
SC93915

IN THE SUPREME COURT
OF MISSOURI

FENIX CONSTRUCTION COMPANY OF ST. LOUIS and FIVE STAR
READY-MIX CONCRETE COMPANY and HORSTMAYER
ENTERPRISES, INC.,
Appellants (Petitioners below),

v.

DIRECTOR OF REVENUE,
Respondent (Respondent below).

From the Missouri Administrative Hearing Commission
The Honorable Sreenivasa Rao Dandamudi, Commissioner
No. 11-2454 RS

APPELLANTS' BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
JURISDICTIONAL STATEMENT	1
STATEMENT OF FACTS	2
POINTS RELIED ON	6
SUMMARY OF THE ARGUMENT	7
ARGUMENT	10
I. The Administrative Hearing Commission Erred in Finding that Fenix Construction Company’s Wall Panels are Not Products Under Section 144.054.2 Because the Panels Have Market Value in that <i>E & B Granite</i> Held that Other Custom Products (Countertops) Were Products and in that the Bidding and Contracting Process For the Panels Demonstrate a Market.	11
II. Fenix Meets the Other Requirements of the Section 144.054.2 Exemption Because Fenix Manufactures and/or Produces Tilt-Up Wall Panels and the Wall Panels are Products.	19
CONCLUSION	24
Certificate of Service and Compliance with Rule 84.06(b)-(c)	26

TABLE OF AUTHORITIES

CASES

AAA Laundry & Linen Supply Co. v. Dir. of Revenue, SC93331,
 2014 WL 946930 (Mo. 2014) 10

Akins v. Dir. of Revenue, 303 S.W.3d 563 (Mo. banc 2010) 10

American Bridge Co. v. Smith, 179 S.W.2d 12 (Mo. 1944) 10

American Healthcare Management v. Director of Revenue, 984 S.W.2d 496
 (Mo. banc 1999) 19

Blevins v. Dir. of Revenue, 938 S.W.2d 899 (Mo. banc 1997) 16

Branson Properties USA v. Director of Revenue, 110 S.W.3d 824
 (Mo. banc 2003) 20

E & B Granite, Inc. v. Dir. of Revenue, 331 S.W.3d 314 (Mo. 2011) *passim*

E & B Granite, Inc. v. Dir. of Revenue, No. 09-0841 RS (AHC, June 2, 2010) ... *passim*

Fred Weber v. Director of Revenue, No. 12-0252 (AHC, March 13, 2014) *passim*

Gash v. Lafayette County, 245 S.W.3d 229 (Mo. banc 2008) 10

International Business Machines Corp. v. Director of Revenue,
 958 S.W.2d 554 (Mo. banc 1997) 15, 23

Jones v. Director of Revenue, 832 S.W.2d 516 (Mo. 1992) 10

LaSalle Iron Works v. Director of Revenue, No. 07-0493 RS
 (AHC, Dec. 31, 2008) 10

Mid-America Dairymen, Inc. v. Director of Revenue, 924 S.W.2d 280

(Mo. banc 1996) 7, 15, 23
State ex rel. Union Elec. Co. v. Goldberg, 578 S.W.2d 921 (Mo. 1979) 10

STATUTES

Mo. Rev. Stat. § 144.030 16, 23
Mo. Rev. Stat. § 144.054 *passim*

OTHER AUTHORITY

Missouri Constitution, Article V 1
12 C.S.R. 10-110.621 20
12 C.S.R. 10-111.010 20

JURISDICTIONAL STATEMENT

The issues before the Court in this matter involve the construction of Mo. Rev. Stat. § 144.054.2 (2009 Cum. Supp.), a revenue law of the State of Missouri. Therefore, this Court has exclusive jurisdiction over this matter pursuant to Article V, § 3 of the Missouri Constitution.

STATEMENT OF FACTS

Fenix Construction Company of St. Louis (“Fenix”) is a Missouri corporation that has been in business for 18 years and engages in tilt-up panel work, among other concrete activities.^{1 2} Tr. 17:7-10; 59:21-23. Tilt-up work involves casting concrete and reinforced steel wall panels horizontally (*i.e.* on the ground) and then lifting and vertically tilting them into position as walls of the building. Appx. p. A8, ¶ 21. Buildings using the tilt-up process typically include warehouses, distribution centers, retail structures, churches, and housing, among many others. *Id.* at ¶ 22.

Fenix generally acts as a subcontractor, receiving a bid invitation and submitting a bid for work to a general contractor on a project. Tr. 30:15-23. The general contractor then informs Fenix whether or not its bid was accepted. Appx. p. A9, ¶ 24. During the period of the refund and protest claims at issue, Fenix had 195 bids accepted for various concrete work. Appx. p. A8, ¶ 19. Of those bids, 53 involved tilt-up panel work. *Id.*

¹ Five Star Ready-Mix Concrete Company (“Five Star”) and Horstmeyer Enterprises, Inc. (“Horstmeyer”) provide materials such as reinforcing steel and concrete to Fenix. Those companies also filed state sales tax refund claims with the Director which were denied, and their cases with the Administrative Hearing Commission were consolidated with Fenix’s case.

² Though Fenix does foundation work and concrete flatwork, only its tilt-up work is subject to its refund claims.

Once a Fenix bid is accepted for tilt-up wall panel work, Fenix generally enters into a written agreement with the general contractor of the project, meets with the general contractor about the plans, and then develops drawings for the tilt-up wall panels. Tr. 31:16 to 32:4. The tilt-up drawings are distinct and separate from any other structural drawings for the building. Tr. 32:9-13. Next, Fenix orders rebar, embeds and other materials needed to produce the tilt-up wall panels. Tr. 32:1-4.

Once the preliminary requirements are complete, Fenix makes the tilt-up wall panels at the construction site. Appx. p. A10, ¶ 30. The panels are made on-site because it is cost-prohibitive to construct them elsewhere and transport them. Tr. 34:3-15. The panels are similar to smaller precast panels that are made off-site and shipped in on a truck, but the panels made by Fenix are generally larger. Tr. 76:3-10.

The panels are made by creating a panel layout made of wood to the exact dimensions of the wall panel section on the ground floor (grade slab) of the building. Appx. p. A10, ¶ 31. The grade slab is sprayed with a chemical that prevents adherence of the panel to the slab and then the rebar, embeds and other panel materials are laid into place. *Id.* at ¶ 33; Tr. 41:12-17; 39:8-13; 42:24-25. During this procedure, Fenix installs materials in the panel layout that are necessary to design the particular panel which can include window openings and door openings, as well as decorative exterior features such

as thin brick facing.³ Tr. pp. 42-44, 46, 49-50. Certain embed materials are installed so that the crane which lifts the panel will have something to hook onto in order to lift and connect the panel to the building. Appx. p. A11, ¶ 37. Fenix creates the panel layouts as close as possible to the location where the wall panels will be tilted into place and become part of the building wall to minimize the distance the panels have to be moved and to minimize the risk of damage to the panel during the move. Appx. p. A10, ¶ 32. After all of the materials are placed in the panel layout, concrete is poured into the panel layout and then Fenix uses trowel machines to finish the surface of each panel. Tr. 5:8-14.

A day after the panels have been poured, the wood forms are removed, any excess concrete is cleaned off the embeds, and the panels are given another three to seven days to reach full strength. Tr. 52:16-21; 53:1. When the curing period is complete the tilt-up panel is a panel product in that Fenix has altered and physically changed the materials used to produce the panel and increased the value of those materials. Tr. 53:2-10.

When the wall panels are ready to be lifted into place, Fenix attaches the braces to certain panel embeds. Tr. 54:9-13. Each panel is then lifted by cranes into a vertical position and moved to connect with the grade slab where they will be held in place by the braces until other components of the building are connected to the panels. Tr. pp. 53-55;

³ The picture on page 7 of Respondent's Trial Exhibit A, Part 1A is an example of the forming process, the reinforcing process and the embed process used by Fenix for its tilt-up panels. Tr. 40:18-20.

see p. 31 of Respondent's Trial Exhibit A, Part 1B for a photo of a panel being moved. The wall panels remain tangible personal property until they become affixed to the customer's real estate. Tr. 60:18-23.

Every wall panel made by Fenix is custom made for the specific job in accordance with the detailed specifications of the customer. Tr. 64:18-20.

In 2011 and 2012, Fenix, Horstmeyer and Five Star all filed sales tax refund claims or Sales Tax Protest Payment Affidavits for their purchases of materials used in the tilt-up process. Appx. pp. A1-A8. The Director denied those claims and Fenix, Horstmeyer and Five Star filed complaints with the Administrative Hearing Commission appealing the Director's decisions. *Id.* In March of 2012, the cases were consolidated into the case at bar. Appx. p. A2.

POINTS RELIED ON

- I. The Administrative Hearing Commission Erred in Finding that Fenix Construction Company’s Wall Panels are Not Products Under Section 144.054.2 Because the Panels Have Market Value in that *E & B Granite* Held that Other Custom Products (Countertops) Were Products and in that the Bidding and Contracting Process For the Panels Demonstrate a Market.**

E & B Granite, Inc. v. Dir. of Revenue, 331 S.W.3d 314 (Mo. 2011)

E & B Granite, Inc. v. Dir. of Revenue, No. 09-0841 RS

(AHC, June 2, 2010)

Fred Weber v. Director of Revenue, No. 12-0252 (AHC, March 13, 2014)

- II. Fenix Meets the Other Requirements of the Section 144.054.2 Exemption Because Fenix Manufactures and/or Produces Tilt-Up Wall Panels and the Wall Panels are Products.**

E & B Granite, Inc. v. Dir. of Revenue, 331 S.W.3d 314 (Mo. 2011)

E & B Granite, Inc. v. Dir. of Revenue, No. 09-0841 RS

(AHC, June 2, 2010)

Fred Weber v. Director of Revenue, No. 12-0252 (AHC, March 13, 2014)

SUMMARY OF THE ARGUMENT

Fenix Construction Company produces custom tilt-up wall panels for different types of buildings—stores, office buildings, housing complexes, etc. Fenix does this at or near the site of the building project because transporting large panels—sometimes two or three stories tall—from an offsite location is impractical. The tilt-up wall panels, which are made of concrete, steel reinforcement, and steel embeds used as connectors, are lifted by cranes and moved into the vertical position they will occupy as part of the building. Braces hold the panels in place until the roof and other building components are connect to them.

The Administrative Hearing Commission found that the wall panels produced by Fenix are not “output[s] with a market value,” *i.e.* “products” under Section 144.054 and thus Fenix was not entitled to the statute’s exemption. *Mid-America Dairymen, Inc. v. Director of Revenue*, 924 S.W.2d 280, 283 (Mo banc 1996). In making this finding the Commission pointed to the “issue before us, which is whether the tilt-up wall panels are a product when they are useful to only the individual for whom they were specifically constructed.” Appx. p. A14. The Commission found that the answer to this question was “no” and ended its analysis.

In making this decision, the Commission found that *E & B Granite, Inc. v. Director of Revenue*, 331 S.W.3d 314, 316-17 (Mo. banc 2011) was inapposite because E & B Granite’s “countertops could have easily been moved from one customer to another customer, prior to installation.” Appx. p. A14. This is a baffling finding, given that the E & B Granite’s countertops were “custom-made to fit the very specific and

precise dimensions of the customer” and “[n]o two tops are manufactured to the same specifications and dimensions.” *E & B Granite, Inc. v. Dir. of Revenue*, Administrative Hearing Commission, ¶ 10 (June 2, 2010). The Commission found that Fenix’s wall panels only “have an output that is useful for the individual for whom they were constructed” and thus there could be no market. Appx. p. A14. But this deciding factor is certainly true of the custom countertops in *E & B Granite*, for which the exemption was granted.

The logic of the Commission is even more confusing considering one of the Section 144.054 decisions it has handed down since its decision in the case at bar. In *Fred Weber v. Director of Revenue*, No. 12-0252 (March 13, 2014), the Commission stated as follows:

Finally, the Director argues that the asphalt pavement is not a product because it is customer-specific, cannot be moved, and it is not valuable to any other person. We disagree. . . . The fact that asphalt pavement cannot be moved, that it is permanently affixed to real property, or that it can be designed to customer specifications, does not make it any less an output with market value. Neither does the fact that asphalt pavement is valuable only to the owner or first user.

Id. at § III. In *Fred Weber*, the Commission found that whether the item at issue can easily be moved or is tailored to one customer’s needs does nothing to detract from the item’s status as a product. This should have been the result in the case at bar.

The implications of the Commission’s decision in the case at bar are that custom products are not products at all, since custom products do not have an expansive market.

As stated above, this is in direct conflict with the finding that custom countertops were products in *E & B Granite*, and it is in conflict with the Director's own letter rulings, which find that custom cabinets are products. Of course custom products have "market value," or else no one would produce and sell them.

The Commission stopped its analysis after incorrectly finding that Fenix's wall panels did not have market value, however, because the Court could affirm the Commission's decision on any basis, Fenix also includes argument on the other elements of its Section 144.054 exemption claim.

ARGUMENT

Standard

This case involves the interpretation and application of a sales and use tax statute. “[T]he primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute.” *Akins v. Dir. of Revenue*, 303 S.W.3d 563, 565 (Mo. banc 2010). “Where the language of the statute is clear and unambiguous, there is no room for construction.” *Jones v. Director of Revenue*, 832 S.W.2d 516, 517 (Mo. 1992). If construction is necessary, “[t]he construction . . . is not to be hyper-technical, but instead to be reasonable and logical and to give meaning to the statutes.” *LaSalle Iron Works v. Director of Revenue*, No. 07-0493 RS (AHC, December 31, 2008) (quoting *Gash v. Lafayette County*, 245 S.W.3d 229, 232 (Mo. banc 2008)).

While it is generally held that statutes providing a tax exemption should be construed strictly against the party claiming the exemption, this principle “should not be applied to force a conclusion that the legislature intended something other than what is expressed in the plain meaning of the statute.” *State ex rel. Union Elec. Co. v. Goldberg*, 578 S.W.2d 921, 923 (Mo. 1979) (citing *American Bridge Co. v. Smith*, 179 S.W.2d 12, 16 (Mo. 1944)).

This Court reviews *de novo* all questions of statutory interpretation raised in an AHC decision. *AAA Laundry & Linen Supply Co. v. Dir. of Revenue*, SC93331, 2014 WL 946930 (Mo. 2014).

Mo. Rev. Stat. Section 144.054.2 states, in pertinent part, as follows:

In addition to all other exemptions granted under this chapter, there is hereby

specifically exempted from the provisions of sections 144.010 to 144.525 and 144.600 to 144.761, and from the computation of the tax levied, assessed, or payable under sections 144.010 to 144.525 and 144.600 to 144.761 . . . materials used or consumed in the manufacturing, processing, compounding, mining, or producing of any product . . .

I. The Administrative Hearing Commission Erred in Finding that Fenix Construction Company’s Wall Panels are Not Products Under Section 144.054.2 Because the Panels Have Market Value in that *E & B Granite* Held that Other Custom Products (Countertops) Were Products and in that the Bidding and Contracting Process For the Panels Demonstrate a Market.

The Commission’s legal analysis consists of less than three pages, the crux of which is that the wall panels produced by Fenix are not “products” under Missouri law because, the Commissioner found, “[t]here is no market for wall panels.” Appx. p. A14. This was an argument that the Director made in two pages toward the end of its 41-page brief with the Commission. Respondent’s Brief, AHC, pp. 37-38. The Commissioner’s decision is wrong for several independent reasons.

A. The Commissioner Incorrectly Distinguished Controlling

Authority, *E & B Granite v. Director of Revenue*

The Commissioner had a material and fundamental misunderstanding about the facts in *E & B Granite*:

These countertops could have easily been moved from one customer to another

customer, prior to installation. The issue decided in *E & B Granite* is not the issue before us, which is whether the tilt-up wall panels are a product when they are useful to only the individual for whom they were specifically constructed.

Appx. p. A14. This is a complete misstatement or misunderstanding of the facts in *E & B*, and it is an argument that not even the Director made in its AHC brief in this case. In fact, the countertops *could not* have easily been moved from one customer to another and *were* useful to only the individual for whom they were specifically designed, fabricated and installed. **“All of the tops are custom-made to fit the very specific and precise dimensions of the customer. No two tops are manufactured to the same specifications and dimensions.”** *E & B Granite, Inc. v. Dir. of Revenue*, No. 09-0842 RS, ¶ 10 (AHC, June 2, 2010) (emphasis added).

Despite the custom-made nature of the granite countertops, and that a piece of granite that is cut to fit the contours of a customer’s unique kitchen dimensions and appliances, the Administrative Hearing Commission in the *E & B* case found that “[t]he installed countertops are a product because they are an output with a market value.” *Id.* at 9. In the Supreme Court case, “[t]he Director agree[d] that the countertops [we]re ‘output[s] with a market value.’” *E & B Granite, Inc. v. Dir. of Revenue*, 331 S.W.3d 314, 316 (Mo. 2011). At both the AHC and Court levels, *E & B Granite, Inc.*’s refund claim under Section 144.054.2 was granted.

The Department of Revenue’s letter rulings also prove helpful. In Letter Ruling 6877, titled “Taxability of Custom Made Cabinetry, Labor, & Parts,” the applicant designed and built *custom* cabinetry for homes and businesses. The applicant asked if its

purchases of materials that are used or consumed in manufacturing cabinetry that it installs or permanently affixes to the customer's real property are subject to the exemption in Section 144.054, and the Director answered in the affirmative. *Id.*

The Administrative Hearing Commission's analysis in the case at bar is especially baffling given its contradictory analysis in a more recent Section 144.054 AHC decision.

In the case at bar, the Commission stated as follows:

These countertops could have easily been moved from one customer to another customer, prior to installation. The issue decided in *E & B Granite* is not the issue before us, which is whether the tilt-up wall panels are a product when they are useful to only the individual for whom they were specifically constructed. . . . There is no market for tilt-up wall panels. While these panels have an output that is useful for the individual for whom they were constructed, "it is incumbent on the taxpayer[s] to prove the existence of a market [.]"

Appx. p. A14. So according to the Commission, Fenix's wall panels are not products because, unlike the custom countertops in *E & B Granite*, they cannot be easily moved to another customer and are only useful to the customer for whom they were made.⁴ In *Fred Weber v. Director of Revenue*, No. 12-0252 (AHC, March 13, 2014), however, a

⁴ As discussed above, the AHC's distinctions between countertops and wall panels come from a misunderstanding of the specialized and individually tailored process used in producing a custom countertop.

decision handed down three months after the Commission's decision the case at bar, the Commission stated as follows:

Finally, the Director argues that the asphalt pavement is not a product because it is customer-specific, cannot be moved, and it is not valuable to any other person. We disagree. The Missouri Supreme Court held in *E & B Granite* that “[§] 144.054.2 applies to products, whether on not they are eventually affixed to real property.” The fact that asphalt pavement cannot be moved, that it is permanently affixed to real property, or that it can be designed to customer specifications, does not make it any less an output with market value. Neither does the fact that asphalt pavement is valuable only to the owner or first user. A large number of products, including writing paper, ink and paint, are valuable only to the first user. That fact does not make those items any less of a product: an output with market value.

Id. at § III. Here, the AHC finds that whether the item at issue can easily be moved or is tailored to one customer's needs does nothing to detract from the item's status as a product.

While Fenix believes the *Fred Weber* approach is clearly the correct one and should have been applied in this case, the contrast between the *Fred Weber* paragraph and the contradictory paragraph above from the case at bar is baffling. Fenix requests that the Court follow the Commission's logic in *Fred Weber*, logic which adheres to this Court's decision in *E & B Granite*.

B. There is Necessarily a Market for Custom Wall Panels

The Director argues that there is no market value for custom wall panels because they are built to suit the needs of only one user. Without market value, there can be no “output with a market value.” *International Business Machines Corp. v. Director of Revenue*, 958 S.W.2d 554, 557 (Mo. banc 1997) (quoting *Mid-America Dairymen, Inc. v. Director of Revenue*, 924 S.W.2d 280, 283 (Mo. banc 1996)).

As discussed above, this argument goes directly against the AHC’s and the Supreme Court’s decisions in the *E & B Granite* cases, where custom countertops cut by complex machinery to fit specific dimensions were found to be products. At the AHC level in *E & B Granite*, the Commission found that the “[t]he installed countertops are a product because they are an output with a market value.” *E & B Granite*, AHC, p. 9; *see also* p. 10 (“... an installed countertop is a product.”). Certainly after a custom granite countertop is installed, it is not marketable to others. But this does not mean that custom countertops or other custom products have no market value. The Director seems to appreciate this logic in its custom cabinet, truss and countertop letter rulings, and the AHC appreciates this logic in its *Fred Weber* decision, but both fail to recognize the logic in the case at bar.

Even more important, the Director’s argument fails due to the mere existence and availability of custom products such as those of Fenix. How could a custom tailor exist if there was no market for the custom tailor’s products and services? If there was no market for custom products then custom products would not exist.

In Fenix’s case, the bidding process, and the bids themselves, demonstrate a market for Fenix’s products. Beyond the bids, the contracts for the manufacture of the tilt-up wall panels—in which the landowner, business owner or contractor agrees to pay a certain price in exchange for the panels and their installation, necessarily demonstrate a market.

Fenix, like E & B Granite, Inc. and like the custom cabinetry applicant in Letter Ruling 6877, *supra*, produces products (tilt-up wall panels) to specific customers’ specifications before installing them on the customers’ real estate.⁵ The custom-made

⁵ In *E & B Granite*, the Director argued that because the countertops were eventually affixed to real estate (like Fenix’s wall panels), they were not tangible personal property and the Section 144.054 exemption could not apply. *E & B Granite*, at 316. The Missouri Supreme Court rejected this argument, finding that the Director was relying on a case, *Blevins v. Dir. of Revenue*, 938 S.W.2d 899 (Mo. banc 1997), which interpreted a statute, Section 144.030, that was similar to Section 144.054 but more narrow.

The Director in *E & B Granite* also denied that the raw materials making up the granite countertops were “used or consumed,” as they were not completely consumed such as may be the case with fuel, for instance. *E & B Granite*, at 318. The Missouri Supreme Court rejected this argument. *Id.*

Finally, the Director argued in *E & B Granite* that an exemption for E & B Granite, Inc. would lead to “absurd results” wherein the company would not be taxed on its materials purchases and would not be taxed on the final sale because after affixation,

nature of the product has no bearing on the Section 144.054.2 exemption, as illustrated in the *E & B Granite* cases and Letter Ruling 6877. *See also* Letter Rulings 4134 and 6717 (same issue and result).

The Director, in its limited analysis of the issue in its AHC brief, has pointed to no authority stating that custom-made or personally tailored products have no market value. This cannot be, as there is a market for an item even if there is only one possible buyer. Black's Dictionary defines "fair market value" as "[t]he price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm's-length transaction; the point at which supply and demand intersect." Black's Law Dictionary (9th Ed. 2009). The Commission's decision fails to acknowledge the existence of markets for various custom-made products.

The Director did not present any evidence, such as that from an economist or other marketing expert, on its custom-made, no-market argument. Instead, the Director states as follows:

There is no market for these items. They have been hired by a particular customer to build a particular building or to build the walls of the building. No one else in the world desires that wall once it's built. It has no market value.

there would be no personal property sale to tax. *Id.* Again, the Missouri Supreme Court rejected this argument. *Id.*

Tr. 25:7-12. This flawed logic, followed by the Commission, fails to acknowledge the existence of a custom-made product market for tilt-up wall panels. What would our world look like without marketable custom products?

The value of a custom product should not be determined by looking at the number of potential purchasers of that particular finished custom product, but instead by looking at what purchasers are willing to pay to have similar custom products produced or made for their specific purposes.

Finally, the Commission points to the following testimony of Fenix founder Steve Ladenberger as an admission that there is no “discreet market for tilt-up wall panels”:

Q: Now, given that each wall panel is designed for a particular building, you can’t sell that wall panel to any other person, could you?

A: No.

Q: And there is no market of people going – somebody doesn’t drive to your site and look at [the] left corner of that building and say that’s amazing. I’ll offer you double what the contractor is paying you for that panel?

A: That’s never happened,

Q: And it really is unlikely to happen, isn’t it, because the panel is designed for that particular building, isn’t it?

A: Yes.

Appx., pp. A14-15. This testimony could have easily come from the founder of E & B Granite Inc. instead of the founder of Fenix. E & B Granite’s countertops were custom designed to fit a particular customer’s house, and certainly no other individuals would be

likely to offer to purchase countertops specifically designed to fit in someone else's kitchen and fit with someone else's sink, appliances and other kitchen particulars. The Commission's analysis reflects a misunderstanding of the facts in *E & B Granite* and, on a more fundamental level, a lack of understanding of custom product markets.

II. Fenix Meets the Other Requirements of the Section 144.054.2 Exemption

Because Fenix Manufactures and/or Produces Tilt-Up Wall Panels and the Wall Panels are Products.

A. Fenix Manufactures and/or Produces Tilt-Up Wall Panels.

Section 144.054's "manufacturing, processing, compounding, mining, or producing" requirement is broad, as almost any activity which results in something being made is, at the very least, "producing."

"Absent statutory definition, words used in statutes are given their plain and ordinary meaning with help, as needed, from the dictionary." *American Healthcare Management v. Director of Revenue*, 984 S.W.2d 496, 498 (Mo. banc 1999). "Produce" is defined by Black's Law Dictionary as "to bring into existence; to create." Black's Law Dictionary (9th Ed. 2009). *Dictionary.com* offers a similar definition: "to make or manufacture." <http://dictionary.reference.com/browse/produce?s=t> (last visited March 24, 2014). Merriam-Webster defines "produce" as "to cause to have existence or to happen" and "to give being, form, or shape to; make, especially manufacture." <http://www.merriam-webster.com/dictionary/produce> (last visited March 24, 2014).

Fenix undoubtedly makes, creates and brings into existence the tilt-up wall panels that it installs in commercial and residential buildings. If nothing else, Fenix easily meets

Section 144.054’s “producing” requirement.

“Manufacturing” is “the alteration or physical change of an object or material in such a way that produces an article with a use, identity, and value different from the use, identity, and value of the original.” *Branson Properties USA v. Director of Revenue*, 110 S.W.3d 824, 826 (Mo. banc 2003).⁶ Manufacturing is essentially taking materials and making something different out of them. Without question, Fenix does this by taking loose cement, rebars, steel embeds and other materials and making them into wall panels. The Commission’s decision in *Fred Weber* is helpful:

Prior to being installed as part of an asphalt pavement, the rock aggregate and the hot mix asphalt were pourable and loose. They could be transported and used for any asphalt installation. After installation, the rock aggregate and hot mix asphalt no longer had individual identities. Those materials now constituted one single asphalt pavement. Consequently, these changes meet the definition of “manufacturing.”

Fred Weber, § II (B). Similar to *Fred Weber* taking loose asphalt and turning it into pavement, Fenix takes loose cement and other materials and turns them into tilt-up wall panels. Fenix products go much further than *Weber*, however, by including steel rebar, specifically placed embeds, window and door openings and decorative exterior facades.

The Director’s decisions in letter rulings are also helpful. The Director has found

⁶ The Director has adopted the same definition. 12 C.S.R. 10-110.621(2)(D); 12 C.S.R. 10-111.010(2)(E)(i).

that companies who make roof and floor trusses ranging “roughly from 2 feet or smaller to 60 feet or larger” are “manufacturers [of] products.” Letter Ruling 6878, Aug. 22, 2011. The Director has found that companies who construct and install granite countertops engage in “manufacturing” the raw granite slabs into “products,” *i.e.* countertops. Letter Ruling 7044, Feb. 22, 2012. The Department of Revenue has also deemed craftsmen making custom cabinets and affixing them to real estate “manufacturers.” Letter Ruling 6717, April 28, 2011.

At the hearing, both Steve Ladenberger and Daniel Bumberry testified that Fenix’s tilt-up wall panel production changes the use, identity and value of the materials utilized, and that the panels are of greater value than the materials used. Tr. p. 53, lines 2-19; p. 75, line 10-20. The Director presented no evidence whatsoever to the contrary.

The Director may argue that the fact that Fenix makes the tilt-up wall panels on the customers’ property and not in a plant or separate facility somehow weakens Fenix’s claim of being a producer or manufacturer of a product. This argument is not grounded in any business or legal precedent. Fenix produces the tilt-up panels on site because of efficiency and cost factors and because there is simply no practical way to transport the large panels on public roads. Tr. p. 34, lines 8-15.

Furthermore, regarding production facilities, engineer Daniel Bumberry testified at the hearing about an exception in the American Concrete Institutes’ building code, which reads as follows:

The term “manufactured under plant controlled conditions” does not specifically imply the precast members should be manufactured in the plant. Structural elements

precast at the job site also qualify under this section if the control of form, dimension, placing of reinforcement, quality control of concrete, and procedures are equal to that normally expected in a plant.

Petitioners' Trial Exhibit 2; Tr. 72:4-14. Mr. Bumberry testified that Fenix's tilt-up wall panels are consistent with these requirements and therefore qualify as "manufactured under plant controlled conditions," despite Fenix not using a plant facility to produce its tilt-up wall panels. Tr. 72:4-19. The Director offered no evidence to the contrary.

Further, the Supreme Court in *E & B Granite* found that the materials exemption was certainly not limited to manufacturing facilities producing various items by means of mass production, as it applied the exemption to skilled laborers making custom countertops and affixing them to real estate. The Department of Revenue has routinely applied this exemption to craftsmen making custom cabinets and affixing them to real estate. Letter Rulings 4134, 6877, and 6717. These custom cabinets are not the result of mass production in a manufacturing plant.

The Director is apparently also prepared to argue that Fenix's work as a construction subcontractor precludes any manufacturing or producing on Fenix's part, but this argument is not based on any legal principle or on the language of the statute. Without question, Fenix's tilt-up wall panels ultimately become part of the construction process and are affixed to the customer's real estate; however, before that occurs the wall panels are tangible personal property and products. Construction subcontractor or not, if the language of Section 144.054 is satisfied, then the exemption is appropriate, and Fenix's work fits solidly within Section 144.054.2's terms.

B. Tilt-Up Wall Panels are Products

The Director disputes that Fenix’s wall panels are products, even beyond the alleged lack of market value discussed *supra*.

The Missouri Supreme Court has defined a “product” as “an output with a market value.” *International Business Machines Corp. v. Director of Revenue*, 958 S.W.2d 554, 557 (Mo. banc 1997) (quoting *Mid-America Dairymen, Inc. v. Director of Revenue*, 924 S.W.2d 280, 283 (Mo. banc 1996)). Such output may include services as well as tangible personal property. *Id.* In *Mid-America Dairymen*, which applied the electrical energy exemption in Section 144.030.2(12), the court stated that a product is “an article with a use, identity, and value different from the use, identity, and value of the original.” *Id.* at 283.

At the hearing, both Steve Ladenberger and Daniel Bumberry testified that Fenix’s tilt-up wall panels are products. Tr. 60:9; 75:21. Fenix presented custom and usage evidence as well, noting that the contract between Fenix and Duke Construction, one of the contracts introduced as evidence at the hearing—requires Fenix “to confirm that your *product* meets the design and is adequate for erection.” Tr. 58:16-24 (emphasis added). The Director offered no evidence whatsoever at the hearing, except for a printout of Fenix’s website, which is essentially used for advertising purposes.

Daniel Bumberry testified further to the panels’ physical nature as tangible personal property. He compared the tilt-up wall panels created by Fenix on-site to precast panels that are shipped to the jobsite. Tr. 76:2-10. “You could actually put this precast panel on the ground next to the tilt-up panel and you couldn’t tell the difference.”

Id. It is difficult to imagine the Director denying that a truckload of precast panels consists of “products” and/or the Director failing to collect tax on these precast products if the title to these products transferred prior to installation. Evolution of the tilt-up wall panel industry, cost factors, efficiency and safety allow Fenix to produce its products on site within the guidelines of the American Concrete Institute, a fact which should not be held against Fenix.

Whether the production of wall panels is on site or not, the same thing happens: tangible personal property is produced and is then affixed to real estate. According to *E & B Granite*, these actions satisfy the elements of Section 144.054.2 and trigger the Missouri Supreme’s Court’s mandate that “[a]ny company may obtain this tax exemption on purchases of materials it uses to manufacture products if it is vertically integrated similarly to E & B.” *E & B Granite*, at 318.

CONCLUSION

For the foregoing reasons, the Administrative Hearing Commission’s decision should be reversed and judgment entered in favor of the Appellants.

Respectfully submitted,

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Certificate of Service and Compliance with Rule 84.06(b)-(c)

The undersigned hereby certifies that on this 11th day of April, 2014, the foregoing brief was served via the Court's online filing system upon:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 5,628 words.

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