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IN THE TWENTY-SIXTH JUDICIAL DISTRICT
DISTRICT COURT, SEWARD COUNTY, KANSAS

ARKALON ETHANOL, LLC, Plaintiff, vs. BOARD OF COUNTY COMMISSIONERS OF SEWARD COUNTY, KANSAS, Defendant.	)	Case No. SW-2023-CV-000005

TRIAL BRIEF OF SEWARD COUNTY

Defendant, Board of County Commissioners of Seward County, Kansas ("the County"), submits this brief in advance of the bench trial to be held in this matter commencing November 4, 2024.

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I.
INTRODUCTION

These appeals involve the fair market value of the real property associated with the Arkalon Ethanol Plant near Liberal, Kansas (the Plant) for ad valorem tax purposes in calendar years 2018, 2019 and 2020. The chart below shows the values assessed by Seward County and the values Arkalon argues the Court should adopt.

FMV Taxable Real Property		
Tax Year	**County Assessment**	**Arkalon (Crown Report)**
2018	$91,223,050	$25,450,000
2019	$91,223,050	$28,545,000
2020	$100,488,000	$29,880,000

To reach a value for taxable real property, one must first classify the property as either real or personal. In this case, there are more than 300 items – consisting of various tanks, machinery, and equipment at the Arkalon ethanol production facility – which the County classified as real that Arkalon argues should have been classified as personal. Thus, the question in this case turns more on classification than valuation.

II.
PROCEDURAL POSTURE / STANDARD OF REVIEW

This case was fully submitted to the Kansas Board of Tax Appeals ("BOTA") on August 15, 2022. BOTA issued its Full and Complete Opinion on Dec. 15, 2022, and Arkalon subsequently appealed to this Court pursuant to K.S.A. 74-2426(c)(4)(B). A review under this statute requires a trial *de novo*, including "an evidentiary hearing at which issues of law and fact shall be determined anew." K.S.A. 74-2426(c)(4)(B).

The district court must follow the Kansas Judicial Review Act to assess BOTA's determination of a taxpayer's challenge in a trial *de novo*. This requires that the parties first raise an issue with BOTA, otherwise nothing exists for a district court to review. *FreeState Electric Coop., Inc., et al. v. Kan. Dept. of Rev., Div. of Property Valuation*, No. 126,642, 2024 WL 3997329 at *18 (Aug., 30, 2024, Kan.) (emphasis added).

III.
OVERVIEW

The parties are going to take very different approaches in persuading this Court of their respective legal positions. The County urges this Court adhere to more than 100 years of case law in Kansas and even to consider how other jurisdictions have applied the same legal test since our country's founding.

Arkalon will rely on sources much more malleable than centuries of case law. It will cite almost exclusively to K.S.A. 79-261 – enacted in 2014 – and the PVD Guides. *See* Pretrial Order, p. 10 (stating its "ultimate request [to] this Court is to follow K.S.A. 79-261 and the PVD Guides"). As explained in further detail below, it is not even clear if K.S.A. 79-261 applies to the disputed items in this case. Assuming, for argument, it does apply, Arkalon wants this Court to adopt its novel interpretation that the statute established a brand new test, rendering all pre-2014 case law obsolete. To help fill this void, Arkalon's focus is almost exclusively on the PVD Guide.

IV.
CLASSIFYING PROPERTY

A. Real Property v. Person Property Under Kansas Law

Kansas law 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." K.S.A. 79-102 (emphasis added). "Personal property" includes "every tangible thing which is the subject of ownership, not forming part or parcel of real property." *Id.* Thus, if any of the disputed items in this case is a "fixture," it is classified as real property for ad valorem tax purposes. This definition of real property has been unchanged since at least 1907 and its legislative history dates back to 1862. *Id.* This definition of real property is also equally applicable to property devoted to residential, agricultural, commercial, industrial or anything else. Article 11, §1(a) of Constitution of State of Kansas ("Class 1 shall consist of real property" and "Real property shall be further classified into seven subclasses") and K.S.A. 79-1439(b)(1).

B. What is a fixture? The Three-Part Fixture Law Test.

Courts have wrestled with the question of when personal property becomes a fixture since before our country's founding. Indeed, the same test applicable to this case has been discussed and developed at least as far back as the sixteenth century. *Walker v. Sherman*, 20 Wend. 636, 640 (Supreme Court N.Y. 1839) (citing cases from the English Year Book during the reign of Henry VIII). That test, of course, is the three-part test. Distilling the test from hundreds of years of case law is the easy part; the hard part is in its application. *Taylor v. Collins*, 51 Wisc. 123, 128 (1881) (noting the difficulty with the three-part test

"is not in the ***rules*** to be adopted…but in the application of the correct rules to the ***facts*** of a given case") (emphasis in original).

Kansas courts have applied the three-part test since statehood. The test consists of the following three prongs: (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. *In re Equalization Appeal of Kansas Star Casino, L.L.C.*, 52 Kan. App. 2d 50, 68, 362 P.3d 1109 (2015); *see also* 35A Am. Jur. 2d Fixtures § 4 (noting jurisdictions nationwide apply a three-part test, all generally using the same three factors: (1) annexation, (2) adaptation, and (3) intention).

C. The Three Part Test – From The Year Books To Now

There is no shortage of jurisprudence from jurisdictions across this country applying the three-part test. The test has been applied by courts in this country since its founding. In fact, many of the early cases in this county cite the Year Books, which contain court decisions in England from 1268-1535.

Exhibit A attached hereto provides clips from authorities applying the common law three-part test to everything from storm windows in a home, to manure on a farm (spoiler alert: its real), to machinery and processing equipment. Each section of Exhibit A begins with Kansas case law and is followed by other frequently-cited authorities on the same topic.

D. K.S.A. 79-261: A New Test?

Understandably, Arkalon seeks a way to escape the crushing weight of authority that dates back to the Year Books. It believes its ticket is K.S.A. 79-261.

In 2006, the legislature passed K.S.A. 79-223. K.S.A. 79-223 exempts from property or ad valorem taxes certain CIME classified as personal property for property tax purposes. K.S.A. 79-223(b) and 79-223(d)(2). In 2014, the legislature passed K.S.A. 79-261. K.S.A. 79-261 sets forth classification procedures for determining whether CIME is real property or personal property for the exemption under K.S.A. 79-223. K.S.A. 79-261(a). The statute directs the county appraiser, in determining such classification of CIME, to conform to (1) the "definitions of real and personal property in Kansas law" and "the factors" set forth in the personal property guide under K.S.A. 79-261(b)(1), and (2) "[w]here the proper classification of commercial and industrial machinery and equipment is not clearly determined from the definitions of real and personal provided in Kansas law", to use "the three-part fixture law test as set forth in the personal property tax guide" and to consider the following:

> (A) The ***annexation*** of the machinery and equipment to the real estate;
> (B) the ***adaptation*** to the use of the reality 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)(A)-(C) (emphasis added).

This is what Arkalon argues establishes a brand new test and sweeps centuries of case law, including more than 100 years of Kansas case law, under the rug. See Pretrial Order, p. 4 (arguing "K.S.A. 79-261 changed how CIME should be classified"). To Arkalon, K.S.A. 79-261 does what nobody has ever been able to do: replace the three-part test with a single bright-line rule. Arkalon says K.S.A. 79-261 simply asks whether the

disputed CIME serves a manufacturing production process. If it does, it is personal. If not, it is real. See Pretrial Order, pp. 9-10. Indeed, Arkalon's expert Megan Sheeley will testify that it is her opinion that CIME used in the manufacturing process is ***always*** personal because it cannot possibly satisfy the adaptation part of the three-part test.

Not surprisingly, all post-2014 authority – from our courts, to BOTA, to PVD – see it differently. These authorities all say K.S.A. 79-261 simply codified the three-part test established by case law. *Dodge City Coop. Exch. v. Bd. Of Cnty. Comm'rs*, 62 Kan. App. 2d 391, 401 (2022) ("Kansas law has long employed a three-part test – ***codified*** by K.S.A. 79-261(b) – to determine whether equipment is a fixture." (emphasis added)); *In re Equalization Appeal of Prairie Tree, LLC*, No. 117,891, 2019 WL 493062, *15 (Kan. Ct. App. Feb. 8, 2019) (noting the three-part test was "***codified***" in K.S.A. 79-261(b)(2)); *In re Equalization Appeal of East KS Agri Energy*, Docket No. 2016-4735-EQ, Full and Complete Decision on Classification, p. 5 (BOTA Jan. 24, 2018) ("In 2014, this "fixtures test" was ***codified*** in K.S.A. 79-261…")[1]; 2018 PVD Guide, p. vii (noting the three-part test in K.S.A. 79-261 is the ***same test*** applied in *In re: Equalization Appeals of Total Petroleum, Inc.*, 28 Kan. App. 2d 295, 16 P.3d 981 (2000), which was decided 14 years before K.S.A. 79-261 was enacted).

Put simply, there is only one three-part test, it has been applied for more than a century by Kansas courts, and it still applies with equal force and effect to the CIME at

[1]The Taxpayer in *East Kansas* was represented by the same counsel as Arkalon in this case.

issue in this case. K.S.A. 79-261 is not Arkalon's "Get Out Of Jail Free Card." This Court should reject the invitation to adopt a novel interpretation and ignore centuries of case law.

E. CIME Can Be Fixtures.

Contrary to Arkalon's assertions, CIME used in the manufacturing process can be classified as real property under the three-part fixture test. *Cook v. Condon*, 6 Kan. App. 574, 584, 51 Pac. 587 (1897) (finding CIME used in the manufacturing process to be fixtures); *U.S.D. No. 464 v. Porter*, 234 Kan 690, 695, 676 P.2.d 84 (1984) (distinguishing this type of machinery and equipment from a tank that had none of those characteristics). The Kansas Director of Property Valuation prepares a Personal Property Valuation Guide for each calendar year ("the PVD Guides"). *See* K.S.A. 75-5105a(b) (requiring the Director to "[d]evise or prescribe guides, or both, for the valuation of personal property"). The PVD Guides for the years at issue also acknowledge that CIME used in the manufacturing process can be classified as real property under K.S.A. 79-261. 2018 Personal Property Valuation Guide, p. viii ("Items directly used for and whose primary purpose is for a manufacturing process are ***normally*** considered personal property") (emphasis added).

If there were any doubt that K.S.A. 79-261 wasn't intended to supplant the three-part test with a single bright-line rule that classifies all CIME used in the manufacturing process as personal property, K.S.A. 79-507 removes it. In the ***same legislation*** in which K.S.A. 79-261 was passed, the Kansas Legislature also passed K.S.A. 79-507. K.S.A. 79-507 establishes a statutory scheme for the classification of CIME used in the manufacture of cement and similar products. K.S.A. 79-507(a) expressly directs that all commercial and industrial equipment used directly in the manufacture of cement and similar products

are "hereby defined as commercial and industrial machinery and equipment, and shall be classified for property tax purposes as tangible personal property within subclass 5 of class 2 of section 1 of article 11 of the constitution of the state of Kansas."

If Arkalon's position that all CIME used in a manufacturing process is always personal property under K.S.A. 79-261 were true, there would be no need for a statute directing that only certain processing machinery and equipment is personal. Kansas courts presume that the legislature does not intend to enact useless or meaningless legislation. *Kan. Dep't of Revenue v. Powell*, 290 Kan. 564, 570-71 (2010).[2] K.S.A. 79-507(a) is further evidence that CIME used in a manufacturing process may be fixtures and, as a result, classified as real property.

F. K.S.A. 79-261 Does Not Even Apply.

The classification procedures in K.S.A. 79-261 only apply to property eligible for exemption from taxation under K.S.A. 79-223. K.S.A. 79-261(a)(1). And for property to qualify for exemption under K.S.A. 79-223, it must initially fall within one of the following two categories:

> *First.* Commercial and industrial machinery and equipment acquired by qualified purchase or lease made or entered into after June 30, 2006, as the result of a bona fide transaction not consummated for the purpose of avoiding taxation.
>
> *Second*. Commercial and industrial machinery and equipment transported into this state after June 30, 2006, for the purpose of expanding an existing business or creation of a new business.

[2]In addition, Arkalon's interpretation would either eliminate or substantially limit the application of K.S.A. 79-1439c, which classifies CIME that cease to be fixtures as tangible personal property under subclass (6) instead of subclass (5) of class 2 of Article 11 of the Kansas constitution.

K.S.A. 79-223(b). Here, the evidence will show that Arkalon acquired the equipment by entering into a Design/Build Agreement before June 30, 2006. Arkalon has never presented any evidence that any of the disputed items would qualify for the exemption under K.S.A. 79-223.[3] Because the property does not satisfy the initial hurdle to qualify for the exemption under K.S.A. 79-223, the classification procedures in K.S.A. 79-261 that Arkalon claims revolutionized the three-part test, don't even apply in this case. If the classification procedures in K.S.A. 79-261 do not apply, then the three-part test set forth in Kansas case law is the only test that could apply.

G. K.S.A. 79-261 Does Not Expand the Exemption Under K.S.A. 79-223.

Arkalon argues that the legislative intent of K.S.A. 79-223 and K.S.A. 79-261 was to exempt all CIME. (Pretrial Order, p. 3). This argument is directly contrary to the clear, unambiguous wording of both statutes. K.S.A. 79-223(d)(d) defines eligible CIME as "property classified for property tax purposes within subclass (5) of ***class 2*** of section 1 of article 11 of the constitution of the state of Kansas". (emphasis added). Article 11, §1(a) of Constitution of State of Kansas ("Class 2 shall consist of tangible personal property" and "such tangible personal shall be further classified into six subclasses");*see also* K.S.A. 79-1439(b)(2). This same definition is repeated in K.S.A. 79-261(a)(2). Thus, only CIME that is first classified as personal property for property tax purposes is eligible for the exemption under K.S.A. 79-223. *Dodge City Coop. Exch. v. Bd. Of Cnty. Comm'rs*, 62

[3]For reasons discussed in Section V.C. *infra*, Arkalon is prohibited from presenting new evidence at trial that the disputed items qualify for the exemption.

Kan. App. 2d 391, 401 (2022) (stating K.S.A. 79-223 "does not extend…to real property").[4]

Arkalon's attempt to expand the exemption is not only contrary to the express language of the statute and case law, it is also contrary to the rule that tax exemption statutes must be strictly construed in favor of taxation. Section V.B. *infra*.

H. The PVD Guides Need to be Interpreted Consistent with Statutes

The PVD Guides for the years at issue were issued pursuant to P.V.D. Directive 17-048 or 19-048. 2018 Personal Property Valuation Guide, Introduction page. Those Directives expressly provide:

> In valuing real and personal property, the county appraiser shall interpret appraisal and valuation guides in a manner consistent with statutes. "To be valid, rules or regulations of an administrative agency must be within the agency's statutory authority. Rules or regulations that go beyond that authority, violate the statute, or are inconsistent with the agency's statutory powers are void. Further, administrative rules and regulations must be appropriate, reasonable, and consistent with the law." *In re Tax Appeal of City of Wichita*, 277 Kan. 487,495, 86 P.3d 513 (2004). *Wagner v. State of Kansas, et al*., 46 Kan App.2d 858, 862, 265 P.3d 577 (2011), *rev. denied* (2012).

Directive 17-048.

For the reasons discussed above, if the PVD Guides required all CIME to be exempt from property tax or be classified as personal property, as Arkalon claims, then such requirement would be inconsistent with the plain language of K.S.A. 79-223 and 79-261, and therefore invalid. *Board of County Comm'rs v. Bankoff Oil Co.*, 24 Kan. App. 2d 532, 540 (1997) ("The PVD Guide is similar to a regulation issued by an administrative agency.

[4]Counsel for Arkalon was counsel for Taxpayer in *Dodge City Coop. Exchange*.

Rules and regulations of an administrative agency that conflict with authorizing statutes are invalid.") *rev'd on other grounds*, 265 Kan. 525 (1998).

I. Examples In The PVD Guides Are Not "Factors" Under K.S.A. 79-261(b)(1).

Arkalon wants this Court to apply the classification examples in the PVD Guide as if they are determinative. In its effort to do so, with sleight of hand, it equates the "factors" that county appraisers are directed to conform to under K.S.A. 79-261(b)(1) with the examples in the Guide. But the language of the statute clearly indicates the "factors" is a reference to the three parts of the three-part test, not the examples.

Under K.S.A. 79-261(b)(1), the county appraiser, in determining the classification of CIME, is directed "to conform to the definitions of real and personal property in Kansas law and to the factors set forth in the personal property guide". The next section of the statute, K.S.A. 79-261(b)(2), provides some clarity. It states that when the classification of CIME "is not clearly determined from the definitions of real and personal property provided in Kansas law, the appraiser shall use the three-part fixture law test…" Read together, the statute directs the appraiser to consider the definitions first, then, if necessary, to look to the three-part fixture law test.

If the "factors" were the examples, K.S.A. 79-261(b)(1) and (b)(2) would conflict, and it would no longer be clear what to look to after the definitions – the factors, or the examples. Those sections clearly indicate the importance and priority placed on the definitions of real and personal property under K.S.A. 79-102. In addition, it is telling that K.S.A. 79-261(b)(2) references the "the three-part fixture ***law*** test". The PVD Guide expressly tells us that the three-part fixture law test is the same three-part fixture test

established by the Kansas courts. 2018 Personal Property Valuation Guide, p. vii (the Kansas Court of Appeals applied the three-part fixture law test in *In re: Equalization Appeals of Total Petroleum, Inc.*, 28 Kan. App. 2d 295, 16 P.3d 981 (2000), which was decided 14 years before K.S.A. 79-261 was enacted)

Provisions of a statute should be interpreted in a fashion to avoid inconsistences therein if possible. *Kilner v. State Farm Mut. Auto. Ins. Co.*, 252 Kan. 675, 686 (1993) ("It is the duty of a court when construing statutes to make the various provisions consistent, harmonious, and sensible."). As discussed in more detail below, Arkalon's focus on the examples set forth in the PVD Guides is misplaced. The application of the three-part fixture law test established by the Kansas courts is and should be the county appraisers focus as K.S.A. 79-261 and the PVD Guides require.

J. The Examples in the PVD Guides Are Not Binding

The examples in the PVD Guides do not override Kansas law – as recognized in Directives 17-048 and 19-048. The PVD Guides include the following disclaimer:

> This publication is not all-inclusive and refers to valuation information contained in statutes, directives, and guidelines. Whenever personal property is required to be valued at fair market value, the county appraiser may deviate from the procedures shown in this guide, on an individual piece of property, "for just" cause shown and in a manner consistent with achieving fair market value.

2018 Personal Property Valuation Guide, Introduction.

The PVD Guides include a list of items and sample classifications, which are intended to address common and likely situations. That classifications may vary in different situations is apparent in the PVD Guides. For example, the PVD Guides state that "[i]tems

directly used for and whose primary purpose is for a manufacturing process are ***normally*** considered personal property." 2018 Guide, p. vi (emphasis added). And, in connection with the examples, the PVD Guides warn, in bold print, that "**[i]t should be recognized that this is a general guideline and that specific listed items may vary under certain conditions**." 2018 Personal Property Valuation Guide, page viii

As discussed in more detail below, strict adherence to the examples listed in the PVD Guide would also be directly contrary to both K.S.A. 79-261(b)(3) which requires the determination of classification to be made on a "case-by-case basis" and to Kansas case law requiring a determination based upon the specific facts and circumstances.

K. The "Boiler In A Building" Example

The "boiler in a building" example is a perfect preview of the conflicting approaches to classification that the Court will hear at trial.

The PVD Guides say a boiler that heats a building is considered real property, but a boiler that is used in the manufacturing process is considered personal. 2018 Guide, pp. vii and viii. Yet, the PVD Guides go on to state "[i]tems directly used for and whose primary purpose is for a manufacturing process are ***normally*** considered personal property". Emphasis added. The PVD Guides are contemplating the most common and likely situations. It makes sense, for example, that a boiler in a general-purpose commercial building providing heat for the building is considered real because it is necessary, integral, and essential to the purpose to which such real estate is devoted (i.e., to be occupied as a place of business). On the other hand, a boiler used in the manufacturing process in that same general-purpose building may not because, for

example, the subsequent owner or tenant may not be engaged in that same manufacturing process.

But here, the Arkalon facility is a special use property. It is, and will continue to be, used and devoted to the single specific purpose of the production of ethanol and its byproducts. Thus, the boiler at the Arkalon facility may be used in the manufacturing process, but it is also necessary, integral, and essential to the purpose to which the real estate is devoted (i.e., to be used as an ethanol production facility). The boiler in this case doesn't fall within a common and likely situation that is contemplated by the examples in the PVD Guides. It is the exception to that example. This is precisely why all authorities, including the PVD Guides, stress the importance of applying the three-part test on a case-by-case basis.

BOTA identified an additional wrinkle with the boilers in this case. It rejected Arkalon's effort to ignore the three-part test in favor of adopting the generic example in the PVD Guide, and correctly concluded the boilers at the Arkalon facility were real:

> [T]he parties spent a great deal of time addressing the use of boilers in the building […] The boilers serve the manufacturing process but also provide heat to the building for the benefit of its occupants. Taxpayer urges that the boiler package falls within the "boiler in the building" exampled found in the PVD guides, and argues that because the boiler package here was designed to serve the manufacturing process that it cannot be considered part of the realty. The Board finds the testimony of Hanson and Watson to be more persuasive, and finds that the boiler system is not exclusively used to serve the manufacturing process. Because the system serves the realty and its occupants, was installed with the intention to remain permanently, and is permanently affixed to the realty, the Board finds that it satisfies all three prongs of the fixture test.

Full and Complete Opinion, p. 13.

Notwithstanding, under the proper application of the three-part fixture law test, the boilers are real property even if exclusively used for the manufacturing process, due to them being necessary, integral, and essential to the process to which the land is devoted.

L. The Three Part Test's Cardinal Rule: Apply It Case-by-Case

If there were a cardinal rule to the three-part test, this would be it. As mentioned to above, because every application is different, the three-part test must be applied anew in each case. "The determination of whether property is real or personal must be made on a case-by-case basis." K.S.A. 79-261(b)(3). The PVD Guides restate the need for such case-by-case determination repeatedly. *See* 2018 Personal Property Valuation Guide, pp. vii and viii. And it's a rule our Kansas courts emphasize too:

> Most modern authorities recognize the practical difficulties in formulating a comprehensive principle for determining what are fixtures, and hold that the determination can only be made from consideration of all of the individual facts and circumstances attending the particular case.

Kansas City Millwright Co., Inc. v. Kalb, 221 Kan. 658, 664, 562 P.2d 65, *modified on other grounds*, 221 Kan. 752, 564 P.2d 1280 (1977); *Total Petroleum*, 28 Kan. App.2d at 300.

On this principal, Arkalon says one thing, then does another. For example, Arkalon acknowledges this rule, then seeks to exclude the County's expert James Watson based on his testimony about CIME in an entirely different case. And Arkalon acknowledges the rule, then claims that in all cases, CIME used in a production process must be classified as personal property. Arkalon's authority for such claim is the same statute and PVD Guide that expressly require case-by-case determinations.

M. The Use To Which The Land Is Devoted / "Highest And Best Use"

The use for which the land is being devoted is fundamental to the application of the three-part fixture test. *See* K.S.A. 79-261(b)(3) ("The basic factors for clarifying items are real or personal property are their designated use and purpose."). Long ago, the Kansas Supreme Court provided a helpful illustration using trees growing at a nursery. It explained:

> That the simple fact of annexation to the reality is not the sole and controlling test of whether a certain article is a fixture or not, is very well illustrated by the fact that trees growing in a nursery and kept there for sale are personal property, while trees no larger, if transplanted to an orchard, become real estate. On the other hand, there are very many things although not attached to the reality which become real property by their use—keys to a house, blinds and shutters to the windows, fences and fence rails, etc.

A. T. & S. F. Rld. Co. v. Morgan, 42 Kan. 23, 29, 21 P. 809 (1889). *See also Dodge City Water & Light*, 64 Kan. at 252 (indicating that an item was sufficiently annexed if "its removal would interfere with the practical use of the land or in any way injure it for" its devoted purpose).

Knowledge of the use of the realty provides the necessary context for examining the benefit, value, use, and purpose of each item. *See Morgan*, 42 Kan. 23 at 29 (analyzing whether a railroad's well and boiler benefitted a small tract of land); *Dodge City Water & Light Co.*, 64 Kan. at 253 (analyzing what adaptation and connection a water-works system with four-inch pipe would have to the ordinary use of land devoted to agricultural purposes). The determination of an individual items' use and purpose cannot be made in a vacuum. It must be viewed in the context of the use to which the land is devoted.

K.S.A. 79-261(b)(2)(B) also expressly directs the county appraiser to consider the adaptation of each item "to the use of the reality to which it is attached". Despite this clear direction, Arkalon will ask this Court to look solely to the use and function of the item itself in a vacuum by completely disregarding the fact that the land is devoted to the production of ethanol and its byproducts. In addition to being directly contrary to language of K.S.A. 79-261(b)(2)(B) and Kansas case law, such request by Arkalon completely circumvents the required case-by-case determination discussed above by requiring all items of the same or similar function to be classified the same irrespective of specific facts and circumstances.

N. The Highest And Best Use

In addition to the actual use of the land, the highest and best use of the real estate is an important valuation concept used to determine "the most profitable, competitive use to which the subject property can be put." Under Kansas law, real property is to be appraised at its fair market value in money for ad valorem tax purposes. K.S.A. 79-501. "Fair market value" is defined as "the amount in terms of money that a well informed buyer is justified in paying and a well informed seller is justified in accepting for property in an open and competitive market, assuming that the parties are acting without undue compulsion." K.S.A. 79-503a. The highest and best use is the initial determination made by an appraiser to identify the use to which the property would be devoted by a well informed buyer and a well informed seller to establish the fair market value of the property.

Here, the evidence will show that the parties and all experts agree that the highest and best use of the real estate is the continued operation of the ethanol plant. Thus, the use

and purpose of the individual disputed items must be viewed in the context of their value and benefit, if any, to real estate that is devoted to the production of ethanol and its byproducts.

O. Application of the Three-Part Fixture Law Test

1. Annexation

The first part of the three-part test is annexation. *See* K.S.A. 79-261(b)(2)(A) ("The annexation of the machinery and equipment to the real estate."). The annexation of an item can be evidenced by varying degrees of the nature and extent of physical attachment, or no physical attachment at all (i.e. constructive annexation). *Id*. The following illustration is helpful:

> There is scarcely any kind of machinery, however complex in character, or no matter how firmly held in its place, which may not with care be taken from its fastenings and moved without any serious injury to the structure where it may have been operated and to which it may have been attached. That the simple fact of annexation to the reality is not the sole and controlling test of whether a certain article is a fixture or not, is very well illustrated by the fact that trees growing in a nursery and kept there for sale are personal property, while trees no larger, if transplanted to an orchard, become real estate. On the other hand, there are very many things although not attached to the reality which become real property by their use-keys to a house, blinds and shutters to the windows, fences and fence rails, etc.

Morgan, 42 Kan. at 29; *see also Dodge City Water & Light*, 64 Kan. at 252 (1902) (indicating that an item satisfies the annexation requirement if "its removal would interfere with the practical use of the land or in any way injure it for" its devoted purpose).

Constructive annexation is the concept that recognizes that an item can satisfy the annexation factor even without any physical attachment at all. This is hornbook law:

> Constructive annexation is the union of such things as have been considered part of the reality, but which are not actually annexed, fixed, or fastened to the property. For purpose of determining whether an object is a fixture, constructive annexation may be found when the object, although not itself attached to the reality, comprises a necessary, integral, or working part of some other object which is attached.

35A Am. Jur. 2d Fixtures § 10.

The case of *Cook v. Condon*, 6 Kan. App. 574, 51 Pac. 587 (1897) is illustrative. In *Cook*, the Kansas Supreme Court considered whether certain machinery at two flouring mills were personal property or had become fixtures. *Cook*, 6 Kan. App. at 587. In addressing the annexation factor of the three-part test, the Court suggested constructive annexation would be sufficient, but nevertheless found that all the items satisfied the annexation factor because they were "attached in some manner, either by screws, bolts, cleats, braces, pulleys and belts, to the building." *Id*. at 590.

This case is like *Cook*. Here, the physical attachment of each of the disputed items is more than sufficient to satisfy this annexation requirement. All items in dispute are physically attached to the land or other items that are. At one extreme, there are items that are set in and on concrete footings and foundations embedded into the ground and would need to be cut into pieces to be removed. At the other end of the spectrum, there are items anchored into concrete slabs and would need to be jackhammered to be removed. A side wall or portion of the roof of a building would need to be removed to extricate certain items. The easiest item to remove would likely be steel piping interconnecting other items. However, all the piping is attached, and would need to be cut to be removed and, if replaced, new piping welded in its place.

Just as in *Cook*, physical annexation is sufficient. But, also like *Cook*, even if it weren't, all the items are also necessary, integral, and essential to the production of ethanol or its byproducts so as to satisfy the annexation requirement through constructive annexation. The removal of any single disputed item would interfere with the practical use of the realty as an ethanol plant and would reduce the fair market value of the realty. See 2018 Personal Property Guide, p. vii (If removing the item causes a reduction in the value of the realty, the item may be real property); *U.S.D. No. 464 v. Porter*, 234 Kan 690, 695, 676 P.2.d 84 (1984) (distinguishing the tank at issue to tanks in another case, "[t]here the machinery was part of the manufacturing plant system specifically adapted to the particular process and in a sense attached to the reality").

The following admissions and testimony from Arkalon in this case are all related to annexation:

50. Admit that, aside from the piping, all of the Disputed Items are anchored in some fashion.
ADMIT ____X_____ DENY _____

51. Admit that most of the Disputed Items, such as tanks, drives, turbines, pumps, conveyers, pipe racks, exchangers, and pressure vessels, are directly attached either through bolting or cementation to concrete foundations that are themselves imbedded in the ground.
ADMIT ____X_____ DENY _____

52. Admit that other Disputed Items that are not directly attached to a concrete foundation are attached to larger disputed items through the interconnected piping, conveyors or ducts, or are attached directly to supporting structural steel framing, that are directly attached through either bolting or cementation to concrete foundations that are themselves imbedded in the ground.
ADMIT ____X_____ DENY _____

Q. Do you agree with me that all of -- all of the items at the Arkalon facility are either attached to the real estate or even if they're not attached to the real estate they're attached to and essential to something else that is attached to the real estate?

A. Yes.[5]

Each of the disputed items at issue clearly satisfy the annexation factor.

Arkalon will assert that the dispute items fail the adaptation factor because they are not attached to the realty to the same extent as the items at issue in *Total Petroleum*. As *Morgan* and other Kansas Supreme Court decisions clearly indicate, such attachment is not required to satisfy the annexation factor. In addition, as discussed below, Arkalon fails to recognize the import of the extensive attachment of the items under the unique facts presented in *Total Petroleum*.

2. Adaptation

The second part of the three-part fixture test is adaptation. The adaptation factor looks first to the use of the real estate as a whole, then considers whether the property at issue serves the real estate. *See* K.S.A. 79-261(b)(2)(B) ("[T]he adaptation to the use of the realty to which it is attached and determination whether the property at issue serves the real estate."). Our caselaw has developed a couple of recognized ways to satisfy the adaptation factor. One is if the assets themselves are adapted to fit the land. *Total Petroleum*, 28 Kan. App. 2d at 301. The other is if the assets are meant to benefit the land itself. *Morgan*, 42 Kan. 23, Syl. ¶ 3. See *In re Equalization Appeal of Coffeyville Res. Nitrogen Fertilizers,*

[5]Deposition of Arkalon Ethanol, LLC (Designee Richard Hanson), Nov. 10, 2023, p. 34.

LLC, No. 117,045, 2018 WL 4655648, *1 (Sep. 8, 2018) (two alternative ways to satisfy the adaptation factor).

In *Morgan*, the Kansas Supreme Court stated:

> It can readily be seen 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. Applying this criterion to the boiler, we are lead to inquire whether this benefited the land of plaintiff. The real estate upon which this boiler was placed was a narrow strip in the city of Burlingame. And it cannot be contended that this well, boiler and the attachments could have greatly benefited this small tract of land. They were not placed there for the purpose of enhancing its value; ordinarily it would not enhance the value of such property in the city, as this small piece of ground, by digging a well thereon like the one in question; and the only value added thereto by placing a pump, boiler and boiler-house like those in controversy would be what they were worth as chattels. 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.

Morgan, 42 Kan. at 29.

Thus, when a chattel is placed on land for the purpose of improving the land and making the land more valuable, that is evidence that it has lost its identity as personal property and has become a fixture. *Morgan*, 42 Kan. 23 at 29. Machinery and equipment that is part of a manufacturing plant system that is specifically adapted to a specialized process, and that enhances the value of the realty must be considered part of the real estate. *See U.S.D. No. 464 v. Porter*, 234 Kan 690, 695, 676 P.2.d 84 (1984) (distinguishing this type of machinery and equipment from a tank that had none of those characteristics); 35A Am. Jur. 2d Fixtures § 11 (stating that "courts will consider the extent to which an article is essential to the permanent use of a building or other improvement").

Here, the permanent use of the real estate is an ethanol plant. The land required significant and extensive preparation—it had to be graded to specified elevations for drainage and the soil had to be modified to satisfy the differing minimum allowable soil bearing pressures for the various disputed items. Concrete foundations, footings and slabs were embedded into the prepared soil and the items were either embedded or anchored into the concrete foundations, footings or slabs. The items were installed first and then the buildings were constructed around many of the items.

The real estate at the Arkalon facility is devoted to the production of ethanol and its byproducts and the evidence will show that each disputed item is necessary, integral, and essential to that use and purpose. Thus, each item serving the ethanol process is serving ***the real estate***, as the real estate is specifically adapted and devoted to that process. Each item serving the ethanol process is enhancing the value of the real estate. The disputed items are more valuable as part of an operational plant than they would be if they were removed and sold separately. Likewise, when the items are installed and producing ethanol and its byproducts, the value of the real estate is higher. The inverse is also true—if the items were removed, the value of the real estate would suffer a reduction in value much greater than the salvage value of the individual items.

The following admissions and interrogatory response from Arkalon in this case are all related to adaptation:

> 18. Admit that the fair market value of the Subject Facility is enhanced by the existing 110 million gallon per year (nameplate capacity) ethanol plant in stabilized operation.
>
> **ADMIT ___X_____ DENY _____**

19. Admit that the fair market value of the Subject Facility would be diminished if the existing 110 million gallon per year (nameplate capacity) ethanol plant had diminished capacity to produce ethanol and/or its co-products.

ADMIT ____X_____ DENY _____

20. Admit that each of the Disputed Items increases the value of the real estate by more than the individual Disputed Item's salvage value.

ADMIT ____X_____ DENY _____

21 Admit that each Disputed Item is more valuable as part of the operating plant than it would be if sold separately.

ADMIT ____X_____ DENY _____

"Depending on the Disputed Item removed, production of the Products would be greatly reduced if not rendered impossible. As an example, if the hammermill or the beer well or all of the fermenters were to be removed, then production of the Products would cease."[6]

Each of the disputed items at issue in this matter clearly satisfy the adaptation factor.

Arkalon will assert that the disputed items fail the adaptation factor based solely on their use in the manufacturing process. As discussed above, neither K.S.A. 79-261 nor the PVD Guides preclude CIME used in the manufacturing process from being classified as real property and therefore satisfying the adaptation factor. Arkalon fails to recognize that, because the realty is a single-purpose property devoted to the production of ethanol, and the value of the realty and each disputed item is enhanced as a result thereof, each disputed item benefits the reality as well as the manufacturing process.

3. Intent

[6]Arkalon's Response to Interrogatory No. 17. Verified by Tom Willis on behalf of Arkalon on May 19, 2021.

The third part of the three-part test is intention. Intent seeks to determine whether the annexing party intended to make the personal property in question a permanent part of the real estate. Intent is to be determined as of the time the item was annexed and "permanent" does not mean in perpetuity. Permanency, in this context, is found if the property in question was intended to remain in place until worn out or functionally or economically obsolete. *See East KS Agri Energy*, Full and Complete Decision on Classification, p. 8 (citing *Kansas City Millwright Co*., 221 Kan. at 664 and quoting *Michigan Nat'l Bank v. City of Lansing*, 96 Mich. App. 551, 554, 293 N.W.2d 626 (1980)).

Here, Arkalon makes intent easy by admitting it intended for all the disputed items to be permanent:

> 67. Admit that all of the Disputed Items were installed, assembled, or constructed with the intent that they remain in place until they become worn out or obsolete.
>
> **ADMIT ____X_____ DENY _____**

In most cases, intent must be determined by objective evidence. *Total Petroleum*, 28 Kan. App.2d at 301; *Eaves*, 10 Kan. at 316. "[T]he focus in determining whether a property is a fixture is on the intention of the annexer as manifested by the objective, visible facts, rather than the annexer's subjective intent." 35A Am. Jur. 2d Fixtures § 14. "Intent is deduced by the court from all of the circumstances surrounding the installation of the purported fixture." *Id*.; *see also* K.S.A. 79-261(b)(2)(C) (listing several circumstances for consideration); 2018 Personal Property Guide, p. viii (For example, a lease or financing agreement may reveal intent).

To the extent they are relevant, the disputed items in this case also satisfy these objective considerations. All items were annexed by Arkalon, the owner. All most all of the items were annexed at the time of original construction and none have been removed after being placed in service. As noted above, all the items are firmly attached to the ground and interconnected in such a way that removal of any item would be exceedingly laborious and complicated, or would prevent the production of ethanol or its byproducts.

Furthermore, the initial mortgage on the financing of the Plant states that personal property, including, without limitation, all machinery "now or hereafter attached to, located at, or placed in the improvements on Land" shall "be deemed for the purposes of this Agreement fixtures and accessory to the freehold and a part of the realty and not severable in whole or in part without material injury to the Premises."

From every conceivable approach, beginning with taking Arkalon's word for it, the disputed items satisfy the intent test.

Arkalon will argue that some items may be removed and replaced with other identical functioning items purchased "off the shelf". The Kansas Supreme Court in *Morgan* clearly tell us that such facts alone are not controlling as to whether an item is fixture. *Morgan*, 42 Kan. at 29 ("There is scarcely any kind of machinery, however complex in character, or no matter how firmly held in its place, which may not with care be taken from its fastenings and moved without any serious injury to the structure where it may have been operated and to which it may have been attached. That the simple fact of annexation to the reality is not the sole and controlling test of whether a certain article is a

fixture or not . . .”). All fixtures are former chattels and those items or their components were purchased “off of the shelf.” *See Eaves v. Estes*, 10 Kan. 314, 316 (1872).

V.
MISCELLANEOUS

A. The *Total* Case (2000).

Total is widely cited by other Kansas cases and it is also mentioned in the applicable PVD Guides. *Total* involved the classification of property in an oil refinery. 28 Kan. App. 2d at 296. At the time of valuation, the oil refinery had been permanently shut down with no intent to reopen. *Id*. at 296. In fact, key components necessary to run the refinery had been removed. *Id*. Interestingly, the Court in *Total* noted that, while the refinery was still operational, the county appraised it using the PVD Guide and “[t]he guide allocated 90 percent of the calculated value of the refinery to real estate . . . and 10 percent to personal property.” *Id*. at 296. When the refinery permanently closed, the use to which the real estate had been dedicated changed, and the county categorized the remaining refinery property as personal because it “ceased to be of any value or usefulness to the land when the refinery closed down.” *Id*. at 301.

Another important point about *Total* is that the items in dispute were massive tanks that had not been removed. Those tanks were firmly attached to the land, not easily removable, and would need to be cut down a piece at a time. *Id*. at 297-298. The Court found there was substantial competent evidence supporting this Board’s decision that such tanks remained fixtures even after the oil refinery was shut down.

Arkalon attempts to turn the massive tanks in *Total* into a minimum threshold for satisfying the three-part test. To Arkalon, no equipment smaller or less attached than the massive tanks in *Total* can possibly satisfy the three-part test, or the decision conflicts with *Total*. But *Total* should not be read to establish a threshold. Of course size and attachment are factors to consider – which the Court rightly did. But nothing about *Total* establishes new minimum thresholds. Again, the three-part test must be applied anew on a case-by-case basis. *See Taylor v. Collins*, 51 Wis. 123, 128 (1881) (stating that, when applying the three-part test, the decisions of courts "are of very little use as authority, unless closely analogous in their facts," and citation to cases not so analogous "are worse than profitless, for they tend to confuse and embarrass rather than to enlighten and settle...").

The PVD Guide acknowledges the unique set of facts presented in *Total* (i.e., an oil refinery that ceased operations). 2018 Personal Property Guide, p. vii ("[T]his case illustrates a unique situation where the 3-part fixture law test was applied."). As previously mentioned, the Kansas Supreme Court in *Morgan* tells us that the extent of attachment of the tanks to the realty in *Total* is not required to satisfy the annexation or adaption factor of the three-part fixture law test. *Morgan*, 42 Kan. at 29. *See also In re Equalization Appeal of Coffeyville Res. Nitrogen Fertilizers, LLC*, No. 117,045, 2018 WL 4655648, *1 (Sep. 8, 2018) (two alternative ways to satisfy the adaptation factor).

B. K.S.A. 79-261 Must Be Strictly Construed Against Arkalon

Arkalon incorrectly asserts that K.S.A. 79-261 should be strictly construed in its favor. (Pretrial Order, p. 5). But the strict construction rule only applies to statutes that impose a tax. The Kansas Supreme Court explains it this way:

> When construing tax statutes, statutes that impose the tax are to be construed strictly in favor of the taxpayer. Tax exemption statutes, however, are to be construed strictly in favor of imposing the tax and against allowing the exemption for one who does not clearly qualify. *In re Tax Exemption Application of Central Illinois Public Services Co.*, 276 Kan. 612, 616, 78 P.3d 419 (2003).

K.S.A. 79-261 is intrinsically tied to K.S.A. 79-223. *See* K.S.A. 79-261(a)(1). Neither K.S.A. 79-223 nor K.S.A. 79-261 impose a tax. To the contrary, K.S.A. 79-223 is an exemption statute that exempts certain machinery and equipment from personal property tax. Therefore, K.S.A. 79-223 and, in turn, K.S.A. 79-261, should be strictly construed in favor of imposing the tax and against allowing the exemption, not the other way around. *In re Exemption Application of Central Illinois Public Services Co.*, 276 Kan. 612, 616, 78 P.3d 419 (2003).

C. This Court Must Consider BOTA's Full and Complete Opinion In This Case

Arkalon will argue BOTA's December 15, 2022 Full and Complete Opinion in this case is inadmissible because it is irrelevant, and it is irrelevant because this Court reviews the facts and the law de novo. Arkalon conflates the standard of review with the admissibility of evidence. The standard of review is undoubtedly de novo, but that does not somehow render BOTA's opinion inadmissible.

First, BOTA's opinion is relevant. All relevant evidence is admissible. K.S.A. 60-407(f). Evidence is relevant if it has any tendency in reason to prove any material fact. K.S.A. 60-401(b). Here, the disputed evidence is the opinion of the State's specialized agency that exists to decide taxation issues and is considered to be the paramount taxing authority in Kansas. That opinion is the product of a week-long trial in which the parties

presented the exact same evidence and applied the exact same law that will be presented to this Court at trial. While not binding on this Court, the opinion is certainly relevant.

Second, the parties have stipulated to the admissibility of all BOTA decisions. (Pretrial Order, p. 15). Certainly no BOTA decision is more relevant or more persuasive than the one issued in this case.

Third, Arkalon's experts will testify that they reached their opinions in this matter, in part, on their review of the record created before BOTA in this case, including transcripts of the BOTA hearing. Both of Arkalon's expert reports discuss previous BOTA decisions, such as those preceding the opinions in *In re Equalization Appeal of Coffeyville Res. Nitrogen Fertilizers, LLC*, No. 117,045, 2018 WL 4655648, *1 (Sep. 8, 2018) ["*Coffeyville II*"] and *Dodge City Coop. Exch. v. Bd. Of Cnty. Comm'rs*, 62 Kan. App. 2d 391, 516 P.3d 615 (2022). Crown's report shows it considered "a number" of BOTA opinions, which "may be used as persuasive authority but aren't legally binding."

Third, reviewing courts consider BOTA decisions on appeal under K.S.A. 74-2426(c)(4)(B). *See FreeState Electric Coop., Inc., et al. v. Kan. Dept. of Rev., Div. of Property Valuation*, No. 126,642, 2024 WL 3997329 (Aug. 30, 2024 Kan.) (scouring the record before BOTA); *and In re Equalization Appeal of Coffeyville Res. Nitrogen Fertilizers, LLC*, No. 117,045, 2018 WL 4655648, *1 (Sep. 8, 2018) ["*Coffeyville II*"] (reciting BOTA's opinions).

Fourth, not only is BOTA's decision relevant and persuasive, but this Court ***must*** take it into consideration. For trial de novo proceedings on appeal under K.S.A. 74-2426(c)(4)(B), the District Court is limited to the issues raised with BOTA. *FreeState*

Electric, No. 126,642 at *18. If there is a dispute about what issues were raised, the agency record controls. *Id. citing Sierra Club v. Mosier*, 305 Kan. 1090, 1123-24, 391 P.3d 667 (2017) ("The entire concept of judicial review contemplates that an agency must have had an adequate opportunity to consider the merits of an issue."); *Kingsley v. Kansas Dept. of Revenue*, 288 Kan. 390, 411-42, 204 P.3d 562 (2009) ("[A] district court may only review those issues litigated at the administrative level.").

D. Depositions Pursuant to K.S.A. 60-230(b)(6)

Arkalon has signaled that, at trial, it will attempt to retreat from some of the binding deposition testimony its designees provided in this case. A brief recitation on the law applicable to depositions conducted pursuant to K.S.A. 60-230(b)(6) is therefore beneficial.

In discussing the federal provision identical to K.S.A. 60-230(b)(6),[7] the United States District Court for the District of Kansas has stated that a corporation receiving a notice of this sort is:

> obligated to prepare (the witness) to provide complete, knowledgeable, and ***binding*** answers. . . .
>
> (The witness's) testimony, offered as the representative voice of the corporation, "is not simply . . . about matters within [the designee's] own personal knowledge," but goes to "matters to which the corporation has reasonable access." . . . Such testimony on behalf of a corporation necessarily implicates "subjective beliefs and opinions," *Taylor*, 166 F.R.D. 356 at 361 (additional citation omitted), including the corporation's "interpretation of documents and events." *Id*. (additional citation omitted). As the *Taylor* court states: "The designee, in essence, represents the corporation just as an individual represents him or herself at a deposition." *Id.*

[7]The federal counterpart to K.S.A. 60-230(b)(6) is Fed. R. Civ. P. 30(b)(6). As stated in *In re Estate of Fechner*, 56 Kan. App. 2d 519, 527, 432 P.3d 93 (2018), "our civil-procedure rules are based on the parallel Federal Rules of Civil Procedure, so caselaw from federal courts is especially persuasive when interpreting our rules."

Media Services Group, Inc. v. Lesso, Inc., 45 F. Supp. 2d 1237, 1253 (D. Kan. 1999) (emphasis added) (citing *United States v. Taylor*, 166 F.R.D. 356 (M.D.N.C. 1995), *order adopted*, 166 F.R.D. 367 (M.D.N.C. 1996)). *See also Coltrane v. Crawford County Board of Comm'rs*, No. 14-2164-JWL, 2015 WL 4496289, at *2 (D. Kan. July 23, 2015) ("A Rule 30(b)(6) deposition, however, is binding on the corporation and requires the deposed to be prepped and informed on matters relating to relevant questions of the corporation."); *Rainey v. American Forest and Paper Association, Inc.*, 26 F. Supp. 2d 82, 94-96 (D.D.C. 1998) (purpose of Rule 30(b)(6) is to force corporation to be bound by testimony of designated witness and to "prevent a corporate defendant from thwarting inquiries during discovery, then staging an ambush during a later stage of the case").

The requirements of a corporation under Rule 30(b)(6) "may be onerous, [but] the burden upon such a responding entity is justified since a corporation can only act through its employees." *EEOC v. Thorman & Wright Corp.*, 243 F.R.D. 421, 426 (D. Kan. 2007). The rule "negates any possibility that an inquiring party will be directed back and forth from one corporate representative to another, vainly searching for a deponent who is able to provide a response which would be binding upon that corporation." *Id.* Any other interpretation of the Rule "would allow the responding corporation to 'sandbag' the deposition process." *Id.*

E. Requests for Admissions

It is also important to note the binding nature of admissions made under K.S.A. 60-236. "A matter admitted under this section is ***conclusively established*** unless the court, on

motion, permits the admissions to be withdrawn or amended." K.S.A. 60-236(b)(emphasis added). Arkalon has not filed a motion seeking to withdraw or amend any of its admissions. Thus, the admitted RFAs are akin to stipulations for use at trial:

> In form and substance a Rule 36 admission is comparable to an admission in pleadings or a stipulation drafted by counsel for use at trial, rather than to an evidentiary admission of a party. Unless the party securing an admission can depend on its binding effect, he cannot safely avoid the expense of preparing to prove the very matters on which he has secured the admission, and the purpose of the rule is defeated.

Fed. R. Civ. P. 36 Advisory Committee's Note to 1970 amendment.[8]

CONCLUSION

Real property includes fixtures. Considering all the circumstances for each of the disputed items, taking into consideration the designated use and purpose of each item, the use to which the real estate is devoted, and the application of the three-part fixture law test in a fashion consistent with longstanding Kansas case law as codified in K.S.A. 79-261, all the disputed items have lost their character as personal property and have become fixtures. Therefore, all were properly classified as real property by the County for ad valorem tax purposes. The Court should make a determination upholding the County's assessment.

FLEESON, GOOING, COULSON & KITCH, L.L.C.

By **/s/ T. Chet Compton**
T. Chet Compton, S.C. # 26811
John R. Gerdes, S.C. # 14358
Attorneys for Board of County Commissioners of Seward County, Kansas

[8]FRCP 36 is the federal counterpart to K.S.A. 60-236.

CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2024, I submitted the foregoing Motion to the Clerk of the Court for filing through the eFlex system, which will provide service to all counsel of record in this case.

/s/ T. Chet Compton
T. Chet Compton

APPLICATION OF THE THREE-PART TEST GENERALLY

It 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. […] It 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.

- ***T. & S. F. R. Co. v. Morgan*, 42 Kan. 23, 27-28, 21 P. 809, 811 (1889)**

We come now to the consideration of the principal question in this case: Was the property in controversy real or personal property? We find it difficult, if not impossible, to state an entirely satisfactory rule which apply to all cases involving questions of this character. The term "fixtures" has been used by so many writers in such various senses and this ambiguity so often followed in adjudicated cases, that "there is inextricable confusion both in the text-books and adjudged cases as to what is such an annexation of chattels to realty as to make them part of, and pass by transfer of, the realty." The only clear thing in the midst of the darkness is, that each particular case must depend for solution upon its particular facts, and not upon any unrelaxing rule of law.

- ***Cook v. Condon*, 6 Kan. App. 574, 51 P. 587, 589 (1897)**

Most modern authorities recognize the practical difficulties in formulating a comprehensive principle for determining what are fixtures, and hold that the determination can only be made from a consideration of all the individual facts and circumstances attending the particular case.
Clearly, it would be impossible for a layman to apply the tests set forth in *Water Co. v. Irrigation Co.*, supra, with any degree of certainty. This is especially true when we consider that one portion of the test is concerned with the intention of the parties.

- **Kansas City Millwright Co., Inc. v. Kalb, 221 Kan. 658, 664, 562 P.2d 65 (1977) (internal quotations omitted).**

The difficulty in such cases is not in the ***rules*** to be adopted by which the question is to be determined, but in the application of correct rules to the ***facts*** of a given case. The decisions of courts, in the application of these rules to the facts of different cases, are as diverse and apparently as conflicting as the diversity and peculiarity of the facts themselves; and such decisions are of very little use as authority, unless closely analogous in their facts to the case under consideration; and such cases are extremely rare. The citation and examination of numerous cases, not so analogous, are worse than profitless, for they tend to confuse and embarrass rather than to enlighten and settle the judgment.

- ***Taylor v. Collins*, 51 Wis. 123, 128 (1881) (emphasis in original)**

On the question whether such machines so situated are fixtures, so that they constitute a part of the real estate, the authorities are so far from being uniform that no rule of universal application can be deduced from them, without conflicting with the doctrines found in some of the decisions upon the subject.

- ***Ottumwa Woolen Mill Co. v. Hawley*, 44 Iowa 57 (1876)**

And the attempt to establish the whole doctrine of fixtures upon these exceptions to the general rule, has occasioned much confusion and misunderstanding on this subject.
***
The great difficulty which has always perplexed investigation upon this subject, has been the want of some certain, settled and unvarying standard, by which it could be determined what amounts to a fixture, or what connexion with the land will deprive a chattel of its peculiar legal qualities as such, and make it accessory to the freehold.

- ***Teaff v. Hewitt*, 1 Ohio St. 511, 525-26 (1853)**

ADAPTATION

It can readily be seen 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.

- ***T. & S. F. R. Co. v. Morgan*, 42 Kan. 23, 29, 21 P. 809, 811 (1889)**

…this property was all necessary to the operation of the mill; that spouts and elevator buckets were properly fitted to said machinery, and attached to the floors of the building, both above and below, and all connected with the motive power by belts and pulleys, thus making the above–described machinery, with other machinery in the mill, one complete system; that said machinery was large and heavy, separate articles weighing 3,000 pounds and more, and was all attached in some manner, either by screws, bolts, cleats, braces, or pulleys, and belts to the building.

- ***Cook v. Condon*, 6 Kan. App. 574, 51 P. 587, 590 (1897)(internal quotations omitted)**

Appellants persist…citing authority for the proposition that machinery attached to a building must be considered a part of the real estate. See *Jackson v. State of New York*…where it was stated: 'Severed from the building, such machinery commands only the prices of second-hand articles; attached to a going plant, it may produce an enhancement of value as great as it did when new.' This case is also easily distinguishable. ***There the machinery was a part of the manufacturing plant system specially adapted to the particular process and in a sense attached to the realty.*** Here, the tank had none of those characteristics and is as usable at another location as on the land in question.

- ***U.S.D. No. 464 v. Porter*, 234 Kan. 690 (1984) (emphasis added)**

What adaptation and connection would a water-works system with four-inch pipe have to the ordinary use of a piece of agricultural land.

- ***Water Co. v. Irrigation Co.*, 64 Kan. 247, 253, 67 Pac. 462 (1902)**

Nearly all improvements to real property may be salvaged to a certain extent. A house may be uninhabitable, but still have salvage value in the wood and fixtures. Merely because a fixture is no longer useable for its intended purpose, but may have some salvage value, does not warrant classifying the fixture as personal property.

- **In the Equalization Appeals of Total Petroleum, Inc.*, 28 Kan. App. 2d 295, 298, 16 P.3d 981 (2000*)**

Whether fast or loose, therefore, all the machinery of a manufactory which is necessary to constitute it, and without which it would not be a manufactory at all, must pass for a part of the freehold.

- ***Voorhis v. Freeman*, 2 Watts & Serg. 116, 119 (Pa. 1841)**

…adaptation to the ***business*** carried on in the building is not a criterion for determining the question as to whether the machinery be real or personal property.
***
The second requisite, being application to the use or purpose to which that part of the realty with which it is connected is appropriated, is in this case fully met by the use of this machinery in a woolen mill, and without which the mill itself would be useless.

- ***Ottumwa Woolen Mill Co. v. Hawley*, 44 Iowa 57, 61, 63 (1876) (emphasis in original)**

The focus of the inquiry regarding adaptation is on the nature of the real estate involved and the degree to which the chattel has been adapted to the use or purpose of the realty to which it becomes attached. […] Items of personal property are uniquely adapted to the real estate if they contribute to the purposes of the realty in the sense that they are necessary or useful for the proper operation or utilization of the realty.
[…]
If it is difficult to think of the realty continuing to be used for its present purposes without the chattel in place it is likely courts will consider the chattel a fixture.

- **8 Powell on Real Property § 57.05 (2024)**

Modern times have been fruitful of inventions and improvements, for the more secure and comfortable use of buildings, as well as of many other things which administer to the enjoyment of life. Venetian blinds, which admit the air and exclude the sun, whenever it is desirable so to do, are of modern use; so are lightning rods, which have now become common in this country and in Europe. These might be removed from buildings without damage; yet, as suited and adapted to the buildings upon which they are placed, and as incident thereto, they are doubtless part of the inheritance, and would pass by deed as appertaining to the realty.

But the genius and enterprise of the last half century has been in nothing more remarkable than in the employment of some of the great agents of nature, by means of machinery, to an infinite variety of purposes, for the saving of human labor. Hence, there has arisen in our country a multitude of establishments for working in cotton, wool, wood, iron and marble; some under the denomination of mills and others of factories, propelled generally by water-power, but sometimes by steam. These establishments have, in many instances, perhaps in most, acquired a general name, which is understood to embrace all their essential parts; not only the building which shelters, incloses and secures the machinery, but the machinery itself. Much of it might be easily detached, without injury to the remaining parts, or the building, but it would be a very narrow

construction, which should exclude it from passing by the general name by which the establishment is known, whether of mill or factory.

If you exclude such parts of the machinery as may be detached without injury to the other parts, or to the building, you leave it mutilated and incomplete, and insufficient to perform its intended operations.

- ***Walker v. Sherman*, 20 Wend. 636, 647-48 (N.Y. 1839)**

ANNEXATION:

And between these two extremes there are infinite degrees and modes of attachment and connection of various things with the soil. Where the connection is slight, property is often considered personal property; whereas, if the connection were close and intimate it would be considered real estate. But the other facts have a controlling influence in determining whether a given thing is a part of the realty or not. A key to the door of a house is a fixture, and a part of the realty, although at the time it may not be at or near the premises to which it belongs.

- ***Shoemaker v. Simpson*, 16 Kan. 43, 49–50 (1876)**

Then, again, this pipe was laid along proposed streets, and evidently as a component part of the waterworks system, and to supply water to those who should purchase and live upon the lots fronting those streets, and was not an appurtenance to farming or agricultural lands. It had in it, at street crossings, cross sections or T's for the purpose of attaching such other water pipes as might be needed in extending the system. It was not attached to the land in which it was placed, so that its removal would interfere with the practical use of the land, or in any way injure it for agricultural purposes.

- ***Water Co. v. Irrigation Co.*, 64 Kan. 247, 252, 67 Pac. 462 (1902)**

…said property was all necessary to the operation of the mill; that spouts and elevator buckets were properly fitted to said machinery, and attached to the floors of the building, both above and below, and all connected with the motive power by belts and pulleys, thus making the above–described machinery, with other machinery in the mill, one complete system; that said machinery was large and heavy, separate articles weighing 3,000 pounds and more, and was all attached in some manner, either by screws, bolts, cleats, braces, or pulleys, and belts to the building.

- ***Cook v. Condon*, 6 Kan. App. 574, 51 P. 587, 590 (1897) (internal quotations omitted)**

Appellants persist…citing authority for the proposition that machinery attached to a building must be considered a part of the real estate. See *Jackson v. State of New York*…where it was stated: 'Severed from the building, such machinery commands only the prices of second-hand articles; attached to a going plant, it may produce an enhancement of value as great as it did when new.' This case is also easily distinguishable. There the machinery was a part of the manufacturing plant system specially adapted to the particular process and in a sense attached to the realty. Here, the tank had none of those characteristics and is as usable at another location as on the land in question.

- ***U.S.D. No. 464 v. Porter,* 234 Kan. 690 (1984)**

There is scarcely any kind of machinery, however complex in its character, or no matter how firmly held in its place, which may not with care be taken from its fastenings, and moved without any serious injury to the structure where it may have been operated, and to which it may have been attached. That the simple fact of annexation to the realty is not the sole and controlling test, of whether a certain article is a fixture or not, is very well illustrated by the fact that trees growing in a nursery, and kept there for sale, are personal property, while trees no larger, if transplanted to an orchard, became real estate. On the other hand, there are very many things although not attached to the realty, which become real property by their use,—keys to a house, blinds and shutters to the windows, fences and fence–rails, etc.

- ***Morgan, 42 Kan. 23, 21 P. 809 (1889)***

For the purpose of determining whether an object is a fixture, constructive 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.

- **35A Am. Jur. 2d. Fixtures Section 10**

Many authorities hold that any and all machinery essential to the proper functioning of a plant, mill, or similar manufactory is a fixture, or is presumed to be regardless of the manner by which it is annexed to the realty. Accordingly, an unattached object may be a fixture under this rule if it is an essential and indispensable functioning part of an industrial establishment.

- **35A Am. Jur. 2d. Fixtures Section 71**

Originally, the primary factor in classifying a chattel as a fixture was physical annexation of the item to the realty. This natural test, considered as a requirement in early English cases, grew out of the doctrine that anything attached to the soil became a part of the soil. Today, annexation remains one of the easier factors to identify in determining the intent of the affixing party. But annexation is no longer an absolute necessity. Many courts are willing to find there has been a sufficient constructive annexation even though actual physical attachment is not present.

- **8 Powell on Real Property § 57.05 (2024)**

Take for instance a manufacturing establishment. The building is constructed to receive the various machines necessary for carding wool, spinning yarn, weaving and dressing cloth, and this business is carried on in the building. One machine is so light, or its motion so violent, that it must be steadied by some fastening to the floor; the next is heavy enough to keep in place by its own weight. Now there is no reason in saying that one machine will, and the other will not, pass with the freehold. Both are essential to the same business, one is useless without the other, and both are in the mind of the purchaser when he buys the establishment. It seems absurd to say that, to be sure of getting all the machinery, he must nail it down to the floor, when perhaps fifty men could not start it a hair. The purpose for which the thing was constructed, and the manner in which it was

enjoyed in connection with the freehold, should determine whether it is real of personal estate

- ***Minn. Co. v. St. Paul Co*., 69 U.S. 609, 646-647 (1865); *see also id.* at p. 648 (calling the necessity of fastening a "senseless fiction…done away with")**

An alleged fixture's connection with the land is essential in determining whether it is real or personal property. […] The need to consider the property as a whole is implicitly recognized in Kansas's three-part test.

- ***Farmland Indus. v. Alliance Process Partners, LLC*, 298 B.R. 382, fn. 6 (Bankr. W.D. Mo. 2003)**

And it seems to have been settled, that in general, whatever has been in any way annexed to the freehold, for the benefit of the inheritance, and is necessary to its enjoyment, shall go to the heir.
***
When land is sold and conveyed, manure lying about a barn upon the land, will pass to the grantee, as an incident to the land…

- ***Kittredge v. Woods*, 3 N.H. 503, 503-04 (1826)**

…the simple criterion of physical attachment is so limited in its range, and so productive of contradiction even in regard to fixtures in dwellings to which it was adapted before England had become a manufacturing country, that it will answer for nothing else.
[…]
By the mere force of habit, they have adhered to it in almost all cases after it has ceased to be a guide in any but a few; for nothing but a passive regard for old notions could have led them to treat machinery as personal property when it was palpably an integrant part of a manufactory or a mill, merely because it might be unscrewed or unstrapped, taken to pieces, and removed without injury to the building. It would be difficult to point out any sort of machinery, however complex in its structure, or by what means soever held in its place, which might not with care and trouble be taken to pieces and removed in the same way, and the greater or less facility with which it could be done, would be too vague a thing to serve for a test. […] It would allow the stones, hoppers, bolts, meal-chests, skreens, scales, weights, elevators, hopper-boys, and running gears of a grist-mill, as well as the hammers and bellows of a forge, and parts of many other buildings erected for manufactories, to be put into the class of personal property, when it would be palpably absurd to consider them such.
[…]
Thus cleared of its exceptions, the rule of physical annexation, though at best a narrow one, might furnish a criterion of universal application, though without them, it would make havoc of the cases already decided, and indeed produce the most absurd consequences by stripping houses of their window-shutters and doors, and farms of the houses themselves.

- ***Voorhis v. Freeman*, 2 Watts & Serg. 116, 118-119 (Pa. 1841)**

It cannot be denied, that the physical attachment of certain articles to the freehold, is a very uncertain and unsatisfactory criterion. We have seen, that it is well settled, that the same attachment will not change the character of the article, when made under one species of tenancy, when under another, with much less of a permanent connexion, it will cause the article to become a part of the real estate. Millstones, the gear of the mill, and the water-wheel to which the power is applied, and the articles connected, which are universally conceded to be fixtures, and to pass with the realty, may be taken from their appropriate places, without the withdrawing of a spike, a pin, or a nail, or the displacement of a cleat, their own weight often keeping them in their intended position, and no injury whatever arise to the building from which they are taken.

- ***Parsons v. Copeland*, 38 Me. 337, 544-45 (1854)**

As to the annexation prong of the three-part test, "…in our opinion the only value to be attached to it is, in determining the intention of the owner of the freehold in making the annexation. If it be so affixed that its removal would materially injure the building, this is evidence of an intention to make it a permanent annexation.

- ***Ottumwa Woolen Mill Co. v. Hawley*, 44 Iowa 57 (1876) (emphasis in original)**

In some cases it has been determined, that in order to constitute a fixture, the article should be so united by physical annexation to the land or to some substance previously belonging thereto, that it cannot be detached without injury to the property; while in other cases, articles have been determined to be fixtures, and as such to pass by a conveyance of the freehold, with but a slight attachment to the realty and in some instances, without any actual but by simply a constructive attachment.
***
Mill stones in a mill, and even the water-wheel, and a great variety of other articles well established by authority and universally admitted to be fixtures, may often be removed without any actual injury to the structure or building, by the act of removal. Fences, which are undeniably fixtures, and so admitted by all the authorities referring to them, although actually annexed to, and in connection with the land, are yet not let into the ground or fastened to any thing which is embedded into the earth. The doors, windows, window-shutters, &c., of a mansion house, may be raised and removed without any actual or physical injury either to the building or the article removed; so, also, in a mill, with the mill-stones, hoppers and bolting apparatus, as usually fixed in a mill; yet it has never been questioned that these articles are fixtures.

- ***Teaff v. Hewitt*, 1 Ohio St. 511, 523-24, 528 (1853)**

Appellants persist…citing authority for the proposition that machinery attached to a building must be considered a part of the real estate. See *Jackson v. State of New York*…where it was stated: 'Severed from the building, such machinery commands only the prices of second-hand articles; attached to a going plant, it may produce an enhancement of value as great as it did when new.' This case is also easily distinguishable. ***There the machinery was a part of the manufacturing plant system specially adapted to the particular process and in a sense attached to the realty.*** Here, the tank had none of those characteristics and is as usable at another location as on the land in question.

- ***U.S.D. No. 464 v. Porter*, 234 Kan. 690 (1984) (emphasis added)**

INTENT:

Clearly, it would be impossible for a layman to apply the [three-part test] with any degree of certainty. This is especially true when we consider that one portion of the test is concerned with the intention of the parties.

- ***Kansas City Millwright Co. v. Kalb*, 221 Kan. 658, 664, 562 P.2d 65, 70, *modified*, 221 Kan. 752, 564 P.2d 1280 (1977)**

'Permanent' should not be taken to mean in perpetuity. *See Kansas City Millwright*, 221 Kan. at 664 (stating that permanency is a matter of degree based on facts and circumstances of the particular case). Permanency may be found if the property in question was intended to remain in place until it wore out or became functionally or economically obsolete.

- ***In re East KS Agri Energy*, Docket No. 2016-4735-EQ (internal citation omitted)**

We have said the facts prove that the Mill Company intended to make the machinery a permanent improvement and part of the mill property. This is clearly shown by the fact that the mortgage by its terms, included the "mill", which by every known definition, when used as here, includes the machinery.

- ***Cook v. Condon*, 6 Kan. App. 574, 583, 51 P. 587, 589 (1897)**

The third requisite, being the intention of the party making the annexation to make a permanent accession to the freehold, is to our minds the controlling consideration in determining the whole question. The character of the physical attachment, whether slight or otherwise, and the use, are mainly important in determining the intention of the party making the annexation.

- ***Ottumwa Woolen Mill Co. v. Hawley*, 44 Iowa 57 (1876) (emphasis in original)**

A thing may be as firmly affixed to the land by gravitation as by clamps or cement. Its character may depend much upon the object of its erection. Its destination, the intention of the person making the erection, often exercises a controlling influence; and its connection with the land is looked at principally for the purpose of ascertaining whether that intent was that the thing in question should retain its original chattel character, or whether it was designed to make it a permanent accession to the lands.

- ***Minn. Co. v. St. Paul Co.*, 69 U.S. 609, 647 (1865) (internal quotations removed)**

Intent is now the principal and most important factor to consider in defining a fixture.25 The other two factors are examined but usually for the purpose of assisting the court in establishing intent.

- **8 Powell on Real Property § 57.05 (2024)**

EXAMPLES OF REAL PROPERTY

If a **billiard table** were fastened to the floor so as to be conceded a fixture, would not the balls and cues pass also? A **bucket** in a well may be detached, and it is movable, running from top to bottom of the well, yet it is a fixture by common consent. A **shuttle in a loom** is thrown from place to place by the motive power of the machinery, yet it is an essential part of the machine. It is not inconceivable that **rails and cars** might be so constructed as that the car should be held upon the rail by certain material contrivances, and yet be propelled from one station to another; from one end of the road to another, by steam power. In such a case none would doubt that the cars were a fixture. Can it be said that the manner of accommodating and adjusting the cars to the rails can make any difference? The railroad, like **a complicated machine**, consists of a great number of parts, a combined action of which is essential to produce revenue. And as well might a creditor claim the right to levy on and abstract some essential part from Woodworth's **planing machine**, or any other combination of machinery, as to take from a railroad its locomotive and passenger cars. Such an obstruction would cause the operations to cease in both cases.

- ***Minn. Co. v. St. Paul Co.,* 69 U.S. 609, 648 (1865) (internal quotations removed) (emphasis added to show examples)**

If an item is particularly suited to the use of the land or building where it is located so that it would largely lose its value and usefulness if it were removed, then it will probably be viewed as a fixture. Examples of this category are **ornaments, statues or decorations** which are part of the unique architectural design of a building. Thus, even though a decorative statue or fountain may not in fact be attached to the realty, the fact that a specific building design or feature has been prepared for the item usually is sufficient to make the item a fixture. On the other hand, if the items are merely ornaments or decorations that could be taken down and used in other settings without harming the real property's dedicated use, the fact that they are unattached will probably prevent them from being considered as fixtures. These principles can be seen in court decisions where **theater seats** were found necessary for the operation of the theater building and were thus deemed fixtures and a **church pipe organ** was similarly found to be a fixture as it was a necessary and integral part of the church and the ceremonies conducted in the church.

- **8 Powell on Real Property § 57.05 (2024) (emphasis added to show examples)**

REPLACEMENTS/EXTRAS:

Some two or three of these rolls, however, were duplicates; but all of them had, at one time or another, been in actual operation, and it is impossible to say which were the proper members of the set, and which the supernumeraries. But even if that could be told, all might nevertheless be deemed a part of the mill, seeing that they are often broken and cannot be instantly replaced if they are not kept ready on hand. Duplicates necessary and proper for an emergency, consequently follow the realty on the principle by which duplicate keys of a banking-house, or the toll-dishes of a mill, follow it. Some two or three of these rolls, however, were duplicates; but all of them had, at one time or another, been in actual operation, and it is impossible to say which were the proper members of the set, and which the supernumeraries. But even if that could be told, all might nevertheless be deemed a part of the mill, seeing that they are often broken and cannot be instantly replaced.

- ***Voorhis v. Freeman*, 2 Watts & Serg. 116, 120 (Pa. 1841)**

Conversely, if an item is an unattached but essential part of a machine it may nonetheless be deemed constructively a fixture if the machine itself is a fixture. If the item's sole purpose is to be fitted into or integrated into a machine at certain times, then it will be considered a fixture even though it is not permanently attached.

- **8 Powell on Real Property § 57.05 (2024)**

Temporary Removal for Repairs or Storage Does Not Destroy Fixture Status.

- ***8 Powell on Real Property § 57.05 (2024) citing Roderick v. Sanborn*, 106 Me. 159 (1909)** (finding storm windows and storm doors that were removed in the spring of each year and stored until the next winter were fixtures because "[a] chattel need not be absolutely necessary to the completeness of the dwelling house if obviously adapted and intended to be used with it"); ***Max Drill v. United States*, 427 F.2d 1233 (Ct. Cl. 1970)** (finding storm windows for seasonal use were realty); and ***Wadleigh v. Janvrin*, 41 N.H. 503, 77 Am Dec. 780 (1860)** (a cedar mill, removed during the summer months to prevent rotting, and timbers in a cow stable removed for repair, passed with the realty).

CONCLUSIONS:

It being conceded by all the cases that the engine, boiler and attachments, being the motive power, are fixtures, and that the stones or burrs of a grist mill, with the attachments, are likewise fixtures, it is not easy to understand why any dividing line should be made at the point where the belting attaches to the other machinery. Is there anything in the whole record of this case tending to show that the machinery in question was intended to be any less permanent than the engine, shafting or belt? The fair presumption is, that the whole machinery, including that now in question, was placed in the building with the intention that they should remain there as part of the manufactory until worn out or displaced by others. This assumption is as strong and controlling as to the carding machines, spinning jacks, etc., as it is as to the engine, shafting and belts. Our conclusion is, that all of the machinery which was propelled by the engine was part of the real estate, and passed with the foreclosure and sheriff's deed.

- ***Ottumwa Woolen Mill Co. v. Hawley,* 44 Iowa 57 (1876) (emphasis in original)**