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OPINION NO. 2012-10

TAXATION; TRADE FIXTURES; REAL ESTATE; Whether statutory requirements for removal of property and reclamation of land has a bearing on determination of whether property is considered a fixture for property tax purposes.

Christopher Nielsen, Executive Director
Nevada Department of Taxation
1550 College Parkway, Suite 115
Carson City, Nevada 89706-7937

Dear Mr. Nielsen:

You requested an opinion from this office regarding whether the NRS Chapter 361 tax assessment of property by the Department of Taxation (Department), subject to a statutory reclamation or remediation requirement for the land upon which the property sits, exempts the property from assessment. You have also requested a clarification of the proper standard for such determination, and analysis of specific terms used in NRS and NAC and whether they conflict.

QUESTION ONE

Does a statutory or regulatory obligation pursuant to state or federal law to: (i) remove property or equipment or (ii) reclaim property in accordance with state or federal reclamation procedures at the termination of a lease, right of way, or other possessory interest fix the removed property or equipment's status as personal property for property

tax assessment and preclude the assessor from classifying the property or equipment as real property?

ANALYSIS

The expansion of the renewable energy sector within the State of Nevada, including the construction of facilities to generate and transmit this energy, has raised a question as to what constitutes real property and what constitutes personal property under NRS Chapter 361. The purpose of these facilities is the production of energy through renewable resources. These will be collectively referred to as "energy producers."¹ A large number of renewable energy facilities are erected on land either leased to or granted as a right of way to the energy producer. At the conclusion of this possessory interest, the energy producer is required as part of the lease agreement and operations authorization, pursuant to both state and federal statutes, to remediate or reclaim the land so that it is in no worse shape than it was prior to the lease.

The Department assesses property as real or personal property under NRS Chapter 361. Improvements to the land are considered real property "whether such land is private property or property of this State or of the United States" and are assessed as such. NRS 361.035(1)(a). A statutory exception to this general rule applies to property subject to an agreement for "the dismantling, moving or carrying away or wrecking of the property" requiring such property to be classified as personal property. NRS 361.035(3). The exception found in NRS 361.035(3) is applicable only where an agreement has been entered into for dismantling, moving, carrying away, or wrecking the assessable property described NRS 361.035(1).

The facts underlying this question with regard to energy producers are similar to the same question posed with regard to mining operations. This question was previously addressed by Attorney General Opinion 2000-04, with regard to mining facilities, and the conclusions and determinations stated therein are applicable to energy production facilities. Op. Nev. Att'y Gen. No. 2000-04 (January 28, 2000). While AGO 2000-04 specifically addressed mining operations, the analysis therein is broadly applicable and in particular applies to the question posed by the Department. Specifically, the mining operation and the energy production operation operate on a grant of a possessory interest in land, both of which require remediation or reclamation after production activity ceases, and therefore the analysis in AGO 2000-04 may be extended to the operation of energy producers.

¹ This definition is for the purpose of this opinion only, and does not track any federal or state definition.

In AGO 2000-04, it was determined that statutory and regulatory requirements for remediation or reclamation of property through the removal of property at the termination of a lease or right of way do not constitute agreements between the parties under NRS 361.035(3), and more particularly do not constitute agreements for removal of property. *Id.* Where regulatory compliance is an operational requirement, no meeting of the minds occurs with respect to the transaction and therefore no agreement arises, as required under NRS 361.035(3). *Resolution Trust Corp. v. Tetco, Inc.*, 758 F. Supp. 1159, 1163 (W.D. Tex. 1990) *vacated by settlement*, 1992 WL 437650 (5th Cir. 1992). Further, to the extent that a party is legally bound to satisfy statutory and regulatory mandates, performance does not constitute consideration, again demonstrating no agreement, and therefore precluding exemption under NRS 361.035(3). *Clausen & Sons, Inc. v. Theo. Hamm Brewing Co.*, 395 F.2d 388, 390 (8th Cir. 1968); *Helton v. Vision Bank*, 2011 WL 3757985, 3 (S.D. Ala. 2011); *Matter of Wadsworth Bldg. Components, Inc.*, 10 B.R. 662, 664 (Bankr. Idaho 1981); *Griffin v. Hardon*, 456 So. 2d 1113 (Ala. Civ. App. 1984). The act of reclamation or remediation required by statute or regulation is a condition of operation, not an agreement between the parties, rendering NRS 361.035(3) inapplicable. See Op. Nev. Att’y Gen. No. 2000-04 (January 28, 2000).

CONCLUSION TO QUESTION ONE

Because reclamation or remediation required by law is a prerequisite to lawful operation, it is not required by agreement. Because the removal of property or reclamation of land involving the removal of property is not required by agreement, NRS 361.035(3) is inapplicable, and the property is subject to assessment under NRS 361.045.

QUESTION TWO

What is the appropriate test in Nevada for determining whether property or equipment has become a “fixture” under NRS Chapter 361?

ANALYSIS

Whether property constitutes a “fixture” is a facts and circumstances analysis that must be applied on a case-by-case basis pursuant to a reasonable person standard. This requires specific analysis for each factor as to each piece of property. This opinion does not address any specific situation, but rather provides a brief overview of the law in Nevada.

The fixture test in Nevada has gone virtually unchanged since the Nevada Supreme Court announced the test in *Fondren v. K/L Complex Ltd.*, 106 Nev. 705, 800 P.2d 719 (1990). In *Fondren*, the Supreme Court of Nevada adopted the three-part test of annexation; adaptation, and intent. *Id.* at 710, 800 P.2d at 722. In addition, the determination whether property is a fixture must be made on an annual basis, in conformity with the annual assessment requirements set out in NRS Chapter 361. Op. Nev. Att'y Gen. No. 2000-04 (January 28, 2000).

Fixtures are defined by regulation as improvements. NAC 361.1133. The three-prong test set out in NAC 361.1127 mirrors the test set forth in *Fondren*, and investigates: (i) physical annexation of the property; (ii) constructive annexation or adaptation; and (iii) intent of the parties.² Such determination is a mixed question of law and fact. *Leasepartners Corp. v. Robert L. Brooks Trust Dated November 12, 1975*, 113 Nev. 747, 753, 942 P.2d 182, 186 (1997). Each of the factors evaluated must be separately addressed, and while no single factor is controlling, the intent of the parties is typically given the most weight. *Crocker Nat'l Bank v. City and County of San Francisco*, 782 P.2d 278, 281 (Cal. 1989); *see also Ballard v. Alaska Theater Co.*, 161 P. 478 (Wash. 1916) (quoted in *In re Logan*, 195 B.R. 769, 772 (Bankr. E.D. Wash. 1996) (stating that "the cardinal inquiry is into the intent of the party making the annexation.")). *Cf. Fondren*, 106 Nev. at 710.

Physical annexation is demonstrated by actual or constructive annexation through attachment or immovability of the property. *Rayl v. Shull Enterprises, Inc.*, 700 P.2d 567, 571 (Idaho 1984). In determining whether property has been physically annexed, courts evaluate whether the item is permanently installed and cannot be removed without substantial damage to the item or the land, regardless of the contractual obligations between the parties. For example, some courts consider heavy machinery to be physically annexed to property where the machinery is annexed by sheer weight alone. *Compare, U.S. v. County of San Diego*, 53 F.3d 965, 968-69 (9th Cir.1995) (holding sheer weight alone is sufficient to constitute annexation); *Seatrain Terminals of Cal., Inc.*, 83 Cal. App. 3d 69, 74 (same); *with In re Naknek Elec.*

² See LCB File No. R039-10 § 16 (adopting the fixture test into regulation); *see also* Nevada Department of Taxation, Division of Assessment Standards, "Personal Property Manual 2012-2013 (citing Op. Nev. Att'y Gen. No. 2000-04 (January 28, 2000); Op. Nev. Att'y Gen. No. 1963-41 (June 12, 1963); *Nat'l Advertising Co. v. State Dep't of Transp.*, 116 Nev. 107, 993 P.2d 62 (2000); *Fondren v. K/L Complex Ltd.*, 106 Nev. 705, 800 P.2d 719 (1990); *State v. Pioneer Citizens Bank of Nev.*, 85 Nev. 395, 456 P.2d 422 (1969); *Arnold v. Goldfield Third Chance Mining Co.*, 32 Nev. 447, 109 P. 718 (1910); *Crocker Nat'l Bank v. City and County of San Francisco*, 782 P.2d 278 (Cal. 1989); *Kaiser Co. v. Reid*, 184 P.2d 879 (Cal. 1947); *Morse Signal Devices of Cal. v. County of Los Angeles*, 207 Cal. Rptr. 742 (Cal. Ct. App. 1984)).

Ass'n, Inc., 471 B.R. 225, 238 (Bankr. D. Alaska 2012) (concluding weight alone is insufficient to annex geothermal rig to real property).

Movability is another factor to consider when evaluating annexation. Again in *Fondren*, because the equipment at issue was "moveable," it was not considered to be a "fixture" and therefore was personal property. *Fondren*, 106 Nev. at 711, 800 P.2d at 722-23. However, movability alone is not determinative. In *L.L. Bean, Inc. v. Comm'r of Internal Revenue*, T.C. Memo. 1997-175, *aff'd*, 145 F.3d 53 (1st Cir. 1998), it was determined that, even though the structure in question could be moved, it was designed to remain permanently in place.

The adaptation test is satisfied when the object in question is adapted to the use to which the real property is devoted. *Leasepartners Corp.*, 113 Nev. at 753, 942 P.2d at 185. Where the purpose of an item not physically annexed to the land is "(1) [a] necessary, integral or working part of the land or improvement; (2) [d]esigned or committed for use with the land or improvement; or (3) [s]o essential to the land or improvement that the land or improvement cannot perform its desired function without the nonattached item," then the fixture is said to be "installed or attached to land or an improvement in a permanent manner." NAC 361.1127(b).

The final prong within the fixture test evaluates the "intention" of the parties. *Crocker Nat'l Bank*, 782 P.2d at 281; *see also In re Logan*, 195 B.R. at 772. The intention of the parties is determined by evaluating whether a reasonable person intended the item to be a permanent part of the land or an improvement thereto, taking into account annexation, adaptation and other objective manifestations of permanence. NAC 361.1127(2). An indication of intended permanence is the great expense or difficulty in removal of the fixture. *Morse Signal Devices v. County of Los Angeles*, 161 Cal. App. 3d 570, 578 (Cal. 1984); *Security Pacific Nat'l Bank v. Los Angeles County*, 161 Cal. App. 3d 877 (Cal. 1984). While the determination of objective intent at the time of annexation may be difficult to glean, current jurisprudence provides for a more subjective intent test. *Arizona Dep't of Revenue v. Arizona Outdoor Advertisers, Inc.*, 41 P.3d 631 (Ariz. 2002).

CONCLUSION TO QUESTION TWO

In conclusion, the test in Nevada to determine whether property is a fixture is a facts and circumstances test. The three-prong test originally announced in *Fondren*, and set out in regulation, remains valid. In the broadest terms, where it can be demonstrated that a reasonable person would consider the property to be physically

annexed to the land, adapted to a use specific to the real property, or intended to be permanently affixed to the real property, such item will be considered a fixture.

QUESTION THREE

Is the term "structure" as used in NRS 361.035 different from a "fixture" as that term is used in NAC 361.1127?

ANALYSIS

The terms "structure" and "fixture" address overlapping items that are similar, but not identical. Nevertheless, the terms have distinct meanings. It is axiomatic that, "[i]n the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used." *McKay v. Bd. of Supervisors*, 102 Nev. 644, 648, 730 P.2d 438, 441 (1986); see also *Russello v. U.S.*, 464 U.S. 16, 21 (1983); *Trustees of Plumbers and Pipefitters Union Local 525 Health and Welfare Trust Plan v. Developers Sur. and Indem. Co.*, 120 Nev. 56, 62, 84 P.3d 59, 61 (2004). Black's Law Dictionary defines structure as "[a]ny construction, production, or piece of work artificially built up or composed of parts purposefully joined together <a building is a structure>." BLACK'S LAW DICTIONARY, 1436 (7th ed. 1999).

"Structure" is not defined anywhere within either the administrative code or the Nevada Revised Statutes. NRS 361.035 defines the terms "real estate" and "real property" utilizing the term "structure" as a definitional component. NRS 361.035(1)(a). NAC 361.1127 defines "fixture," which is considered "real property," without the use of the term "structure." NAC 361.1127(1). Therefore, a structure is always considered "real property" or "real estate," but a "fixture" does not have to be a "structure."

The Legislature's use of specific language is presumptively purposeful. *City of Boulder v. Gen. Sales Drivers*, 101 Nev. 117, 118-19, 694 P.2d 498, 500 (1985). The use of the term "structure" within NRS 361.035 implies that "structure" was the intended word choice, and is meant to have a distinct meaning as an item of "real property." The fact that "structure" was not used in the definition of "fixture" is evidence that a fixture need not be a structure, although the two may overlap.

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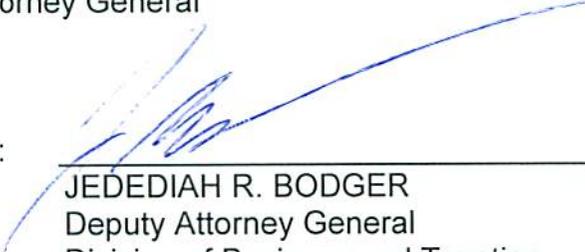
CONCLUSION TO QUESTION THREE

As part of the definition of "real property" a structure is per se an improvement upon real property. NRS 361.035. Alternatively, property that is not a "structure" must be shown to be a fixture to be considered real property.

Sincerely,

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