Court: Supreme Court

Case Number: 122499

Case Title: DODGE CITY COOPERATIVE EXCHANGE, APPELLEE,
V.
BOARD OF COUNTY COMMISSIONERS
OF GRAY COUNTY, KANSAS, APPELLANT.

Type: Petition for Review (re: opinion) by Aplt/X-Aple, Bd of Co Comms of Gray

Considered by the Court and denied.

SO ORDERED.

/s/ Marla J. Luckert, Chief Justice

No. 20-122499

IN THE
SUPREME COURT OF THE
STATE OF KANSAS

DODGE CITY COOPERATIVE EXCHANGE,
Appellee/ Cross-Appellant,

vs.
BOARD OF COUNTY COMMISSIONERS OF
GRAY COUNTY, KANSAS,
Appellant/Cross-Appellee

PETITION FOR REVIEW

Appeal from the Court of Appeals
of the State of Kansas
Memorandum Opinion No. 122, 499
District Court of Gray County, Kansas
Honorable Van Z. Hampton, Judge
District Court Case No. 15 CV 18

/s/ Curtis E. Campbell
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PETITION FOR REVIEW

I. PRAYER FOR REVIEW

The Board of County Commissioners of Gray County, Kansas (County) by and through County Counselor Curtis E. Campbell and Assistant County Counselors Sunny A. Schroeder and Michael Giardine, respectfully requests that the Court grant this petition for review pursuant to Supreme Court Rule 8.03 and reconsider the decision of the Court of Appeals upholding the District Courts decision that the County bore the burden of proof in a trial de novo to show the correctness of its taxing classification and upholding the district courts determination that various pieces of equipment attached to the elevator were fixtures. The Court of Appeals decision to vacate the District Courts prospective judgement regarding tax years after 2014 was agreed to have gone beyond the scope of the Dodge City Cooperative Exchange (Co-op) petition for judicial review. As such the county is not asking for this portion to be reviewed.

For relief, the County requests that this Court find that the Court of Appeals' and the District Court's determination that the County bore the burden to show its taxing classification is improper as it is in direct conflict with the court's ruling in the *Matter of Prairie Tree, L.L.C.*, 434 P.3d 240 (2019) (unpublished)[1] and ignores every direction of the Kansas Judicial Review Act (KJRA). Additionally, the County requests that this Court find that the Court of Appeals and the District Court should have viewed the record

[1] This cited case is an unpublished decision of the Kansas Court of Appeals. Pursuant to Kansas Supreme Court Rule 7.04(g)(2)(A), the decision "is not binding precedent..." but may be cited if the opinion "has persuasive value with respect to a material issue not addressed in a published opinion of a Kansas appellate court; and would assist the court in the disposition of the issue..." Kansas Supreme Court Rule 7.04(g)(2)(B).

as a whole to determine whether various pieces of equipment were fixtures and given deference to Board of Tax Appeals (BOTA).

The County respectfully requests, that it be remanded to BOTA to apply the standard of proof identified in the Court of Appeals decision when dealing with matters of classification. In the alternative, this matter should be remanded to the District Court with directions that the aggrieved party asserting invalidity of the classification bears the burden of proof. The District Court should also be directed to view the record as a whole, considering the uncontroverted testimony of Fred Norwood establishing that though the equipment could be easily removed ; the facility would not function without it, when applying the three-prong test to determine if the various pieces of equipment are fixtures.

The relief requested is warranted for the following reasons:

First, the Court of Appeals determined that the distinction between real and personal property is a classification issue rather than an exemption. The Court of Appeals has now created a conflict in this instant ruling that is likely to cause confusion for similar matters down the road. In *Prairie Tree*, the Court of Appeals determined that that County bore the burden of proof before BOTA. However, the burden of proving the invalidity of BOTA's actions on appeal is on the party asserting the invalidity of the classification. *Id.*

Second, the Court of Appeals' and District Courts' standard of review when using the three-prong test was improper as *Matter of Walmart Stores, Inc.*, 61 Kan. App 2d 154, 513 P.3d 457 (2022), held that a reviewing court must determine whether the evidence

supporting the agency's factual findings is substantial when considered 'in light of the record as a whole.'

Finally, the District Court and Court of Appeals should have given deference to BOTA as the recent *Matter of Walmart Stores* decision suggests, that BOTA is the best tribunal to determine factual issues involving classification as it is a board specifically designed to hear matters involving ad valorem taxes.

This case presents an issue of public importance and consequence because it impacts all taxing authorities in Kansas governing grain elevators. Additionally, it is an issue likely to reoccur that is in need of immediate resolution by this Court. The Property Valuation Divisions (PVD) will be forced to rewrite its long-accepted grain elevator valuation manual and will have to draw a hard line between fixtures and non-fixture real property. If permitted to stand this ruling will open the floodgates to litigation as many reported sales do not currently have a distinction drawn. It is vitally important that taxing authorities are able to classify the various pieces of equipment utilized by the co-op as fixtures where they will be subject to taxation. Not classifying the equipment as fixtures and placing the burden on the County to show the correctness of its taxation classification will create serious consequences for taxing authorities throughout the state of Kansas. If the equipment is able to be classified as personal property, exempt from taxation, taxing authorities across the state will be forced to shift the tax burden or sustain a significant deficit.

II. COURT OF APPEALS DECISION

The County seeks a review of a decision of the Court of Appeals dated July 22, 2022, a copy of which is attached as Appendix A. A copy of the District Courts order dated November 6, 2018, is attached as Appendix B. A copy of BOTA's final order file stamped February 13, 2020, is attached as Appendix C.

III. STATEMENT OF ISSUES

1. Whether the burden of proof assigned at the BOTA level continues or shifts to the taxing authority at the District Court level.

2. Whether the proper standard of review at trial de novo includes the record as a whole (including BOTA's full record).

3. Whether BOTA's determination should be given deference in matters of classification appealed to the District Court.

IV. SHORT STATEMENT OF RELEVANT FACTS

The County believes certain facts omitted from the Court of Appeals decision will assist the Court's review of the above stated issues.

When reviewing the three-prong fixture test the co-op's witness, Fred Norwood of Norwood & Co., revealed that based on his 20 plus years' experience in building and designing grain elevators, he built grain storage bins with the anticipation that the various pieces of attached equipment would only be removed in the event it needed to be repaired, replaced, or upgraded. [R. Vol 1, Brief in Support of Proposed Findings of Fact and Conclusions of Law of Gray County, Kansas, p.90]. Further Mr. Norwood stated

definitely that, without the various pieces of equipment at issue, the purpose of the facility will fail. [R. Vol. I, Journal Entry and Order Regarding Trial De Novo, p. 106].

V. ARUGUMENT AND AUTHORITIES

A. Introduction

The issues raised in this appeal are issues of first impression. They are matters of public importance and consequence that significantly impact any jurisdiction where a grain elevator is located. It also forces the Counties to make a significant tax burden shift or suffer a substantial deficit. If permitted to stand, PVD will be required to rewrite its grain elevator valuation manual opening the doors to litigation. The issues at hand require analysis from this Court because they are issues of law and are not dependent on evidentiary or disputed facts. Additionally, the Court of Appeals appears to have made conflicting rulings when identifying who bears the burden of proof at both administrative and judicial levels including the District Court and Appeals therefrom.

A judicial review from this Court is necessary to clarify explicit contradictions in statutes, caselaw, as the well as Kansas Judicial Review Act. Clarification is also needed on the standard of review in a trial de novo based off of those inherit contradictions.

B. Whether the burden of proof assigned at the BOTA level continues or shifts to the taxing authority at the District Court level.

The Court of Appeals ruled in favor of the taxpayer in the instant case, relying on caselaw indicating that the same party should bear the burden of proof throughout the proceedings, concluding that the district court stood in the position of the Board, where the County bore the burden of proof that the Co-op's various pieces of equipment were

taxable real estate. The District Court and the Court of Appeals failed to uphold the correct standard of review as set out in *Prairie Tree* when the issue at hand is one of classification rather than an exemption.

The legislative intent for the appraiser to initiate production is codified in Chapter 79 of the Kansas Statutes Annotated. That Chapter addresses the initiation of taxation. The fundamental rule of statutory construction would seem to require the appraiser under K.S.A. 79-1609 to produce evidence at the BOTA level. Here, as the statute required, the appraiser produced documentation supporting the determination to assess as valorem taxes on CIME. However, the Petitioner was not satisfied with the ruling at the BOTA level, which was based on the production at the BOTA level, and chose to appeal using Chapter 77, the Kansas Act for Judicial Review.

Pursuant to K.S.A. 77-261 of the Kansas Judicial Review Act, the burden of proving the invalidity of an agency action is on the party asserting the invalidity. In *Prairie Tree,* the Court of Appeals correctly concluded that the burden of proving the invalidity of BOTA's actions on appeal is on the party asserting the invalidity of classification. Like, *Prairie Tree,* the instant case involves a disagreement on classification, whether the various pieces of equipment were classified as real or personal property. *Prairie Tree* was arguing its green houses were improperly classified as real property at BOTA level. Here, the Co-op is claiming that various pieces of equipment were improperly classified as real property with BOTA. The decision in this matter has created confusion that will continue to carry forward with the recent addition of K.S.A. 74-2426 (c)(4)(B) and its allowance for a de novo review. The decisions in *Prairie Tree*

now stands in conflict with the recent addition to K.S.A. 79-1609 which states the county appraiser bears the burden of proof no matter issue at hand.

Prairie Tree specifically asserts where the burden of proof lies when a party is attempting to challenge BOTA's classification of property. The instant case is one that involves an issue of classification and an aggrieved party who is challenging that classification.

C. Whether the proper standard of review at trial de novo includes the record as a whole (including BOTA's full record).

The Kansas Judicial Review Act (KJRA) controls the Court of Appeals review of BOTA decisions. K.S.A. 74-2426(c). As stated in *Walmart*, the party challenging BOTA'S decision, carries the burden to show its invalidity citing K.S.A. 77-621(a). Under the KJRA, factual determinations are reversed only if those determinations were "not supported to the appropriate standard of proof of evidence that is substantial when viewed in light of the record as a whole." The whole record in this case would include the agency record from the BOTA hearing, as well as the evidence considered by the district court. K.S.A. 77-621(c)(7),(d).

Here, the Co-op did not specifically claim error and request review in the fixture test but rather argues that the County failed to present evidence to establish that the Co-op had intended for the asset to become a part of the real property. The Co-op instead argues that the County did not provide evidence to support the District Courts findings, when viewed in the light most favorable to the prevailing party, are supported by

substantial competent evidence and are sufficient to support the district court's conclusions of law.

In fact, critical in this discussion is the agreement of the District Court that the County satisfied the annexation and adaptation prongs. The Court of Appeals reaffirmed the District Courts conclusion. However, the Court of Appeals contradicted itself when it determine that the various pieces of equipment were not sufficiently annexed, and went on to conclude that the Co-op did not intent the items to be permanently affixed to the storage bins.

By not including all evidence presented both supporting and detracting from BOTA's findings the incorrect conclusion was drawn as testimony that asserted without the various pieces of equipment at issue, the purpose of the facility would fail, was not considered.

In the instant matter the facts were reviewed de novo rather than considered in light of the record as a whole in line with the *Walmart,* standard of review.

D. Whether BOTA's determination should be given deference in matters of classification appealed to the District Court.

Walmart, established that BOTA is the highest administrative tribunal to hear cases involving ad valorem taxes. BOTA is a neutral decision-making body and has longstanding authority as the fact-finder. Substantial testimony and evidence was presented to BOTA on the instant matter. The District Court and Court of Appeals simply overlooked all that was presented to BOTA, a board that is specifically designed to hear

matters such as property classifications. Deference should be given to BOTA's order as it is the true fact-finder in these types of cases.

VI. CONCLUSION

The County respectfully requests that the Court grant this Petition for Review for analysis on the issues raised at the Court of Appeals and in its Petition for Review. A decision by the Court is essential as it is a matter of first impression and clarification is necessary to clarify explicit contradictions in statutes, caselaw, as the well as Kansas Judicial Review Act. Without review all taxing authorities in Kansas governing grain elevators will sustain a significant deficit or be forced to shift the tax burden.

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CERTIFICATE OF SERVICE

I, Curtis E. Campbell, hereby certify that on the 19th day of August, 2022, I electronically filed the Certificate of Service with the Clerk of the Appellate Court by using the eFlex System. Further, I served a true and correct copy of the foregoing Petitioner for Review, either by electronic mail or by deposing the same in the United Stated mail, postage prepaid and property addressed to:

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Appendix A

No. 122,499

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

DODGE CITY COOPERATIVE EXCHANGE,
Appellee/Cross-appellant,

v.

BOARD OF COUNTY COMMISSIONERS
OF GRAY COUNTY, KANSAS,
Appellant/Cross-appellee.

SYLLABUS BY THE COURT

1.

When a taxpayer challenges the valuation of real property for commercial and industrial purposes, K.S.A. 79-1606(c) and K.S.A. 79-1609 require the county or district appraiser to "initiate the production of evidence to demonstrate, by a preponderance of the evidence," that the property has been properly classified. These statutes establish a quantum of proof—"preponderance of the evidence"—and designate who bears the burden of proof during the proceedings—the county or district appraiser.

2.

An appeal to the district court providing a trial de novo—whether taken from an agency determination or from a different court—requires issues of both law and fact to be determined anew. The burden of proof in a trial de novo remains with the party who bore the burden in the underlying proceedings.

3.

Kansas law exempts commercial and industrial machinery and equipment from property and ad valorem taxes, but this exemption does not extend to real property. Real

property includes land, buildings, and fixtures—personal property affixed to and considered part of the real estate.

4.

Machinery and equipment are taxable fixtures if they (1) are annexed to real property; (2) are adapted to the use of and serve the real property; and (3) were intended by the party attaching the equipment to be permanently affixed to the property. All three elements must be met for equipment to be a fixture.

Appeal from Gray District Court; VAN Z. HAMPTON, judge. Opinion filed July 22, 2022. Affirmed in part and vacated in part.

Michael Giardine, assistant county attorney, for appellant/cross-appellee.

Marc E. Kliewer and *Klint A. Spiller*, of Kennedy Berkley Yarnevich & Williamson, Chartered, of Salina, for appellee/cross-appellant.

Before ATCHESON, P.J., WARNER, J., and ANTHONY J. POWELL, Court of Appeals Judge, Retired.

WARNER, J.: This appeal involves the classification for tax purposes of various equipment associated with grain storage bins in Gray County. The County assessed ad valorem taxes for tax years 2013 and 2014 for the equipment, which was bolted to the storage bins to allow for transfer and monitoring of grain, based on its conclusion that the pieces of equipment were taxable fixtures rather than personal property.

The owner of the equipment—the Dodge City Cooperative Exchange (the Co-op)—appealed this assessment to the Board of Tax Appeals. When the Board affirmed the County's assessment, the Co-op petitioned for judicial review by the district court, seeking a trial de novo under K.S.A. 2016 Supp. 74-2426(c)(4)(B). After considering the

parties' arguments and the evidence presented, the district court reversed the taxing authorities. The court ordered the County to refund the taxes collected based on the equipment's value for both the 2013 and 2014 tax years and all subsequent tax years.

The County has now appealed the district court's decision, arguing the court imposed an incorrect burden of proof and erred in concluding that the various pieces of equipment were not fixtures. The Co-op has cross-appealed, claiming some of the district court's findings were not supported by the record but asking this court to affirm the district court's ultimate conclusion. After carefully considering the parties' arguments and reviewing the record before us, we affirm the district court's finding that the equipment was not taxable property. We vacate the district court's prospective judgment regarding tax years after 2014, as that judgment went beyond the scope of the Co-op's petition for judicial review.

FACTUAL AND PROCEDURAL BACKGROUND

In 2009, the Co-op built two grain storage bins at its facility in Ensign. It also purchased equipment to move, blend, aerate, monitor, and dispense the stored grain. The additional pieces of equipment included:

- An 80-foot, 45,000 bushels per hour (bph) Essmueller drag conveyor;
- A 107-foot, 45,000 bph Essmueller drag conveyor;
- A 235-foot, 40,000 bph Hi Roller belt conveyor;
- Two 18-inch by 57-foot bin unloading screw conveyors;
- Two 18-inch by 35-foot belt feeder square spouts;
- Two 18-inch square transitions;
- Two 24-inch by 15-foot square unloading spouts with side draw slide gates;
- Two overhead connecting bridges;
- Aeration-system components;

- Temperature-monitoring system components; and
- A Compuweigh Train Loadout remote communications module and components.

These pieces of equipment were assembled at the site of storage bins and were installed by bolting the equipment either to the bins or to the ground. Fred Norwood, whose company installed the equipment, explained that the equipment could be removed for repair or replacement with "relative ease." According to Jerald Kemmerer, the Co-op's CEO, the Co-op had removed similar equipment from other grain elevators in the past for use in other locations. When the equipment was moved, it would not damage the storage bin (though there might be an open hole where a conveyor or some other equipment had been).

For the 2011 tax year, the Gray County Appraiser assessed ad valorem taxes for the various pieces of equipment based on its finding that the equipment had become affixed to (and thus become part of) the real property. Apparently, the Co-op contested this classification and brought its claims before the Board. The record and disposition of that case are not before us, however.

This appeal involves a similar classification in tax years 2013 and 2014. During those years, the Gray County Appraiser again classified the Co-op's various equipment as fixtures and assessed ad valorem taxes based on the equipment's value. The Co-op again contested the County's classification, appealing the County's assessment to the Board of Tax Appeals.

Our review of the proceedings before the Board is hampered by the fact that the record on appeal does not include the administrative record. Instead, we must rely on the summary contained in the Board's final order and the parties' later submissions to the district court to ascertain what occurred there.

Appendix A

The Board's order indicates that an evidentiary hearing was held on both years' assessments in April 2015. During the hearing, Kemmerer, Norwood, and Jerry Denney, the Gray County Appraiser, testified. According to the Board's summary, Norwood explained that the equipment could easily be removed from the storage bins, but the bins could not operate properly without the equipment. Kemmerer described how similar pieces of equipment had been removed from and installed on other bins. And the County Appraiser discussed why he classified the equipment as fixtures.

After considering the evidence, the Board issued its order in September 2015 affirming the County's classification of all equipment, except the temperature-monitoring system, as taxable fixtures to the real estate. To reach this conclusion, the Board first found that the Co-op—not the County—bore the burden of proving that the various pieces of equipment were personal property. The Board then applied a three-part test to determine whether the various equipment were fixtures. The Board found that the equipment became annexed to the realty when it was bolted to the bins, was adapted to the bins' function of moving and storing grain, and—given the size and weight of the equipment—was intended to be annexed until the equipment broke or became obsolete. The Board thus affirmed the County's assessment of all equipment except the temperature-monitoring system.

The Co-op petitioned for judicial review of the Board's decision, filing its petition with the district court and requesting a trial de novo under K.S.A. 2016 Supp. 74-2426(c)(4)(B). In its petition, the Co-op challenged all aspects of the Board's decision, except its analysis of the temperature-monitoring system (which the Board found to be personal property) and the overhead connecting bridges.

Though K.S.A. 2016 Supp. 74-2426(c)(4)(B) contemplates a "trial de novo" before the district court, the parties did not conduct a new evidentiary hearing. Instead,

after a series of delays in the litigation, the parties submitted testimony by affidavit from Kemmerer, as well as various stipulations. The parties did not dispute the short summary of the evidence provided to the Board, with both parties referencing the Board's decision in their respective factual recitations. In addition to this written evidentiary record, the parties submitted written argument on the appropriate burden of proof and the application of the fixture test to the equipment in question.

In his affidavit, Kemmerer explained in detail how each piece of equipment subject to the assessment could be easily removed and how removal would not affect the bins' value because similar replacement equipment could be installed. He also described three instances when similar pieces of equipment had been removed and installed on a different bin at some of the Co-op's other locations.

In November 2018, the district court reversed the Board's decision. The court's decision regarding the burden of proof and its fixture analysis are both subject to significant discussion by the parties on appeal.

- *First*, the district court found that the taxing authority—here, the County—not the taxpayer bore the burden of proving the various pieces of equipment were taxable fixtures. In doing so, the district court acknowledged that K.S.A. 79-223(b) describes commercial and industrial machines and equipment as "exempt" from taxation, and a person seeking an exemption has the burden of proving property is exempt from taxation. But relying on K.S.A. 79-1609, the court determined the County bore the burden before the Board and in the trial de novo of proving that otherwise-exempt equipment is a taxable fixture.

- *Second*, the district court concluded—based on Kemmerer's written testimony and the undisputed facts summarized by the Board—that the County had not met this burden. The court interpreted the evidence to indicate the equipment was annexed

to the bins and adapted to the processing of grain. But the court found that the County failed to prove the Co-op *intended* to permanently affix the equipment to the bins; the equipment processed the grain, rather than stored it, and could be removed and installed on different bins. Thus, the County had not established that the equipment was a fixture under Kansas law.

Based on these conclusions, the district court ordered the County to refund any ad valorem taxes collected based on the equipment's value from the 2013 and 2014 tax years. The court also indicated that its order should apply to any subsequent years involving this equipment.

DISCUSSION

The County now appeals the district court's decision, challenging its assignment of the burden of proof, its fixture analysis, and its dispositional remedy. The Co-op has cross-appealed, contesting the district court's conclusions—as part of its fixture analysis—that the equipment had been sufficiently attached and adapted to the storage bins for purposes of the fixture analysis.

Each of these assertions is rooted, in part, in Kansas' taxation statutes and requires their interpretation. Courts interpret statutes to effect the legislature's intent. *State v. Queen*, 313 Kan. 12, 17, 482 P.3d 1117 (2021). Our review begins with the statute's plain language. *State v. Dinkel*, 314 Kan. 146, 155, 495 P.3d 402 (2021). If that language is unambiguous, courts apply it as written. Only when an ambiguity exists do courts look to other sources, such as legislative history or canons of construction, for clarification. 314 Kan. at 155. The interpretation of statutes and the allocation of the burden of proof present legal questions appellate courts review de novo. 314 Kan. at 155 (statutory interpretation); *In re G.M.A.*, 30 Kan. App. 2d 587, Syl. ¶ 7, 43 P.3d 881 (2002) (burden of proof). With these principles in mind, we turn to the parties' claims.

1. *The district court correctly concluded that the County—not the Co-op—bore the burden of proving the various pieces of equipment were taxable fixtures.*

We first consider the County's assertion that the district court erred when it found that the County bore the burden to prove the various equipment were fixtures subject to taxation. The County claims that the district court should have concluded, as the Board had previously, that the Co-op was required to prove the pieces of equipment were personal property exempt from taxation.

Challenges to taxation decisions involve multiple levels of review. A dispute must first be addressed at an informal meeting with the county appraiser, where the appraiser presents evidence supporting the tax assessment. K.S.A. 79-1448. If this meeting does not resolve the dispute, the taxpayer may appeal the assessment to a hearing officer or panel and then to the Board of Tax Appeals. K.S.A. 79-1606(c); K.S.A. 79-1609. After exhausting these administrative remedies, a taxpayer may petition a court—either the Court of Appeals or the district court where the property is located—for judicial review of the Board's decision. K.S.A. 2016 Supp. 74-2426(c)(4)(A)-(B).

These petitions are generally governed by the Kansas Judicial Review Act (KJRA). See K.S.A. 2016 Supp. 74-2426(c); see also K.S.A. 77-621(a)(2). But there are exceptions to this general rule. Relevant here, when a party seeks review of a Board's decision by the district court, K.S.A. 2016 Supp. 74-2426(c)(4)(B) states the appeal must include a "trial de novo." The statute contemplates that this "trial de novo" will include "an evidentiary hearing at which issues of law and fact shall be determined anew." K.S.A. 2016 Supp. 74-2426(c)(4)(B). These proceedings must be followed "[n]otwithstanding K.S.A. 77-619," which otherwise limits courts' evidentiary decisions in administrative appeals under the KJRA. K.S.A. 2016 Supp. 74-2426(c)(4)(B).

Our analysis begins with identifying who carries the burden of proof in the initial stages of the administrative action (before the hearing officer and the Board). In its order, the Board found that the taxpayer bore the burden of establishing that the various pieces of equipment were personal property, finding the Co-op's claims were "essentially tax exemption requests." In doing so, the Board relied on K.S.A. 79-223(b), which states that certain commercial and industrial equipment is "exempt from all property or ad valorem taxes." In its brief to this court, the County argues that this was the proper assignment of the evidentiary burden based on the general principle that a person claiming a tax exemption must prove that the exemption applies. See *In re Tax Appeal of Collingwood Grain, Inc.*, 257 Kan. 237, Syl. ¶ 4, 891 P.2d 422 (1995).

This discussion by the Board, reiterated by the County on appeal, fails to recognize that the primary issue in this case is whether the Co-op's equipment was taxable *at all*—that is, whether the various pieces of equipment were nontaxable personal property or whether they were taxable as fixtures to the real property. And Kansas law is clear that as the taxing authority, the County bore the burden to prove the equipment was taxable real property in the administrative proceedings before the hearing officer and the Board. See K.S.A. 79-1606(c); K.S.A. 79-1609; *In re Equalization Appeal of Kansas Star Casino*, 52 Kan. App. 2d 50, 67, 362 P.3d 1109 (2015), *rev. denied* 307 Kan. 987 (2017).

When a challenge involves the valuation of real property used for commercial and industrial purposes, Kansas law requires the county or district appraiser—whether before a hearing officer or the Board—to "initiate the production of evidence to demonstrate, by a preponderance of the evidence," that the property has been properly classified. K.S.A. 79-1606(d) (hearing officer); K.S.A. 79-1609 (Board of Tax Appeals).

The County argues that this language describes the production of documents during discovery or the order of evidentiary production during a hearing, not a burden of proof. But the County's position would have us ignore the plain language of the statute,

which requires the appraiser "to demonstrate, by a preponderance of the evidence," that the classification was correct. K.S.A. 79-1609. This provision establishes a quantum of proof—"preponderance of the evidence"—and designates who bears the burden of proof during the proceedings—"the county appraiser." K.S.A. 79-1609. In other words, this language evinces a legislative intent that the taxing authority must prove the correctness of its classification. See *In re Camp Timberlake, LLC*, No. 111,273, 2015 WL 249846, at *6-7 (Kan. App. 2015) (unpublished opinion) (in valuing land for tax purposes, K.S.A. 79-1609 requires county to prove land should be classified as commercial rather than agricultural); see also *Kansas Star Casino*, 52 Kan. App. 2d at 67-68 (applying this analysis to fixture determination). The Board thus erred when it placed the burden on the Co-op—not the County—to prove the equipment's status as personal property.

As the County points out, however, K.S.A. 79-1606(c) and K.S.A. 79-1609—which respectively assign the burden and quantum of proof for classification proceedings before the hearing officer and the Board—do not directly resolve who bore the burden of proof when the Co-op petitioned for judicial review of the Board's decision before the district court. In 2021, the legislature amended K.S.A. 74-2426(c)(4)(B) to include the same language as K.S.A. 79-1606(c) and K.S.A. 79-1609, clarifying that the burden of proof rests with the appraiser. L. 2021, ch. 58, § 4. But at the time the district court heard this case, K.S.A. 2016 Supp. 74-2426 did not specifically indicate who bore the burden of proof when a petition for judicial review was filed with the district court, beyond describing the proceedings as a "trial de novo."

We must therefore examine the statutes to determine who the legislature intended to bear the burden of proof during the trial before the district court. The County is correct that under the KJRA, the party challenging an agency's decision generally bears the burden of invalidating the agency action. K.S.A. 77-621(a)(1). Courts have applied this provision to decisions by the Board of Tax Appeals, concluding that the party challenging a Board decision bears the burden of proving its invalidity. See, e.g., *Bicknell v. Kansas*

Dept. of Revenue, 315 Kan. ___, 509 P.3d 1211, 1229 (2022). In those cases, courts have found that the burden of proof remains with the challenger throughout the proceedings on appeal. 509 P.3d at 1229.

But while the KJRA contains this broad assignment of the burden of proof, the legislature is free to depart from this default rule and assign the burden to a different party as it finds appropriate. See K.S.A. 77-621 (placing the burden on the party asserting invalidity "[e]xcept to the extent [the KJRA] or another statute provides otherwise"). The district court found that this case involved one such legislative departure, concluding that K.S.A. 2016 Supp. 74-2426(c)(4)(B)'s reference to a "trial de novo" continued to place the burden to prove the proper classification of the equipment on the County—not the Co-op—since the County bore the initial burden of proof before the Board. We agree.

Kansas courts have long recognized that a trial de novo—whether in an appeal from an agency determination or from a different court—requires "issues of both law and fact to be determined anew." *Nurge v. University of Kansas Med. Center*, 234 Kan. 309, 317, 674 P.2d 459 (1983). And we have consistently found that the burden of proof in a trial de novo remains with the party who bore the burden in the underlying proceedings. See, e.g., *State v. Legero*, 278 Kan. 109, 114, 91 P.3d 1216 (2004) (government has the burden to prove defendant's guilt in a municipal case and in the appeal de novo to the district court); *In re Park's Estate*, 151 Kan. 447, 452, 99 P.2d 849 (1940) (administrator of the estate had burden to prove correctness of the estate accounting before the probate court and in a trial de novo to the district court); see also *Janda v. Kansas Dept. of Revenue*, No. 118,677, 2018 WL 4263321, at *8 (Kan. App. 2018) (Atcheson, J., concurring) (noting that K.S.A. 2017 Supp. 8-1020, which governed appeals from driver's license suspensions, "does not recast the substantive issues or the burden of proof").

Though the County cites numerous decisions in its brief where we have observed that the party challenging a Board decision must prove its invalidity, those cases are not analogous to the assignment of burdens here. In other words, none involved a situation where the county appraiser—not the taxpayer—bore the initial burden before the Board, and the taxpayer exercised his or her right to a trial de novo before the district court. See, e.g., *Bicknell*, 509 P.3d at 1229-30 (concluding that the taxpayer bore the burden to prove a change in domicile, both before the Board of Tax Appeals and before the district court). Nor does the fact that the parties in this case waived a new evidentiary hearing and proceeded on a written record somehow transfer the County's burden. See *Frick v. City of Salina*, 289 Kan. 1, 22-23, 208 P.3d 739 (2009) (trial de novo can be conducted on written record).

The fact that the County would continue to bear the burden throughout these proceedings—before the hearing officer, the Board, and the district court—makes practical sense, as the district court judge in a trial de novo "stands in the shoes" of the previous decision maker. *City of Shawnee v. Patch*, 33 Kan. App. 2d 560, 562, 105 P.3d 727 (2005). And it is consistent with our caselaw indicating that the same party should bear the burden of proof throughout the proceedings. See *Bicknell*, 509 P.3d at 1229. Here, that means the district court stood in the position of the Board, where the County bore the burden to prove that the Co-op's various pieces of equipment were taxable real estate. The district court correctly found that the County—not the Co-op—continued to bear the burden of proof before the district court to show the correctness of its taxing classification.

2. *The district court correctly concluded that the various pieces of equipment are not fixtures.*

Having determined that the district court correctly placed the burden of proof with the County to prove the various pieces of equipment were taxable fixtures, we turn to the substance of the court's analysis.

Generally speaking, Kansas law exempts commercial and industrial machinery and equipment from property and ad valorem taxes. K.S.A. 79-223(b), (d)(2). This exemption does not extend, however, to real property. See K.S.A. 79-261. Real property includes land, buildings, and fixtures—personal property affixed to and considered part of the real estate. K.S.A. 79-102; see *City of Wichita v. Denton*, 296 Kan. 244, 258, 294 P.3d 207 (2013). There is no question that the Co-op's *storage bins* at its Gray County grain elevator were taxable real property. The central question here is whether the Co-op's various *equipment* that had been bolted to the bins were personal property exempt from taxation or had been permanently affixed to the realty (and thus were taxable).

Kansas law has long employed a three-part test—codified by K.S.A. 79-261(b)—to determine whether equipment is a fixture. See *In re Equalization Appeals of Total Petroleum, Inc.*, 28 Kan. App. 2d 295, 300, 16 P.3d 981 (2000). Under this test, machinery and equipment are taxable fixtures only if they (1) are annexed to real property; (2) are adapted to the use of and serve the real property; and (3) were intended by the party attaching the equipment to be permanently affixed to the property. K.S.A. 79-261(b)(2)(A)-(C). This test is fact-dependent, and all three elements must be met for equipment to be a fixture. K.S.A. 79-261(b)(3).

The first element concerns how permanently the item is attached to the real property. *City of Wichita*, 296 Kan. 244, Syl. ¶ 2. Fixtures are generally more difficult to remove than personal property and may result in damage to the item or real property if removed. See *Total Petroleum*, 28 Kan. App. 2d at 300; *In re Equalization Appeal of Coffeyville Resources Nitrogen Fertilizers*, No. 117,045, 2018 WL 4655648, at *10-11 (Kan. App. 2018) (unpublished opinion) (assets that were readily removable were not fixtures). The second element addresses an item's use and purpose in relation to the real property. See K.S.A. 79-261(b)(2)(B); *In re Equalization Appeal of Prairie Tree*, No. 117,891, 2019 WL 493062, at *8 (Kan. App. 2019) (unpublished opinion) (evidence that

item improves real property indicative of fixture); see also *Coffeyville Resources*, 2018 WL 4655648, at *11 (looking at whether item is adapted to and benefits real property, rather than another interest). And the third element assesses the party's intent at the time the item was affixed. See *Total Petroleum*, 28 Kan. App. 2d at 301. To ascertain this intent, courts examine various considerations, such as the nature of the equipment, how it was annexed, the purpose of the annexation, and the annexing party's relation and situation. K.S.A. 79-261(b)(2)(C).

As this summary indicates, the analysis of whether an item is a fixture requires courts to make factual findings and then draw legal conclusions based on those facts. *City of Wichita v. Eisenring*, 269 Kan. 767, 783, 7 P.3d 1248 (2000). We defer to the district court's factual findings if they are supported by substantial competent evidence, viewing the evidence in the light most favorable to the prevailing party without reweighing the evidence. *In re Estate of Moore*, 310 Kan. 557, 566, 448 P.3d 425 (2019). But see *Telegram Publishing Co. v. Kansas Dept. of Transportation*, 275 Kan. 779, 784, 69 P.3d 578 (2003) (when controlling facts are based solely on written evidence, court reviews facts de novo). We exercise unlimited review over a district court's legal conclusions. See *State v. Dooley*, 313 Kan. 815, 819, 491 P.3d 1250 (2021).

In this case, the district court found the equipment met the annexation and adaptation requirements of the fixture test, but it concluded that the County had not shown that the Co-op intended for the equipment to be permanently affixed to its bins. The court explained that even though the equipment was designed to be removable, the Co-op had fastened the various pieces to the storage bins with bolts. And the court found that the equipment was adapted to the use of processing grain in the bins. But it concluded the Co-op had not intended to permanently affix the equipment; the equipment was not unique to these storage bins, could be easily removed and installed on other bins, removal would not damage the bins, and the equipment was attached to process grain—not to simply store it, as the bins do. Because the Co-op did not intend for the equipment

to be affixed to the storage bins, the court found the County had erred when it classified the various equipment as taxable fixtures.

The parties' briefs, taken together, now challenge the district court's analysis of all three fixture elements. The Co-op contends in its cross-appeal that though the district court's ultimate conclusion was correct, it erred when it found the equipment was attached to the bins or adapted to their use. And the County asserts that the evidence as a whole showed that the Co-op intended to annex the equipment to the bins; although the Co-op may decide to replace the equipment, the evidence suggested the Co-op intended to keep the equipment in place until it wore out or required an upgrade.

We need not examine each of these elements in detail, however, because we agree with the Co-op that the various pieces of equipment are not fixtures, as they were not sufficiently annexed to the storage bins. For annexation, courts look to "the degree of permanency with which the property is attached to the realty." *City of Wichita*, 296 Kan. at 258. This requires examining various details surrounding an item's physical attachment and removability. See *Total Petroleum*, 28 Kan. App. 2d at 300. A readily replaceable item is less likely to be annexed. *Coffeyville Resources*, 2018 WL 4655648, at *10. In *Total Petroleum*, the panel found that refinery tanks were annexed because of their large size and weight, they had to be constructed on-site, parts were welded together and built into the ground, and removal would require cutting them down piece-by-piece. 28 Kan. App. 2d at 300.

In contrast, another panel found that a metal building was not annexed when, although it was attached to a concrete slab by metal bolts, removal would simply require detaching the bolts and would not damage the realty. *Stalcup v. Detrich*, 27 Kan. App. 2d 880, 886-87, 10 P.3d 3 (2000). And with little discussion of annexation, our Supreme Court found a billboard was not a fixture despite being attached to a concrete foundation

for 20 years because the evidence that the billboard was intended to be removable was "undisputed and overwhelming." *City of Wichita*, 296 Kan. at 259.

Applying these principles here demonstrates that the various equipment is more akin to the removable property we examined in *Stalcup* than the permanently annexed tanks discussed in *Total Petroleum*. It is true that the equipment is large and bolted to the storage bins, as the district court indicated. But the undisputed evidence also showed that the equipment could be easily removed, and removal would not damage the bins. No evidence indicates that removal would be unduly complicated or costly. See *Total Petroleum*, 28 Kan. App. 2d at 301 (finding "exceedingly laborious and complicated" task of removing property indicated property was a fixture). And Kemmerer stated that similar pieces of equipment had been removed and placed on different bins, indicating that doing so is feasible. See *Coffeyville Resources*, 2018 WL 4655648, at *10-11 (readily movable assets not fixtures).

Since the equipment was not attached—or affixed—to the real estate with the requisite degree of permanency, it cannot be classified as a fixture. K.S.A. 79-261(b)(3). We therefore need not consider the questions of the equipment's adaptation and the Co-op's intent. We note, however, that the district court found the same removability aspects of the equipment that we find dispositive in our review of the annexation element also demonstrated that the Co-op did not intend the items to be permanently affixed to the storage bins. We find this analysis persuasive. See *Coffeyville Resources*, 2018 WL 4655648, at *13 (intent can be determined from the circumstances surrounding the installation of the item and the "'structure and mode'" of annexation).

The evidence before the district court showed that the various pieces of equipment were not permanently annexed to the storage bins. Based on this record, the County did not prove that the pieces of equipment were fixtures. Thus, the district court properly reversed the Board's decision upholding the County's contrary classification. We affirm

the district court's conclusion and its order that the County refund the ad valorem taxes levied against those items for the 2013 and 2014 tax years.

3. *The district court erred when it included in its refund order tax years beyond 2013 and 2014.*

In its final claim on appeal, the County asserts the district court exceeded its authority by ordering the County to refund any taxes collected based on the equipment beyond the 2014 tax year. The Co-op agrees because it only challenged assessments from the 2013 and 2014 tax years.

Because taxes are levied annually, a taxpayer may only challenge a taxing decision once the tax has been imposed. See K.S.A. 2021 Supp. 79-1460; *KNEA v. State*, 305 Kan. 739, 743, 746-48, 387 P.3d 795 (2017) (standing and ripeness, both elements of subject matter jurisdiction, require an injury that is concrete). But before challenging a taxing decision, a taxpayer must exhaust available administrative remedies. See *Dean v. State*, 250 Kan. 417, 420-21, 826 P.2d 1372 (1992); see also K.S.A. 2021 Supp. 79-1448 (informal meeting is condition precedent to appeal to hearing panel).

Here, the Co-op challenged only its 2013 and 2014 tax assessments. When the Board considered the Co-op's appeal in 2015, the Co-op could not challenge assessments in future years. Accord *Shipe v. Public Wholesale Water Supply Dist. No. 25*, 289 Kan. 160, Syl. ¶ 8, 210 P.3d 105 (2009) (courts cannot engage in premature adjudication of questions that have yet to take shape). And no evidence shows the Co-op attempted to challenge future assessments, when they were made, by exhausting its administrative remedies. Because no evidence indicates the Co-op challenged or took the steps to challenge those future assessments, the district court erred by ordering the County to refund taxes collected after the 2014 tax year. We thus vacate that portion of its order.

Affirmed in part and vacated in part.

IN THE DISTRICT COURT OF GRAY COUNTY, KANSAS

DODGE CITY COOPERATIVE EXCHANGE,
Petitioner,

vs. **Case number: 15-CV-18**

BOARD OF COUNTY COMMISSIONERS
OF GRAY COUNTY, KANSAS,
Respondent.
Pursuant to chapters 74, 77 and 79 of the Kansas Statutes Annotated.

JOURNAL ENTRY AND ORDER REGARDING TRIAL *DE NOVO*

After considering all evidence submitted, and authorities cited by the parties, and after reviewing the court's file containing all pleadings and records herein, the District Court makes the following findings and Order:

1. Petitioner elected to present this action to the District Court for a trial *de novo* after an adverse decision by the Kansas Board of Tax Appeals, (pursuant to K.S.A. 74-2426(c)(4)(B), though the Board of Tax Appeals and the parties have inadvertently referred to 74-2426(c)(4)(A) in the Order appealed from, and in the subsequent pleadings).

2. The decision by the Board of Tax Appeals affirmed the decision by Gray County to assess *ad valorem* taxes on Commercial and Industrial Machinery and Equipment (hereafter referred to as CIME) due to a determination that the CIME was affixed to the real estate and subject to taxation as part of that real estate, and not exempt from taxation as provided in K.S.A. 79-223(b) which is recited below:

> (b) The following described property, to the extent specified by this section, shall be and is hereby exempt from all property or ad valorem taxes levied under the laws of the state of Kansas:
> *First.* Commercial and industrial machinery and equipment acquired by the 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.

3. When considering the evidence, and determining which party should prevail, the court must assign the burden of proof. For this case, there are conflicting declarations in the law regarding the burden of proof.

4. At first glance, it appears that burden of proof is borne by the Petitioner who is seeking to establish exemption from *ad valorem* taxation under the exemption regime established in 79-223(b). The Kansas Supreme Court has stated generally the burden of proof is "on the person asserting the exemption to bring himself [] within the exemption statute". *In re* Tax Appeal of Collingwood Grain, Inc., 257 Kan. 237, Syl. 4 (1995). Nevertheless, the Court acknowledged "[t]his rule is, of course, subservient to the fundamental rule of statutory construction which requires that the purpose and intent of the legislature govern." 257 Kan. at 246. The issue in Collingwood Grain was whether electricity used in the storage, processing and shipping of grain was exempt from sales tax. In that case the County Appraiser was not required to make the discretionary determination of whether the CIME was personalty or real property. The legislature recognized the reasonableness of placing the burden of proof on the taxing authorities making such a determination because of the variety of circumstances that must be considered. "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." *In re* Equalization Appeals of Total Petroleum, Inc., 28 Kan. App.2d 295, 300 (2000).

5. The Kansas Legislature has addressed the burden of proof for county appraiser determinations that CIME is real property and not exempt from taxation. That legislation is codified at K.S.A. 79-1609:

> With regard to any matter properly submitted to the board relating to the determination of valuation of residential property **or 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.**

Any party attempting to persuade a fact finder to change the *status quo* should bear the burden of proof. In this case, the County is attempting to persuade the fact finder that the tax exemption granted to a good faith purchaser of commercial and industrial machinery and equipment pursuant to K.S.A. 79-223(b) should be disregarded. **The County should bear the burden of proof.** The Court of Appeals has recognized this assignment of the burden of proof to the county, as Petitioner herein argued. The opinion cited as *In re* Equalization Appeal of Kansas Star Casino, 52 Kan. App.2d 50 (2015) clearly states the burden of proof rests with the county when making a determination that CIME is real property. See, 52 Kan. App.2d at 67 (the county failed to provide sufficient proof that a marquee sign was real property and therefore it was determined to be personalty). In light of the nature of this current proceeding as a trial *de novo* as provided in K.S.A. 74-2426(c), the county is now assigned the burden to prove by a preponderance of the evidence that the CIME at issue is not personal property and should be classified as real property for ad valorem taxation purposes.

6. The evidence presented to the District Court consists of the affidavits from Jerald Kemmerer submitted by Petitioner, the exhibits presented from both parties, the stipulations of the parties, together with the undisputed facts stated in the ORDER issued by the Board of Tax Appeals in September, 2015.

7. At issue in this action is the classification of CIME purchased after June 30, 2006 (as required to qualify for the exemption in K.S.A. 79-223), acquired by a bona fide purchase not intended to avoid taxation, and still owned by the Petitioner, described as follows:

a.) One 80' 45,000 bph Essmuller drag conveyor ("80' Conveyor");
b.) One 107' 45,000 bph Essmuller drag conveyor ("107' Conveyor");
c.) One 235' 40,000 bph Hi Roller belt conveyor ("Hi Roller");
d.) Two 18" bin unloading screw conveyors 57' long ("Screw Conveyors");
e.) Two 18" x 35' belt feeder square spouts ("Belt Feeder Spouts");
f.) Two 18" square transitions ("Square Transitions");
g.) Two 24" x 15' sq. unloading spouts with side draw slide gates ("Unloading Spouts");
h.) Each aeration fan ("Aeration Fan") and all components of the aeration system (collectively the "Aeration System") for bins numbered R-5 and R-6;

i.) The temperature monitoring system components ("Temperature Monitoring System") for bins numbered R-5 and R-6; and,
j.) Compuweigh Train Loadout remote communications module components (computerized weighing system).

8. The Board of Tax Appeals found the temperature monitoring system components were not fixtures, and the County did not assert any argument on that issue, so this court finds those components, identified in subparagraph "i." above, are personal property and not subject to ad valorem taxation, and the evidence concerning the additional items will be considered.

9. Petitioner presented testimony from Jerald Kemmerer, who since 2007 has acted as the Chief Executive Officer for Dodge City Cooperative Exchange, doing business as Pride Ag Resources, the Petitioner herein. Mr. Kemmerer was the CEO for Petitioner in 2009 during the construction of bins R-5 and R-6, and was aware of the installation and purpose of the equipment at issue herein. (The parties stipulate that the grain bins and foundations are considered real estate.)

10. All of the equipment described in paragraph number 7, above, was installed by Norwood and Co., and a summary of Mr. Kemmerer's testimony establishes the purpose of that equipment was to process grain deposited for storage or sale from patrons of the Co-op whereby the Co-op would blend, turn, fumigate, clean, aerate, draw moisture from, convey from one location to another, preserve and improve the quality of the grain. Ultimately, the Co-op would weigh and direct the grain for loading out of the storage bins into trucks or trains for transport after sale.

11. Fred Norwood, owner of Norwood and Company, testified that his Company built the "jump form" bins, numbered R-5 and R-6, and the equipment at issue was attached to the bins, or nearby concrete slabs. He stated the purpose of the bins would fail without the subject equipment but added that the equipment was attached by bolts and could be removed for upgrades, repair or replacement with relative ease. Mr. Kemmerer testified that similar equipment on other elevators was in fact removed and relocated to serve on other elevators owned by Dodge City Coop during his tenure as Chief Executive

officer. He further testified that the equipment was utilized for enhancing the value of grain received from customers by cleaning, drying, aerating, blending, moving and loading the grain which was all in the nature of processing, not storing the grain as is the purpose of the bins. Finally, Mr. Kemmerer testified that if any of the equipment was removed from the elevators it would not damage them and the equipment could be replaced rather easily.

12. Kim Frodin, the Gray County Appraiser, and Jerry Denny, the former Appraiser, testified that the Appraiser used the "three-prong test" and determined that the purpose of the grain storage bins was to store and handle grain and the equipment was necessary for the fulfillment of that purpose and if the equipment was removed the structure would no longer function.

13. This court finds that there is an inherent bias in the testimony of the County Appraiser, as an employee of the County which directly benefits from a finding that the CIME is not personalty but instead qualifies as fixtures which will be subject to *ad valorem* taxation. The testimony of the Petitioner's witness is equally biased so the court must view the totality of the evidence with those juxtaposed biases providing offsetting demerits to the testimony.

14. The "three-prong test" cited by the County's witnesses arises from the statutory guidance given Appraisers, found at K.S.A. 79-261(b) (with emphasis added):

> (2) Where the proper classification of commercial and industrial machinery and equipment 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 as set forth in the personal property guide prescribed by the director of property valuation pursuant to K.S.A. 75-5105a(b), and amendments thereto, and 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.

> (3) 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.**

15. The Petitioner cited the Supreme Court's opinion *In re* Tax Appeal of Collingwood Grain, Inc., 257 Kan. 237 (1995) as authority for the proposition that the use of CIME for processing grain entitles the Co-op to the tax exemption provided in K.S.A. 79-223. The Petitioner made much of the fact the Board of Tax Appeals did not consider the *Collingwood* opinion in making their decision. However, there is a clear reason why the "grain processing" basis for exemption established in that opinion was not considered. That opinion addressed an exemption from sales tax on electricity used in the processing of tangible personal property as expressly provided in K.S.A. 79-3606(n). The tangible personal property at issue was the grain stored in, and distributed from their multiple storage facilities. The present action obviously is not intended to establish an exemption from sales tax. Nevertheless, the argument regarding "processing" of grain does have some merit and should be considered in the analysis of the three-part fixture test as it applies to the Petitioner's equipment that is the subject of this action.

16. Jerald Kemmerer, Chief Executive officer for Petitioner testified that the machinery that is the subject of this action was purchased and installed on and near the grain storage bins solely to process grain with the particular function of each item described in paragraph 7, above, whereby the Co-op could convey, blend, turn, fumigate, aerate, preserve and process grain received from the Co-ops members and patrons. He further testified that several similar items were previously purchased and installed on one elevator but moved to another where the equipment served a similar function. Finally, Mr. Kemmerer testified that each piece of equipment that is the subject of this action could be removed easily by detaching bolts and the removal would cause no "material" damage to the grain bins or the equipment and would have no effect on the value of the real estate. This testimony was not disputed or rebutted by the County.

17. The Respondent cited and proffered testimony from Fred Norwood, the owner of Norwood and Company which obtained and installed on or near the grain storage bins, numbered R-5 and R-6. Mr. Norwood's firm constructed the storage bins and installed all of the subject equipment. He confirmed the purpose of the equipment was to process grain and that the equipment could be removed for the purposes of repairing, replacing or upgrading. He added his opinion that the purpose of the facility would fail without the equipment at issue but this court does not find that opinion persuasive in determining whether the "three-part test" has been satisfied. The only additional evidence presented by the County in support of the assertion that the subject equipment should be classified as real estate is the determination of the Appraiser and former Appraiser that the items are necessary for the operation of the structure and that they believe the "three-prong test" was satisfied.

ANALYSIS AND CONCLUSIONS OF LAW

As stated previously, quoting K.S.A. 79-261(b)(3), "all three parts of the three-part fixture test must be satisfied for the item to be classified as real property." The court will consider each part in sequence.

With regard to ***annexation***, the evidence establishes the equipment was assembled and attached to the bins and concrete footings near the bins, with bolts. All of the equipment was attached in place, either on or near the bins, to facilitate the "processing of grain". There is no evidence provided by the Petitioner to refute the attachment of the equipment to the real estate. It was necessary to firmly attach each item of equipment to the particular bin or real estate in order to process the grain in that bin (including the loading of the grain into train cars or semi trucks for transporting it after sale). Even though the equipment was "easily removable", it was sufficiently attached that it is deemed annexed to the real estate so that for each item, the "annexation test" is satisfied.

With regard to ***adaptation***, the evidence presented from the County established by a preponderance of the evidence that each item of property at issue was used to process grain in its particular place where it was attached. This is apparent in spite of the ease of removal. This particular use, in place, to process the grain satisfies the "adaptation test".

With regard to ***intention***, the County failed to present sufficient evidence to establish this part of the three-part test. Though the County's witnesses expressed their opinions that the equipment was installed permanently, the Petitioner's evidence rebutted those opinions. The Co-op's Chief Executive Officer testified that the equipment installed was easily removable, and other similar equipment had been removed from other elevators and re-installed elsewhere. The Co-op considered this equipment as personal property, installed for the purpose of "processing grain". This processing of grain is a multi-function aspect of the business described by Mr. Kemmerer. This is in addition to and separate from the simple act of storing the grain in the bins. The equipment described was necessary for the processing of grain, and intended for that purpose, not for the storage of grain as was the sole purpose of the bins. Further, the equipment was not unique to the bins on the property but rather could be easily removed and relocated or replaced without damaging or devaluing the real estate. These items were considered personal property by the Co-op, and the facts show a lack of intent that the items become part of the real estate upon installation. For these reasons the third part of the test fails, and the County cannot prevail unless all three parts of the test are established.

For the above reasons, the Petitioner's request for relief should be granted.

IT IS THEREFORE ORDERED ADJUDGED AND DECREED that the Petition for relief be granted and judgment is granted in favor of Dodge City Co-operative Exchange and against the Board of County Commissioners of Gray County, Kansas, and costs are assessed against the Board of County Commissioners of Gray County, Kansas; and,

IT IS FURTHER ORDERED that refunds of those portions of *ad valorem* taxes paid by the Petitioner for the CIME identified herein for tax years 2013 and 2014, together with *ad valorem* taxes paid for the same CIME for any subsequent years that may be effected by this order, be paid into the Clerk of the Court to await further order, and, any amounts due for reimbursement of costs borne by Petitioner that cannot be agreed upon shall be the subject of a subsequent hearing to determine costs ; and,

IT IS FURTHER ORDERED that this be considered the final order addressing the claims asserted in the Petition filed herein, and the time for filing motions or Notices of Appeal shall run from the date of the filing stamp on the signature page attached to this Order.

IT IS SO ORDERED.

Ordered and signature page attached by Van Z. Hampton, District Judge

BEFORE THE BOARD OF TAX APPEALS
STATE OF KANSAS

IN THE MATTER OF THE EQUALIZATION APPEALS OF DODGE CITY COOPERATIVE EXCHANGE FOR THE YEARS 2013 & 2014 IN GRAY COUNTY, KANSAS	Docket Numbers 2013-2335-EQ and 2014-2560-EQ

ORDER

Now the above-captioned matters come on for consideration and decision by the Board of Tax Appeals of the State of Kansas. The Board conducted a hearing in these matters on April 17, 2015. The Taxpayer, Dodge City Cooperative Exchange, appeared by Marc Kliewer, Attorney; Jerald Kemmerer, Witness; and, Fred Norwood, Witness. The County of Gray appeared by Michael Giardine, Attorney; and, Jerry Denney, Gray County Appraiser. County Exhibits A and B, and Taxpayer Exhibits 1 through 18 were admitted into evidence. The tax years at issue are 2013 and 2014.

The subject matters of these tax appeals are located at 706 Bent Street, Ensign, Gray County, Kansas, also known as Parcel Identification Number # 035-167-36-0-30-02-001.00-0 and, per the Taxpayer's proposed findings of fact and conclusions of law, are described as follows:

One 80' 45,000 bushels per hour Essmueller drag conveyor.

One 107' 45,000 bushels per hour Essmueller drag conveyor.

One 235' 40,000 bushels per hour Hi Roller belt conveyor.

Two 18" bin unloading screw conveyors, 57' long.

Two 18" by 35' belt feeder square spouts.

Two 18" square transitions.

Two 24" by 15' square unloading spouts including side draw slide gates.

Two overhead connecting bridges.

Aeration system components for Bin R-5 and Bin R-6.

Temperature monitoring system components for Bin R-5 and Bin R-6.

Compuweigh Train Loadout remote communications module components.

The Board rules that the evidentiary burden is on the Taxpayer as these matters are essentially tax exemption requests. The Taxpayer requests that the subject of these appeals be considered commercial and industrial personal property and therefore, exempt from ad valorem taxation pursuant to K.S.A. 2014 Supp. 79-223 (b) *First*. The County considers the subject property as fixtures to real estate.

The subject properties in these matters are the same properties that the Board considered for the 2011 tax year. *See* Docket Number 2012-726-PR. In that matter, the Board found that after applying the three-part fixture test that the subject property should be considered real estate with the except of the temperature monitoring system components for Bin R-5 and Bin R-6.

All of the items were purchased and installed after June 30, 2006. At the hearing the parties indicated that they would stipulate to the appropriate appraised values of the subject properties; however, no stipulation has been filed.

Unlike the 2011 tax year matter, Mr. Fred Norwood testified concerning the construction of the elevator and installation of the subject property. Mr. Norwood is a fourth generation elevator builder who builds, refurbishes, and removes grain storage elevators and flour mills and has done this for over 20 years. Mr. Norwood's firm purchased the subject property and installed on the grain bins referred to as R4, R5 and R6. This equipment was bolted to the concrete slab and could be removed easily without damaging the bins or other pieces of the subject property. Removal would take as long as three days to complete. However, removal of some items would leave an open hole in the side of the elevator.

Mr. Norwood noted that the items were assembled on-site but not constructed on-site.

Under cross-examination, Mr. Norwood testified that without the subject property, the elevator would not be able to operate as the subject property loads the grain into the storage facility and unloads it into train cars or semi-trailer trucks.

The general manager of the facility, Mr. Jerald Kemmerer, testified that items like the subject property have been moved between facilities as needed and have been upgraded for faster loading and unloading speeds. The bins have remained the same but the conveyance mechanisms have changed.

The County relied on the three-part test to determine whether the subject property is personal property or real estate. The three parts are: 1. Annexation to the realty, 2. Adaptation to the realty, and 3. Intention of the annexing party.

There is no bright-line rule for determining under what conditions a chattel loses its character as personal property and becomes a fixture of the freehold. That "determination can only be made from a consideration of all the individual facts and circumstances attending the particular case." *In re Equalization Appeals of Total Petroleum, Inc.*, 28 Kan. App. 2d 295, 300, 16 P.3d 981 (2000) (citing *Kansas City Millwright Co., Inc. v. Kalb*, 221 Kan. 658, 664, 562 P.2d 65 *modified* 221 Kan. 752, 564 P.2d 1280 (1977)).

To ascertain whether personal property has become a fixture, Kansas has adopted a long standing common law test known as the "fixtures test." The three-part test requires consideration of the following: "(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." *Total Petroleum*, 28 Kan. App. 2d at 299-300 (citing *Stalcup v. Detrich*, 27 Kan. App. 2d 880, 10 P.3d 3 [2000]). The three-part fixtures test is not conducive to rigid application and must be applied within the context of the legal problem and the individual facts presented. "[T]here appears to be no single statement in our law defining fixtures which is capable of application in all situations." *Kansas City Millwright*, 221 Kan. at 664.

The 2013 and 2014 Personal Property Valuation Guides ("Guide") promulgated by the Division of Property Valuation (PVD) discuss classification as personal property or real property and provides a list of many types of properties and the classification for each one in order to promote uniformity. The Guides instruct that if a county appraiser is faced with a unique situation or property not addressed by the list, the county shall utilize the three-pronged fixtures test.

The first part of the test is annexation to the realty. Annexation is "[t]he act of attaching, adding, joining, or uniting one thing to another; generally spoken of the connection of a smaller or subordinate thing with a larger or principal thing." Black's Law Dictionary, Sixth Ed (1990). "Annexation" is the union of property with a freehold. *Webster's Third New Int'l Dictionary* 87 (1981). Whether an item is sufficiently annexed to the freehold under the fixtures test is a matter of degree and is driven by the attendant circumstances. *See Shoemaker v. Simpson*, 16 Kan. 43, 44 (1876).

In determining whether an item is annexed to real estate, the nature and extent of its physical attachment are relevant considerations. *See Dodge City Water and Light Co. v. Alfalfa Land and Irrigation Co.*, 64 Kan. 247, 252, 67 P. 462 (1902) (declaring that an item is permanently attached to the real estate if "its removal would interfere with the practical use of the land, or in any way injure" the land for its usual use). Annexation is not necessarily indicated where removal of the property in question requires that it be disassembled. *See Stalcup*, 27 Kan. App. 2d at 886 (finding metal farm building not annexed to realty where removal required the unfastening of bolts anchoring it to a concrete pad). Where removal, however, requires a more complex and costly disassembling process in order to preserve the property's future usefulness, annexation may obtain. *See Farmland Indus., Inc.*, 298 B.R. 382, 388-89 (Bankr.W.D.Mo. 2003) (applying Kansas law to find oil refinery equipment annexed to realty where its removal required a costly process, including match-marking components for reassembly).

Still, an item's physical attachment and ease of removal are not determinative factors under the fixtures test. As explained by the Kansas Supreme Court,

> "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.... 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. at 29.

It has long been held that certain unattached items may become part of the real property by means of "constructive annexation." *See, generally, Green v. Chicago R.I. & P.R. Co.*, 8 Kan. App. 611, 56 P. 136 (1899) (in *replevin* action, finding heavy lathe not fastened to ground to be a fixture because it was an essential part of the machinery of a manufactory as originally planned and operated). Constructive annexation may be found where items specially fabricated for installation in a particular structure are introduced upon the land, even though not through physical attachment. *See* 35A Am. Jur. 2d *Fixtures* § 4. The doctrine also may apply in cases where an item, although not attached to the real estate, "comprises a necessary, integral or working part of some other object which is attached" to the real estate. 35A Am. Jur. 2d *Fixtures* § 10 (observing that constructive annexation 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.")

In the instant case, the conveyors, spouts, transitions, overhead connecting bridges, and aeration system components are attached directly to the massive grain elevator bins, which the parties agree are realty. Although they are bolted together and could be removed or replaced, we find that this does not preclude annexation to the realty because they have become part of the whole of the structure. By analogy, a window in a house does not remain personal property once installed merely because it can be replaced to increase energy efficiency and can be easily removed by removing casing and nails. The casing and nails in this example are sufficient for annexation just as the bolts are sufficient in the present case because, once installed, the conveyors, spouts, transitions, overhead connecting bridges, and aeration system components have become part of the elevator structure. These assets are more analogous to the window example, as building materials becoming part of a whole improvement, than the building example of *Stalcup* where the entire structure itself was at issue. The annexation prong of the test is satisfied.

The second part of the test is adaptation to the use of that part of the realty to which it is attached. The focus of the adaptation test is the use to which the item in question is put relative to its surroundings. If an item of property is "placed on the land for the purpose of improving it

and to make it more valuable, that is evidence that it is a fixture." *Morgan*, 42 Kan. at 29. If the property is an integral or essential part of the use that it being made of the realty, that too is evidence that the property is a fixture. *See Total Petroleum*, 28 Kan. App. 2d at 301; 35A Am. Jur. 2d Fixtures § 11 (observing that "[a]n article loses its status as simple unrelated personalty and becomes a fixture when it becomes so integrated into the efficient use of the particular parcel of real estate that it has become logically considered more a part of the real estate than not".)

Property attached for purposes unrelated to the use to which the real estate is devoted, however, fails the adaptation test. *See, e.g., Dodge City Water & Light Co.*, 64 Kan. at 248 (finding pipe installed on land platted for development but later returned to farmland was part of water works and not adapted for farm use). Adaptation also may be lacking where the property in question has no special connection with the real estate to which it is attached and can be put to a similar use at other locations. *See Stalcup*, 27 Kan. App. 2d at 886 (finding metal farm building of a type found across the state not adapted to use of realty).

The Kansas Supreme Court highlighted the distinction between adapted property and general use property in *Board of Education, Unified Sch. Dist. No. 464 v. Porter*, 234 Kan. 690 (1984). In *Porter*, a condemnation case, the court found an above-ground storage tank was not a fixture of the freehold based in part on the adaptation prong. The court noted that the storage tank was not the kind of machinery that when severed "commands only the prices of second-hand articles," but when attached to an operating plant "may produce an enhancement of value as great as it did when new." *Id.* at 695. The storage tank, the court said, "had none of those characteristics and [was] as usable at another location as on the land in question." *Id.*

The Kansas Department of Revenue, Property Valuation Division, has provided illustrative guidance on the adaptation prong of the fixtures test:

> "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."

2014 PVD Guide at p. iv.

In this case, we are not presented with a general storage building like *Stalcup* which could be similarly used for general storage on an adjacent vacant parcel. Nor are we presented with a system of production assets housed in, or supported by, a general purpose building or structure. Instead, the particular assets at issue herein are interdependent upon and have become part of the large storage elevators or bins which are a part of realty. The elevators were designed to hold or incorporate these assets as part of the whole. The assets at issue are components integrated into the efficient use of the elevators and are logically considered part of the realty. The items at issue cannot be removed and simply placed on an adjacent vacant parcel and have any comparable utility. They do not perform a function or operate independent of the elevator. We conclude that the assets at issue were installed to carry out the particular purpose to which

the real estate, including the elevator, has been devoted, and each asset is important to the effective utilization of the real estate for this purpose. The conveyors, spouts, transitions, overhead connecting bridges, and aeration system components are adapted to the property as they make the facility more valuable and usable and are an integral part to the grain facility use.

The third part of the test is intention: that is, whether the annexing party intended to make the personal property in question a permanent part of the real estate. *See Total Petroleum*, 28 Kan. App. at 299-300. "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. *See Michigan Nat'l Bank v. City of Lansing*, 96 Mich. App. 551, 554, 293 N.W.2d 626 (1980). Intention is determined as of the time of annexation and may be inferred from the nature of the annexed article, the purpose or use for which the annexation is made, and the structure and mode of the annexation. *Eaves v. Eaves*, 10 Kan. 314, 316 (1872).

The Taxpayer's witnesses contend that the assets at issue were designed, constructed and installed with the intention that they could be removed and transported to another site for installation if business conditions warranted. The fact that Taxpayer may decide to replace the assets at issue over time does not equate to a finding that the assets remained personal property. Often certain components of a building or structure wear out faster than others, such as the roof of a house, or are upgraded for more efficient operation, such as a furnace. These components, which start out as personal property, do not remain personal property once they become part of the permanent improvement. The weight of the evidence suggests that Taxpayer intended for the assets at issue to remain in place until they wore out, became obsolete, or needed to be upgraded. Nearly all improvements to real property may be salvaged to a certain extent, but that does not make salvagable parts of an improvement personal property as long as they remain and function as part of the whole improvement. Based upon the facts and circumstances of this case, we find the intention prong of the fixtures test is satisfied.

One item at issue has a slightly different consideration. We find that the temperature monitoring system components for Bins Nos. R-5 and R-6 are not sufficiently annexed and adapted to the realty to be considered a fixture. The temperature monitoring system components include a box situated outside the bins and cables running inside the bins to monitor the temperature and moisture of the grain. The removal of the system would not incapacitate the function of the elevator or leave large holes in the structure. The temperature monitoring system /*110only0 to the grain, not to the physical structure which is part of the realty. For these reasons, we conclude that the temperature monitoring system is personal property.

Based on the evidence presented at the hearing, duly weighing such evidence, the Board finds that the subject properties, as described above, except for the temperature monitoring system components for Bin R-5 and Bin R-6, for tax years 2013 and 2014, are determined to be real estate. The temperature monitoring system components for Bin R-5 and Bin R-6 shall be considered personal property and would be exempt pursuant to K.S.A. 2014 Supp. 79-223.

IT IS THEREFORE ORDERED that the finding made hereinabove, shall be, and is hereby, adopted by this Board.

IT IS FURTHER ORDERED that the appropriate officials shall correct the county's records to comply with this Order, re-compute the taxes owed by the taxpayer and issue a refund for any overpayment.

This order is a full and complete opinion pursuant to K.S.A. 74-2426(a), and amendments thereto.

Any party who is aggrieved by this order may file a written petition for reconsideration with this Board as provided in K.S.A. 77-529, and amendments thereto. *See* K.S.A. 74-2426(b), and amendments thereto. The written petition for reconsideration shall set forth specifically and in adequate detail the particular and specific respects in which it is alleged that the Board's order is unlawful, unreasonable, capricious, improper or unfair. Any petition for reconsideration shall be mailed to the Secretary of the Board of Tax Appeals. The written petition must be received by the Board within 15 days of the certification date of this order (allowing an additional three days for mailing pursuant to statute).

Rather than filing a petition for reconsideration, any aggrieved person has the right to appeal this order of the Board by filing a petition with the court of appeals or the district court pursuant to K.S.A. 74-2426(c)(4)(A), and amendments thereto. Any person choosing to petition for judicial review of this order must file the petition with the appropriate court within 30 days from the date of certification of this order. *See* K.S.A. 77-613(b) and (c) and K.S.A. 74-2426(c), and amendments thereto. Pursuant to K.S.A. 77-529(d), and amendments thereto, any party choosing to petition for judicial review of this order is hereby notified that the Secretary of the Board of Tax Appeals is to receive service of a copy of the petition for judicial review. Please note, however, that the Board would not be a party to any judicial review because the Board does not have the capacity or power to sue or be sued. *See* K.S.A. 74-2433(f), and amendments thereto.

If both parties are aggrieved by this order, and one party timely appeals this order to the district court (which necessitates a trial de novo pursuant to K.S.A. 74-2426(c)(4)(A)), then this order will be deemed final and will render moot any pending petition for reconsideration or request for a full and complete opinion filed by the other party. If both parties are aggrieved by this order, one party timely appeals this order to the court of appeals (which would involve appellate review under the Kansas judicial review act), and the other party timely files a petition for reconsideration, then this order will be deemed non-final and the Board will proceed to render an order regarding reconsideration.

Unless an aggrieved party files a timely petition for reconsideration as set forth herein, this order will be appealable by that party only by timely appeal to the district court or the court of appeals as set forth above.

The address for the Secretary of the Board of Tax Appeals is Board of Tax Appeals, Eisenhower State Office Building, 700 SW Harrison St., Suite 1022, Topeka, KS 66603. A party filing any written request or petition shall also serve a complete copy of any written request or petition on all other parties. Please be advised that the administrative appeal process is governed by statutes enacted by the legislature and no further appeal will be available beyond the statutory time frames.

IT IS SO ORDERED

THE KANSAS BOARD OF TAX APPEALS

BOARD OF TAX APPEALS STATE OF KANSAS

RONALD C. MASON, BOARD MEMBER

JAMES D. COOPER, BOARD MEMBER

ARLEN SIEGFREID, MEMBER PRO TEM

JOELLENE R. ALLEN, SECRETARY

CERTIFICATION

I, Joelene R. Allen, Secretary of the Board of Tax Appeals of the State of Kansas, do hereby certify that a true and correct copy of this order in Docket Nos. 2013-2335-EQ & 2014-2560-EQ and any attachments thereto, was placed in the United States Mail, on this 23rd day of September, 2015, addressed to:

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IN TESTIMONY WHEREOF, I have hereunto subscribed my name at Topeka, Kansas.

Joelene R. Allen

Joelene R. Allen, Secretary