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COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

REC Solar Grade Silicon, LLC, Appellant, v. Melissa McKnight, Grant
County Assessor, Respondent

RESPONDENT MELISSA MCKNIGHT, GRANT COUNTY
ASSESSOR'S RESPONSE BRIEF

EVANS, CRAVEN & LACKIE
Sean P. Boutz, WSBA #34164
Christopher J. Kerley, WSBA #16489
Counsel for Respondent
818 West Riverside Avenue, Suite 250
Spokane, WA 99201-0910
Telephone: (509)455-5200

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I. INTRODUCTION

This case has been ongoing for many years because Appellant REC Solar Grade Silicon, LLC (“REC”) continues to seek a forum that will agree with the appraisal report prepared by its expert Stancil & Co. (“Stancil”) because the Board of Tax Appeals (“BTA”) disagreed with its flawed analysis. While the BTA also disagreed with the expert appraisals provided by Respondent Grant County Assessor Melissa McKnight, (successor to Laure Grammer) (“Respondent”), Respondent has accepted the BTA’s Final Decision on Remand (“Decision”) (CP 498-531) and the valuation set forth therein for the real property where REC’s manufacturing facility is located in Moses Lake, Washington (“Property”). The Property valuation also includes certain manufacturing machinery and equipment (“M&E”) attached to the Property as fixtures.

After the BTA issued its original decision REC sought judicial review with Judge Wilson of the Thurston County Superior Court in 2015. Judge Wilson ordered remand with instructions for addressing certain issues in the original decision (“Judge Wilson’s Order”). Clerk’s Papers (“CP”) at 247-249. On remand, the BTA revised its original decision and subsequently issued the Decision. Again disagreeing with the BTA, REC sought judicial review with Judge Wilson a second time, but due to the reassignment of duties, Judge Lanese was assigned to the case. CP 347.

Sitting in its appellate jurisdiction, Judge Lanese affirmed the Decision (“Appellate Court”).

REC now seeks review of many of the same arguments previously made to the BTA and Appellate Court with the hope that this Court will agree to remand with instructions for the BTA to accept the Stancil appraisal. However, this Court should not take such action when the evidence supported the Decision. The BTA adhered to the evidence presented, Judge Wilson’s Order and the administrative record on appeal (“AR”). Accordingly, this Court should affirm the Appellate Court and the Decision.

II. ASSIGNMENTS OF ERROR AND ISSUES

Respondent disputes REC’s claims that the BTA committed legal errors in its Conclusions of Law and Findings of Fact. Specifically, Respondent disputes REC’s assertions that errors are contained in 1) Findings of Fact 30, 34, 36.3, 38-40, 51 (including subparts), 61, 76 (including subparts), 101 (including subparts), or 105.2 (CP 504-08, 512, 514-515, 520-521), and 2) Conclusions of Law 6, 9, 11-14, 17, or 21-24. CP 525-530.

Respondent disputes REC’s claims that 1) the BTA failed to follow Judge Wilson’s Order, and 2) the Findings of Fact and Conclusions of Law set forth above are invalid as a matter of law, inconsistent with other Findings of Fact and Conclusions of Law, and the BTA failed to reexamine the evidence,

which cannot be reconciled with unchallenged findings or unrebutted evidence in the record.

Issue 1

Did the BTA err in rejecting REC's appraisal?

Answer: No. The BTA considered all of the evidence presented, followed the instructions contained in Judge Wilson's Order, and determined that REC's appraisal was insufficient for a proper valuation. Contrary to REC's position that rejection of Grant County's appraisals automatically required the BTA to agree with REC's appraisals, REC is still required to demonstrate by a preponderance of the evidence that its appraisals were appropriate. Yet, it also failed to do so. After careful consideration of volumes of materials and testimony, the BTA used its discretion to reach a suitable valuation that is amply supported by the evidence in the record.¹

Issue 2

Did the BTA make legal errors in determining REC's M&E were part of the real property rather than personal property?

¹ *In Re Sego*, 82 Wash.2d 736, 513 P.2d 831; *Washington Beef, Inc. v. County of Yakima*, 143 Wash. App. 165, 170, 177 P.3d 162 (2008)(burden of proof shifts to a preponderance of the evidence once the assessor's valuation is incorrect, but only the presumption of correctness is overcome).

Answer: No. The BTA properly evaluated REC's M&E and determined, consistent with the three-factor test for fixtures², that the M&E were part of the of the Property and should be included in the valuation. REC's claims the BTA decided the M&E were fixtures solely from the "fixed asset list" fails to consider the entirety of the BTA's consideration of the evidence. The BTA did not simply adopt the term "fixture" from that of "fixed asset", but rather, as explained in Conclusion of Law 23, that REC did not object to characterization of the M&E as fixtures, especially when they were included in previous assessments in 2010 and 2011. The evidence simply did not exist to conclude that the M&E was personal property.

Therefore, for the reasons set forth herein, Respondent respectfully requests the Court affirm the Appellate Court and the BTA's valuation of the Property in its entirety.

III. STATEMENT OF THE CASE

A. Factual Background

Respondent agrees with the BTA's facts as stated in the Decision and inclusive of the referenced and cited materials therein. CP 498-524. REC agrees that most of the facts in the Decision are correct and have not been challenged (Appellant's Brief, p. 10), and therefore, are verities on

² *Dep't of Revenue v. Boeing Co.*, 85 Wash.2d 663, 668, 538 P.2d 505 (1975); *Lipsett Steel Products, Inc. v. King County*, 67 Wash.2d 650, 409 P.2d 475 (1965).

appeal. But REC does take liberty with some of the facts in this case and on appeal.

While it is unnecessary to reiterate each and every issue, since the BTA properly sets forth the facts, several examples of REC's liberty with the facts include the following:

- “The Facility suddenly had to find customers for the balance of its mixed-grade FBR products, with a granular form that still lacked general market acceptance.” Appellant’s Brief, p. 13.

Yet, testimony from Mr. Kurt Levens, Vice President of Commercial for REC Silicon, Inc., indicated that REC found customers whom they had kept relationships with despite having turned them away in previous years. REC sold the product to these new customers, and as Mr. Levens testified, “We’re still here.” AR Transcripts VRP (4/1/14) at 234-235.

- “In early fall [2011], REC considered shutting down its Siemens unit.” Appellant’s Brief, p. 15.

Yet, the Siemens unit remained operational during all of 2012 and there was only minimal impact on the overall valuation.³

³ AR Exhibit A1 at 97-98.

- “Sales prices for REC Silicon are expected to decrease significantly in 2012 compared to the average for 2011’; REC never expects the prices to ‘return to the average 2011 level.” Appellant’s Brief, pp. 15-16.

Yet, REC’s annual report indicated that prices would pick up year-by-year in subsequent years from that of 2012.⁴

- “Because the Facility’s expenses are not tied to the price of the finished product, the Facility operated at a loss in 2012.” Appellant’s Brief, p. 16.

Yet, REC Silicon’s EBITDA (Earnings before Interest, Taxes, Depreciation and Amortization) for 2012 was \$755 million NOK⁵, which is \$135.68 million when using an exchange rate as of December 31, 2012.⁶

B. Procedural Posture

Generally, Respondent does not dispute the procedural posture of the case as contained in REC’s briefing, and defers to the BTA’s Decision which addresses the specific values and considerations for the real and

⁴ AR Exhibit R22-88.

⁵ Norwegian Krone is currency in Norway.

⁶ AR Exhibit R23-78.

personal property accounts. CP 498-531. However, to the extent REC argues otherwise within its briefing, Respondent disputes such arguments.⁷

IV. STANDARD OF REVIEW

In general, Respondent does not dispute REC's standard of review citations and the applicability of such review to the issues for determination by this Court. However, to the extent that REC has stretched the particular law for argumentative purposes, the standard of review includes the entire statutory requirement(s) and/or specific case law holding.

For example, the Court is bound by unchallenged findings as facts in the case, but not necessarily that inconsistencies of the Decision must be resolved in favor of the unchallenged facts.⁸ Next, under RCW 34.05.570(3)(e), the Court will grant relief if an order is not supported by substantial evidence "when viewed in light of the whole record".⁹ Similarly, pursuant to RCW 34.05.570(3)(f), the Court failing to decide all issues which "require resolution".¹⁰

⁷ For instance, REC argues that the BTA made its Decision without a hearing or input from the parties (Appellant's Opening Brief, p. 18), but nothing required a hearing or input. In fact, Judge Wilson's Order specifically identified that the BTA was to review its decision according to "Washington law and the existing record." CP 249.

⁸ Citing *R.R. Gable, Inc. v. Burrows*, 32 Wash. App. 749, 753, 649 P.2d 177 (1982), *review denied*, 93 Wash.2d 1008, *cert. denied*, 461 U.S. 957, (1983).

⁹ RCW 34.05.570(3)(e).

¹⁰ RCW 34.05.570(3)(f).

Finally, under RCW 34.05.570(3)(i), “a decision is not [arbitrary and capricious] if there is room for more than one opinion and the opinion is based on honest and due consideration...”¹¹

V. SUMMARY OF ARGUMENT

The BTA followed the instructions of Judge Wilson’s Order when it issued the Decision contrary to REC’s repeated arguments that it failed to address such instructions. The BTA engaged in a thorough and extensive review of the voluminous amounts of evidence and testimony presented in this case and merely because the BTA determined that the Stancil appraisal was flawed, leading to a different Property valuation, does not require remand.

The BTA did not ignore Judge Wilson’s Order and it was not required to accept a flawed Stancil appraisal even though it determined that the Respondent’s appraisals also contained flaws. REC’s Property presents very unique circumstances for valuation and there is no way to arrive at a perfect result under such circumstances. However, the fact that the BTA did not agree with the Stancil appraisal, as detailed in the respective Findings of Fact and Conclusions of Law, does not mean the BTA ignored or refused to follow Judge Wilson’s Order.

¹¹ RCW 34.05.570(3)(i); quoting *Karanjah v. Dep’t of Social & Health Services*, 199 Wash. App. 903, 925, 401 P.3d 381.

Until REC receives a decision that accepts the Stancil appraisal it will be dissatisfied with any result. But this Court should not appease REC's desires because the evidence in this case justifies and supports the Decision. The Decision should not be reversed under RCW 34.05.570(3)(c), (d), (e), (f), or (i), as alleged by REC, because the BTA followed Judge Wilson's Order and its conduct was appropriate.

Finally, the BTA determination to include REC's M&E in the Property valuation as fixtures was supported by the three-factor test for fixtures. REC presented limited evidence and objections to the asset list, which was provided by REC, that such items would be considered fixtures, especially when the M&E was also utilized and included in assessments for REC's Property in 2010 and 2011. Thus, the evidence supported the M&E as real property and not personal property.

The BTA Decision is in accordance with the statutory criteria set forth in RCW 84.40.030 and Washington law necessitating this Court to affirm the Appellate Court.

VI. ARGUMENT

No matter how REC attempts to slice the facts, use sleight of hand maneuvers to persuade this Court that the BTA failed to follow Judge Wilson's Order, or even re-argue the facts in a different fashion after

multiple appeals, the fact remains that the Decision was consistent with the instructions on remand and in accordance with Washington law.

Throughout much of its briefing, REC wants to focus the Court's attention on the BTA's purported failure to accept the Stancil appraisal. Appellant Brief, pp. 24-47. REC repeatedly asserts that because the BTA rejected the appraisals submitted by the Respondent it had to derive a valuation for the Property based upon the Stancil appraisal. *Id.* However, such is not the law in this case nor the responsibility of the BTA.¹² Rather, the BTA was required to address the issues presented by Judge Wilson's Order and that is exactly what the BTA did in its Decision. As such, the Appellate Court should be affirmed.

A. The BTA followed the specific instructions contained in Judge Wilson's Order and its actions were consistent with Washington law and the existing record.

1. The BTA applied the correct test for admissibility of the evidence and evaluated such evidence as required by Judge Wilson's Order

Initially, Judge Wilson's Order required the BTA to do the following:

¹² *Weyerhaeuser Co. v. Easter*, 126 Wash.2d 370, 894 P.2d 1290 (1995) ("if a taxpayer overcomes the presumption on the assessor's overall approach or technique, i.e., invalidates the technique, the standard of proof shifts to a preponderance of the evidence for all issues. The taxpayer retains the burden of persuasion at all times."); see also, *Washington Beef, Inc. v. County of Yakima*, 143 Wash. App. 165, 170, 177 P.3d 162 (2008)(rejection of the assessor's valuation doesn't require acceptance of taxpayer's valuation).

Apply the correct test for admissibility of evidence of events occurring after the assessment date as described in Conclusion 6 (*i.e.*, that evidence about later events may be considered if they confirm trends that a buyer or seller would reasonably consider on the assessment date); explain its application by first describing the evidence known by a buyer or seller as of January 2, 2012, and second, the evidence from after that date whether or not it came before or after July 20, 2012; and consider the evidence in evaluating anew the taxpayer's appraisal assuming it finds that the events could reasonably have been expected.

CP 495.

REC engages in a lengthy discussion about Stancil's proper appraisal methods and that the BTA made a number of errors in rejecting the appraisal, including lack of consideration of external obsolescence, REC's revenue forecasts and budgeting, a differing discount rate, and other similarly made arguments made throughout the varying levels of this case. Appellant Brief, pp. 24-28. But the question for this Court is whether the BTA satisfied Judge Wilson's Order as set forth *supra*. The answer to that question is, yes.

Conclusion of Law 6 addresses events that were to have occurred after the assessment date, or January 1, 2012. CP 525. Judge Wilson found that the BTA erroneously set an evidentiary cut-off date of July 1, 2012, since it conflicted with the test the BTA had articulated in the original BTA Conclusion of Law 6. The BTA followed Judge Wilson's Order wherein it cited the Uniform Standard of Professional Appraisal Practice ("USPAP"), addressing

retrospective value opinions, which the BTA outlined in Findings of Facts 60.1-60.3. In Finding of Fact 60.2, the BTA points out that “Data subsequent to the effective date may be considered in developing a retrospective value as a confirmation of trends that would reasonably be considered by a buyer or seller as of that date” and “In the absence of evidence in the market that data subsequent to the effective date were consistent with and confirmed market expectations as the effective date, the effective date should be used as the cut-off date for data considered by the appraiser.”¹³

The BTA reviewed the evidence presented to it in this case and upon further review, ultimately concluded that the post valuation date evidence was inconsistent, and would not provide a prospective buyer or seller any clear confirmation of trends as of January 1, 2012. Additionally, the BTA provided the following analysis of the evidence:

- The BTA included a timeline of events in the polysilicon industry up to the valuation date, noting an enormous increase in demand in 2006 which continued until around 2009, with spot prices reaching as high as \$400 per kilogram, but due to oversupply in the market in the 2010 and 2011 years, spot prices dropped significantly. The polysilicon industry had been receiving government subsidies and incentives for many years

¹³ The Appraisal Foundation, Uniform Standards of Professional Appraisal Practice U-85 (SMT 3) (2012-2013 ed.)

prior to 2012. The government was under pressure to cut back on these programs by January 1, 2012, but no evidence points to the complete removal of such subsidies or incentives that were being provided. CP 504-506 (Findings of Facts 25 through 37).

- The BTA states in Findings of Facts 38 and 39 (including subparts) that there were rumors of the Chinese seeking a tariff on polysilicon in 2011, but despite the tariff eventually being issued by the Chinese in May of 2012, the taxpayer was able to work around such a tariff being imposed upon them. CP 506.
- The BTA further determined in Findings of Facts 30, 40, 42, 46, 48, 49, and 50 that despite the oversupply of polysilicon in 2011 and estimated oversupply for 2012, the taxpayer had a profitable year in 2011, was operating at full capacity as of January 1, 2012, and was working to increase production of both prime product and volume overall. The taxpayer also had long-term volume agreements with two Chinese companies in 2012, and had a strong position in the market with their patented FBR technology that limited other companies from implementing the same technology, which allowed the taxpayer to be the low cost producer in the industry during 2012 and beyond. CP 504, 506-507.

- Lastly, the BTA added that as of January 1, 2012, the taxpayer had offered zero evidence indicating that REC made an impairment write-down, as outlined in Findings of Fact 51 (including subparts). CP 507-508. Such an impairment write-down would have been documented at some point prior to and/or on January 1, 2012 if REC believed there to be evidence or an expectation that assets were impaired at that time. REC argues that the BTA's finding is incorrect with regard to REC's lack of impairment, yet provides no evidence or law to support their argument.

The BTA followed Judge Wilson's Order by identifying the evidence for both the pre and post valuation date in Findings of Facts 25 through 62 (including subparts). REC continues to argue against the Decision because it simply doesn't like the newest findings, and therefore, the BTA must have failed to conduct any analysis, or better yet, that it should just accept the Stancil appraisal.

The analysis is the separation of a whole into its components, which is precisely what the Conclusions of Law set forth. From those, it is clear that the BTA correctly applied the test as required by Judge Wilson's Order, yet REC apparently requires the BTA to include its thought processes in a final decision. However, that was not the instruction given to the BTA by Judge Wilson's Order.

Judge Wilson's Order next instructed the BTA to consider the evidence in evaluating the taxpayer's appraisal assuming it finds that the events could reasonably have been expected. CP 249. "Assuming" is the key element in Judge Wilson's Order and REC seems to look past this important factor because it ardently wants this Court to choose the Stancil appraisal.

As the BTA established in the Decision, because all post-valuation date evidence was inconsistent with pre-valuation date evidence and highly inconsistent as a whole, the BTA determined the post valuation date evidence would not have been reasonably considered by a prospective buyer or seller. It was not enough that REC only attempted to provide post-valuation evidence and/or alleged facts that indicated "dark clouds" were forming over REC and that it failed to provide evidence of REC's future. The BTA reviewed all the evidence presented and found there was no clear indication of the market specific to REC.

Thus, the BTA came to the appropriate conclusion, and as ordered to do by Judge Wilson's Order, that the Stancil appraisal was insufficient to determine an appropriate valuation of the Property and the evidentiary cut-off of January 1, 2012 was consistent with RCW 84.40.020 and the USPAP guidelines.

In the end, REC wants this Court to address the evidence in a nutshell, and by that, only consider the Stancil appraisal. However, the entirety of the evidence is what was necessary for the BTA to consider in

determining a proper valuation. The BTA was not wrong to reject the Stancil appraisal if it determined that the valuation methods were lacking, and merely because REC doesn't agree is not a basis in which to remand this case for additional review and valuation.

2. The BTA properly evaluated the market circumstances consistent with Judge Wilson's Order

The next instructions under Judge Wilson's Order required the BTA to conduct the following:

- “Identify how market circumstances changed after the taxpayer's October, 2011 revenue forecast was prepared;” CP 248.
- “Re-determine whether the taxpayer's appraisal experts were justified in placing only limited weight on that budget;” CP 248.
- “If the Board finds that the taxpayer's revenue forecast should have received more than 10 percent weight, explain how much weight would have been appropriate, particularly in light of Findings 49 and 50;” CP 248.
- “Reexamine the income and cost approaches of the taxpayer's appraisal experts with due consideration in light of this reevaluation of the evidence;” CP 249.
- “Use the external obsolescence calculated by the taxpayer's appraisal experts if the evidence in the record supports it as valid;” and (CP 249).
- “Reconsider Conclusions of Law 10 through 13.” CP 249.

REC, again, argues that the BTA completely ignored nearly all of these instructions and claims REC provided the BTA with uncontested and unrefuted testimony pursuant to the Stancil appraisal. Appellant Brief, pp. 28-47. The evidence relied upon in the Stancil appraisal, and which the BTA reviewed and noted, included REC's own forecasts that were apparently inaccurate due to budgetary aggressiveness to direct "personnel behaviors and performance measures." CP 508. This was the evidence before the BTA and only after the fact does REC now want to opine differently, or re-set its budget.

REC merely wants to argue that the BTA should not have believed their numbers and forecasts (because they were intentionally too high for investment purposes as argued by Stancil). REC has not directed this Court to evidence that this is an accepted way to do business, and further, that it is perfectly believable to have a company's own expert say the numbers are just numbers and should be ignored. This argument is disingenuous at best.

REC also argues that "Stancil is the only one to have provided a thorough and mathematically accurate explanation of its weighting based on an evaluation of the reliability of REC's budget and each independent industry source." Appellant Brief, p. 33. REC can't have it both ways by preparing an aggressive budget that it claims is reliable and then on the other hand when the BTA attempts to compare that budget with Stancil's appraisal claim it is

unreliable as intentionally aggressive. Actions have consequences and REC must live with its decisions in preparing its budget.

The following shall provide this Court with an outline of how the BTA did adhere to Judge Wilson's Order despite REC's allegations to the contrary.

a. Identify how market circumstances changed after the taxpayer's October, 2011 revenue forecast was prepared

i. The BTA added Findings of Fact 58, citing a PowerPoint Presentation created by REC that the market price for prime grade silicon dropped approximately fifty percent (50%) by 2011 year end. The graph indicates that the market price continued to decrease from October 2011 through December 2011, which the BTA took into consideration in arriving at its conclusions.

b. Re-determine whether the taxpayer's appraisal experts were justified in placing only limited weight on that budget

i. The BTA correctly points out in Findings of Fact 57, that REC Solar has successfully met its annual budget projections for volume every year, by citing REC's evidence to support this finding.

ii. Findings of Fact 76 (including subparts) shows that there is a large discrepancy between Stancil's revenue forecast and REC's internal revenue forecast. The BTA points out that Stancil's appraisal revenue forecast underestimates the projected levels of production and product prices, given the

evidence in Findings of Facts 57 and 58, which more closely mirrored REC's internal budget projections.

iii. After review of evidence provided by REC, Respondent's valuation expert, Mr. Neal Beaton, identified the concern with regard to such limited weight of REC's budget, pointing out that "the Stancil Report forecasted 2011 revenue at \$511,113,000...which is 11.5 percent less than actual revenues for 2011 of \$569,998,000" and further pointed out that despite this 2011 evidence, Stancil's five year budget forecast further distanced his projections from that of REC's own five year budget forecast for years 2012 through 2016, which is set forth in Findings of Fact 76.1.¹⁴

iv. Findings of Fact 76.4 also points out that Stancil's appraisal provides a flat production forecast, which is inconsistent with REC's internal budget, as indicated in REC's 2011 Annual Report which states, "Volumes included in the impairments analysis are near full production capacities. Production volumes are expected to increase." Despite REC's argument that the Annual Report indicates a projected decrease in sales prices and may not return

¹⁴ Citing AR Exhibit R18 and the testimony of Respondent expert, Mr. Neal Beaton. REC takes issue with the BTA's aforementioned citations, especially the testimony of Mr. Neal Beaton by essentially concluding that because the BTA did not accept Mr. Beaton's valuation that any other opinions he may have rendered must also be rejected. Appellant Brief, pp. 34-37. REC can point to no evidence that this is the case and/or that the BTA could not rely upon his testimony in reviewing and considering the entirety of the evidence.

to average 2011 prices, they fail to point out that the report states prices would “pick up year-by-year in subsequent years”¹⁵

v. The BTA further notes in Findings of Fact 76.5 that Stancil’s appraisal discount rate is inaccurate, unreliable and contradicts REC’s public financial disclosures, and in citing Mr. Beaton’s review and opinion of the discount rate, more specifically points out “the derivation of the discount rate in the Heaton Report [another REC expert] relies on general industry data rather than the actual discount rates utilized for REC Silicon found in REC Silicon’s parent company’s annual reports” which can be seen by the fact that Stancil’s discount rates for years 2010, 2011 and 2012 were 15.78%, 15.79% and 15.92%, compared to REC’s discount rates of 8.70%, 7.80% and 10.60% respectively.¹⁶

c. If the Board finds that the taxpayer’s revenue forecast should have received more than 10 percent weight, explain how much weight would have been appropriate, particularly in light of Findings 49 and 50

i. Due to the fundamental flaws in Stancil’s income approach methods and calculations, the BTA ultimately determined that there was no clear evidence or way to judge how much weight REC’s internal revenue forecast should have been given, as the appraisal had more flaws than that of

¹⁵ AR Exhibit R22-88.

¹⁶ AR Exhibit R18 at 13-14.

simply the internal revenue forecast weight. Due to this, the BTA concluded that it would utilize both REC's cost approach and Respondent's cost approach, with pre-external obsolescence as shown in the table of Findings of Fact 107.

ii. Because Stancil's appraisal methods in the income approach were fundamentally flawed the entire valuation was invalidated, as discussed below.

d. Reexamine the income and cost approaches of the taxpayer's appraisal experts with due consideration in light of this reevaluation of the evidence

i. The BTA summarizes its analysis and examination of the income and cost approaches of Stancil's appraisal in Findings of Fact 76 (including subparts). The income approach is still flawed for all the reasons as set forth *supra*, and as noted by the BTA, and the cost approach is fundamentally flawed because a flawed income shortfall calculation was inappropriately applied directly to the cost approach from the income approach to indicate that there was 83.8 percent external obsolescence¹⁷, as further discussed in Findings of Facts 99, 100 and 101 (including subparts).

ii. It should also be noted that the income shortfall amount allegedly assessed by Stancil didn't align with his DCF calculations. REC did not provide the BTA with any appraisal authority that approves of methods such

¹⁷ Findings of Fact 107. CP 521-522.

as providing flat projections and quasi calculations that allowed Stancil to arrive at an opinion that \$1,265,000,000.00 of external obsolescence existed as of the valuation date. With Stancil's income and cost approaches being nearly identical in value after the application of their identified external obsolescence, it is unexplainable, although REC will most certainly have some contrived reply, as to how the obsolescence identified and applied by Stancil ultimately culminated in such a close resemblance value to the income approach value.

iii. Stancil's flawed methods were discussed in the BTA's original decision and were further elaborated on in the Decision, where the BTA cited not only publications from various case law but also expert testimony that is now in evidence at Findings of Fact 101.1.

e. Use the external obsolescence calculated by the taxpayer's appraisal experts if the evidence in the record supports it as valid

i. REC continues to argue Stancil's appraisal is more appropriate and that because REC says it is true that Stancil is the omniscient authority. The BTA is not bound by REC's unfettered beliefs or the flawed analysis presented by Stancil's appraisal. REC claims that the BTA ignored Stancil's methods for determining external obsolescence and that income loss as a method to calculate external obsolescence is unacceptable. Appellant's Brief, pp. 40-41. But this is incorrect, and merely a ploy to confuse the Court as to the BTA's Findings of Fact and Conclusions of Law. Both parties' experts recognized income loss as

an accepted method, but what they failed to elaborate on is that Respondent's experts and the BTA did not agree with the specific manner in which Stancil was attempting to calculate and apply such obsolescence, which again is contained in Findings of Fact 101 (including subparts) that cites multiple authorities discussing the controversy behind the income shortfall method being used to directly calculate depreciation.

ii. REC provides multiple citations of authority to persuade the Court that the BTA committed reversible error, but such authorities do not invoke the unique circumstances of the Property and the flawed analysis based upon budgetary forecasts presented by REC.¹⁸ There was learned dispute and controversy over external obsolescence in the appraisal community and merely because the BTA did not agree with REC's assertions does not mean reversible error occurred.

iii. Additionally, in Robert F. Reilly and Robert P. Schweihs publication, *Economic Obsolescence is an Essential Procedure of Cost Approach Valuation of Industrial or Commercial Properties* they state that "A cost approach economic obsolescence analysis should be totally independent of the income approach analysis" and "the economic obsolescence analysis should not be influenced by (and should not be manipulated to equal) the result of the

¹⁸ See, Appellant Brief, pp. 42-43, n. 21-25.

income approach analysis” They go on to state “some analysts inappropriately quantify economic obsolescence as a ‘plug number’ or residual” adding that “[u]sing this inappropriate procedure, the IAV [Income Approach Value Indication] will always be exactly equal to the CAV [Cost Approach Value Indication]. Using this inappropriate procedure, the cost approach is 100 percent influenced by (and is forced to equal) the conclusion of the income approach.”¹⁹

Stancil’s appraisal did just this. Moreover, “A correctly prepared economic obsolescence analysis can and should stand independently on its own analytical merits. It should be (and can be) independent of the income approach analysis.”²⁰ Stancil’s analysis is not independent, and inappropriately relies on the income approach for its external obsolescence adjustment in its cost approach, which ultimately brought his cost approach valuation within less than once percent of his income approach value.

f. Reconsider Conclusions of Law 10 through 13 accordingly

i. The BTA followed Judge Wilson’s Order and appropriately reconsidered and revised its conclusions based upon the information and analysis it was instructed to conduct.

¹⁹ Robert F. Reilly and Robert P. Schweihs, *Economic Obsolescence is an Essential Procedure of a Cost Approach Valuation of Industrial or Commercial Properties* (Willamette Management Associates, Spring 2006), p. 11-12.

²⁰ *Id* at 12.

ii. The BTA revised Conclusion of Law No. 10 (now Conclusion of Law 11) to add information Judge Wilson's Order required the BTA to review and reconsider concerning the 2011 fourth quarter polysilicon prices and forecasts. Based upon further consideration, the BTA noted that there was only a maximum of fifty percent (50%) obsolescence based upon market data (with the range being 24-50 percent), and more specifically in Conclusion of Law 11.5 that there was approximately another 10 percent fall in polysilicon prices overall based upon the 2011 fourth quarter figures. CP 526.

iii. In Conclusion of Law 11 (now Conclusion of Law 12) the BTA revised its earlier obsolescence from 35 to 45 percent based upon the additionally considered information as outlined therein, and applied this to both REC's and Respondent's cost approach appraisals (prior to the application of external obsolescence). It gave both parties' cost approach values nearly equal weight in coming to the BTA's conclusion of value. The BTA also noted in Findings of Fact 107, "the parties' cost approach values prior to economic obsolescence are less than eight percent different and considered reasonably close." CP 521.

iv. Conclusion of Law 12 (now Conclusion of Law 13) was revised to conclude a new market value of the Property based upon Conclusions of Law 11 and 12 (including subparts). CP 526-527. While Respondent maintained a

different Property valuation, it did not argue with, nor appeal, the BTA's valuation in the Decision.

Contrary to REC's allegations and attempts to shape the facts in a "new" light, the BTA laid out the evidence presented to it, utilized the information it considered as foreseeable and useable given the nature of the market circumstances at the time of and subsequent to, and utilized the test of appraisal as instructed by Judge Wilson's Order. The BTA's additional analysis is consistent with its Decision and that it did not use information beyond 2012 because there was no evidence offered by REC (or in the record) that would have provided a clear indication of the market and known thereof by January 1, 2012.

Finally, interestingly enough, the case of *Washington Beef, Inc. v. County of Yakima*, 143 Wash. App. 165, 170, 177 P.3d 162 (2008) (emphasis added) contains an appropriate citing for appraising real property like that in this case wherein it stated,

'appraising property is more of an art than a science[.] ... [I]t necessarily deals in imponderables and may involve wide disputes in expert opinion or judgment. Even functional obsolescence is a vague and imprecise concept, and when related to the idea of economic obsolescence it becomes even more so.'²¹
Washington Beef asks that the trial judge do something none of the experts here was able to do:

²¹ Quoting *Boise Cascade*, 84 Wash.2d at 680, 529 P.2d 9 (Hale, C.J., concurring).

come up with one specific formula for arriving at the value of this plant and facilities. That is not possible and it is not required.²² Fair market value is a matter of opinion rather than of hard fact. Each expert witness is called upon to use his or her judgment regarding the appropriate factors to be considered in each particular case.²³ A trial court is entitled to rely on its determination of the credibility of these expert witnesses.²⁴

Here, this is exactly what occurred when the BTA considered the evidence, including the respective experts' reports and testimony and determined the credibility of such experts and their reports in arriving at an appropriate valuation. As in *Washington Beef*, appraising is an art and REC simply doesn't like the picture that the BTA painted, but that doesn't mean it was legal error. In fact, there was no legal error and the Court should affirm the Appellate Court and the BTA's valuation of the Property.

B. The BTA did not misapply controlling law in classifying REC's M&E as Real Property.

REC continues to assert that the BTA failed to adhere to Judge Wilson's Order in characterizing REC's M&E as real property rather than personal property. Specifically, and similar to previously unsuccessful arguments to the BTA and Appellate Court, REC contends that 1) REC

²² *Id.* at 678, 529 P.2d 9.

²³ 181 Nw. *Chemurgy Sec. Co. v. Chelan County*, 38 Wash.2d 87, 94, 228 P.2d 129 (1951).

²⁴ *Xerox Corp. v. King County*, 94 Wash.2d 284, 287, 617 P.2d 412 (1980).

didn't intend its M&E to be permanently attached to the real property, and 2) extensive case law dictates a different result in applying the three-factor test for fixtures. Appellant Brief, pp. 47-49. Contrary to REC's contentions and the repeated assertions that the BTA ignored evidence and Judge Wilson's Order, the BTA properly determined that REC's M&E satisfied the three-factor test and there was no objection made by REC over the identified fixtures.

The three-factor common-law test to establish REC's M&E as real property requires: 1) actual annexation to the realty, or something appurtenant thereto, 2) application to the use or purpose to which that part of the realty with which it is connected is appropriated, and 3) the intention of the party making the annexation to make a permanent accession to the freehold.²⁵

Initially, Judge Wilson's Order required the BTA to "[r]eview the record and provide detailed findings explaining the basis for characterizing [REC's] machinery and equipment as real or personal property based on the factors in Conclusion 18 [now Conclusion 19]." CP 249. The BTA followed Judge Wilson's Order. First, as contained in Findings of Fact 115 (including subparts), the Department of Revenue assigned a valuation

²⁵ *Dep't of Revenue v. Boeing Co.*, 85 Wash.2d 663, 668, 538 P.2d 505 (1975); *Lipsett Steel Products, Inc. v. King County*, 67 Wash.2d 650, 409 P.2d 475 (1965).

specialist, Ms. Lisa Brewer, to conduct an advisory appraisal of the Property that included Ms. Brewer performing a walk-through and receiving an asset list from REC. CP 523.

As part of Ms. Brewer's appraisal process she provided REC with her template of the extensive asset list for review and received only an unrelated concern to a software issue. CP 523 (Findings of Fact 115.4). Furthermore, REC raised no objections to the same assets list that had been placed on Grant County's real property tax rolls for assessment in 2010 and 2011. CP 523 (Findings of Fact 115.5.).

The only other response from REC concerning the assets list issue was that provided by testimony from REC's Director of Operations, Mr. Jeffrey Johnson wherein he opined that 1) the M&E could be and has been moved, 2) the M&E has a shorter useful life than the buildings, and 3) some of the M&E has been replaced or reconfigured. CP 524 (Findings of Fact 119.1-119.3); see also, AR Transcripts VRP (3/31/14) at 98, 128-130, 172, 175-178, 182-183. REC asserts that "unrebutted, inherently credible testimony showed that REC's M&E fails to satisfy the three-factor test", yet it fails to provide this Court with specific evidence to justify such assertions. Instead, it wants this Court to simply accept its arguments and disregard the BTA's review of the record, the limited testimony from REC's Director of Operations, the fact that REC raised no objections to the assets list being

included in previous assessments, and most importantly, the lack of any substantive evidence that REC cites that the BTA failed to consider.

REC attempts to persuade this Court to ignore all of the BTA efforts in rendering a decision adverse to its position by claiming that the BTA failed to adhere to Judge Wilson's Order. In short, the only way for REC to be satisfied on appeal is if the BTA cited every single piece of evidence and transcript testimony it requested and eliminated any other contrary evidence or testimony. The BTA reviewed the record and considered the witness testimony and provided detailed additional findings of relevant evidence. For example,

- The Board added additional findings based upon the testimony of Mr. Jeffrey Johnson as contained in Findings of Fact 116-119. CP 523-524.

- Mr. Johnson testified that particular items on the Property could be moved or replaced, but that the manufacturing process halts when a M&E item is removed, admitting that the system cannot work if one part fails or is removed, and if a part and its redundancy fail then production is interrupted or stopped. CP 523; see also, AR Transcripts VRP (3/31/14) at 175-178.

- Mr. Johnson also testified that the FBR building was uniquely designed for the FBR process of manufacturing polysilicon. The

FBR reactor and M&E as a whole cannot be placed in the old Siemen's building on the same site due to the shear height of the FBR to allow M&E to operate properly. "FBR is a unique process...we are one of the few that do it." CP 523; see also, AR Transcripts VRP (3/31/14) at 128.

- Mr. Johnson admitted that if a part of the approximately 17,775 pieces of M&E in the process of the production line fails then this causes a failure in the production of solar grade polysilicon. CP 523; see also, AR Transcripts VRP (3/31/14) at 182-183.

- Mr. Johnson testified that the FBR reactors and other M&E could be removed without damaging the land or building, but failed to elaborate whether the removal of the M&E would necessitate the destruction of such M&E or damage the M&E that it could no longer be used at another polysilicon manufacturing facility, nor whether it could be reasonably transported without destroying or damaging the M&E either. Mr. Johnson additionally testified that individual items of equipment could be relocated within the building, stating "I mean, you could rearrange – rearrange footprints, rearrange how equipment sits" but failed to specify any actual piece of M&E where they could actually accomplish this without halting the manufacturing process. AR Transcripts VRP (3/31/14) at 129-130, 175.

- Mr. Johnson also admitted that even if they were able to attempt to transport such equipment to another facility for use, no one in the polysilicon industry would utilize such M&E, as polysilicon manufacturers are only utilizing new construction. AR Transcripts VRP (3/31/14) at 172.

The BTA did not fail to follow Judge Wilson's Order and properly determined that the M&E were actually annexed to or something appurtenant to the Property, the M&E were used and for the purpose of integrating with the Property and associated buildings, and REC intended for the M&E to be part of the Property, especially when REC made no objection to such inclusion.

REC also cites a number of case law decisions to support its contentions that the M&E is personal property. However, none of the decisions are applicable to this case. In *Lipsett Steel Products v. King County*, 67 Wash.2d 650, 409 P.2d 475 (1965) the Court determined that a large steel sheer could have been removed from the present location for use at another location if needed. *Id.* at 653. This is not the same as REC's M&E, as the M&E was admittedly constructed onsite and would not be removed by REC to be transported and utilized at another location. See, AR Transcripts VPR (3/31/14) at 129-130, 175. This was specifically addressed in testimony before the BTA.

In *Zimmerman v. Bosse*, 60 Wash. 556, 111 P. 796 (1910) the Court determined that none of the sawmill machines and equipment were specially made for that particular building or plant, that the machinery and equipment were stock goods sold by catalogue and were suitable for use in any plant of that same nature. *Id.* at 558. REC's M&E is quite the opposite, as it was specifically made based upon the patented FBR technology in order to manufacture polysilicon. In *Sherrick v. Cotter*, 28 Wash. 25, 68 P. 172 (1902), the Court determined that the hop presses of the one in question were constructed to be used in any particular building, were articles of merchandise, themselves having a market value, and did not differ in kind from an ordinary hop press. *Id.* REC's M&E is instead uniquely constructed for the FBR technology, to be used solely to manufacture granular solar grade polysilicon and is very different than the traditional Siemens chunk manufacturing facilities. AR Transcripts VPR (3/31/14) at 128.

In *Neufelder v. Third Street & Suburban Railway*, 23 Wash. 470, 63 P. 197 (1900), the Court determined that the machinery and equipment was likewise of common lot, that it was not more specially adapted to that structure than any other milling structure and that it could be used in any other mill as the mill was built substantially in the manner of any other saw mill. *Id.* at 472. Again, this is simply not the case in this matter, as the

previously cited testimony of Mr. Johnson reflects that the structure and M&E are uniquely adapted to one another. AR Transcripts VPR (3/31/14) at 128. In *Chase v. Tacoma Box Co.*, 11 Wash. 377, 39 P. 639 (1895), the Court determined that the machinery and equipment could be used for the purpose it was intended as well in any other place as where it is now located, and that said machinery and equipment were all independent machines, complete in themselves. The “fixture” must be “permanently attached to, or the component of, some erection, structure, or machine which is attached to the freehold, and without which would be imperfect or incomplete.” *Id.* at 382. “The intent that they should remain for permanent use is unimportant.” *Id.* Again, none of REC’s M&E are independent machines, complete in themselves, and instead require all of the other parts to be considered an operational whole. The M&E fixed assets are all a component of an erection, structure or machine of the Property that would otherwise be incomplete on their own as individual parts, regardless of the intent of permanent use or not. This issue was also specifically addressed by testimony before the BTA and in the Decision. CP 522-524.

REC cites *Washington Nat’l Bank v. Smith*, 15 Wash. 160, 45 P. 736 (1896), to purportedly assert that the fixed pattern sawmill machinery is the same as REC’s complex machinery that was constructed and affixed on site. Unlike the smaller, and simple machinery that can be broken down,

transferred to another location and reconstructed for use again in *Washington Nat'l Bank*, REC's M&E was custom made. Further, REC's M&E is not of a fixed pattern, nor to be considered that of a chattel like smaller scale sawmill machinery in *Washington Nat'l Bank*. REC's M&E was constructed and affixed to the structure and buildings on site with no intention that it would ever have the ability to be transferred to another location. Furthermore, even if REC at some point in time were to have the intention of moving the M&E from the structures they are currently affixed to, they could not do so. Much of REC's M&E could not be deconstructed in a manner that would allow the same to be reconstructed and viable at another location. Finally, REC could not deconstruct and remove much of the M&E without injury to the buildings themselves during such removal. This constitutes that nearly all of REC's M&E is a fixture to the Property, and therefore, real property and not personal property.

In *Cherry v. Arthur*, 5 Wash. 787, 32 P. 744 (1893), the Court determined that “[I]f a building be erected for a definite purpose, or to enhance its value for occupation, whatever is built into it to further those objects becomes a part of it, even though there be no permanent fastening such as would cause permanent injury if removed.” *Id.* at 788. REC did just this, for no other purpose than to manufacture polysilicon utilizing the FBR technology they patented. AR Transcripts VPR (3/31/14) at 128.

In *Union Elevator v. Dep't of Transp.*, 144 Wash. App. 593, 183 P.3d 1097 (2008), the Court noted that the equipment could be broken down into parts and easily moved, and that Union Elevator moved its equipment between various facilities. It was also noted that the company regularly salvaged equipment from its various facilities, and added that the facilities were used for purposes other than moving and storing grain, such as a vodka distillery. It was additionally found that trade magazines buy and sell equipment comparable to the equipment at issue and that the equipment could be removed and used for other purposes. *Id.* at 600. Here again, REC's M&E is nothing like that of a grain elevator. It is unique and custom fitted for the FBR technology, and the M&E cannot be easily removed or utilized for another purpose, nor can the building as it was specifically designed to house the fluidized bed reactors and various other machinery and equipment. AR Transcripts VPR (3/31/14) at 128-130, 172, 175-178, 182-183.

REC attempts to use all of these cases to explain how similar in nature all of these cases are to that of the situation here in this matter, yet none of these cases relate to, or can even be analogized, to the Property. The preceding law provided by Respondent shows how REC's M&E is, in fact, appropriately classified as real property.

Finally, REC cites an excerpt from *Boeing* for the proposition that REC did not intend a permanent attachment, but again it fails to include the fact that the court in that case specifically stated that the intent “is not to be gathered from the testimony of the annexor as to his actual state of mind. Moreover, all pertinent factors reasonably bearing on the intent of the annexor should be considered including the nature of the article affixed, the relation and situation to the freehold of the annexor, the manner of annexation, and the purpose for which the annexation is made”²⁶

Thus, the law clearly supports the BTA Conclusion of Law 15 that “‘real property’ ... shall ... mean and include the land itself ... all buildings, structures or improvements or other fixtures of whatsoever kind thereon.”²⁷ The BTA also properly affirmed Conclusion of Law 17, that REC has the burden of proving, by preponderance of the evidence, that Respondent erroneously classified the M&E as fixtures.²⁸ The preponderance of the evidence standard requires evidence that is sufficient to make a fact “more probably true than not true.”²⁹ “[T]he determination of what is a fixture is a mixed question of law and

²⁶ *Boeing*, 85 Wash.2d at 668.

²⁷ Citing RCW 84.04.990; see also, CP 527.

²⁸ *Ziv v. Knight*, 121 Wash. 539, 541, 209 P. 685 (1922).

²⁹ *In re Welfare of Sego*, 82 Wn.2d 736, 739 n.2, 513 P.2d 831.

fact, and each of the three prongs of the common-law test must be established before an article may be properly deemed a fixture.”³⁰

The BTA’s Conclusions of Law 21, 22 23 and 24, in their entirety (including subparts), are correct. REC’s arguments that the BTA inferred the notion of the M&E as fixtures solely from the term “fixed asset list” lacks any evidence and is inherently erroneous. The BTA did not simply adopt the term “fixture” from that of “fixed asset”, but instead explained in Conclusion of Law 23 that REC did not object to characterization of thousands of pieces of M&E as fixtures and is, therefore, evidence that REC considered the items to be fixtures rather than personal property.

REC has not met its burden of proof nor has it been able, through two appeals, to demonstrate otherwise. There is simply no evidence to support REC’s conclusion that the M&E is personal property. Therefore, affirming the Appellate Court and the BTA’s characterization of the M&E is appropriate.

VII. CONCLUSION

The BTA followed and complied with Judge Wilson’s Order and determined a proper valuation for the Property. The evidence was reviewed, reexamined and reassessed by the BTA in accordance with the law and

³⁰ *Boeing*, 85 Wash.2d at, 667-668, 538 P.2d 505 (1975).

instructions. REC's renewed allegations and suppositions on appeal do not support that the BTA erred in its Decision. Further, REC's arguments that the BTA simply ignored many of the instructions in Judge Wilson's Order is dubiously inaccurate. The fact that REC does not again like the result, does not establish an error by the BTA.

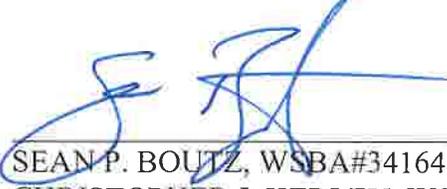
Moreover, although REC makes a cursory citation to the BTA's conduct being arbitrary and capricious, there is no specific argument, but more importantly, evidence to support such a claim. Therefore, this Court should deny any request for remand on that basis.

For the reasons set forth herein, Respondent respectfully requests this Court affirm the Appellate Court and the Decision.

RESPECTFULLY SUBMITTED this 4 day of June, 2019.

EVANS, CRAVEN & LACKIE, P.S.

By:


SEAN P. BOUTZ, WSBA#34164

CHRISTOPHER J. KERLEY, WSBA #16489

Attorneys for Respondent Melissa McKnight, Grant
County Assessor

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of June, 2019, a copy of Respondent's Response Brief was served on Appellant at the following address via U.S. First-Class Mail and emailed as set forth below:

Norman J. Bruns
Michelle DeLappe
Garvey Schubert Barer, P.C.
1191 Second Avenue, 18th Floor
Seattle, WA 98101-2939
nbruns@gsblaw.com
mdelappe@gsblaw.com

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 4th day of June, 2019, at Spokane, Washington.



Stacy Tracht, Legal Assistant

EVANS, CRAVEN & LACKIE, P.S.

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