

FILED
Court of Appeals
Division II
State of Washington
8/19/2019 4:33 PM
NO. 52975-1-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

REC SOLAR GRADE SILICON, LLC,

Appellant,

v.

MELISSA MCKNIGHT, Grant County Assessor,

Respondent.

ON APPEAL FROM THURSTON COUNTY SUPERIOR COURT
(Hon. Chris Lanese)

APPELLANT'S REPLY BRIEF

Norman J. Bruns, WSBA #16234
Michelle DeLappe, WSBA #42184
GARVEY SCHUBERT BARER, P.C.
1191 Second Avenue, 18th Floor
Seattle, Washington 98101-2939
(206) 464-3939
seasalt@gsblaw.com
Attorneys for Appellant

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	ISSUE 1: The BTA’s stated reasons for rejecting REC’s appraisal conflict with Washington law, appraisal principles, and the BTA’s other findings	3
	A. Judge Wilson’s Order required the BTA to resolve the contradiction in how it treated REC’s outdated internal budgets	3
	B. The BTA failed to resolve the contradiction and also added a new contradiction	4
	1. The Assessor’s position clashes with the legal standard for property tax valuation	6
	2. The Assessor’s position clashes with the facts about REC’s outdated budget	7
	3. The Assessor’s position clashes with the facts about the financial accounting analysis, which included a very different, profitable plant in Montana	13
III.	ISSUE 2: The BTA’s stated reasons for classifying REC’s M&E as fixtures conflict with Washington law and the unrebutted, credible evidence	14
	1. The BTA and Assessor incorrectly assume REC has the burden of proving the presumption applies to its M&E	15
	2. The BTA and Assessor misinterpret the controlling law	15
	3. The Assessor and the BTA misinterpret the evidence	16
	4. The Assessor misreads the BTA’s flawed application of the “intent” factor	19
IV.	CONCLUSION	21
V.	APPENDIX	24

TABLE OF AUTHORITIES

Cases

<i>Andrews v. King County</i> , 1 Wash. 46, 23 P. 409 (1890)	23
<i>Cascade Court Ltd. P’ship v. Noble</i> , 105 Wn. App. 563, 20 P.3d 997 (2001)	7
<i>Chase v. Tacoma Box Co.</i> , 11 Wash. 377, 39 P. 639 (1895).....	16
<i>Dep’t of Revenue v. Boeing Co.</i> , 85 Wn.2d 663, 538 P.2d 505 (1975)	15, 18, 20, 21
<i>Karanjah v. Dep’t of Social & Health Services</i> , 199 Wn. App. 903, 401 P.3d 381 (2017)	12
<i>Krivanek v. Fiberboard Corp.</i> , 72 Wn. App. 632, 865 P.2d 527 (1993), <i>review denied</i> , 124 Wn.2d 1005 (1994).....	18
<i>Ziv v. Knight</i> , 121 Wash. 539, 209 P. 685 (1922).....	15

Statutes

RCW 84.04.090	15
RCW 84.52.018	2

Other Authorities

<i>The Bluebook: A Uniform System of Citation</i> 58 (Columbia Law Review Ass’n et al. eds., 20th ed. 2015).....	4
Towards Freedom: a multimedia presentation of the speech the Reverend Dr. Martin Luther King, Jr. delivered at Dartmouth on May 23, 1962, https://www.dartmouth.edu/~mlk/towards_freedom_mlk.pdf (transcript for the presentation at https://250.dartmouth.edu/highlights/reverend-dr-martin- luther-king-jr-speaks-dartmouth) (last visited August 15, 2019).....	21, 22

I. INTRODUCTION

The Assessor repeatedly states that the BTA's second decision fully implements the detailed remand instructions of Judge Wilson's Order. Merely stating the desired conclusion, no matter how often, does not make it so. The Assessor must prove it, and to prove it she must refute REC's meticulous factual description of the BTA's failure to implement that Order. This she has not done. The Assessor creates an illusion that she has done so by pointing to specific portions of the remand decision as new material. But much of what she depicts as new was in the first decision that Judge Wilson reversed. This is just one of the false impressions she creates to divert attention from the real issues.

Another, starting with her brief's first sentence, is to portray REC as a rapacious and relentless corporation. That portrayal is false. REC is fighting for its life. That fight is not just for its shareholders. It is also for its employees, their families, and their community. Retaliatory tariffs are now familiar to all Americans, but Moses Lake has been living with that pain for years. REC is not asking for any special favors in the ongoing fight to save its Moses Lake plant. It only asks for what the law requires.

The Assessor, on the other hand, seeks this Court's assistance in extracting over \$7 million from REC for the tax year involved in this

case.¹ That is on top of the nearly \$8 million REC already paid in 2013 taxes.² This is not the first such effort. Immediately after the BTA's first decision, the Assessor declared victory and tried to extract the additional tax and interest she claims REC owes.³ This was contrary to law (RCW 84.52.018) and over the objections of the State Department of Revenue.⁴ Yet the Assessor forced REC to obtain a court order requiring the Assessor to cease collection efforts until after the case is finally resolved.⁵

The Assessor mischaracterizes the issues, arguments, and other statements raised by REC; disregards the internal conflicts that continue to plague the BTA's decision; asserts facts and legal principles without citations; cites sources that do not support her assertions; generally responds to REC's substantive and detailed analysis with conclusory assertions, often without addressing key arguments; and descends into disparaging characterizations of REC's position. Fortunately, the parties agree that the dispute is simply whether the BTA followed Judge Wilson's Order. Resp. at 11. As shown by REC's brief and the appended redline of the BTA's changes on remand, the BTA did not follow her Order. Nothing

¹ App. to this Reply (calculations for amount sought by the Assessor in this case).

² CP 58, 62-63 (regarding taxes REC paid in 2013).

³ CP 59-60 (discussing the Assessor's premature bill and quoting her election campaign website about issuing the tax bill to REC after her "huge victory" before the BTA), 74 (showing a copy of the premature bill).

⁴ CP 75-76 (stating the Department of Revenue's efforts to recommend that the County cancel the tax bill as premature under RCW 84.52.018).

⁵ CP 172-173.

in the Assessor's brief shows otherwise.

II. ISSUE 1:

The BTA's stated reasons for rejecting REC's appraisal conflict with Washington law, appraisal principles, and the BTA's other findings.

REC's first issue is whether the BTA's basis for rejecting REC's appraisal was flawed. As REC explained in its opening brief, Judge Wilson had ordered the BTA to resolve internal conflicts within the BTA's original decision, but the BTA did not do so. The BTA's reasons for rejecting REC's appraisal continue to conflict with the BTA's own unchallenged findings. Further, though the BTA added a new reason for rejecting the appraisal based on the discount rate, that only exacerbated the decision's internal conflicts.

A. Judge Wilson's Order required the BTA to resolve the contradiction in how it treated REC's outdated internal budgets.

Core to this issue is the BTA's failure to resolve an internal conflict that Judge Wilson pointed out twice in her Order. First, she explained that the BTA erred in "fail[ing] to explain the basis for rejecting the taxpayer's [income and cost] approaches in light of [the BTA's] Finding 49 and 50⁶⁶ (finding that the taxpayer's budgets are intentionally aggressive and that market conditions shifted in late 2011." CP 247-248. Second, she ordered the BTA to "explain how much weight [for the taxpayer's budget] would

⁶⁶ In the BTA's decision on remand, these became Findings 54 and 55. App. to Appellant's Br. at 12.

have been appropriate, particularly in light of Findings 49 and 50, which recognize that market conditions changed by the end of 2011 and that the taxpayer's revenue forecast was intentionally aggressive to drive personnel and performance." CP 248.

The only way for the BTA to follow the Order was to either correct the findings Judge Wilson listed as erroneous (CP 247) or to explain the apparent conflict. Changing unchallenged findings was not an option; the parties agree these are verities. Resp. at 4. The Assessor incorrectly argues that REC "stretched" case law to imply it says more than this. Resp. at 7. That is not true. REC quoted from the case to show what it directly states: "the Court is 'bound by the unchallenged findings' as 'established fact[s]' in the case."⁷ Unlike the Assessor, REC has strictly adhered to the law and the facts in its brief. Judge Wilson's Order correctly concluded that the erroneous findings either needed correction in light of the unchallenged ones or the BTA needed to provide an explanation for the apparent conflict.

B. The BTA failed to resolve the contradiction and also added a new contradiction.

The conflict in the BTA's treatment of REC's internal budget remains—a fact that the Assessor ignores. To its previous erroneous

⁷ Appellant's Br. at 21 n.5. REC properly signaled that the stated proposition could be clearly inferred from the cited case. *The Bluebook: A Uniform System of Citation* 58 (Columbia Law Review Ass'n et al. eds., 20th ed. 2015).

findings that criticize REC's appraisal the BTA added a new one about the discount rate employed by REC's experts. This exacerbated the problem by creating a new conflict. The BTA preferred a rate that REC used for financial accounting purposes. That rate is irrelevant for property tax purposes. In the end, the BTA jettisoned the work of REC's independent experts for two reasons: because the experts did not adopt the company's internal budget and its financial accounting discount rate. Neither criticism—whether based on REC's budget or its financial accounting analysis—is a legitimate reason to reject the appraisal.

The Assessor's response is that it is REC's own fault that it created a budget not suited to property tax valuation in this case or had another discount rate for different purposes. Resp. at 17-18, 20. According to her, taxpayers must live with whatever property tax valuations result from their internal budgets or financial accounting analyses. *Id.* Note that this response in no way explains what the BTA did to either correct the erroneous findings or explain the apparent conflict. And the Assessor can cite nothing in the BTA decision supporting her position: the BTA did not say that taxpayers' financial analyses for other purposes necessarily control their property tax valuations, whether as a matter of the specific facts in this case or as a matter of law generally. The Assessor cites no legal or appraisal authority dictating this either.

This argument that REC's internal budget and financial accounting

analysis should dictate the property tax value of the Moses Lake Facility is the keystone on which the Assessor relies for her entire position on the first issue. This argument fails. It misapprehends or ignores the legal standard for property tax valuation. It also ignores the specific facts that made the budget and financial accounting analysis so unsuitable to valuing the physical assets of the Moses Lake Facility, particularly as of January 1, 2012. Because she errs in both the law and facts, the entire structure of the Assessor's position on the first issue collapses.

1. The Assessor's position clashes with the legal standard for property tax valuation.

If the Assessor's view were to become the law, any company aiming to reduce its property tax expense would have an easy new way to do so. The company could simply create a budget that underestimates revenues and overstates expenses. And perhaps it could formulate other financial analysis for other purposes that would favor the taxpayer's property tax valuation. The savvy taxpayer would then send that information to the assessor and simply wait for lower property tax assessments to appear. This is what the Assessor's arguments regarding REC's internal budget and discount rate could lead to.

In all of her brief, the Assessor never mentions what the controlling legal standard is. As REC's brief explains, Washington law requires assessing property at its market value, based on what a willing buyer

would pay a willing seller as of the assessment date.⁸ For her keystone argument to hold, the Assessor would have to show that the willing buyer would pay a price based entirely on the seller's internal budget or discount rate. This would be absurd. Indeed, the Assessor's own expert testified the opposite: buyers would use their own analysis, not the seller's. Appellant's Br. at 32, 36 (citing AR Transcripts VRP (4/8/14) at 1452). The Assessor attempts to avoid the obvious absurdity by asserting that REC was somehow receiving its just deserts. Both the Assessor and the BTA try to sidestep this vital fact: there is no evidence that a willing buyer would have paid REC a price for the Facility's physical assets based on REC's internal budget and financial accounting analysis.

2. The Assessor's position clashes with the facts about REC's outdated budget.

The other main reason the Assessor's argument cannot stand is that several circumstances make the budget and financial accounting analysis in this case unreliable for valuing the Facility's physical assets, particularly as of January 1, 2012. Judge Wilson recognized that the BTA's unchallenged findings set forth two circumstances indicating that the budget did not deserve much weight, if any, in the property tax valuation. CP 248-249. First, market conditions changed drastically

⁸ Appellant's Br. at 24 (citing *Cascade Court Ltd. P'ship v. Noble*, 105 Wn. App. 563, 568, 20 P.3d 997 (2001)).

between the time when REC prepared the budget and year end. CP 248, 506, 509. The Assessor emphasizes the BTA's new finding (Finding 58) that prime grade prices dropped between October 2011 and year end. Resp. at 18. This only confirms the change in market conditions. She claims that the BTA took this price drop "into consideration in arriving at its conclusions." *Id.* Nothing supports that claim. The precipitous drop occurred between the date REC completed its internal budget and the January 1, 2012, valuation date. Appellant's Br. 14-15. She ignores this in her brief. She even argues that the price drop in Finding 58 "closely mirrored REC's internal budget projections." Resp. at 19. She cites nothing, so it is impossible to discern how she could have arrived at that very wrong conclusion.

This echoes the Assessor's state of denial generally about how bleak REC's outlook was on January 1, 2012. For example, she repeatedly highlights as positive news the following announcement that REC made after prices plunged in 2011 (Resp. at 6, 19-20):

Sales prices for REC Silicon are expected to decrease significantly in 2012 compared to the average for 2011, largely due to expected weak end user markets, but then to pick up year-by-year in subsequent years but not to return to the average 2011 level.

AR Ex. R22-88. The prediction that prices, which had already fallen to a December average of \$17.55 per kilogram, would continue to "decrease significantly," was dismal news.

This prediction came true. The actual average price in 2012 was \$14.71 per kilogram, and the average price for December, 2012, was \$10.27. Appellant's Br. at 16. In comparison, REC's appraisers projected average prices of approximately \$25 per kilogram. CP 514. The expectation of another large decline in 2012 was hardly tempered by the prediction that prices would not stay at the bottom forever. The awful truth was that REC would fall far short of the expectations on which it had based its massive investment in the Facility. CP 504 (finding REC based its investment on prices of \$35-\$50 per kilogram for its full mixed-grade production); AR Transcripts VRP (4/1/14) at 295 (REC's Vice President of Commercial testifying that REC would not have built the Moses Lake plant based on what it knew as of January 1, 2012). Stating that the outlook was bleak is not taking "liberty with the facts," as the Assessor alleges. Resp. at 5-6. Ample evidence in the record supports the reality reflected in REC's brief.

Similarly, stating that REC considered shutting down its Siemens unit in 2011 is not taking "liberty with the facts." Resp. at 5. REC actually started considering it in 2010 and ultimately operated the Siemens unit in the red for approximately 18 months. AR Transcripts VRP (4/1/14) at 544-546. But the Assessor only focuses on the fact that REC kept operating it in 2012. The Assessor apparently reads REC's appraisal to say that running the unit at a loss had "only minimal impact on the overall

valuation.” Resp. at 5 (citing AR Ex. A1-97 to -98). In fact, REC’s appraisal explains that, given the market and inefficient technology, the Siemens unit itself had almost no value, not that continuing to run it at a loss would have little effect on the Facility’s value. AR Ex. A1-98.

The Assessor also attempts to undermine the fact that REC operated at a loss in 2012 by pointing to the company’s total U.S. earnings before interest, taxes, depreciation, and amortization (EBITDA). Resp. at 6. The same annual report the Assessor cites explains that this includes operations in Butte, Montana (REC Advanced Silicon Materials LLC), which produces electronics-grade polysilicon for the semiconductor market. Ex. R23-77, -157. The Butte plant was very profitable, with an important impact on the combined revenue of the two plants. AR Transcripts VRP (4/1/14) at 552. As the BTA’s unchallenged finding established, electronics-grade polysilicon commands higher prices in a stable market. CP 503. Nothing refutes this truth: REC’s Moses Lake Facility operated at a loss in 2012. AR Transcripts VRP (4/1/14) at 565.

As Judge Wilson pointed out, even as of the date REC prepared its budget in fall 2011, the budget was “intentionally aggressive to drive personnel and performance.” CP 248-249, 508. The Assessor essentially says that this fact does not matter, but she cites no support for saying so. Resp. Br. at 17-18. Judge Wilson clearly thought it mattered. Moreover, at the time REC prepared the budget, it stated that the aggressive goals were

qualified by specifically identified risks involving highly probably, critical events—these are what the “risk matrix” accompanying the budget showed. CP 509. As REC had explained at the time it created its budget, and the BTA recognized, that the budget was subject to important known risks. CP 509. Though REC’s opening brief discusses this in detail (Appellant’s Br. at 10, 14, 15), the Assessor never even mentions it.

Not much later, these known risks became reality. Appellant’s Br. at 15-16. And yet, the Assessor claims that nothing that occurred after January 1, 2012, confirmed evidence of market expectations as of that date. Resp. at 15, 26. The Assessor cites nothing for this remarkable claim. The BTA itself never states that. The BTA’s conclusion that later events were “unknowable” as of January 1, 2012, is very different from claiming the events deviated from expectations—another point that the Assessor’s response ignores. Appellant’s Br. at 34.

The BTA’s rejection of REC’s appraisal also hinged on a fundamental misinterpretation of the budget. For example, the BTA improperly compared prime-grade price forecasts from the budget with mixed-grade forecasts in REC’s appraisal, as discussed in REC’s brief. Appellant’s Br. at 7, 9, 13, 17, 31. At other points in its decision the BTA showed that it understood the different pricing for the Facility’s mixed grades and the error of drawing such false comparisons. CP 515 (rejecting the Klingeman-Brewer appraisal relied on by the Assessor for this same

error). The Assessor's brief does not address this at all.

Despite the detailed remand instructions, the BTA's second decision did not resolve these conflicts. The second decision neither explains a basis for reconciling the conflicts nor revises its erroneous findings and conclusions to accord with the findings that had become verities. The BTA's inconsistent treatment of the budget is just one example of where the BTA has been "willful and unreasoning or does not consider the facts and circumstances underlying the decision," as this Court characterized another agency's arbitrary and capricious decision.⁹ The Assessor argues that the BTA followed Judge Wilson's instructions to redetermine the weight to place on the outdated budget in the BTA's Findings of Fact 57, 58, and 76. Resp. at 18-20. In fact, Finding 57 and most of Finding 76 were in the BTA's original decision, as the redline appended to REC's brief clearly shows at pages 13 and 18-19. Finding 58 discusses the precipitous price drop between the time when the budget was created and the valuation date. CP 509. This supports REC's appraisal, not the BTA's rejection of that appraisal. And the only part of Finding 76 that is new is subpart 76.5, which discusses the discount rate, not the budget. CP 515. So in no way did the BTA resolve the conflicts on which it was reversed.

⁹ *Karanjah v. Dep't of Social & Health Services*, 199 Wn. App. 903, 924-25, 401 P.3d 381 (2017).

3. The Assessor's position clashes with the facts about REC's financial accounting analysis, which included a very different, profitable plant in Montana.

REC's experts performed an independent analysis of the discount rate that would apply to the sale of the physical assets of the Moses Lake Facility. The BTA rejected that analysis on the basis that REC itself had engaged in financial accounting analysis that concluded a lower discount rate. For many reasons, the two discount rates are not interchangeable. Appellant's Br. at 36-38. One key reason is that REC's financial accounting analysis was based on a different collection of assets including not only the Moses Lake Facility but also REC's very profitable plant in Butte, Montana.

A discount rate can be compared to the interest rate that a lender charges on a debt. *See* AR Transcripts VRP (4/4/14) at 1009. If the borrower were a plant with poor prospects and high risk, the lender would charge a high rate of interest. But if the borrower has a combination of two plants—the one with poor prospects plus another plant that is a steady, strong performer—the lender would obviously offer a much lower rate. The BTA here has opted for the equivalent of the combined entity and lower rate even though the valuation analysis applies to only the plant with poor prospects and high risk. The BTA cites no legal authority or appraisal literature that would support equating these two very different types of analysis. The Assessor similarly cites no authority for doing so. The

Assessor's response is that REC must live with whatever consequences flow from these circumstances. Resp. at 18.

This is not how Washington law operates. The controlling standard is what a willing buyer and willing seller would use. REC's experts used this standard as their lodestar in arriving at their independent valuation, as emphasized repeatedly throughout their appraisal report. AR Ex. A1-16, -18, -23, -54, -116, -119, -244, -247, -250, -258, -260. REC's appraisal team has significant experience assisting buyers and sellers in such valuations for sale transactions and used the same approach in appraising REC's Facility for this case. AR Ex. A1-16, -18; AR Transcripts VRP (4/2/14) at 659-662. The BTA does not base its reasons for rejecting REC's appraisal on this controlling legal standard or on any other legal authority or appraisal principle. The Assessor's brief fails to show otherwise.

III. ISSUE 2:

The BTA's stated reasons for classifying REC's M&E as fixtures conflict with Washington law and the unrebutted, credible evidence.

The second issue raised in REC's opening brief is whether the BTA erred in concluding that REC's M&E is real property. Only if the M&E were to meet all three factors in the fixtures test would it become real property: (1) the M&E must be actually annexed to land or buildings, (2) the M&E's use or purpose must be integrated with land or buildings, and (3) REC must have intended a permanent attachment. Appellant's Br.

at 47. The Assessor concedes that the law presumes chattels (items of tangible personal property) remain such unless these three factors are met. Resp. at 28, 38. The Assessor's response brings several of the BTA's errors on this issue to the fore: the burden of proof, the controlling law, the evidence, and in particular the application of the "intent" factor in the fixtures test.

1. The Assessor and the BTA incorrectly assume REC has the burden of proving the presumption applies to its M&E.

The Assessor and BTA assume REC has the burden of proving its M&E did not become part of the real property. Resp. at 37-38, CP 527. The Assessor and BTA cite only an opinion involving a landlord-tenant dispute.¹⁰ That opinion in no way requires the party claiming the presumption to prove that the presumption applies. By putting the burden on REC, the Assessor and BTA stand the presumption on its head: they effectively presume that the M&E is real property.

2. The Assessor and the BTA misinterpret the controlling law.

The determination of whether assets have become fixtures "must be governed and decided by reference to common-law principles."¹¹ The BTA instead repeatedly quotes an administrative rule. CP 528-530. REC's brief points out that the BTA largely ignored the controlling case law and

¹⁰ Resp. at 37; CP 527 (citing *Ziv v. Knight*, 121 Wash. 539, 541, 209 P. 685 (1922)).

¹¹ *Dep't of Revenue v. Boeing Co.*, 85 Wn.2d 663, 666, 538 P.2d 505 (1975). See also RCW 84.04.090.

its implications for REC's M&E. Appellant's Br. at 47. The Assessor tries to conduct her own review of case law to compensate for this lapse. Resp. at 32-38. But she does not dispute that the BTA's decision disregards the many cases in which manufacturing M&E remain chattels. And she cites no case where manufacturing M&E became fixtures.

The Assessor often misinterprets the law on fixtures. For example, she repeatedly implies, with no legal authority, that something is a fixture if removing it would halt the manufacturing process. Resp. at 30, 31. This is not the test. If it were, all of the many cases characterizing manufacturing M&E as personal property would have reached the opposite conclusion. As Washington's Supreme Court long ago explained, "That the article is essential to the use of the building for the *business for which it is used, is not the test by which to determine whether or not it is a part of the realty.*"¹² The BTA similarly failed to apply the correct test.

3. The Assessor and the BTA misstate and misinterpret the evidence.

The Assessor's interpretation of REC's evidence on this issue is wrong. For example, she asserts that the testimony failed to specify actual items of M&E that could be moved. Resp. at 31. She also asserts that REC cannot remove the M&E without injury to the buildings. Resp. at 35. No

¹² *Chase v. Tacoma Box Co.*, 11 Wash. 377, 382-83, 39 P. 639 (1895) (emphasis in original).

evidence supports these assertions. REC's director of operations, an engineer with many years of experience at the Facility, testified specifically for each unit that all the M&E, including the FBR reactors, can be removed without damaging the land or the buildings. AR Transcripts VRP (3/31/14) at 117-130. Another fact ignored by the BTA and Assessor is that, to make room for packaging equipment, REC actually removed entire reactors without any damage to the building. *Id.* at 121-123 ("we were able to just take the equipment down and out of the building and out the end of the building"). REC has also replaced and reconfigured other specific items of M&E, such as the product handling equipment and coolers within the FBR building. *Id.* at 125-126, 130.

Also disregarded is testimony from REC's director of operations and REC's corporate controller about the thorough useful life analysis REC's engineers conducted for all REC's assets. *Id.* at 132-134, (4/2/14) at 535. REC concluded its M&E would last 5 to 15 years depending on the item, with the average at 12 years. *Id.* (3/31/14) at 133, (4/2/14) at 535. For example, REC originally expected the FBR reactors to last five or six years but later increased the expectation to ten years. *Id.* (3/31/14) at 134, (4/2/14) at 535-536. In contrast, REC concluded its buildings would last 30 years. *Id.* (3/31/14) at 133-134, (4/2/14) at 535-536. The BTA noted these facts as quotations from REC's proposed findings. CP 524 (Finding 119). The BTA does not indicate whether it accepts them as facts in

themselves, and it does not incorporate them into its analysis. This evidence was unrebutted, undisputed, and presented by two knowledgeable, credible witnesses. There is nothing inherently unreliable about it. As a matter of law, the BTA must accept this evidence as true.¹³

The BTA's conclusions are at odd with these facts. The BTA focused on only the FBR M&E, concluding that the FBR building could never be used for anything except the specific M&E currently in that building. CP 529. This is similar to the mistake the BTA made in *Boeing* that the 747 assembly plant building could not be used for other purposes.¹⁴ The Supreme Court observed that was "clearly erroneous": the building could be used for the "manufacture of either larger or smaller aircraft," requiring the immense jigs at issue in the case to be discarded and replaced.¹⁵

The eight-floor FBR building "is essentially like being inside a big building." AR Transcripts VRP (3/31/14) at 123, 127. Given that reactors that will last only five to ten years are in a building designed to last 30 years, the reactors will need to be replaced. REC's director of operations testified this can be done. *Id.* at 130. Both REC's experts and the BTA assumed in valuing the Facility that the FBR unit would continue production well beyond 2019, ten years after it began production. AR Ex.

¹³ *Krivanek v. Fiberboard Corp.*, 72 Wn. App. 632, 636-37, 865 P.2d 527 (1993), review denied, 124 Wn.2d 1005 (1994).

¹⁴ *Boeing*, 85 Wn.2d at 665.

¹⁵ *Id.* at 665, 669.

A1-89 (noting the FBR unit began production in 2009); CP 512 (finding REC's experts forecast production at a constant level to 2027); CP 515 (finding production could be even higher). Given the reactors' short useful lives, production could continue that long by replacing them. There is also no evidence that other uses for the FBR building would not be feasible, such as new types of M&E as the technology matures or any number of other purposes. For example, REC started using its Siemens building for research and development work and additional packaging facilities. AR Transcripts VRP (3/31/14) at 121-122. The same type of analysis applies to all the M&E.

Fixated only on the FBR building, the BTA skipped over all the remainder of the M&E. CP 529-530. The BTA did not discuss the M&E in the Siemens unit or the equipment outside the buildings, such as the extensive piping and pressure vessels that REC frequently replaces. AR Transcripts VRP (3/31/14) at 117-118. Yet somehow the BTA concluded that all of it met the three factors of the fixtures test. CP 529-530.

4. The Assessor misreads the BTA's flawed application of the "intent" factor.

As REC's brief explains, the BTA concluded one of the three crucial factors—the owner's intent to permanently annex chattels to the realty—based solely on the fact REC reports the M&E on a "fixed asset list." Appellant's Br. at 48. As noted in REC's brief, a fixed asset list" is an

accounting term for a list of tangible assets. *Id.* The Assessor claims REC's statement "lacks any evidence and is inherently erroneous." Resp. at 38. Citing Conclusion of Law 23, the Assessor states that the BTA derived REC's intent on the failure to object to characterization of the M&E as fixtures in prior property tax assessments. Resp. at 4, 29, 38.

Conclusion of Law 23 does not reference prior property tax assessments. Rather, it assumes intent based on this statement: REC "submitted its fixed-asset list and did not object to the Department's characterization of the approximately 18,000 items as fixtures." CP 530. The BTA then refers to Boeing's reporting of its jigs to the Snohomish County Assessor as personal property. *Id.* The BTA ignores two facts in the *Boeing* case in extrapolating REC's intent: (1) the Supreme Court listed the reporting to the Assessor as the fourth of five facts indicating Boeing's intent to treat its jigs as personalty, not as the sole fact;¹⁶ and (2) there is no evidence that REC reported its M&E as fixtures.

Conclusion 23 relies solely on Finding 115. That finding repeatedly states that REC provided a "fixed-asset list." CP 523. It does not explain anything about how REC supposedly reported the M&E as "fixtures." In fact, REC reported everything at the Facility, from vehicles to desktop computers to chairs, on the "fixed-asset list"; nothing on the list

¹⁶ *Boeing* at 669-670.

characterized any of the M&E as “fixtures.” AR Ex. R6-233 (including, for example, “Office & Furniture,” “Vehicles,” and desktop computers in REC’s fixed-asset list).

Finding 115 mentions that REC “raised no objections” to M&E being placed on the real property rolls in prior years. CP 523. The BTA cites no evidence in the record for that claim. The BTA likewise cites no legal authority for the notion that it could deduce intent based on not objecting to third parties’ characterizations of the assets. The evidence discussed above shows REC’s consistent intent that the M&E remain chattels. As stated in *Boeing*, “It is difficult to ascribe an intent to Boeing that the jigs be a permanent part of the realty when they can be so readily moved out of the plant and thus transformed back into personalty.”¹⁷ The evidence here supports the same conclusion: REC’s M&E constitute chattels. The Assessor and BTA cannot overcome this truth no matter how many unrelated facts they enumerate.

IV. CONCLUSION

Rev. Dr. Martin Luther King, Jr. famously distinguished between facts and truth in a speech on race relations in the United States.¹⁸ “A fact,” he

¹⁷ *Boeing* at 669.

¹⁸ Towards Freedom: a multimedia presentation of the speech the Reverend Dr. Martin Luther King, Jr. delivered at Dartmouth on May 23, 1962, https://www.dartmouth.edu/~mlk/towards_freedom_mlk.pdf (transcript for the presentation at <https://250.dartmouth.edu/highlights/reverend-dr-martin-luther-king-jr-speaks-dartmouth>) (last visited August 15, 2019).

said, “is the absence of contradiction.”¹⁹ Truth, in contrast, is “the presence of coherence; truth is the relatedness of facts.”²⁰ He drew this distinction in the context of explaining why his speech could not end with recounting the progress made since the “separate but equal” doctrine of *Plessy v. Ferguson*.²¹ Ending his speech with the demise of de jure segregation might have been factually accurate, but it would have been “an illusion wrapped in superficiality,” giving a misleading and untruthful impression of the work still to be done.²²

The Assessor is attempting to do that here. In an effort to create a variety of false impressions, her brief selects isolated pieces of evidence, such as her bullet points on pages 12-14 and 30-32. She then makes the incoherence worse by misrepresenting crucial facts. For example, Judge Wilson did not merely order the BTA to list facts that occurred after January 1, 2012. And even to the extent the BTA listed those facts, most of the findings the Assessor lists as a response to Judge Wilson’s Order were in the original decision that Judge Wilson reversed. *See, e.g.*, Resp. at 14. Instead, Judge Wilson ordered the BTA to apply the correct test and explain its application. CP 248. The Assessor claims the BTA did so and “concluded that the post valuation date evidence was inconsistent.” Resp.

¹⁹ *Id.* at 5.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 6.

at 12. But she omits any citation to the BTA's decision for that statement. That is because nothing in the BTA decision supports that claim. This is part of the work the BTA still needs to do. This is typical of the Assessor's treatment of the issues in this case.

The essential idea of property taxation is that each member of a community should contribute to the cost of government according to that person's wealth.²³ REC's Moses Lake Facility has suffered a huge loss in value, and its community has suffered a corresponding loss of wealth. The Assessor's job requires her to recognize that harsh reality. It is not her job to turn away from the truth and encourage the BTA to do the same. Judge Wilson saw that and required the BTA to do a better job. The BTA did not do as she instructed. REC is only asking this court to give effect to Judge Wilson's Order and to correct the additional inconsistencies and errors that the BTA added on remand.

Respectfully submitted this 19th day of August, 2019.

GARVEY SCHUBERT BARER, P.C.



Norman J. Bruns, WSBA #16234
Michelle DeLappe, WSBA #42184
Attorneys for Appellant

GSB:10442760.5

²³ *Andrews v. King County*, 1 Wash. 46, 51, 23 P. 409 (1890).

V. APPENDIX
to Appellant's Reply Brief
REC Solar Grade Silicon, LLC v. McKnight, No. 52975-1-II

	A	B	C
1	today's date	19-Aug-2019	
2	first half payment date	30-Apr-2013	RCW 84.56.020(3)
3	days since first half payment	2,302	B1 minus B2
4	second half payment date	31-Oct-2013	RCW 84.56.020(3)
5	days since second half payment	2,118	B1 minus B4
6	annual interest rate on underpayment	9.00%	RCW 84.52.018
7	daily interest rate on underpayment	0.024658%	B6 divided by 365
8			
9	BTA value on remand	774,000,000	CP 499
10	initial appeal value	450,000,000	RCW 84.52.018; AR at 1195
11	additional taxable value per BTA	324,000,000	B9 minus B10
12	tax rate	1.417411%	CP 62
13	principal amount of additional tax	4,592,412	B11 times B12
14	interest on additional first half tax	1,303,364	B13 divided by 2 times B7 times B3
15	interest on additional second half tax	1,199,186	B13 divided by 2 times B7 times B5
16	total due per BTA on remand	7,094,961	B13 plus B14 plus B15

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on August 19, 2019, I caused to be served on the person(s) listed below the foregoing Appellant's Reply Brief, via e-mail and U.S. First Class Mail, postage prepaid:

Sean P. Boutz
Christopher J. Kerley
Evans Craven & Lackie PS
818 West Riverside, Suite 250
Spokane, WA 99201-0910
sboutz@ecl-law.com
ckerley@ecl-law.com
Attorneys for: Respondent

DATED AT SEATTLE, WASHINGTON this 19th day of August, 2019.



Bonnie Rakes
Legal Assistant to Michelle DeLappe
and Norman J. Bruns

GARVEY SCHUBERT BARER

August 19, 2019 - 4:33 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 52975-1
Appellate Court Case Title: Rec Solar Grade Silicon, LLC, Appellant v. Laure Gammer, et al, Respondents
Superior Court Case Number: 14-2-01810-7

The following documents have been uploaded:

- 529751_Briefs_20190819163053D2549377_2579.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was Appellants Reply Brief.pdf

A copy of the uploaded files will be sent to:

- ckerley@ecl-law.com
- ldavis@ecl-law.com
- nbruns@gsblaw.com
- sboutz@ecl-law.com
- stracht@ecl-law.com
- wfreese@gsblaw.com

Comments:

Sender Name: Michelle DeLappe - Email: mdelappe@gsblaw.com

Address:

1191 2ND AVE STE 1800

SEATTLE, WA, 98101-2939

Phone: 206-464-3939 - Extension 1403

Note: The Filing Id is 20190819163053D2549377