeal of Coffeyville Res. Nitrogen Fertilizers, L.L.C., 2014 Kan. LEXIS 201 (Kan., Apr. 28, 2014)

Decision reached on appeal by In re Equalization Appeal of Coffeyville Res. Nitrogen Fertilizers, L.L.C., 2018 Kan. App. Unpub. LEXIS 739 (Kan. Ct. App., Sept. 28, 2018)

Prior History: [*1] Appeal from Court of Tax Appeals.

Disposition: Affirmed in part, reversed in part, and remanded with directions.

Counsel: Lynn D. Preheim and Jarrod C. Kieffer, of Stinson Morrison Hecker LLP, of Wichita, for appellant.

Jeffery A. Jordan, James D. Oliver, Justan R. Shinkle, and Scott C. Palecki, of Foulston Siefkin, LLP, of Wichita, for appellee.

Judges: Before BRUNS, P.J., MCANANY and SCHROEDER, JJ.

Opinion

MEMORANDUM OPINION

Per Curiam: This is a judicial review action arising out of Montgomery County's classification, valuation, and assessment of certain assets owned by Coffeyville Resources Nitrogen Fertilizers, L.L.C., (Coffeyville Resources) for the 2008 tax year. The Montgomery County appraiser classified, valued, and assessed the 699 assets in dispute—which are used by Coffeyville Resources at a nitrogen fertilizer plant—as real property. The Kansas Court of Tax Appeals (COTA) found in a 2-1 decision that the assets in dispute were properly classified as real property and that the fair market value of the real property was $303,066,836 as of January 1, 2008. For the reasons set forth in this opinion, we affirm in part, reverse in part, and remand the matter to COTA for further proceedings.

FACTS

Coffeyville Resources owns [*2] and operates a nitrogen fertilizer plant located on 15 acres of land in Montgomery County, Kansas. The fertilizer plant includes a concrete-block control building; concrete piers, pads, and foundations; structural improvements; assorted steel structures; and hundreds of other assets.

The primary product manufactured at the plant is urea ammonium nitrate (UAN).

The plant makes ammonia-based fertilizer products using gasification to convert petroleum coke into forms of carbon and hydrogen. The fertilizer plant receives most of its supply of petroleum coke from an oil refinery located on adjacent property. No other fertilizer plant in the United States utilizes the same method of production. Instead, other fertilizer plants use natural gas, both as a power source and as feedstock.

The nitrogen fertilizer plant was originally constructed and owned by Farmland Industries, Inc. (Farmland). From the initial development stage in 1996 to final completion of the project in 2000, construction of the nitrogen fertilizer plant lasted approximately 4 years. Farmland constructed the plant using a combination of new and used parts. Most of the used parts were purchased by Farmland from a defunct power [*3] plant in California. The used parts were disassembled, shipped to Montgomery County, and reassembled at the fertilizer plant.

Before constructing the nitrogen fertilizer plant, Farmland excavated and prepared the land to accommodate the subsurface concrete piers, foundations, and utility systems that support the above-ground structures. This required significant dirt work and the use of millions of pounds of concrete and steel rebar. Design engineers determined how to integrate the new and used parts with the structural improvements and incorporated them into a functioning fertilizer plant.

The principal parts of the nitrogen fertilizer plant are interconnected and supported by steel frames connected to large concrete foundations. The components of each section of the plant are interconnected with pipes, conveyors, cables, and wiring supported by steel structures. Some of the equipment is protected from the elements by sheet metal attached to structural steel.

The nitrogen fertilizer plant is divided into six primary sections—the gasification unit, the selexol unit, the ammonia unit, the urea unit, the nitric acid unit, and the UAN unit. While all sections of the fertilizer plant typically [*4] operate as a whole, it is possible to operate certain sections or units independently. For example, Coffeyville Resources has operated the gasification unit without the ammonia unit as well as the gasification unit and the ammonia units without the UAN unit.

In 2004, Coffeyville Resources purchased the nitrogen fertilizer plant—together with the adjoining refinery—from Farmland's bankruptcy estate for $281,000,000. Because Farmland originally constructed the fertilizer plant with proceeds from revenue bonds, it was exempt from property taxes for the first 10 years of operation. The exemption expired on December 31, 2007. The Montgomery County appraiser classified the vast majority of the plant's assets as real property for the tax year 2008.

On July 7, 2008, Coffeyville Resources filed an equalization appeal with COTA for the 2008 tax year. Coffeyville Resources agreed that the land, the control building, and three large storage tanks at the fertilizer plant were properly classified as real property. It also agreed that the value of the land was $38,660 and the value of the control building was $385,256. Moreover, Montgomery County and Coffeyville Resources agreed that certain assets [*5] located at the plant were properly classified as personal property.

In the equalization appeal, Coffeyville Resources asserted that 699 assets—including such things as valves, pumps, filters, coolers, condensers, tanks, drums, motors, hoists, heaters, cranes, generators, conveyors,

gasifiers, and rod mills—are personal property. Some of the disputed assets can be moved by hand while other assets can only be moved by truck or rail. Approximately 134 of the disputed assets—including the gasifiers, rod mills, coke silo conveyor, syngas scrubbing unit, radiant cooler, shift converters, and parts of the selexol equipment—had been salvaged from the power plant in California.

Commencing on January 31, 2011, COTA held a hearing that spanned over the course of 7 nonconsecutive days. During the hearing, the parties presented the testimony of 13 witnesses and introduced hundreds of exhibits into evidence. Several months later, on June 11, 2011, COTA heard closing arguments and took the appeal under advisement.

In a 2-1 decision filed on January 13, 2012, the majority concluded that all of the disputed assets were fixtures that Montgomery County had properly classified as real property for the tax [*6] year 2008. In addition, the majority found that Coffeyville Resources had failed in its burden to prove that Montgomery County's appraisal of the disputed assets violated the Kansas Constitution's requirement that property be appraised uniformly and equally. Finally, the majority concluded that the weight of the evidence supported Montgomery County's appraised fair market value of the facility's real property in the amount of $303,066,836.

The dissenting COTA judge agreed with the majority's findings of fact, its statements of applicable law, and its ruling regarding the constitutionality of Montgomery County's appraisal. But he did not agree with the majority's conclusions regarding the classification of the assets in dispute or the valuation of the disputed assets. The dissenting judge noted that in the context of industrial property, "realty includes the land and those large assets that are not feasible to move, while personality includes assets of a kind that may be feasibly removed from the premises and relocated as the economics of the business enterprise dictate." Furthermore, the dissenting judge found Montgomery County's appraisal of the assets in dispute to be "so flawed as [*7] to be useless in determining value, and no other indicator of fair market value was presented." Thus, the dissenting judge suggested that COTA should hold an additional evidentiary hearing to determine the value of the assets determined to be real property.

Subsequently, Coffeyville Resources filed a petition for reconsideration, which COTA denied. Thereafter, Coffeyville Resources timely filed a petition for review with this court.

ANALYSIS

Issues Presented

This appeal raises three issues. First, we must decide whether COTA utilized the appropriate test in classifying the disputed assets as real property. Second, we must decide whether COTA erred in concluding that Coffeyville Resources failed to establish a violation of its constitutional right to uniform and equal tax treatment. Third, we must decide if COTA erred in relying on Montgomery County's appraisal of the disputed assets.

Standard of Review

The Kansas Judicial Review Act (KJRA), K.S.A. 77-601 *et seq.*, controls our review of COTA's decision. Under the KJRA, the burden of proving the invalidity of COTA's action rests on the party asserting invalidity. See K.S.A. 2012 Supp. 77-621(a)(1). We have unlimited review of COTA's interpretation [*8] and application of law. See K.S.A. 2012 Supp. 77-

621(c)(4). Furthermore, we review COTA's findings of fact to determine whether they are "supported . . . by evidence that is substantial when viewed in light of the record as a whole." K.S.A. 2012 Supp. 77-621(c)(7).

Classification of Disputed Assets

Coffeyville Resources contends that COTA improperly classified the disputed assets as fixtures—or real property—instead of personal property. It argues that in classifying the disputed assets as fixtures, COTA (1) used an incorrect legal standard and (2) applied the legal standard incorrectly to the facts. Our review of these matters is unlimited. See *In re Tax Appeal of LaFarge Midwest*, 293 Kan. 1039, 1043, 271 P.3d 732 (2012).

Under Article 11, § 1 of the Kansas Constitution (2012 Supp.), property subject to *ad valorem* property tax is divided into two classes—real property and personal property. K.S.A. 79-102 provides that the term "real property" includes not only land "but all buildings, fixtures, improvements, mines, minerals, quarries, mineral springs and wells, rights and privileges appertaining thereto." In contrast, the term "personal property" is defined to "include every tangible [*9] thing which is the subject of ownership, not forming part or parcel of real property . . . ." K.S.A. 79-102.

Long ago, the Kansas Supreme Court recognized that "[i]t is frequently a difficult and vexatious question to ascertain the dividing line between real and personal property, and to decide upon which side of the line certain property belongs." *A.T. & S.F. Rld. Co. v. Morgan*, 42 Kan. 23, 21 P. 809 (1889). As this judicial review action illustrates, the "dividing line between real and personal property" is no less difficult today than it was in 1889.

Both parties agree—at least on the surface—that the factors to be considered in determining whether a particular piece of property is a fixture are found in this court's decision in the case of *In re Equalization Appeals of Total Petroleum, Inc.*, 28 Kan. App. 2d 295, 16 P.3d 981 (2000). These factors are: "'(1) annexation to the realty; (2) adaptation to the use of that part of the realty with which it is attached; and (3) the intention of the party making the annexation.'" 28 Kan. App. 2d at 299-300. Application of these factors involves a careful analysis of "'all the individual facts and circumstances attending the particular case.'" [*10] 28 Kan. App. 2d at 300.

Although Coffeyville Resources does not dispute the applicability of the *Total Petroleum* factors, it argues COTA committed legal error by not applying a trade fixtures analysis to the disputed assets. Trade fixtures represent an exception to the general rules associated with fixtures, and the exception depends on the status of the owner of the property. See *City of Wichita v. Denton*, 296 Kan. 244, 257-58, 294 P.3d 207 (2013). Usually, the trade fixtures analysis is limited to property disputes involving landlords and tenants or other analogous situations. "In such cases, the classification of an item as a trade fixture allowed the lessee to retain ownership of that item—and the right to remove it from the realty—on termination of the lease." 296 Kan. at 258; see also *Railroad Co. v. Jefferson County*, 114 Kan. 156, 161, 217 P. 315 (1923) (*Union Pacific*).

When classifying property for tax purposes, the status of the owner is not a consideration. See *Krueger v. Board of Woodson County Comm'rs*, 31 Kan. App. 2d 698, Syl. ¶ 8, 71 P.3d 1167 (2003) ("[T]he method of valuation should be tied to factors associated with each parcel of property, not the status of the owner [*11] of the property."); see also *Michigan Nat'l Bank v. City of Lansing*, 96 Mich. App. 551, 555-56, 293 N.W.2d 626 (1980) (although

a particular piece of property may be a trade fixture—or personal property—as between a lessor and lessee, it may still be classified as real property for the purposes of taxation). Accordingly, we find the reliance of Coffeyville Resources on the trade fixtures doctrine to be misplaced.

Next, we turn to the question of whether COTA appropriately applied the three-part test set forth in *Total Petroleum* in determining that the 699 assets in dispute in this equalization appeal were fixtures. As the majority recognized below, whether a particular piece of property is a fixture presents a mixed question of law and fact. See *City of Wichita v. Eisenring*, 269 Kan. 767, 783, 7 P.3d 1248 (2000). Hence, we must review the record to determine whether COTA's findings and conclusions are "supported to the appropriate standard of proof by evidence that is substantial when viewed in light of the record as whole." See K.S.A. 2012 Supp. 77-621(c)(7). In other words, without reweighing the evidence or engaging in a de novo review, we must judge COTA's findings "in light of [*12] all the relevant evidence in the record cited by any party that detracts from such finding as well as all of the relevant evidence in the record . . . cited by any party that supports such finding . . . ." K.S.A. 2012 Supp. 77-621(d).

We agree with the dissenting COTA judge that although the *Total Petroleum* factors are applicable in determining whether any or all of the 699 assets in dispute are fixtures, *Total Petroleum* is factually distinguishable from the present case. Unlike this case, the refinery that was being appraised in *Total Petroleum* had been shut down and "certain key components necessary to run" the refinery had been removed—presumably because these components had not become permanent fixtures to the real property. As such, the appraisal in *Total Petroleum* only involved the remaining refinery property, which included large tanks and other structural assets that were not portable. 28 Kan. App. 2d at 296-97.

Unfortunately, COTA did not make any individualized findings regarding whether any particular assets in this dispute were fixtures. Rather, the majority simply considered all 699 assets together. A review of the record reveals that some of the assets in dispute are small [*13] and/or easily removable while other assets are very large and/or difficult to remove. Thus, based on the *Total Petroleum* factors, if the assets are considered individually or in groups of similar assets, it is likely that some of the disputed assets are fixtures—or real property—while others are personal property.

It appears that the parties presented this case to COTA—at least initially—as an "either/or" proposition. We note, however, that Coffeyville Resources specifically objected in post-hearing briefing to consideration of the fertilizer plant as a "single, huge machine" instead of individual assets. Regardless, this court may consider a remand if the lack of specific findings precludes meaningful review. See *O'Brien v. Leegin Creative Leather Products, Inc.*, 294 Kan. 318, 361, 277 P.3d 1062 (2012) (citing *Dragon v. Vanguard Industries*, 282 Kan. 349, 356, 144 P.3d 1279 [2006]).

Here, the majority's failure to make findings of fact and conclusions of law regarding the individual assets—or groups of similar assets—in dispute has made it difficult—if not impossible—for this court to meaningfully review whether COTA appropriately applied the *Total Petroleum* factors in this case. We, [*14] therefore, remand this matter to COTA to make specific findings and conclusions, based on the *Total Petroleum* factors, as to whether each asset—or group of assets—should be classified as real property or personal property.

Uniform and Equal Basis of Valuation and Taxation

All real and personal property in Kansas is subject to taxation on a uniform and equal basis unless specifically exempted. It is the duty of the legislature to provide for a uniform and equal basis of assessment and taxation. Kan. Const. art. 11, § 1(a) (2012 Supp.); K.S.A. 79-1439(a). Moreover, the Fourteenth Amendment to the United States Constitution provides that states cannot "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV, § 1. The Kansas Constitution provides virtually identical protection. Kan. Const. art. 11, § 1 (2012 Supp.); see *Colorado Interstate Gas Co. v. Beshears*, 271 Kan. 596, 609, 24 P.3d 113 (2001).

Coffeyville Resources argues that COTA erred in finding that it failed to meet its burden to prove that the County violated the Kansas Constitution's requirement that all property be taxed uniformly and equally when it classified the assets in dispute [*15] as real property. A taxpayer seeking to establish a violation of the Equal Protection Clause has the burden to prove that the unequal treatment is the result of a deliberately adopted system that results in intentional, systematic unequal treatment. *In re Tax Appeal of City of Wichita*, 274 Kan. 915, 920-21, 59 P.3d 336 (2002) (citing *Beshears*, 271 Kan. at 612, and *Sunday Lake Iron Co. v. Wakefield*, 247 U.S. 350, 353, 38 S. Ct. 495, 62 L. Ed. 1154 [1918]).

Accordingly; we must review the record as a whole to determine whether substantial evidence supports COTA's finding that Coffeyville Resources failed to meet its burden of proving unequal treatment. See *Herrera-Gallegos v. H & H Delivery Service, Inc.*, 42 Kan. App. 2d 360, 362, 212 P.3d 239 (2009) (stating that appellate courts do not apply a negative-findings test when the Board ruled against a party who had the burden of proof on a factual issue). Caselaw has long held that substantial evidence is such evidence as a reasonable person might accept as being sufficient to support a conclusion. 42 Kan. App. 2d at 363.

Coffeyville Resources argues that Montgomery County's classification of the assets in dispute was not uniform and equal [*16] because similar assets used in other manufacturing facilities were classified as personal property rather than real property. In support of this position, Coffeyville Resources presented COTA with evidence about the classification of 10 properties that it believed were comparable to the nitrogen fertilizer plant. Eight of these comparison properties were located in Montgomery County while the other two were located in other parts of the state. Although COTA found these other properties to be "largely similar in scale and function" to the nitrogen fertilizer plant, the majority concluded that Coffeyville Resources "failed to make an adequate showing that it is entitled to relief under the 'uniform and equal' clause of the Kansas Constitution."

In its decision, COTA found:

> "On the whole, Taxpayer's evidence may have established that the subject facility is comprised of assets that are similar in nature and configuration to those assets used at the ten comparison properties. Yet the evidence falls short of providing a basis for this court to determine whether the assets used at the comparison facilities were properly classified in 2008, an analysis requiring consideration of 'all the individual [*17] facts and circumstances attending the particular case.' *Total Petroleum*, 28 Kan. App. 2d at 300. Without sufficiently detailed evidence about the comparison properties, this court is unable to apply the three part fixtures

> test to determine the validity of the classifications of the comparison properties, a necessary finding in any case alleging non-uniform and unequal tax treatment based on disparate classification."

As indicated in the previous section of this opinion, classification of property is fact sensitive. See *Total Petroleum*, 28 Kan. App. 2d at 299-300. For example, a tank might, under the three-part test in *Total Petroleum*, classify as real property at one facility but personal property at another facility. Likewise, evidence that similar property has been classified differently does not establish that the classifier actually treated one taxpayer differently. Without adequate evidence of the comparison properties, COTA did not err in concluding Coffeyville Resources failed to present sufficient evidence of comparison properties to meet its burden of proof. Furthermore, we see no evidence in the record of "an intentionally and deliberately adopted system which results in [*18] systematic unequal treatment" of Coffeyville Resources. *In re City of Wichita*, 274 Kan. at 920, 922. We, therefore, find no error in COTA's finding that Coffeyville Resources failed to meet its burden to prove unequal treatment.

Valuation of Disputed Assets

Finally, Coffeyville Resources contends that COTA erred in relying on the appraisal done by Hadco International Inc. (Hadco) when determining the value of the disputed assets. At the outset, we note that the Hadco appraisal was premised on the proposition that all of the disputed assets would be classified as real property. Because we remand this case to COTA for further proceedings to determine the proper classification of particular assets or groups of assets under the *Total Petroleum* factors, it is likely that new appraisals will need to be obtained depending on which assets are found to be personal property and which assets are found to be real property. Notwithstanding, we do share the concerns over certain aspects of the Hadco appraisal that were noted by the dissenting judge.

As COTA appropriately found in its decision, Montgomery County bears the burden of proof on the issue of valuation. As this court found in the case of *In re Protests of City of Hutchinson/Dillon Stores For Taxes Paid for 2001 & 2002*, 42 Kan. App. 2d 881, 885, 221 P.3d 598 (2009) [*19] :

> "With regard to any matter properly submitted to [COTA] relating to the determination of valuation of ... real property used for commercial and industrial purposes for taxation purposes, it shall be the duty of the county appraiser to initiate the production of evidence to demonstrate, by a preponderance of the evidence, the validity and correctness of such determination .... No presumption shall exist in favor of the county appraiser with respect to the validity and correctness of such determination." K.S.A. 2012 Supp. 79-2005(i).

A property appraisal for tax purposes must comply with the Uniform Standards of Professional Appraisal Practice (USPAP) as adopted in 1992. See K.S.A. 79-505(a)(1); K.S.A. 79-506(a); Directive No. 92-006 (requiring County appraisers to "perform all appraisal functions in conformity with the Uniform Standards of Professional Appraisal Practice Sections 2 and 6 . . . ."). "These standards are embodied in the statutory scheme of valuation, and a failure by BOTA to adhere to them may constitute a deviation [*20] from a prescribed procedure or an error of law. [Citation omitted.]" *City of Hutchinson*, 42 Kan. App. 2d at 890.

In some cases, perfect adherence to USPAP

is not required. But any deviation should not be materially detrimental to the appraiser's opinion of value. See *In re Equalization Proceeding of Amoco Production Co.*, 33 Kan. App. 2d 329, 336-37, 102 P.3d 1176 (2004). As such, COTA should also be prepared to address the dissenting judge's concerns regarding the Hadco appraisal on remand.

Affirmed in part, reversed in part, and remanded for further proceedings.

In re Equalization Appeal of Coffeyville Res. Nitrogen Fertilizers, L.L.C.

Court of Appeals of Kansas

September 28, 2018, Opinion Filed

No. 117,045

Reporter
2018 Kan. App. Unpub. LEXIS 739 *; 426 P.3d 537; 2018 WL 4655648

In the Matter of the Equalization Appeal of COFFEYVILLE RESOURCES NITROGEN FERTILIZERS, L.L.C., for the Year 2008 in Montgomery County, Kansas.

Notice: NOT DESIGNATED FOR PUBLICATION.

PLEASE CONSULT THE KANSAS RULES FOR CITATION OF UNPUBLISHED OPINIONS.

PUBLISHED IN TABLE FORMAT IN THE PACIFIC REPORTER.

Prior History: [*1] Appeal from Board of Tax Appeals.

In re Equalization Appeal of Coffeyville Res. Nitrogen Fertilizers, L.L.C., 305 P.3d 47, 2013 Kan. App. Unpub. LEXIS 726 (Kan. Ct. App., Aug. 9, 2013)

Disposition: Affirmed.

Counsel: James D. Oliver, of Foulston Siefkin LLP, of Overland Park, and Jeffery A. Jordan, of the same firm, of Wichita, for appellant.

Jarrod C. Kieffer and Lynn D. Preheim, Stinson Leonard Street LLP, of Wichita, for appellee.

Judges: Before ARNOLD-BURGER, C.J., ATCHESON, J., and LORI BOLTON FLEMING, District Judge, assigned.

Opinion

MEMORANDUM OPINION

PER CURIAM: Determining whether an asset is personal property or a fixture for taxing purposes requires consideration of three factors: (1) an item's annexation to the realty; (2) the item's adaptation to the use of that part of the realty with which it is attached; and (3) the intention of the party making the annexation. *In re Equalization Appeals of Total Petroleum, Inc.*, 28 Kan. App. 2d 295, 299-300, 16 P.3d 981 (2000). The parties, Coffeyville Resources Nitrogen Fertilizers, L.L.C. (CRNF) and Montgomery County (the County), disagree whether 699 assets at CRNF's plant should be classified as personal property or fixtures. The Board of Tax Appeals (BOTA) held that all but 17 of the assets were personal property, and the County appealed. We find that the evidence supports BOTA's findings that the assets are personal property. They are bolted onto the foundations and easily movable, they were not specially designed to [*2] fit the land, and the circumstances surrounding the plant's construction suggests that CRNF's predecessor intended for the assets to be treated as personal property. Accordingly, we affirm.

FACTUAL AND PROCEDURAL HISTORY

CRNF and the County dispute how 699 of CRNF's assets should be classified for taxation purposes. This is the second time the case has appeared before us. In the parties'

first appeal, this court provided the underlying facts of the case. *In re Equalization Appeal of Coffeyville Res. Nitrogen Fertilizers, L.L.C.*, 305 P.3d 47, 2013 Kan. App. Unpub. LEXIS 726, *2, 2013 WL 4046403, at *1-2 (Kan. App. 2013) (unpublished opinion) (*CRNF I*). We will merely summarize them here.

CRNF owns and operates a nitrogen fertilizer plant located on 15 acres of land in Montgomery County. CRNF purchased the plant in 2004 from Farmland Industries, Inc. (Farmland). Because Farmland originally constructed the fertilizer plant with proceeds from revenue bonds, it was exempt from property taxes for the first 10 years of operation. The exemption expired on December 31, 2007. The Montgomery County appraiser classified most of the plant's assets as real property for the tax year 2008. Real property includes not only the land itself but all buildings and fixtures as well. *Total Petroleum, Inc.*, 28 Kan. App. 2d 295, 16 P.3d 981, Syl. ¶ 4.

CRNF filed an equalization appeal with the Court of Tax Appeals (COTA). CRNF agreed [*3] that the land, the control building, and three large storage tanks at the fertilizer plant were properly classified as real property. It also agreed that the land was valued at $38,660 and the control building was valued at $385,256. CRNF and the County also agreed that certain assets located at the plant were properly classified as personal property. They disagreed, however, over whether 699 identified assets were personal or real property. COTA conducted a hearing over the course of seven nonconsecutive days with numerous witnesses and hundreds of exhibits. After closing arguments, COTA took the matter under advisement.

In a 2-1 decision, COTA concluded that all 699 items were fixtures and properly classified as real property. In reaching its holding, COTA applied the three-part fixtures test used by this court in *Total Petroleum*, 28 Kan. App. 2d at 299-300. This test requires consideration of the following: (1) an item's annexation to the realty; (2) the item's adaptation to the use of that part of the realty with which it is attached; and (3) the intention of the party making the annexation. 28 Kan. App. 2d at 299-300. While COTA refers to the test as the *Total Petroleum* test, the three factors have long been used by Kansas courts. See, e.g., *Water Co. v. Irrigation Co.*, 64 Kan. 247, 252-53, 67 P. 462 (1902); *Cent. Branch Rld. Co. v. Fritz*, 20 Kan. 430, 435 (1878) [*4] .

COTA noted that "most of the assets in dispute are movable, are equipped with design features that make them movable, and are in fact moved from time to time." Nevertheless, COTA held that the assets in dispute were annexed to the real estate. COTA explained that each asset was directly or indirectly attached to massive concrete structures designed to support the assemblage. COTA credited the County's expert, James Watson, in regards to the adaptation factor. It held that the facility was adapted to the land upon which it was built, and that "the assets in dispute were installed to carry out the particular purpose to which the real estate has been devoted, and each asset is important to the effective utilization of the real estate for that purpose." The third factor, intent, is assessed at the time of annexation. See *Total Petroleum*, 28 Kan. App. 2d at 301. As such, COTA assessed Farmland's intent and not CRNF's. It held "that Farmland intended for the assets to remain in place until they either wore out or became obsolete." COTA concluded that the County properly classified the assets in dispute as real property.

CRNF filed a petition for judicial review with this court. On appeal, it argued that COTA erred by failing to [*5] classify the disputed assets as personal property. CRNF asserted

that COTA erred by considering the plant as a "'single, huge machine'" instead of as 699 individual assets. *CRNF I*, 2013 Kan. App. Unpub. LEXIS 726, *13, 2013 WL 4046403, at *5. This court held that COTA correctly identified the *Total Petroleum* factors as the factors relevant to the analysis. *CRNF I*, 2013 Kan. App. Unpub. LEXIS 726, *9, 2013 WL 4046403, at *5. However, it held that COTA made inadequate findings to facilitate appellate review. The court stated:

> "Unfortunately, COTA did not make any individualized findings regarding whether any particular assets in this dispute were fixtures. Rather, the majority simply considered all 699 assets together. A review of the record reveals that some of the assets in dispute are small and/or easily removable while other assets are very large and/or difficult to remove. Thus, based on the *Total Petroleum* factors, if the assets are considered individually or in groups of similar assets, it is likely that some of the disputed assets are fixtures—or real property—while others are personal property.
>
> "It appears that the parties presented this case to COTA—at least initially—as an 'either/or' proposition. We note, however, that Coffeyville Resources specifically objected in post-hearing briefing to consideration of [*6] the fertilizer plant as a 'single, huge machine' instead of individual assets. Regardless, this court may consider a remand if the lack of specific findings precludes meaningful review. [Citations omitted.]
>
> "Here, the majority's failure to make findings of fact and conclusions of law regarding the individual assets—or groups of similar assets—in dispute has made it difficult—if not impossible—for this court to meaningfully review whether COTA appropriately applied the *Total Petroleum* factors in this case. We, therefore, remand this matter to COTA to make specific findings and conclusions, based on the *Total Petroleum* factors, as to whether each asset—or group of assets—should be classified as real property or personal property." 2013 Kan. App. Unpub. LEXIS 726, *14, 2013 WL 4046403, at *5.

In 2014, the Kansas Legislature replaced COTA with the Board of Tax Appeals (BOTA). L. 2014, ch. 141, § 1; K.S.A. 2014 Supp. 74-2426. Thus, BOTA considered this court's mandate on remand.

On remand, BOTA held that all but 17 of the assets were personal property. In regards to annexation, BOTA noted that the personal property assets were bolted into place—not attached to the land in a permanent manner. And, each of the personal property assets was designed to be easily movable and was in [*7] fact routinely moved as part of CRNF's normal business practice. The personal property assets could be moved without damaging the land, foundations, or surrounding equipment. In its adaptation analysis, BOTA held that the personal property assets were "used to serve and support [CRNF]'s manufacturing operation and are, in no way, adapted to the land." It noted that many of the assets were of the "'off the shelf'" variety and could be used in other manufacturing operations. They were not designed to fit the land. For the intent prong, BOTA cited "numerous documents created at the time of the plant's construction establishing that the assets in dispute were intended to be personal property." Additionally, it found "nothing in the annexation or adaptation analyses . . . that indicates that any individual asset was placed in service with the intent to become a permanent fixture to the land." BOTA found that the 17 assets which it held to be real property fixtures were each too large to move in one piece and would have to be

disassembled. BOTA had "not been persuaded that these assets can be taken apart and reassembled without significant damage to the equipment itself and, further . . . [*8] . that it is economically feasible to remove and resale these items."

The County appealed.

ANALYSIS

This court did not err in remanding this case after the first appeal.

The County argues that this court committed an error of law by exceeding the statutory scope of review under the Kansas Judicial Review Act when it reversed COTA's decision and remanded the case. The County asserts that CRNF failed to ask COTA to itemize its findings of fact to each individual asset. The County notes that K.S.A. 2017 Supp. 77-621 limits the ability of a party to obtain judicial review of an issue that was not raised before the agency. The County also asserts that CRNF failed to raise this issue before the Court of Appeals. The County then cites the well-known rule that an issue not briefed is deemed waived or abandoned. See *Superior Boiler Works, Inc. v. Kimball*, 292 Kan. 885, 889, 259 P.3d 676 (2011). Given these rules, the County concludes that it was inappropriate for this court to remand the case with instructions "to make specific findings and conclusions, based on the *Total Petroleum* factors, as to whether each asset—or group of assets—should be classified as real property or personal property." *CRNF I*, 2013 Kan. App. Unpub. LEXIS 726, *9, 2013 WL 4046403, at *5.

CRNF argues that the County is precluded from relitigating this issue under the law of the case doctrine. [*9] CRNF also argues that it properly raised challenges to COTA's factual findings.

"Whether the law of the case doctrine bar[s] a party from relitigating an issue is a legal question over which an appellate court has unlimited review." *State v. Parry*, 305 Kan. 1189, 1194, 390 P.3d 879 (2017).

The law of the case doctrine provides that "once an issue is decided by the court, it should not be relitigated or reconsidered unless it is clearly erroneous or would cause manifest injustice." *State v. Collier*, 263 Kan. 629, Syl. ¶ 3, 952 P.2d 1326 (1998). Thus, when a second appeal is brought in a case, "the first decision is generally the settled law of the case on all questions involved in the first appeal and reconsideration will not normally be given to those questions." *Parry*, 305 Kan. at 1195. Here, the County is arguing that CRNF did not meet the burden necessary to justify reversal of COTA's decision. However, this court has already determined that reversal and remand was necessary. Therefore, the law of the case doctrine applies and the prior decision will not be revisited unless clearly erroneous.

The County argues that this court's decision to remand for specific findings in the first appeal was erroneous because no challenge to COTA's fact-finding was properly before the court. However, CRNF did not need to challenge COTA's [*10] fact-finding for this court to remand the case. CRNF was actually challenging COTA's application of the law, the three *Total Petroleum* factors, to the facts. This is apparent from CRNF's brief at the time, in which it argued that "COTA applied . . . the three-part fixtures test incorrectly to the facts of the case, facts that were either part of the Court's own holdings or were controverted in the record." Further CRNF argued that "[e]ach asset must be analyzed individually." CRNF also argued that COTA "misinterpreted the law and misapplied the law to the facts" in a

motion for reconsideration filed after COTA entered its order. This court held that COTA did not correctly apply the law because it considered the assets as a "'single, huge machine'" instead of as 699 individual assets. *CRNF I*, 2013 Kan. App. Unpub. LEXIS 726, *13, 2013 WL 4046403, at *5. Because of COTA's failure to analyze the disputed assets individually, this court was unable to give meaningful review to the issue of whether the disputed assets were fixtures or personal property. It is appropriate for this court to "consider a remand if the lack of specific findings precludes meaningful review." *Dragon v. Vanguard Industries*, 282 Kan. 349, 355, 144 P.3d 1279 (2006).

The County argues that rule allowing this court to remand for specific findings was inapplicable [*11] in the first appeal. It asserts that the rule was "derived from cases in which the Kansas Supreme Court exercised its constitutionally created supervisory authority over inferior courts and power to adopt and enforce court rules governing the administration of justice in the courts." Because COTA is an administrative body, the County argues that applying the rule in its situation "violates the separation of powers and is unconstitutional." However, the Kansas Supreme Court has held that "[t]he appropriate remedy for inadequate findings in a final order of an administrative agency is to remand for additional findings of fact and conclusions of law." *Jones v. Kansas State University*, 279 Kan. 128, 142, 106 P.3d 10 (2005). The Court of Appeals is duty bound to follow Kansas Supreme Court precedent, absent some indication the Supreme Court is departing from its previous position. *Majors v. Hillebrand*, 51 Kan. App. 2d 625, 629-30, 349 P.3d 1283 (2015), *rev. denied* 303 Kan. 1078 (2016).

We conclude that this court properly remanded the case for adequate findings to facilitate meaningful review of the issue of whether the disputed assets were personal property or fixtures.

BOTA complied with this court's mandate on remand.

The County argues that BOTA failed to comply with this court's mandate on remand. Determining whether the district court complied [*12] with the mandate presents a question of law over which this court exercises unlimited review. *Edwards v. State*, 31 Kan. App. 2d 778, 780, 73 P.3d 772 (2003).

In the first appeal, this court could not review whether there was substantial evidence to support COTA's classification of the disputed assets because COTA applied the law incorrectly. The error occurred because COTA considered the 699 individual assets as a "'single, huge machine'" for purposes of applying the *Total Petroleum* test. *CRNF I*, 2013 Kan. App. Unpub. LEXIS 726, *9, 2013 WL 4046403, at *5. COTA should have applied the test to the assets as individual assets and not considered them as a conglomerate. This court remanded the case for COTA "to make specific findings and conclusions, based on the *Total Petroleum* factors, as to whether each asset—or group of assets—should be classified as real property or personal property." *CRNF I*, 2013 Kan. App. Unpub. LEXIS 726, *14, 2013 WL 4046403, at *5. On remand, BOTA identified 17 assets as real property. It classified the remaining 682 assets as personal property. BOTA considered the assets as individual assets, but lumped the 682 personal property assets together for the purposes of applying the *Total Petroleum* test rather than performing a separate analysis for each individual asset.

The County interprets the remand to require BOTA to apply a separate *Total Petroleum* analysis [*13] to each asset. It asserts that BOTA's findings "provide[] no more specific

basis for this court's appellate review than it had before." CRNF agrees that "BOTA did not specifically break out its analysis and provide a separate individual analysis for each of the 699 assets." However, it asserts that "[t]he remand mandate did not require such an effort." It states that BOTA's decision complied with the mandate because BOTA reviewed the assets and determined that the factors applied exactly the same to each of the remaining 682 personal property assets. This is consistent with CRNF's argument before BOTA, in which it argued that the facts relevant to the *Total Petroleum* analysis were applicable to each and every individual asset.

BOTA sufficiently complied with the orders on remand. This court now has the findings it needs to determine whether substantial evidence supports BOTA's holdings. BOTA held that the personal property assets shared several similarities. For example, in the annexation analysis BOTA noted that each and every one of the personal property assets was bolted in place and readily movable. Each asset possessed design features that made it readily movable, and the plant [*14] itself was equipped with various mechanisms to allow for ready removal of the assets. The assets were routinely moved by CRNF, and CRNF maintained a fleet of equipment to allow for moving the assets. Each asset could be moved without damaging or removing the foundations, underlying land, or other equipment. And, there was an active market of brokers and sellers specializing in the acquisition, sale, and relocation of used industrial assets like the ones BOTA found to be personal property assets. The County could counteract this holding on appeal by pointing to evidence in the record that showed that a particular asset did not share these features, or that these features do not make an asset personal property.

BOTA'S decision did not impermissibly weigh evidence or redetermine witness credibility.

The position of the parties is outlined.

COTA heard the live testimony presented by the parties before the County's first appeal. By the time the case was remanded, COTA had been renamed BOTA and its membership had changed. See L. 2014, ch. 141, § 1. The County argues that BOTA reweighed evidence and redetermined witness credibility on remand, and that this was impermissible because none of the [*15] BOTA members witnessed the live testimony.

In its adaptation analysis, COTA held that "the assets in dispute each may be useful apart from the subject facility" but that "they would not be of comparable utility elsewhere without considerable site preparation and extensive engineering work at the new location." COTA cited the County's expert, Watson, in support of this holding. The County contrasts this with BOTA's opinion, which states:

> "In regard to all of our findings and conclusions, the Board finds [CRNF]'s witnesses—specifically, Neal Barkley, CRNF Plant Manager; Kevan Vick, CRNF Executive Vice President and Fertilizer General Manager; and Kamaya Manesh, Farmland Asset Trust Administrator—provided testimony demonstrating detailed knowledge of the day-to-day operation of the subject plant, as well as the acquisition, operation, and market for industrial equipment such as the assets in dispute that was collectively superior to that of the witnesses who appeared for the County."

The County asserts that this reweighing of evidence and redetermination of witness credibility rendered BOTA's decision invalid. CRNF makes three arguments in reply. First, it argues that the County waived its [*16] right to

make this argument by failing to raise the issue below. Second, it argues that BOTA's findings on remand were not contrary to COTA's original findings. Third, it argues that the County cites no relevant legal authority in support of its position.

We exercise unlimited review over questions of law.

Neither party proposes a standard of review when examining whether an agency engaged in illegal fact-finding. It does not appear that any Kansas cases have directly addressed this issue. However, determining whether BOTA engaged in illegal fact-finding naturally presents a question of law. This court exercises unlimited review over such questions. See *Presbyterian Manors, Inc. v. Douglas County*, 268 Kan. 488, 492, 998 P.2d 88 (2000).

The County preserved this issue for appeal.

CRNF argues that the County never raised this issue below, either before BOTA's decision or in a motion for reconsideration so it has failed to properly preserve the issue for appeal. "In an appeal from an administrative agency decision, one is limited to the issues raised at the administrative hearing." *In re Tax Appeal of Panhandle Eastern Pipe Line Co.*, 272 Kan. 1211, 1235, 39 P.3d 21 (2002).

The County asserts that it did raise the issue. And, a review of the record shows that the County did raise the issue. The parties each proposed findings of fact and conclusions of law, and [*17] a series of responses and replies followed. In one reply, the County specifically argued that there was no way for BOTA to reweigh the evidence. The County asserted that "[a]t every turn, and on each element of the three part test, CRNF asks this Board to reweigh the evidence that was heard by COTA and reach a different conclusion." Additionally, the County asserted that CRNF "directly asks this Board to evaluate the testimony of its expert, John Jenkins, and find it to be more credible than that of the County's expert, James Watson, again directly contrary to the credibility determination that COTA made regarding their testimony . . . ." The County then asked: "How can this Board be expected to do what CRNF requests, when it did not hear the testimony and observe the witnesses and their credibility?" Similar concerns were raised in other filings. This was sufficient to preserve the issue.

BOTA did reweigh evidence and redetermine witness credibility.

CRNF argues that BOTA's findings of fact on remand were not contrary to COTA's findings of fact. It asserts that "[t]he underlying facts in this matter are not in dispute." However, this misses the point of the County's argument. The County [*18] is concerned about reweighing the evidence and redetermining witness credibility.

There is some evidence that BOTA reweighed the evidence. For example, during the adaptation analysis COTA held that "[a]lthough the assets in dispute each may be useful apart from the subject facility, according to the evidence, they would not be of comparable utility elsewhere without considerable site preparation and extensive engineering work at the new location." To the contrary, BOTA held that the assets it deemed personal property "are generic, off-the-shelf, and can be utilized in a variety of manufacturing applications." Another example arose in the adaptation analysis. There, COTA held: "Based on the weight of the evidence, we find an absence of proof that Farmland annexed the assets in dispute with the intention that they retain their character as items of personal property."

BOTA held the opposite—that nothing indicated "that any individual asset was placed in service with the intent to become a permanent fixture to the land." These discrepancies could be explained by the fact that COTA was applying the *Total Petroleum* factors to the factory as a whole as opposed to 699 individual assets. But, [*19] they still provide some support for the County's argument that BOTA reweighed evidence.

Furthermore, BOTA clearly favored the testimony of CRNF's witnesses—Neal Barkley, Kevan Vick, and Kamaya Manesh—over that of the County's witnesses. BOTA characterized CRNF's witnesses' knowledge as "collectively superior to that of the witnesses who appeared for the County." COTA, on the other hand, found that the County's witness was more credible for purposes of the adaptation prong. This may suggest that BOTA reevaluated witness credibility.

But that said, at the heart of the varied analyses was COTA's treatment of the assets combined as a single unified factory operation versus BOTA's focus on the individual characteristics of each asset—which is what it was instructed to do by this court upon remand. We agree with CRNF that the "difference in factual findings is not one of witness credibility, but rather one of application of the uncontroverted facts to the correct legal standard." It was not a matter of which witnesses were telling the truth and which witnesses were lying. If such was the case, we agree that witnessing the demeanor of the witnesses would be crucial. It was a matter of which [*20] witness was properly applying the facts to the *Total Petroleum* factors. BOTA found CRNF witnesses had superior knowledge concerning the day-to-day operation of the plant as well as the acquisition, operation, and market for industrial equipment—individual assets. This knowledge became more important as BOTA examined the individual nature of the assets on remand. COTA, instead, relied on County expert Watson's testimony that under the adaptation prong of *Total Petroleum* the entire facility was adapted to the land and the land adapted to the facility, so it must all be treated as real property. That theory was rejected in *CRNF I*. On remand, BOTA was advised to examine the individual assets. In *CRNF I*, this court recognized and in fact anticipated that such a review may result in different findings regarding the assets.

> "Unfortunately, COTA did not make any individualized findings regarding whether any particular assets in this dispute were fixtures. Rather, the majority simply considered all 699 assets together. A review of the record reveals that some of the assets in dispute are small and/or easily removable while other assets are very large and/or difficult to remove. Thus, based on [*21] the *Total Petroleum* factors, if the assets are considered individually or in groups of similar assets, it is likely that some of the disputed assets are fixtures—or real property—while others are personal property." *CRNF I*, 2013 Kan. App. Unpub. LEXIS 726, *13, 2013 WL 4046403, *5.

Even COTA recognized in its decision that "most of the assets in dispute are moveable, are equipped with design features that make them movable, and are in fact moved from time to time." It simply concluded that all these moving parts were interconnected and function as one working system causing them to conclude it should all be classified as real property.

But BOTA did not impermissibly *reexamine and evaluate the record of the proceedings before COTA*.

Assuming that BOTA did in fact reweigh evidence and reevaluate witness credibility, and that the County preserved the issue for appeal, the question of whether BOTA's actions are permissible remains. The County argues BOTA's actions were not permissible because it did not hear the trial testimony and it cannot substitute its judgment for the tribunal that did—COTA. CRNF argues that there is no legal authority for the County's position. The County cites three cases in support of its argument, so these will be examined.

First, [*22] the County cites *Hudson v. Bd. of Dirs. of the Kan. Pub. Emples. Ret. Sys.*, 53 Kan. App. 2d 309, 388 P.3d 597 (2016). The County asserts that *Hudson* stands for the principle that BOTA members cannot substitute their judgment for that of COTA. However, this case does not stand for such a proposition.

In *Hudson*, John Hudson applied for disability through the Kansas Public Employees Retirement System (KPERS) on the basis that he had post-traumatic stress disorder (PTSD). KPERS denied his claim and Hudson requested an administrative hearing. Hudson submitted medical reports from three doctors who had personally examined him and diagnosed him with PTSD. KPERS sent Hudson's application, doctors' reports, and medical records to Dr. Guillermo Ibarra, its consulting physician for psychiatric claims. Dr. Ibarra did not perform an examination of Hudson, nor talk to Hudson or his three treating physicians. After reviewing the records, Dr. Ibarra concluded that Hudson did not have a disabling case of PTSD. Hudson testified live at the administrative hearing, and Dr. Ibarra and Hudson's three treating physicians testified by deposition. The administrative law judge (ALJ) denied Hudson's application for disability benefits, and the Public Employees Retirement System Board affirmed. The Board relied [*23] heavily on Dr. Ibarra's conclusions that Hudson and his three treating physicians were not credible. Hudson appealed.

The district court reversed the Board, and this court affirmed the district court decision. 53 Kan. App. 2d at 315, 323. The primary reason for reversal was that the Board relied too much on Dr. Ibarra's credibility conclusions. 53 Kan. App. 2d at 316, 319. This court noted "the value of actual observation of the witness when credibility determinations are made." 53 Kan. App. 2d at 317. Because the Board "did not observe testimony of Hudson's treating physicians or Dr. Ibarra, it was near impossible for the Board to make valid credibility determinations solely on the basis of deposition testimony." 53 Kan. App. 2d at 317. The Board failed to explain why it found Dr. Ibarra's deposition more persuasive than the other testimony. This court held that "[t]he reliance by the Board upon Dr. Ibarra's deposition testimony, without explanation, was based on a determination of fact that [was] not supported by the record as a whole . . . ." 53 Kan. App. 2d at 319.

Hudson does not support the County's argument in this appeal. In fact, it supports the idea that an administrative body may make credibility determinations without live testimony as long as its determinations are supported by the record. [*24] The *Hudson* Board's credibility determination could have been affirmed had the Board supported its determination with sufficient evidence.

The County also relies on *Sunflower Racing, Inc. v. Board of Wyandotte County Comm'rs*, 256 Kan. 426, 885 P.2d 1233 (1994). There, Sunflower Racing appealed a BOTA decision and argued that BOTA was improperly constituted when it ruled on the case. Only one BOTA member heard all of the evidence presented. Two other members were present for most of the evidence. Only two of the three

BOTA members who heard the evidence participated in the final decision. Three BOTA members who had participated in the final decision were appointed after the case had been heard. Sunflower "argued that it was not preferable for panel members who were not assigned or could not participate in the hearing to read a transcript of the evidence presented at the hearing as opposed to actually hearing the evidence and questioning the witnesses." 256 Kan. at 430. But, the Kansas Supreme Court held that Sunflower failed to object to the arrangement and was thus precluded from raising the issue on appeal. 256 Kan. at 440. *Sunflower Racing* is not persuasive in this appeal because the court never reached the issue presented—whether it was proper for BOTA members to participate in a decision if they had not [*25] seen the presentation of the evidence.

Finally, the County cites *In re Equalization Appeal of Krueger*, 305 P.3d 47, 2013 Kan. App. Unpub. LEXIS 710, 2013 WL 4046463 (Kan. App. 2013) (unpublished opinion). There, Karen Krueger appealed a COTA decision adopting Woodson County's ratings and valuations of her residential property. One of the issues she raised was whether successor COTA judges could issue an order in a case for which they were not present at the hearing. Only one of the three COTA judges who signed the order in her case was present at the evidentiary hearing. The other two judges had been confirmed after the hearing. This court framed the issue as "whether successor COTA judges may issue an order in a case for which they were not present at the hearing." 2013 Kan. App. Unpub. LEXIS 710, *28, 2013 WL 4046463, at *10.

In deciding this issue, the court in *Krueger* found "guidance in Kansas cases that have addressed the issue of whether a successor or substitute judge may hear a jury trial or issue orders on motions for a new trial where another judge was originally appointed to the case, as well as in the Kansas Rules of Civil Procedure." 2013 Kan. App. Unpub. LEXIS 710, *29, 2013 WL 4046463, at *10. For example, the court noted "K.S.A. 43-168 provides that if a judge is unable to proceed with a jury trial, another judge assigned to the court may proceed with and finish the trial 'upon certifying that he [or she] has familiarized [*26] himself [or herself] with the record of the trial.'" 2013 Kan. App. Unpub. LEXIS 710, *29, 2013 WL 4046463, at *10. This court concluded that "[t]he primary concern in resolving each of these cases was whether the successor judge adequately familiarized himself or herself with the record before performing any judicial duties." 2013 Kan. App. Unpub. LEXIS 710, *30, 2013 WL 4046463, at *11. The successor judges in Kreuger's administrative appeal had access to the evidence and the record. Therefore, the court concluded that "the successor judges could properly perform any duties of the court, including signing the order of the decision of COTA." 2013 Kan. App. Unpub. LEXIS 710, *31, 2013 WL 4046463, at *11. Like *Hudson, Krueger* contradicts rather than supports the County's argument on this point. *Krueger* shows that successor judges can make fact-intensive decisions as long as they are familiar with the record.

In re Marriage of Salien, No. 88,658, 2003 Kan. App. Unpub. LEXIS 361, 2003 WL 22532928 (Kan. App. 2003) (unpublished opinion), provides another example of the principle that successor judges must only familiarize themselves with the record before rendering judgment. That case involved issues stemming from the divorce of Alta and Jean Salien. The parties divorced in 1979, but resumed cohabitation within two years of the divorce. Alta filed a motion "alleging the couple had become remarried under common law, or, in the alternative, that the court should use

its [*27] equitable powers to divide the couple's property." 2003 Kan. App. Unpub. LEXIS 361, 2003 WL 22532928, at *1. Judge William Madden presided over a hearing and concluded that the parties were not common-law married. He reserved the issue of equitable division of the property to a later date. However, before rendering a decision Judge Madden recused himself and Judge Edward Bouker took his place. Alta filed a motion for a new trial, arguing that she was entitled to a new trial under K.S.A. 60-263. This statute gave a successor judge discretion to grant a new trial where the original judge is unable to continue due to death, sickness, or other disability. K.S.A. 60-263. The successor judge denied her motion, and she appealed. On appeal, Alta made an argument similar to the County's—that Judge Bouker could not adequately assess witness credibility from the record. This court rejected her argument, holding that "Judge Bouker took sufficient steps to become familiar with the case." 2003 Kan. App. Unpub. LEXIS 361, 2003 WL 22532928, at *3.

There is no indication here that the BOTA judges failed to familiarize themselves with the record. In fact, BOTA received new proposed findings of fact and conclusions of law, asked for some additional assistance from the parties in obtaining master copies of some spreadsheets used to create [*28] exhibits in the case—having noted some exhibits that it could not reconcile—and heard oral argument. BOTA stated clearly and unequivocally in its order that it reviewed all the evidence in the record.

In sum, we find that BOTA's actions in hearing and deciding this case were permissible under the unique facts presented and the directions from this court on remand.

BOTA's decision is supported by substantial evidence.

The County makes a number of arguments that BOTA's decision was not supported by substantial evidence. The County attacks BOTA's application of each prong of the *Total Petroleum* test. The County also argues that BOTA failed to consider the record as a whole because it did not give credit to COTA's determinations of witness veracity. The County also makes a few arguments which are reiterations of the other issues raised in this appeal. For example, it argues that BOTA impermissibly reweighed evidence and reassessed witness credibility and that BOTA did not comply with the mandate. Finally, the County argues that this court's opinion in the first appeal prejudiced BOTA's fact-finding on remand. Each argument will be addressed in turn.

BOTA's decisions are reviewable under the [*29] Kansas Judicial Review Act (KJRA), which defines the proper scope of review. K.S.A. 2017 Supp. 77-621. Appellate courts review BOTA's factual findings to ensure that they are supported by substantial evidence in light of the record as a whole. K.S.A. 2017 Supp. 77-621(c)(7). "'[I]n light of the record as a whole'" includes evidence both supporting and detracting from the agency's finding. K.S.A. 2017 Supp. 77-621(d). It includes "any determinations of veracity by the presiding officer who personally observed the demeanor of the witness and the agency's explanation of why the relevant evidence in the record supports its material findings of fact." K.S.A. 2017 Supp. 77-621(d). This court "shall not reweigh the evidence or engage in de novo review." K.S.A. 2017 Supp. 77-621(d). While the County asserts it is challenging the sufficiency of BOTA's evidentiary findings, it appears that the County also contests the application of the law to the facts. This court has unlimited review over issues of law. See *Presbyterian Manors, Inc.*, 268 Kan. at 492.

We examine BOTA's application of the Total Petroleum *factors*.

The County argues that substantial evidence does not support BOTA's findings in its application of the *Total Petroleum* factors. *Total Petroleum* provided three considerations in determining whether personal property becomes a fixture: (1) annexation to the realty; [*30] (2) adaptation to the use of that part of the realty with which it is attached; and (3) the intention of the party making the annexation. 28 Kan. App. 2d at 299-300. Each factor will be examined.

Annexation

Annexation is "[t]he act of attaching; the quality, state, or condition of being attached." Black's Law Dictionary 108 (10th ed. 2014). In regards to this prong, courts generally consider whether property can be removed without causing damage to the real estate. See *Stalcup v. Detrich*, 27 Kan. App. 2d 880, 886-87, 10 P.3d 3 (2000). For example, in *Stalcup* this court had to determine whether a metal building was a fixture. The building was 40 feet by 80 feet, and attached to a concrete slab with bolts. The court held that the building was not annexed to the real estate, because "although it would take some effort, the building could be removed by detaching the bolts and removing the metal sheeting" with no damage to the real estate. 27 Kan. App. 2d at 886. *Stalcup* can be contrasted with *Total Petroleum*. There, a refinery's property was firmly attached to the land and could only be removed with great effort. The tanks at the refinery had to be pieced together with sheet metal delivered by semi-trucks. The metal was welded together until the tanks had walls 3 inches thick. To remove the tanks, [*31] they would have to be cut down piece by piece. The towers at the refinery were built 20 feet into the ground and weighed as much as 175,000 pounds. Additionally, the refinery property was interconnected. This led the Court of Appeals to conclude that the refinery property was annexed to the real estate. 28 Kan. App. 2d at 300.

Whether property can be readily replaced also factors in to the annexation analysis. See *In re Farmland Indus., Inc.*, 298 B.R. 382, 387-88 (Bankr. W.D. Mo. 2003) (applying Kansas law to determine whether certain equipment was personal property or real property). The Kansas Supreme Court favorably cited a New York case for this proposition. See *Lumber and Grain Co. v. Eaves*, 114 Kan. 576, 580-81, 220 P. 512 (1923) (citing *Ford v. Cobb*, 20 N.Y. 344 [1859]). There, the issue was whether salt kettles embedded into brick arches were personal property or fixtures. The kettles could be removed only by "tearing off a portion of the upper bricks of the arch, and prying the kettles out by a plank and bars." *Ford*, 20 N.Y. at 345. The kettles were removed and reset in the arch every year in the course of the salt works' business. The New York court held that the kettles were personal property even though they were embedded in the brick because they could be removed and replaced without damage to their condition or value. 20 N.Y. at 351-52.

Here, BOTA found that most of CRNF's assets were personal property [*32] for several reasons. It held that the evidence showed that the property was not attached to the land in a permanent manner, but rather bolted into place and readily movable. The assets were designed to be readily movable, and CRNF routinely moved the assets as part of its normal business practice and without damaging the foundations, underlying land, or other equipment. Furthermore, BOTA found that there was an active industry of people specializing in the acquisition, sale, and relocation of used industrial assets like those

at issue in the case. The evidence supports BOTA's findings. The assets are supported by concrete foundations, but the assets themselves are merely bolted on. They are routinely moved for maintenance or repair. The larger assets have lifting lugs to assist in moving them. Smaller assets were specifically designed so that they could be easily removed and replaced. The assets can be moved without damaging the foundations or surrounding equipment.

Still, the County maintains that the "assets CRNF contended were movable and not annexed or adapted to the real property . . . ***could not*** be removed without lengthy costly effort and ***would not*** be removed because they were [*33] integral parts of the plant." The County's argument is focused on the "single, huge machine" theory. It would be costly and time consuming to remove all of the assets from the property. But the analysis should be focused on each individual asset.

The County also argues that the assets are constructively annexed to the land. Constructive annexation has not been well-defined in Kansas. The concept is discussed in American Jurisprudence, which BOTA cited in its analysis. It provides:

> "[C]onstructive annexation may be found when the object, although not itself attached to the realty, comprises a necessary, integral, or working part of some other object which is attached. Constructive annexation to the realty occurs when removal leaves the personal property unfit for use so that it would not of itself and standing alone be well adapted for general use elsewhere." 35A Am. Jur. 2d, Fixtures § 10.

The County argues that both Watson and Barkley's testimony established that removal or failure of an asset would render the principal part of the fertilizer plant unfit for use and that the assets "are primarily of limited, specialized uses in refineries and similar plants."

While there are several sections in CRNF's plant, its primary [*34] purpose is to produce urea ammonium nitrate (UAN). However, Barkley testified that the ammonia plant could be operated without the UAN plant. There have been occasions in the plant's history where it has produced ammonia but not UAN, and when it has produced UAN but not ammonia. Therefore, failure of an asset would not render the plant unfit for use.

Even if loss of an asset did render the plant inoperable, the testimony established that the assets would be fit for use in other plants, and for other purposes.

For example, Barkley testified that the Selexol removal system could be "put into a refinery, a natural gas processing plant or any number of plants and remove carbon dioxide and H2S." The compressors could be used in any plant that utilizes compressed air. The pumps can be picked "out of a book" and are not specifically for use in a UAN plant. Many of the assets were in fact relocated from the California plant, where they were not used to produce UAN.

CRNF notes that Kansas caselaw has never "held that assets used in a production process become constructively annexed by virtue of incorporation into the production process." The County has failed to show that the mere use of an asset [*35] in a large plant or manufacturing operation renders it annexed to the land. BOTA's findings are consistent with traditional annexation considerations, and substantial evidence supports its findings on this factor.

Adaptation

The second part of the test is "'adaptation to the use of that part of the realty with which it is

attached." *Total Petroleum*, 28 Kan. App. 2d at 299 (quoting *Stalcup*, 27 Kan. App. 2d at 886). The caselaw shows that there are a couple of ways to satisfy this prong of the test. One is if the assets themselves are adapted to fit the land. See, e.g., *Total Petroleum*, 28 Kan. App. 2d at 301. The other is if the assets are meant to benefit the land itself, as opposed to benefitting some other interest. *A. T. & S. F. R. Rld. Co. v. Morgan*, 42 Kan. 23, Syl. ¶ 3, 21 P. 809 (1889). Each of these ways of showing adaptation will be examined.

The first inquiry is whether the assets were adapted to fit the land. In *Total Petroleum* the assets, tanks, "were constructed using sheet metal, which was welded to the ground, and that their side walls were put up one sheet at a time until each was 3 inches thick." 28 Kan. App. 2d at 297. Additionally, "the tanks were not portable, were never moved, and would have to be cut down a piece at a time to be hauled away." 28 Kan. App. 2d at 297. This court held that the tanks were part of the realty because they were "specifically constructed for placement on that particular [*36] land" and because their "removal would result in environmental contamination that would have to be treated." 28 Kan. App. 2d at 301. This can be contrasted with *Stalcup*, where a metal building bolted to a concrete foundation was personal property because the building was the type "frequently found on farms all across the state and that they are not particular to the real estate upon which they sit." 27 Kan. App. 2d at 887; see also *Board of Education v. Porter*, 234 Kan. 690, 695-96, 676 P.2d 84 (1984) (holding that a liquid propane storage tank, supported by concrete piers extending 6 feet into the ground, was personal property because the tank was not buried in the ground, was easily movable, and was "as usable at another location as on the land in question").

BOTA held that "the uncontroverted evidence indicates that the personal property assets, when examined individually . . . are, in no way, adapted to the land." It noted that many of the assets were "'off-the-shelf'" and could be used in a variety of manufacturing applications. BOTA further held that none of the assets "were designed to fit the subject land nor is there any rational reason to believe these assets could not easily be re-tasked in another location." BOTA rejected the idea that the concrete foundations, which were clearly adapted [*37] to the land, were part of the assets.

The County argues that BOTA should have considered the concrete foundations as evidence that the assets were adapted to the realty. However, this assertion is contrary to the caselaw as demonstrated by *Stalcup* and *Porter*. In each of those cases, the assets were supported by concrete foundations. And, in each case the court held that the assets were not adapted to the land. The County does not argue that the personal property assets were fused to the land or specifically constructed to fit the land as in *Total Petroleum*. The evidence shows that the assets could be used on any piece of land, given the proper foundation, and that they could be used to make products other than UAN.

The second inquiry is whether the assets are meant to benefit the land itself, or some other interest. *Morgan*, 42 Kan. at 29. "The test of whether real estate is benefited by the act of annexation has been repeatedly applied by the courts, to determine whether the chattel annexed became a fixture or not." 42 Kan. at 29. In *Morgan*, a railroad company installed a well, pump, and boiler-house on A.O. Morgan's property, believing that it owned the land. Steam from the boiler operated the pump in the well. The [*38] company intended to use the well to provide water to supply its engines. Morgan sold the land, and the eventual owner discovered that the company's assets were on

his property. The new owner forbade the company from coming onto his property, and prevented the company from using the assets. One night, the company trespassed onto the owner's land and removed the boiler, damaging the boiler-house. The company did not remove the pump. The owner brought an action in district court, which held in part that the owner was entitled to recover the value of the boiler and damages to the boiler-house, and that the pump belonged to the owner. The company appealed, arguing that the boiler and pump were not fixtures, and therefore, the owner was not entitled to damages or possession of either.

The Kansas Supreme Court noted in its analysis that "one of the tests of whether a chattel retains its character or becomes a fixture is the uses to which it is put. If it be placed on the land for the purpose of improving it and to make it more valuable, that is evidence that it is a fixture." 42 Kan. at 29. The court held that the pump and boiler did not benefit the owner's land, and that "the only value added thereto [*39] by placing a pump, boiler and boiler-house like those in controversy would be what they were worth as chattels." 42 Kan. at 29. The court concluded that the items were not fixtures, because the company "dug the well, put in the pump and boiler for the sole purpose of operating its railroad, and not to improve the land where the property was placed." 42 Kan. at 30.

An example of this principle is the "boiler in a building" illustration in the Personal Property Valuation (PVD) Guide. The PVD Guide is written pursuant to K.S.A. 2017 Supp. 79-505(a), which requires the director of property valuation to "adopt rules and regulations or appraiser directives prescribing appropriate standards for the performance of appraisals in connection with ad valorem taxation in this state." County appraisers must follow the guidelines in the performance of their duties. K.S.A. 2017 Supp. 79-1456(a). The "boiler in a building" example provides that "a boiler that heats a building is considered real property, but a boiler that is used in the manufacturing process is considered personal property."

The County asserts that the "boiler in a building" example "is not persuasive here." It argues that the assets all serve the purpose of improving the land, and "not some general manufacturing [*40] operation that could be conducted anywhere." However, as already discussed, there is nothing special about the assets that make them unfit for use in other operations. Additionally, there is nothing unique about the land that requires the assets to remain there. Barkely testified that the assets could have been erected in some other location, and that there was nothing about the land that made it the only place the plant could operate. Substantial evidence supports BOTA's findings on this factor.

Intent

The final prong of the *Total Petroleum* test is the intention of the party making the annexation. 28 Kan. App. 2d at 299. Intention must be determined at the time of annexation. See 28 Kan. App. 2d at 301. "The intention of the party making the annexation of the article to the freehold must be deducted very largely from his acts and surrounding circumstances . . . ." *Water Co. v. Irrigation Co.*, 64 Kan. 247, 253, 67 P. 462 (1902). Intention can be "'inferred from the nature of the article affixed, the relation and situation of the party making the annexation, the structure and mode of annexation, and the purpose or use for which annexation has been made.'" *Eaves v. Estes*, 10 Kan. 314, 316-17 (1872) (quoting *Teaff v. Hewitt*, 1 Ohio St. 511, 530 [1853]).

The County makes a brief, one sentence argument that "[t]he self-serving declarations of the owner's employee could not be

accepted [*41] as substantial evidence of intent to annex in the context of the record as a whole." The County fails to identify evidence that would show that the intent was to have the assets treated as fixtures. Generally, an issue not briefed by the appellant is deemed waived or abandoned. *Superior Boiler Works, Inc.*, 292 Kan. at 889. A point raised incidentally in a brief and not argued therein is also deemed abandoned. *Friedman v. Kansas State Bd. of Healing Arts*, 296 Kan. 636, 645, 294 P.3d 287 (2013). Due to the County's failure to sufficiently address this issue, we deem it to be abandoned.

Moreover, even if we were to consider it, the County's argument fails. There is no indication in BOTA's opinion that it relied solely on the testimony of CRNF employees. BOTA stated that it found "nothing in the annexation or adaptation analyses . . . that indicates that any individual asset was placed in service with the intent to become a permanent fixture to the land." BOTA noted that the assets were movable, and that the plant was designed so that the assets could be moved. And, the assets had been moved into and out of the plant for various reasons. This is consistent with the rule that intention can be inferred from the nature of the articles affixed and the structure and mode of annexation. In *Total Petroleum*, this court [*42] found that Total Petroleum intended the property to be fixtures because "[i]t was firmly affixed to the ground, and the property was interconnected in such a way that removal of any portion would be exceedingly laborious and complicated." 28 Kan. App. 2d at 301. Here, however, removal of an asset only requires unbolting it from the foundation or surrounding assets.

BOTA also considered that "numerous documents created at the time of the plant's construction establish[ed] that the assets in dispute were intended to be personal property." This included documents created for the purposes of the lease, Industrial Revenue Bond tax exemption, and for the ad valorem property tax. The record supports this finding. The County itself treated the property as personal property for the years prior to this dispute.

Substantial evidence supports BOTA's holding on this factor.

Miscellaneous Arguments

The County makes a number of other miscellaneous arguments that BOTA's decision is not supported by substantial evidence which we will briefly address.

First, the County argues that BOTA came to a different result than COTA because it impermissibly reweighed evidence and witness credibility. This argument was addressed above, and [*43] is not persuasive. BOTA came to a different result because it was applying the law differently. Many of the basic facts were not in dispute. Second, the County argues that BOTA failed to comply with this court's mandate to consider the assets individually, so this court is precluded from determining whether BOTA's decision is supported by substantial evidence. This argument has also been addressed.

The County also argues that BOTA did not consider the record as a whole because it did not consider the determinations of veracity made by COTA. The County cites the rule that BOTA's decision must be supported by substantial evidence when viewed in light of the record as a whole. See K.S.A. 2017 Supp. 77-621(c)(7). It notes that "in light of the record as a whole" is defined as:

> "all the relevant evidence in the record cited by any party that detracts from such finding as well as all of the relevant evidence in the record, compiled pursuant

> to K.S.A. 77-620, and amendments thereto, cited by any party that supports such finding, including any determinations of veracity by the presiding officer who personally observed the demeanor of the witness and the agency's explanation of why the relevant evidence in the record supports its material [*44] findings of fact." K.S.A. 2017 Supp. 77-621(d).

The County distorts the meaning of the statute in this argument. The statute puts forth the scope of review for appellate courts under the Kansas Judicial Review Act. It does not mandate that BOTA give deference to prior determinations of veracity. As already discussed, it was not error for BOTA to rely on different witnesses on remand.

Finally, the County argues that this court's opinion in *CRNF I* prejudiced BOTA's fact-finding. The County makes three points relevant to this argument. First, the County asserts that this court "said the *Total Petroleum* tests should be applied in light of the fact that *Total Petroleum* involved a stripped and abandoned refinery." And, that this court "suggested that only what's left after an improvement to real estate has been abandoned, stripped and salvaged is real property." The County argues that "[t]his statement encouraged undue weight to evidence of whether and what assets could be removed and salvaged for some purpose someday in the unknown, and likely distant future."

The County does not include citations to the places in *CRNF I* where it alleges that this court made the prejudicial comparison. This is because this court did [*45] not make the statements that the County is asserting. To the contrary, at the beginning of its analysis this court specifically noted that "*Total Petroleum* is factually distinguishable from the present case" because the refinery in *Total Petroleum* had been shut down. *CRNF I*, 2013 Kan. App. Unpub. LEXIS 726, *9, 2013 WL 4046403, at *5. This court never made the suggestions the County is asserting, and thus did not prejudice BOTA's fact-finding process.

The County also argues that "this court, which is precluded by statute from reweighing evidence and determining credibility, stated that some of COTA's findings were 'probably wrong.'" Again, the County fails to cite to the portion of the *CRNF I* opinion where this court made such a statement. The statement does not appear in the opinion. At one point this court noted that "some of the assets in dispute are small and/or easily removable while other assets are very large and/or difficult to remove." *CRNF I*, 2013 Kan. App. Unpub. LEXIS 726, *13, 2013 WL 4046403, at *5. The court then stated: "Thus, based on the *Total Petroleum* factors, if the assets are considered individually or in groups of similar assets, it is likely that some of the disputed assets are fixtures—or real property—while others are personal property." *CRNF I*, 2013 Kan. App. Unpub. LEXIS 726, *13, 2013 WL 4046403, at *5. This does not show that this court reweighed evidence, [*46] as no one disputed that some of the assets were small and easy to move and some were large and would take more effort to move. As we have already discussed, the caselaw provides that assets which are easy to remove are more likely to be classified as personal property. It is not prejudicial for this court to say what the law provides.

Third, the County argues that "although the court didn't intend it, BOTA was clearly influenced by the argument on remand that the court's order for separate findings of fact as to each asset required viewing each asset as separate." The County continues that "CRNF argued that this meant BOTA should give little or no heed or weight and credibility to the testimony regarding the nature and extent of the assets' integration into the structure and

function of the entire plant as an improvement to real estate." This court clearly intended BOTA to view each asset as separate—that was the point of the remand. This court explicitly rejected the County's "single, huge machine" theory of viewing the assets. *CRNF I*, 2013 Kan. App. Unpub. LEXIS 726, *13, 2013 WL 4046403, at *5. In the annexation analysis, BOTA considered how extensively the assets were ingrained into the real estate and found that the personal property assets could [*47] be removed easily as they were merely bolted together. In the adaptation analysis, BOTA did consider whether the assets improved the real estate or merely served a business interest, and concluded that it served a business interest. These findings were supported by substantial competent evidence.

Conclusion

Generally, all three factors—annexation, adaptation, and intent—must be met to show that an asset has lost its identity as personal property and become a fixture. 35A Am. Jur. 2d, Fixtures § 4. BOTA considered all three factors and concluded that 682 of the disputed assets were CRNF's personal property under each factor. Or stated another way, it found that none of the factors—let alone all three—supported a finding that the 682 disputed assets had lost their identity as personal property and become fixtures to the real property. Substantial evidence supports BOTA's holding, and accordingly, its decision is affirmed.