

**BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION**

Upper Republican Natural Resources  
District,  
Appellant,

v.

Dundy County Board of Equalization,  
Appellee,

and

M & L Cattle Company,  
Appellee,

and

FEM, Inc.,  
Appellee,

and

Steve Yost,  
Appellee,

Case Nos. 13E 019, 13E 020, 13E 021, 13E  
022, 13E 023, 13E 024, 13E 025, 13E 026,  
13E 027, 13E 028, 13E 029, 13E 030, 13E  
031, 13E 032, 13E 033, 13E 034, 13E 035,  
13E 036, 14E 069, 14E 070, 14E 071, 14E  
072, 14E 073, 14E 074, 14E 075, 14E 076,  
14E 077, 14E 078, 14E 079, 14E 080, 14E  
081, 14E 082, 14E 083, 14E 084, 14E 085,  
14E 086, 15E 052, 15E 053, 15E 054, 15E  
055, 15E 056, 15E 057, 15E 058, 15E 059,  
15E 060, 15E 061, 15E 062, 15E 063, 15E  
064, 15E 065, 15E 066, 15E 067, 15E 068,  
& 15E 069

Decision and Order Reversing the  
Determinations of the Dundy County  
Board of Equalization

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**For the Appellee:**

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**I. INTRODUCTION**

The appeals for the above-captioned 2013 appeals were heard by Commissioners Nancy J. Salmon and Thomas D. Freimuth. The appeals for all of the above-captioned appeals were

subsequently assigned to Commissioner Salmon and Commissioner Robert W. Hotz.<sup>1</sup> The Commission has reviewed the record in its entirety.

## II. PROCEDURAL HISTORY

The Subject Property consists of multiple parcels located in Dundy County, Nebraska. The legal descriptions of the parcels and property record cards for the Subject Property are found at Exhibits 8 to 25 (tax year 2013), Exhibits 53 to 70 (tax year 2014), and Exhibits 73 to 91 (tax year 2015).

The Dundy County Assessor (the County Assessor) determined that the Subject Property was not exempt from taxation for tax years 2013, 2014, and 2015.<sup>2</sup> The Upper Republican Natural Resources District (the URNRD) protested these assessments to the Dundy County Board of Equalization (the County Board) and requested that the Subject Property be exempt from taxation for tax years 2013, 2014, and 2015.<sup>3</sup> The County Board also determined that the Subject Property was not exempt from taxation for tax years 2013, 2014, and 2015.<sup>4</sup>

The URNRD appealed the decisions of the County Board to the Tax Equalization and Review Commission (the Commission). The Commission held a hearing on June 26, 2014, concerning the taxable status of the Subject Property for tax year 2013.<sup>5</sup> The parties submitted briefs subsequent to the hearing, which were received by the Commission September 11, 2014, October 1, 2014, and October 16, 2014.

During its review of the evidence and argument, the Commission concluded that one or more of the Subject Properties had been leased by the URNRD to a private party. It was noted that the Commission does not have jurisdiction to determine whether real property owned by a governmental entity but leased to a non-governmental entity is exempt from taxation without the lessee being made a party to the appeal.<sup>6</sup> The Commission thus determined that not all of the necessary parties had been noticed and joined to the appeals. Therefore, the Commission issued

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<sup>1</sup> Commissioner Thomas D. Freimuth resigned from the Commission on September 2, 2015, necessitating that Commissioner Hotz be assigned to the appeals.

<sup>2</sup> See, Case Files.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Commissioners Freimuth and Salmon were assigned to be present at the hearing and to conduct the business of the Commission.

<sup>6</sup> See, *Conroy v. Keith County Board of Equalization and Central Nebraska Public Power and Irrigation District*, 288 Neb. 196, 203-204, 846 N.W.2d 634, 640 (2014), holding that, “[w]ithout the lessees being parties to the action, [the Commission] could not determine whether there should be a separate tax obligation on the parcels or whether the parcels had an assessed value.

an Order to Show Cause on November 12, 2014, in order to resolve the jurisdictional issues.<sup>7</sup> The hearing was held on December 16, 2014.

Following the Show Cause hearing, the Commission issued an Order To Vacate Hearing,<sup>8</sup> vacating the June 26, 2014 hearing, and also issued an Order To Disclose Necessary Parties.<sup>9</sup> After a review of responses from the URNRD and the County Board, the Commission sent Notices of Appeal to FEM, Inc., M & L Cattle Company, and Steve Yost as necessary parties.<sup>10</sup> A Notice of Substitution of Necessary Party was sent to Ben Reinick.<sup>11</sup> The Commission also ordered that the appeals that had been filed for tax year 2014 be consolidated with the tax year 2013 appeals.<sup>12</sup>

On June 17, 2015, all of the necessary parties agreed in a joint stipulation to submit the matter to the Commission without a hearing and to have the Commission determine the issues based on the following: (1) in Case Nos. 13E 019 to 13E 036, the transcript of the June 26, 2014 hearing, all exhibits received during the June 26, 2014 hearing, and an affidavit of Steve Winger; (2) in Case Nos. 14E 069 to 14E 086, the transcript of the June 26, 2014 hearing, all exhibits received during the June 26, 2014 hearing, an affidavit of Steve Winger, the 2014 Dundy County Assessor's property record file for each parcel, and the Notice of Taxable Status for tax year 2014; and (3) in Case Nos. 15E 052 to 15E 069, the transcript of the June 26, 2014 hearing, all exhibits received during the June 26, 2014 hearing, an affidavit of Steve Winger, the 2015 Dundy County Assessor's property record file for each parcel, and the Notice of Taxable Status for tax year 2015. The Commission issued an Order Accepting Joint Motion Waiving Hearing and deemed the matters submitted to the Commission.<sup>13</sup>

The Commission notes that the affidavit of Steve Winger, the 2014 Dundy County Assessor's property record file for each parcel, the 2015 Dundy County Assessor's property record file for each parcel, and the Notices of Taxable Status for tax years 2014 and 2015 were not marked and numbered during the Commission's June 26, 2014 hearing. However, these items were numbered by the parties prior to their submission to the Commission. The

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<sup>7</sup> See, Case File.

<sup>8</sup> *Id.* The Order was dated December 31, 2014.

<sup>9</sup> See, Case File. The Order was dated January 7, 2015.

<sup>10</sup> See, Case File. The Notices were dated March 3, 2015.

<sup>11</sup> See, Case File. The Notice was dated September 19, 2016.

<sup>12</sup> See, Case File. The Order was dated March 9, 2015.

<sup>13</sup> See, Case File. The Order was dated June 18, 2015.

Commission will utilize the parties' exhibit numbering in this Decision and Order and for the official record maintained by the Commission.

### III. STANDARD OF REVIEW

The Commission's review of the determination of the county board of equalization is de novo.<sup>14</sup> When the Commission considers an appeal of a decision of a county board of equalization, a presumption exists that the "board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action."<sup>15</sup>

That presumption remains until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence adduced on appeal to the contrary. From that point forward, the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon all the evidence presented. The burden of showing such valuation to be unreasonable rests upon the taxpayer on appeal from the action of the board.<sup>16</sup>

The order, decision, determination or action appealed from shall be affirmed unless evidence is adduced establishing that the order, decision, determination, or action was unreasonable or arbitrary.<sup>17</sup> Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.<sup>18</sup>

A Taxpayer must introduce competent evidence of actual value of the Subject Property in order to successfully claim that the Subject Property is overvalued.<sup>19</sup> The County Board need not put on any evidence to support its valuation of the property at issue unless the taxpayer establishes the Board's valuation was unreasonable or arbitrary.<sup>20</sup>

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<sup>14</sup> See, Neb. Rev. Stat. §77-5016(8) (2016 Cum. Supp.), *Brenner v. Banner Cty. Bd. of Equal.*, 276 Neb. 275, 286, 753 N.W.2d 802, 813 (2008). "When an appeal is conducted as a 'trial de novo,' as opposed to a 'trial de novo on the record,' it means literally a new hearing and not merely new findings of fact based upon a previous record. A trial de novo is conducted as though the earlier trial had not been held in the first place, and evidence is taken anew as such evidence is available at the time of the trial on appeal." *Koch v. Cedar Cty. Freeholder Bd.*, 276 Neb. 1009, 1019 (2009).

<sup>15</sup> *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted).

<sup>16</sup> See, e.g., *JQH La Vista Confr. Ctr. v. Sarpy Cty. Bd. Of Equal.*, 285 Neb. 120, 124, 825 N.W.2d 447, 451-52 (2013), quoting *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008).

<sup>17</sup> Neb. Rev. Stat. §77-5016(9) (2016 Cum. Supp.).

<sup>18</sup> *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

<sup>19</sup> Cf. *Josten-Wilbert Vault Co. v. Board of Equalization for Buffalo County*, 179 Neb. 415, 138 N.W.2d 641 (1965) (determination of actual value); *Lincoln Tel. and Tel. Co. v. County Bd. Of Equalization of York County*, 209 Neb. 465, 308 N.W.2d 515 (1981)(determination of equalized taxable value).

<sup>20</sup> *Bottof v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).

In an appeal, the Commission “may determine any question raised in the proceeding upon which an order, decision, determination, or action appealed from is based.”<sup>21</sup> The Commission may also “take notice of judicially cognizable facts and in addition may take notice of general, technical, or scientific facts within its specialized knowledge...,” and may “utilize its experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to it.”<sup>22</sup> The Commission’s Decision and Order shall include findings of fact and conclusions of law.<sup>23</sup>

#### IV. EXEMPTION

##### A. Law

The Nebraska Constitution specifies that property of the state and its governmental subdivisions used for authorized public purposes is exempt from taxation and it permits the Legislature to classify other exempt properties “owned by and used exclusively for agricultural and horticultural societies and property owned and used exclusively for educational, religious, charitable, or cemetery purposes, when such property is not owned or used for financial gain or profit to either the owner or user.”<sup>24</sup> Statutes that exempt property from taxation are to be “strictly construed, and the burden of proving the right to exemption is on the claimant.”<sup>25</sup> There are two overriding factors to be considered when a request has been made for an exemption. Those two factors are: the property tax burden is necessarily shifted from the beneficiary of an exemption to others who own taxable property, and that the power and right of the state to tax is always presumed.<sup>26</sup>

Nebraska Courts have developed several principles concerning requests for exemptions: (1) an exemption is never presumed;<sup>27</sup> (2) the alleged exempt property must clearly come within the provision granting the exemption;<sup>28</sup> (3) the laws governing property tax exemptions must be strictly construed;<sup>29</sup> (4) the courts must give a “liberal and not a harsh or strained construction

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<sup>21</sup> Neb. Rev. Stat. §77-5016(8) (2016 Cum. Supp.).

<sup>22</sup> Neb. Rev. Stat. §77-5016(6) (2016 Cum. Supp.).

<sup>23</sup> Neb. Rev. Stat. §77-5018(1) (2016 Cum. Supp.).

<sup>24</sup> Neb. Const., Art. VIII, § 2.

<sup>25</sup> *Fort Calhoun Baptist Church v. Washington Cty. Bd. of Equal.*, 277 Neb. 25, 30, 759 N.W.2d 475, 480 (2009) (citations omitted).

<sup>26</sup> See, e.g., *Jaksha v. State*, 241 Neb. 106, 112, 486 N.W.2d, 858, 864 (1992); *Ancient and Accepted Scottish Rite of Freemasonry v. Board of County Com’rs*, 122 Neb. 586, 241 N.W. 93 (1932).

<sup>27</sup> *Pittman v. Sarpy Cty. Bd. of Equal.*, 258 Neb. 390, 398, 603 N.W.2d 447, 453 (1999).

<sup>28</sup> *Nebraska State Bar Foundation v. Lancaster Cty. Bd. of Equal.*, 237 Neb. 1, 4, 465 N.W.2d 111, 114 (1991).

<sup>29</sup> *Nebraska Annual Conference of United Methodist Church v. Scotts Bluff County Board of Equalization*, 243 Neb. 412, 416, 499 N.W.2d 543, 547 (1993).

...to the terms ‘educational,’ ‘religious,’ and ‘charitable’ in order that the true intent of the constitutional and statutory provisions may be realized[;]”<sup>30</sup> and (5) this interpretation should always be reasonable.<sup>31</sup>

The intended use of real property is not determinative of whether property qualifies for an exemption as used for a public purpose. Property owned by the State or one of its governmental subdivisions is exempt to the extent it is “used or being developed for use...for a public purpose.”<sup>32</sup> The property is exempt only to the extent there is active use for a public purpose or active development for a public purpose.<sup>33</sup> Public purpose means, in relevant part, “use of the property (A) to provide...the general operation of government... or (B) to carry out the duties and responsibilities conferred by law with or without consideration.”<sup>34</sup> Leasing property to a private party does not meet the definition of a public purpose unless: (1) the lease is at fair market value; and (2) the lease is for a public purpose.<sup>35</sup>

The exemption of property owned by the state or its governmental subdivisions is authorized “to the extent” it is used or developed for use for a public purpose.<sup>36</sup> The phrase “to the extent” indicates that it is possible for property owned by the state or its governmental subdivisions to be partially exempt.<sup>37</sup>

In cases where it is determined that the property, when considered as a whole, is not used entirely for a public purpose, but the property has separate and distinct use portions, an exemption from taxes for the portion used for a public purpose shall be allowed.<sup>38</sup>

There is a separate analysis for when property owned by the state or its governmental subdivisions has multiple simultaneous uses: “When a parcel of governmentally owned property is used for several purposes simultaneously, the determination of taxable status should be based on the predominant use of the property. The predominant use of the property is the primary or dominant use.”<sup>39</sup>

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<sup>30</sup> *Lincoln Woman’s Club v. City of Lincoln*, 178 Neb. 357, 363, 133 N.W.2d 455, 459 (1965).

<sup>31</sup> *Id.* (citing, *Young Men’s Christian Assn. of City of Lincoln v. Lancaster County*, 106 Neb. 105, 182 N.W. 593 (1921)).

<sup>32</sup> Neb. Rev. Stat. §77-202(1)(a) (2016 Cum. Supp.).

<sup>33</sup> *Id.*

<sup>34</sup> Neb. Rev. Stat. §77-202(1)(a)(ii) (2016 Cum. Supp.).

<sup>35</sup> See, *id.*

<sup>36</sup> *Id.*

<sup>37</sup> Neb. Rev. Stat. §77-202(1)(a)(ii) (2016 Cum. Supp.).

<sup>38</sup> 350 Neb. Admin. Code, ch. 15 §003.07 (03/15/2009).

<sup>39</sup> 350 Neb. Admin. Code, ch. 15 §003.07 (03/15/2009).

Partial use analysis and predominant use analysis are materially different. A partial use analysis looks for distinct portions of the property having separate and distinct uses; a predominant use analysis focuses on the uses of the property that are comingled such that some portion of the property is being used for multiple purposes at the same time.

Additional factors that may be analyzed when determining whether property owned by the state or its governmental subdivisions which is used simultaneously for multiple purposes is exempt property include the following:

- (1) Whether the use of the property assists the governmental entity in meeting a long term or ongoing purpose;
- (2) Whether the governmental entity has spent significant money in making the property ready for its public purpose use in comparison with any revenue generated by its nonpublic use; and
- (3) Whether the public purpose use is ongoing throughout the year as opposed to the seasonal nature of its nonpublic use.<sup>40</sup>

## **B. Summary of the Issues**

In 2011 and 2013, the URNRD purchased the Subject Property, the real property of two separate farm operations totaling approximately 6,400 acres; including 3,261.6 certified irrigated acres from FEM, Inc. in 2011,<sup>41</sup> and 3,200 certified irrigated acres of agricultural land and horticultural land from Maurice Wilder in March 2013.<sup>42</sup> Certified irrigated acres are defined as, “the number of acres or portion of an acre that a natural resources district has approved for irrigation from ground water in accordance with law and with rules adopted by the district.”<sup>43</sup> After the purchases, the URNRD decertified the irrigated acres on both parcels.<sup>44</sup>

On the unimproved FEM, Inc. parcels, the URNRD created a water augmentation project for Rock Creek, a tributary of the Upper Republican River.<sup>45</sup> The URNRD used the pumps and wells that had previously been used to irrigate crops. They also constructed pipelines to allow ground

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<sup>40</sup> 350 Neb. Admin. Code, ch. 15 §003.07A (03/15/2009).

<sup>41</sup> See, E42:1.

<sup>42</sup> See, E45.

<sup>43</sup> Neb. Rev. Stat. §46-706(30)(Reissue 2010).

<sup>44</sup> See, E33-34.

<sup>45</sup> See, E51.

water to be extracted from the unimproved FEM, Inc. parcels and transmitted to Rock Creek where it would aid in maintaining appropriate stream flows.<sup>46</sup>

The URNRD converted the previously irrigated acres to grassland and rented the grassland to FEM, Inc. for the grazing of cattle. The URNRD also leased the improvements located on the parcels to FEM, Inc. for its commercial purposes and uses.<sup>47</sup> FEM, Inc. subsequently sublet the FEM, Inc. parcels to a related entity, M & L Cattle Co., with the URNRD agreeing to the conveyance.<sup>48</sup> The FEM, Inc. parcels remained leased by FEM, Inc., and sublet to M & L Cattle Co. through tax year 2015.<sup>49</sup> As of January 1, 2013, the augmentation operations and leased uses were fully implemented on the FEM, Inc. parcels.

Jasper Fanning, General Manager of the URNRD, testified that following the implementation of the augmentation project on the FEM, Inc. parcels it became apparent that further acres of irrigated land would need to be decertified to offset the augmentation in an amount sufficient to accomplish both the goals of increasing streamflow in Rock Creek and the duty to maintain a reasonable proportion of ground water use at the FEM, Inc. parcels. To fulfill this need, the URNRD purchased the Wilder parcels in 2013.<sup>50</sup> Mr. Fanning testified that the purchase was intended to allow the URNRD to decertify more irrigated acres and that the URNRD intended to plant the Wilder parcels into natural grass similar to the FEM, Inc. parcels.

The Wilder parcels were purchased too late in the growing season to permit the planting of natural grasses. The URNRD purchased the Wilder parcels subject to a lease that expired May 1, 2013.<sup>51</sup> The URNRD therefore planted a cover crop of sorghum. The sorghum crop was not harvested. Following the 2013 planting season, the URNRD established grassland on the Wilder properties.<sup>52</sup>

The issue before the Commission is whether the Subject Property, which is made up of all former FEM, Inc., and Wilder parcels, is exempt from taxation. Since the URNRD is a political

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<sup>46</sup> *Id.*

<sup>47</sup> See, E43.

<sup>48</sup> See, E43:12.

<sup>49</sup> See, E72 (affidavit of Steve Winger).

<sup>50</sup> See, E45.

<sup>51</sup> See, E45:8.

<sup>52</sup> See, E60-66 and E70.



subdivision of the State of Nebraska,<sup>53</sup> the primary issue before the Commission is whether the Subject Property is used for a public purpose as required by Neb. Rev. Stat. §77-202(1).

### **C. Scope of the Commission's Public Purpose Analysis**

The County Board asserts that the Commission's examination of the use of the Subject Property should be limited to the surface of the Subject Property and all improvements located thereon, but should not take into account the use of the water rights. For further context, we must look at the specific powers of natural resource districts under Nebraska law.

Under Nebraska Law, natural resources districts have limited powers<sup>54</sup>: “[a] natural resources district, as a political subdivision, has only that power delegated to it by the Legislature, and a grant of power to a political subdivision is strictly construed.”<sup>55</sup> A natural resources district

possesses and can exercise the following powers and no others: first, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; and third, those essential to the declared objects and purposes of the district -- not simply convenient, but indispensable.<sup>56</sup>

As a natural resources district, the URNRD has the express authority to acquire title to real property.<sup>57</sup>

The purposes of natural resources districts are

to develop and execute, through the exercise of powers and authorities granted by law, plans, facilities, works, and programs relating to (1) erosion prevention and control, (2) prevention of damages from flood water and sediment, (3) flood prevention and control, (4) soil conservation, (5) water supply for any beneficial uses, (6) development, management, utilization, and conservation of ground water and surface water, (7) pollution control, (8) solid waste disposal and sanitary drainage, (9) drainage improvement and channel rectification, (10) development and management of fish and wildlife habitat, (11) development and management of recreational and park facilities, and (12) forestry and range management.<sup>58</sup>

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<sup>53</sup> Neb. Rev. Stat. §2-3213(1) (Reissue 2012).

<sup>54</sup> Neb. Rev. Stat. §46-707 (Reissue 2010). See, generally, Neb. Rev. Stat. §2-3201 et. seq. (Reissue 2012).

<sup>55</sup> *Medicine Creek v. Middle Repub. Nat. Res. Dist.*, 296 Neb. 1, 5, \_ N.W.2d \_, \_ (2017), citing *Wagoner v. Central Platte Nat. Resources Dist.*, 247 Neb. 233, 526 N.W.2d 422 (1995).

<sup>56</sup> *Id.*

<sup>57</sup> Neb. Rev. Stat. §2-3233 (Reissue 2012).

<sup>58</sup> Neb. Rev. Stat. §2-3229 (Reissue 2012).

In this context, the County Board asserts that the URNRD was not required to purchase the whole property, but instead could have purchased only the water or the water rights. The County Board asserts that because there was another way to accomplish the URNRD's purpose of stream flow augmentation, that any property right associated with the Subject Property that was not necessary for augmentation is not a public purpose and should be taxed accordingly.

The Commission finds that our public purpose analysis, as required by Neb. Rev. Stat. §77-202(1), should not be limited to the surface of the Subject Property. The ownership of real property interests is best described by what has been termed as a bundle of rights.<sup>59</sup> The bundle of rights theory imagines each property right and privilege as a distinct stick that is contained in a larger bundle of sticks.<sup>60</sup> The size of the bundle of sticks, and the rights and privileges contained within the bundle, are dependent upon the type of ownership interest represented.<sup>61</sup> "Ownership of the fee simple interest is equivalent to ownership of the complete bundle of sticks, while one or more of the sticks (or a portion of individual sticks) can represent a partial interest in a specific property."<sup>62</sup> If the Commission is to determine the predominant use of real property, we must examine how all portions of the real property are used, including all rights and privileges associated with the real property, including, but not limited to, water rights and privileges.

#### **D. Public Purpose Analysis of the URNRD Subject Property**

The URNRD asserts that the Commission should examine the Subject Property as it is consistent with its larger augmentation project. It is appropriate for the Commission's examination to take into account the URNRD's use of the Subject Property in meeting a long term purpose, but Nebraska law permits the taxation of any portion of property owned by the State or its governmental subdivisions that is not used for a public purpose.<sup>63</sup> Therefore, our analysis divides the properties into two distinct groups: (1) parcels without improvements (except well heads); and (2) parcels with improvements. The Commission's analysis of whether the property's use meets the standard of use for a public purpose is different for each of these two groups.

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<sup>59</sup> See, The Appraisal Institute, *The Appraisal of Real Estate*, at 5 (14th ed. 2013).

<sup>60</sup> See, The Appraisal Institute, *The Appraisal of Real Estate*, at 5 (14th ed. 2013).

<sup>61</sup> See, The Appraisal Institute, *The Appraisal of Real Estate*, at 5 (14th ed. 2013).

<sup>62</sup> See, The Appraisal Institute, *The Appraisal of Real Estate*, at 5 (14th ed. 2013).

<sup>63</sup> See, 350 Neb. Admin. Code, ch. 15 §003.07 (03/15/2009).

## **1. Properties Without Improvements (except well heads)**

Within the group of parcels without improvements, the Commission will separately analyze those parcels which were purchased by the URNRD and leased back to FEM, Inc., and then sublet to M&L Cattle, Co. through 2015 (FEM, Inc., parcels), from those parcels which were purchased by URNRD from Wilder, of which a portion were subject to a lease until May 1, 2013 (Wilder parcels). This distinction is made because the actual uses in tax years 2013, 2014, and 2015 were different for these two groups of parcels.

The evidence indicates that the unimproved FEM, Inc., parcels were decertified and planted in natural grasses prior to January 1, 2013.<sup>64</sup> The grassland was then leased to FEM, Inc., and later sublet to M&L Cattle, Co. (a subsidiary of FEM, Inc.) through tax year 2015.<sup>65</sup> After examination of the property record cards from the unimproved FEM, Inc. parcels, it is apparent that the grazing of the natural grass continued into 2015.<sup>66</sup> The Wilder parcels were converted sometime after the 2013 growing season, and the facts and conclusions regarding the Wilder parcels are discussed separately.

### **a. Unimproved FEM, Inc. Parcels**

The unimproved FEM, Inc. parcels include those portions of the Subject Property found in cases 13E 019, 14E 080, 15E 063,<sup>67</sup> 13E 020, 14E 074, 15E 057,<sup>68</sup> 13E 021, 14E 075, 15E 058,<sup>69</sup> 13E 023, 14R 077, 15E 060,<sup>70</sup> 13E 024, 14E 078, 15E 061,<sup>71</sup> 13E 025, 14E 079, 15E 062,<sup>72</sup> 13E 030, 14E 069, 15E 052,<sup>73</sup> 13E 034, 14E 071, 15E 054,<sup>74</sup> and 13E 036, 14E 073, 15E 056.<sup>75</sup> Following the purchase of these parcels, they were leased to FEM, Inc., and then sublet to M&L Cattle, Co. to be used for grazing cattle through 2015.<sup>76</sup> Property owned by the state or its

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<sup>64</sup> See, E33-34, and the transcribed testimony of Mr. Fanning. Decertification occurred when the URNRD voluntarily remitted its claim to appropriate groundwater for irrigation on the Subject Property.

<sup>65</sup> See, E43 and E72.

<sup>66</sup> See, E74-80, E85, and E87-90.

<sup>67</sup> See, E8, E53, E74 (Parcel ID 290025990).

<sup>68</sup> See, E10, E55, E76 (Parcel ID 290029449).

<sup>69</sup> See, E11, E56, E77 (Parcel ID 290029546).

<sup>70</sup> See, E12, E57, E78 (Parcel ID 290029775).

<sup>71</sup> See, E13, E58, E79 (Parcel ID 290029783).

<sup>72</sup> See, E14, E59, E80 (Parcel ID 290029813).

<sup>73</sup> See, E18, E63, E84 (Parcel ID 290031125).

<sup>74</sup> See, E22, E67, E88 (Parcel ID 290031249).

<sup>75</sup> See, E24, E69, E90 (Parcel ID 290031265).

<sup>76</sup> See, E43.

governmental subdivisions and leased to a private party is only exempt if the lease is at fair market value for a public purpose.<sup>77</sup>

### **(1) Public Purpose Analysis of the FEM, Inc. Lease**

The Commission will examine first the question of whether the unimproved FEM, Inc. parcels were leased for a public purpose.

The unimproved FEM, Inc. parcels were simultaneously used for multiple purposes. The URNRD had developed an augmentation project on the unimproved FEM, Inc. parcels, had decertified the acres, and had planted them back to natural grassland. Additionally, FEM, Inc. and/or its sub-lessee, M&L Cattle Co., were grazing cattle on the unimproved parcels according to a lease through 2015.<sup>78</sup> When real property owned by the state or its governmental subdivisions is used simultaneously for multiple uses the property is only exempt if the predominant use of the real property is for a public purpose.<sup>79</sup> Some factors for consideration include but are not limited to:

- (1) Whether the use of property assists the governmental entity in meeting a long term or ongoing purpose;
- (2) Whether the governmental entity has spent significant money in making the property ready for its public purpose use in comparison with any revenue generated by its nonpublic use; and
- (3) Whether the public purpose use is ongoing throughout the year as opposed to the seasonal nature of its nonpublic use.<sup>80</sup>

First, the evidence indicates that grazing of the cattle assists in the URNRD's long term and ongoing development of an augmentation project to comply with the Republican River Compact, for management of water use, for conducting range management, and for controlling the erosion of soils. All of these activities fall within the statutorily declared purview of the URNRD.<sup>81</sup>

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<sup>77</sup> See, Neb. Rev. Stat. §77-202(1)(a)(ii) (2016 Cum. Supp.).

<sup>78</sup> See, E43 and E72.

<sup>79</sup> See, 350 Neb. Admin. Code, ch. 15 §003.07 (03/15/2009).

<sup>80</sup> 350 Neb. Admin. Code, ch. 15 §003.07A (03/15/2009).

<sup>81</sup> "The purposes of natural resources districts shall be to develop and execute, through the exercise of powers and authorities granted by law, plans, facilities, works, and programs relating to (1) erosion prevention and control, (2) prevention of damages from flood water and sediment, (3) flood prevention and control, (4) soil conservation, (5) water supply for any beneficial uses, (6) development, management, utilization, and conservation of ground water and surface water, (7) pollution control, (8) solid waste disposal and sanitary drainage, (9) drainage improvement and channel rectification, (10) development and management of fish and wildlife habitat, (11) development and management of recreational and park facilities, and (12) forestry and range management." Neb. Rev. Stat. §2-3229 (Reissue 2012).

The County Board argued that the URNRD could have undertaken actions to meet its goals other than by purchasing the unimproved FEM, Inc. parcels. But that argument is irrelevant. There is no requirement that the State or its governmental subdivisions restrict their methods for performing their duties to the least expensive, least restrictive, or least impactful means for any real property owned by the State or its governmental subdivisions in order to maintain a property tax exemption. Indeed, there is no requirement that the method chosen by the State or its governmental subdivisions even be a good method or a generally accepted method in order for it to be leased for a public purpose. Nor is there a requirement that the long term project and goals of the State or its governmental subdivisions be the best goals or be generally accepted for real property purchased and leased in order that those long term goals are exempt. The Commission will not impose such a requirement that is not found in the Nebraska Constitution, Statutes, or Rules and Regulations. Nor will the Commission stand in place of the URNRD to determine whether these goals or methods are the best or are generally accepted. The URNRD is directed by publicly elected officials.<sup>82</sup> Other than determining whether the actions fall within the URNRD's statutory duties and authorities, the Commission will not evaluate the performance of these elected officials based upon any suggested subjective criteria not based in Nebraska law.

The URNRD determined that it would comply with the integrated management plan and the Republican River Compact in part by creating an augmentation project.<sup>83</sup> The creation of the augmentation project involved diverting water from the unimproved FEM, Inc. parcels to Rock Creek, a tributary of the Republican River.<sup>84</sup> This augmentation is possible as a result of the privileges the URNRD obtained through ownership of the unimproved FEM, Inc. parcels. These privileges are included in the fee simple estate of the Subject Property, and the uses of these privileges are appropriately examined when determining whether the Subject Property is leased for a public purpose.<sup>85</sup>

After the URNRD diverted water from the unimproved FEM, Inc. parcels, the URNRD then planted natural grasses. The URNRD's authorized purposes include erosion control and range

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<sup>82</sup> See, Neb. Rev. Stat. §2-3214 (Reissue 2012).

<sup>83</sup> An integrated management plan or IMP, is an agreed upon plan between the URNRD and the Department of Natural Resources for the balancing of water use and water supplies that must contain ground water and surface water controls. See, Neb. Rev. Stat §46-715 (2016 Cum. Supp.).

<sup>84</sup> See, E51.

<sup>85</sup> See, *Sorensen v. Lower Niobrara Natural Resources Dist.*, 221 Neb. 180, 191, 376 N.W.2d 539 (1985).

management.<sup>86</sup> The introduction of natural grasses clearly meets both of these authorized purposes. Mr. Fanning testified that the cover crop of sorghum was planted to prevent soil erosion.

The URNRD leased the unimproved FEM, Inc. parcels for grazing.<sup>87</sup> The evidence and testimony indicate that range management is not passive. The grazing of cattle is often used as a tool in range management. In the current situation, the URNRD did not supply its own cattle to fulfill this purpose. Instead, the cattle were supplied by M&L Cattle Co., and M&L Cattle Co. was able to profit from the grazing with the sale of the cattle. However, this does not change the fact that grazing the cattle was a means to fulfill the URNRD's purposes of range management. Mr. Fanning asserted that the grazing furthered the URNRD's range management goals, and that the type of grazing was limited accordingly. There was no evidence presented that the grazing was contrary to the purposes of range management. The County Board asserted that because the lease does not allow the URNRD to disturb the agreed upon grazing activity that the URNRD's use of the unimproved real property could not be the predominant use. This is factually incorrect.

Every lease places obligations on the lessor. Every lease includes an implied covenant of quiet enjoyment.<sup>88</sup> The covenant of quiet enjoyment is breached when the lessor's wrongful conduct results in substantial interference with the lessee's use of the property.<sup>89</sup> If the County Board's assertion was followed to its ultimate conclusion, there could be no such thing as real property leased for a public purpose when simultaneously used for multiple uses, some of which are not for a public purpose, because all leases include an implied covenant of quiet enjoyment. It is clear from the statutes,<sup>90</sup> rules and regulations,<sup>91</sup> and case law that this is not the correct interpretation of Nebraska law.<sup>92</sup> The Commission finds that the use of the unimproved FEM, Inc. parcels fulfills the long term goals and purposes of the URNRD and supports the conclusion that the predominant use of the FEM Inc. parcels was for a public purpose.

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<sup>86</sup> See, Neb. Rev. Stat. §2-3229 (Reissue 2012).

<sup>87</sup> See, E43.

<sup>88</sup> See, *Sempak v. Minarik*, 200 Neb. 532, 264 N.W.2d 426 (1978).

<sup>89</sup> See, *id.*

<sup>90</sup> See, Neb. Rev. Stat. §77-202(1)(a) (providing for exemption of real property owned by the state or its governmental subdivision to the extent it is used for a public purpose and specifically defining some leases as uses that are also public purposes).

<sup>91</sup> See, 350 Neb. Admin. Code, ch. 15 §003.07 (03/15/2009) (providing guidance and allowing leased real property owned by the state or its governmental subdivisions to be exempt in some situations).

<sup>92</sup> See generally, *Conroy v. Keith Cty. Bd. Of Equal.*, 288 Neb. 196, 864 N.W.2d 634 (2014).

Second, the URNRD has expended significant resources in converting the unimproved FEM, Inc. parcel to fit into its designed use.<sup>93</sup> The parcels were purchased as part of a multi-million dollar real estate transaction.<sup>94</sup> Following the transaction, the URNRD converted well heads from irrigation systems to pipelines stretching to Rock Creek.<sup>95</sup> Additionally, natural grasses were planted and cultivated, converting the parcels from irrigated cropland to grassland. This conversion also decreased the actual value of the real property.<sup>96</sup> The URNRD only receives \$40,000 per year in rental income.<sup>97</sup> This factor would also support the conclusion that the unimproved FEM, Inc. parcels were predominantly used for a public purpose.

Third, the URNRD's use of the unimproved FEM, Inc. parcels was ongoing throughout the year, while the grazing of cattle is seasonal. The URNRD's uses of the unimproved FEM, Inc. parcels to allow for the augmentation project through transfer of water from the property to Rock Creek, to establish natural grasses for wildlife habitat, to prevent erosion, and for range management are constantly occurring. The Commission finds that this factor also indicates that the unimproved FEM, Inc. parcels' predominant use is for a public purpose.

Finally, a use is incidental when it is so secondary in nature that it does not distract from the primary use of the real property.<sup>98</sup> Mr. Fanning testified that but for grazing the cattle on the property, the URNRD would have incurred costs to machine cut the grasses. The grazing of cattle on the unimproved FEM, Inc. parcels actually supports the more primary uses of the parcels by providing a useful and economical tool for range management. The augmentation, erosion control, and habitat development are likewise unimpeded by the grazing.

Therefore, the Commission finds that the unimproved FEM, Inc. parcels were leased for a public purpose for tax years 2013, 2014, and 2015.

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<sup>93</sup> See, E42.

<sup>94</sup> The FEM, Inc. property was purchased by URNRD for \$10 million. URNRD paid \$8.05 million for the Wilder property.

<sup>95</sup> See, E51.

<sup>96</sup> The Commission notes that the property record cards indicate a decreased actual value for grassland acres as compared to irrigated acres. See generally, E8, E53, E74 (Parcel ID 290025990); E10, E55, E76 (Parcel ID 290029449); E11, E56, E77 (Parcel ID 290029546); E12, E57, E78 (Parcel ID 290029775); E13, E58, E79 (Parcel ID 290029783); E14, E59, E80 (Parcel ID 290029813); E18, E63, E84 (Parcel ID 290031125); E22, E67, E88 (Parcel ID 290031249); and E24, E69, E90 (Parcel ID 290031265).

<sup>97</sup> See, E43:4-5.

<sup>98</sup> See, 350 Neb. Admin. Code, ch. 15 §002.21 (03/15/2009).

## (2) Fair Market Value Analysis of the FEM, Inc. Lease

Having concluded that the unimproved FEM, Inc. parcels are leased for a public purpose for tax years 2013, 2014, and 2015, the Commission next turns to the issue of whether the lease of the unimproved FEM, Inc. parcels in tax years 2013, 2014, and 2015 was at fair market value. In order for property owned by the state or its governmental subdivisions to be exempt from taxation, the real property, if leased to a private party, must be leased “at fair market value for a public purpose.”<sup>99</sup>

Mr. Fanning asserted that the lease of the grazed acres was based upon the fair market value of a grazing lease per cow/calf pair.<sup>100</sup> The County Board did not offer any evidence to rebut this assertion. The Commission must base its decision on the evidence received, which includes a statement by a qualified individual that the lease of the grassland for grazing was at fair market value. The record is silent to the contrary. The Commission finds that Mr. Fanning’s testimony is sufficient to determine that the lease rate for grazing was at fair market value for all tax years.

The County Board asserts that the analysis of fair market value must be based upon the total rent for the whole project, including leased improvements. The determination of the tax exempt status of real property may include the partial exemption of real property.<sup>101</sup> The Commission finds that when dealing with parcels where there are no improvements and only grazing activity, it is acceptable to limit the analysis of fair market value to the portion of rent attributable to grazing activities.

The Commission finds that the unimproved FEM, Inc. parcels were leased for a public purpose at fair market value and are exempt from property taxation.

### **b. The Wilder Properties**

The evidence indicates that the URNRD purchased the Wilder parcels in March 2013.<sup>102</sup> Due to a pre-existing lease on some of the parcels, the grazing of cattle on corn stalks left on the parcels after harvesting occurred until May 1, 2013.<sup>103</sup> After May 1, 2013, the URNRD planted a

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<sup>99</sup> See, Neb. Rev. Stat. §77-202(1)(a)(ii) (2016 Cum. Supp.).

<sup>100</sup> See, transcript page 47, lines 11-17.

<sup>101</sup> See, 350 Neb. Admin. Code, ch. 15 §003.07 (03/15/2009).

<sup>102</sup> See, E45.

<sup>103</sup> *Id.*



cover crop of sorghum using the irrigation equipment located on these parcels to establish the crop; it was too late in the season to establish natural grasslands on the parcels and a cover crop was necessary to prevent erosion and loss of topsoil. The evidence also indicates that the URNRD converted the Wilder parcels into grassland by tax years 2014 and 2015.<sup>104</sup> There is no evidence that any portion of the Wilder parcels were leased after the cattle were removed in 2013.

The Commission's review of the portions of the Subject Property in case Nos. 13E 027, 14E 082, 15E 065,<sup>105</sup> 13E 026, 14E 081, 15E 064,<sup>106</sup> 13E 028, 14E 083, 15E 066,<sup>107</sup> 13E 029, 14E 084, 15E 067,<sup>108</sup> 13E 032, 14E 086, 15E 069,<sup>109</sup> and 13E 031, 14E 085, 15E 068,<sup>110</sup> (the "Wilder Properties"), is significantly different from the Commission's review of the other parcels consolidated in this order. When the tax status of real property owned by the state or its governmental subdivisions changes after January 1 but before the levy date, the county assessor is required to modify its determination of the tax status as of the levy date.<sup>111</sup> The levy date is October 15.<sup>112</sup> The Wilder properties were purchased March 13, 2013, and a pre-existing lease expired as of May 1, 2013.<sup>113</sup> Even had the Wilder property failed the exemption tests prior to May 1, 2013, that is not determinative in these appeals. The unrefuted evidence is that the use changed after May 1, 2013. Because the Commission finds that the change in the use of the Wilder properties resulted in a change in tax status prior to October 15, 2013, and that the URNRD's use after May 1, 2013, constitutes use for a public purpose (as discussed below), the Commission will not examine the impact of the lease to Yost which concluded by May 1, 2013. In other words, because the tax status of the Wilder Properties was exempt prior to October 15, 2013, the tax status of the Wilder Properties before May 1, 2013, is irrelevant.

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<sup>104</sup> See, E60, E61, E62, E64, E65, and E70.

<sup>105</sup> See, E16, E61, and E82 (Parcel ID 290030854).

<sup>106</sup> See, E25, E70, and E91 (Parcel ID 290047390).

<sup>107</sup> See, E15, E60, and E81 (Parcel ID 290030838).

<sup>108</sup> See, E17, E62, and E83 (Parcel ID 290030986).

<sup>109</sup> See, E20, E65, and E86 (Parcel ID 290031184).

<sup>110</sup> See, E19, E64, and E85 (Parcel ID 290031176 improved with House, Machine Shed, 10 grain bins, scale house and scale, dryer, 2 vertical tanks, 2 anhydrous tanks, home site 1 acre).

<sup>111</sup> See, 350 Neb. Admin. Code, ch. 15 §003.11A (03/15/2009).

<sup>112</sup> See, Neb. Rev. Stat. §77-1601(1) (Reissue 2009).

<sup>113</sup> See, E45.

Similarly, the Commission notes that the URNRD purchased all of the real property located on the Wilder properties, including some improvements.<sup>114</sup> Mr. Fanning testified that the residence located on the Wilder properties was uninhabitable, and that no one had been living in it. Mr. Fanning also testified that the improvements on the Wilder properties were run down and unusable. He testified that some of the improvements had been sold for scrap value. There is no indication that any of the improvements were leased for any use. The improvements do not help or hinder the URNRD in its use of the Subject Property and are merely incidental to the URNRD's use of the Subject Property.

Property of the state and its governmental subdivisions is exempt from property taxes to the extent it is "used or being developed for use...for a public purpose."<sup>115</sup> The URNRD's authorized purposes include soil conservation, wildlife habitat, and range management.<sup>116</sup> The URNRD used the irrigation equipment located on the Wilder parcels in 2013 to establish a cover crop of sorghum. Mr. Fanning testified that sorghum was chosen for its utility as a cover crop to provide shelter and nutrients for future natural grasslands. The sorghum was not harvested or sold, but allowed to lay and cover the ground. By planting the sorghum, the URNRD was actively preserving the soil from erosion and suppressing weeds. In other words, the planted sorghum was serving the URNRD's authorized purposes of soil conservation, development of wildlife habitat, and range management.

Therefore, the Commission finds that the Wilder properties were used for a public purpose and exempt from property taxation for tax years 2013, 2014, and 2015.

## **2. Properties with Improvements: FEM, Inc. Parcels**

The improved FEM, Inc. parcels include those portions of the Subject Property in Case Nos. 13E 022, 14E 076, 15E 059,<sup>117</sup> 13E 033, 14E 070, 15E 053,<sup>118</sup> and 13E 035, 14E 072, 15E 055.<sup>119</sup> The improved FEM, Inc. parcels were also leased to FEM, Inc., and sublet to M&L Cattle

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<sup>114</sup> See, E45:1-3.

<sup>115</sup> Neb. Rev. Stat. §77-202(1)(a) (while this section of statute has been changed multiple times throughout the tax years at issue the relevant portions have remained unchanged).

<sup>116</sup> See, Neb. Rev. Stat. §2-3229 (Reissue 2012).

<sup>117</sup> See, E9, E54, and E75 (Parcel ID 290029422 improved with seven grain bins, 1 acre farm site).

<sup>118</sup> See, E21, E66, and E87 (Parcel ID 290031230 improved with three mobile homes, scales and scale house, twelve grain bins, garage, livestock shed, and two vertical tanks, 1 acre farm site, 4 acres home site).

<sup>119</sup> See, E23, E68, and E89 (Parcel ID 290031257 improved with a steel building (old airplane hangar) (2.07 acres farm site).

Co.<sup>120</sup> Portions of some of these properties were also planted in natural grasses and were grazed by M&L Cattle Co. and/or FEM, Inc. as part of the lease agreement.<sup>121</sup> For those portions used for grazing, the Commission relies on its preceding reasoning outlined in its analysis of the unimproved FEM, Inc. parcels and finds that those portions of the improved FEM, Inc. parcels used by the URNRD for water augmentation, habitat development, and range management, and simultaneously used by M&L Cattle Co. and/or FEM, Inc. for grazing are exempt from property taxation.

Other portions of the improved FEM, Inc. parcels, however, were used exclusively by the lessees for purposes unrelated to the URNRD's authorized purposes. "In cases where it is determined that the property, when considered as a whole, is not used entirely for a public purpose, but the property has separate and distinct use portions, an exemption from taxes for the portion used for a public purpose shall be allowed."<sup>122</sup> The Commission finds, based on the following reasoning, that portions of the improved FEM, Inc. parcels are not exempt from property taxation.

First, the Commission notes that while Mr. Fanning testified that the portion of the rent associated with the grazing operations was derived from the fair market value, there is no corresponding testimony indicating that the portion of the lease associated with the use of the improvements, including the home site and farm home site, was also derived or based on fair market value. Public property leased to a private party must be leased at fair market value in order to be exempt.<sup>123</sup> The Commission finds that there is not clear and convincing evidence that the portion of the lease associated with the improvements, other than well heads or other fixtures used to provide water for the cattle, were at fair market value.

As noted above, Nebraska law allows for a partial exemption from property taxation of real property owned by the state or its governmental subdivisions when portions of the real property are not used for a public purpose.<sup>124</sup> The Commission finds that the following portions of the improved FEM, Inc. parcels are not exempt from property taxation: (1) seven grain bins and one

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<sup>120</sup> See, E43.

<sup>121</sup> See, E43.

<sup>122</sup> See, 350 Neb. Admin. Code, ch. 15 §003.07 (03/15/2009).

<sup>123</sup> Neb. Rev. Stat. §77-202(1)(a)(ii) (2016 Cum. Supp.).

<sup>124</sup> See, 350 Neb. Admin. Code, ch. 15 §003.07 (03/15/2009).

acre of farm site of the parcel associated with Case Nos. 13E 022, 14E 076, 15E 059;<sup>125</sup> (2) three mobile homes, scales and scale house, twelve grain bins, garage, livestock shed, two vertical tanks, one acre of farm site, and four acres of farm home site of the parcel associated with Case Nos. 13E 033, 14E 070, 15E 053;<sup>126</sup> and (3) the entire parcel associated with Case Nos. 13E 035, 14E 072, 15E 055.<sup>127</sup>

Having concluded that portions of the improved FEM, Inc. parcels are not exempt, the Commission next determines which of the parties hold the obligations to pay the tax for the non-exempt portions. The Nebraska legislature has created a unique assessment structure for leased public property.<sup>128</sup> Non-exempt leased public property must be taxed to the leaseholder as if the leaseholder were the owner.<sup>129</sup> Nebraska law defines a leaseholder as “a person leasing property from a lessor.”<sup>130</sup> A lessor is defined as, “the owner of property who leases the property to a lessee.”<sup>131</sup> Based on these definitions, the Commission determines that FEM, Inc. is the leaseholder, and we will use the terms “leaseholder” and “lessee” interchangeably.

Regarding leased public land, Nebraska law also provides that the state or any of its governmental subdivisions may choose to:

provide the appropriate county assessor a description of the property rather than a copy of the lease; request that the assessor notify it of the amount of tax which would be assessed to the leaseholder; voluntarily pay that tax; **and collect that tax from the leaseholder as part of the rent.**<sup>132</sup>

Under the statute, the governmental subdivision is effectively permitted to operate as a tax collector; to collect the tax on behalf of the county through monthly rental payments, and then to pay the taxes due to the county.<sup>133</sup> The law does not authorize the state or its governmental

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<sup>125</sup> See, E9, E54, and E75.

<sup>126</sup> See, E21, E66, and E87.

<sup>127</sup> See, E23, E68, and E89.

<sup>128</sup> See, Neb. Rev. Stat. §77-202.11 (Reissue 2009) .

<sup>129</sup> See, Neb. Rev. Stat. §77-202.11(1) (Reissue 2009).

<sup>130</sup> 350 Neb. Admin. Code, ch. 15 §002.17 (03/15/2009).

<sup>131</sup> 350 Neb. Admin. Code, ch. 15 §002.16 (03/15/2009).

<sup>132</sup> Neb. Rev. Stat. §77-202.11(4) (Reissue 2009) (emphasis added).

<sup>133</sup> See, *id.*

subdivisions to assume the tax liability.<sup>134</sup> There is no set of circumstances under the statute where the actual tax liability shifts to the state or its governmental subdivisions.<sup>135</sup>

The state or its governmental subdivisions are also assigned additional obligations relating to leased property. The state or its governmental subdivisions are required to provide county assessors with copies of new leases or leases that have substantially changed from the previous year.<sup>136</sup> County assessors are required to provide the state or its governmental subdivisions with notice that property not used for public purposes will be subject to taxation.<sup>137</sup> If the state or its governmental subdivision does not intend to exercise its ability to voluntarily pay the tax and collect it from the leaseholder, then the governmental subdivision is required to forward the notice to the leaseholder.<sup>138</sup> The statutes provide no clear consequences if the state or the governmental subdivision fails in these duties.

There is no direct evidence that the URNRD contacted the County Assessor and volunteered to pay the taxes and then collect them from FEM, Inc. There is evidence that the URNRD did not forward the County Assessor's notice that the Subject Property was subject to taxation to FEM, Inc.<sup>139</sup> Additionally, the original lease contemplated that the URNRD would be responsible for all property taxes associated with the Subject Property.<sup>140</sup> Regardless of the contract, or even in the event that the URNRD exercises its discretion to voluntarily pay the tax and collect it from FEM, Inc., the ultimate responsibility for the property taxes lies with the lessee, FEM, Inc.<sup>141</sup>

The Nebraska Supreme Court reviewed Neb. Rev. Stat. §77-202.11 in *Conroy v. Keith Cty. Bd. Of Equal.*<sup>142</sup> The Court reasoned that Section 77-202.11 places liability for property taxes associated with leased public property not for a public purpose upon the lessee.<sup>143</sup> The state and its political subdivisions are allowed only two options when it comes to leased public land not used for a public purpose: (1) do nothing and the county treasurer will collect the property tax

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<sup>134</sup> See, *id.*

<sup>135</sup> See, Neb. Rev. Stat. §77-202.11(3) (Reissue 2009).

<sup>136</sup> See, Neb. Rev. Stat. §77-202.11(2) (Reissue 2009).

<sup>137</sup> See, Neb. Rev. Stat. §77-202.12(1) (2016 Cum. Supp.).

<sup>138</sup> *Id.*

<sup>139</sup> See, E72 (affidavit of Steve Winger).

<sup>140</sup> See, E43.

<sup>141</sup> See, Neb. Rev. Stat. §77-202.11(1) (Reissue 2009).

<sup>142</sup> 288 Neb. 196, 864 N.W.2d 634 (2014).

<sup>143</sup> *Id.* at 209, 864 N.W.2d at 643-44 (2014).

from the lessee;<sup>144</sup> or (2) voluntarily pay the tax, but collect the tax from the lessee through rents.<sup>145</sup> The statute states, “The state or its governmental subdivisions shall not be obligated to pay the taxes upon failure of the lessee to pay.”<sup>146</sup> The statutory structure of Neb. Rev. Stat. §77-202.11 limits the URNRD from assuming FEM, Inc.’s property tax liability. The Commission further notes that any contrary ruling that placed the property tax liability on the URNRD would result in the URNRD, a political subdivision with the power to levy, collecting taxes from all taxpayers in the district to pay for FEM, Inc.’s tax liability. This result would be inconsistent with the plain meaning of the statute.

The Commission finds that the property taxes associated with the non-exempt portions of the FEM, Inc. properties should not be assessed to the URNRD. However, the Commission will not assign the tax liability to FEM, Inc., because the Commission finds that FEM, Inc.’s due process rights were violated, as discussed below.

#### **E. Due Process Rights of FEM, Inc.**

The Legislature has enacted statutes, including mandatory notice provisions, when the County Assessor determines that leased public property is not exempt.<sup>147</sup> These statutes provide direct and indirect methods, respectively, for providing notice regarding leased public lands and the liability of lessees for payment of property tax.<sup>148</sup> The evidence indicates that, in compliance with these statutes, the County Assessor sent notice to the URNRD that the Subject Property was taxable for the tax years in question. The County Assessor is required to send the notice to the governmental subdivision,<sup>149</sup> and the URNRD is required to forward the notice to the lessee when it does not intend to exercise the authority granted to it to voluntarily pay the tax and collect the tax from the leaseholder as part of the rent.<sup>150</sup> Yet, as a term of their lease agreement, the URNRD and FEM, Inc. contracted that, “URNRD shall pay all real estate taxes[.]”<sup>151</sup>

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<sup>144</sup> See, Neb. Rev. Stat. §77-202.11(1) (Reissue 2009).

<sup>145</sup> See, Neb. Rev. Stat. §77-202.11(4) (Reissue 2009).

<sup>146</sup> See, Neb. Rev. Stat. §77-202.11(3) (Reissue 2009).

<sup>147</sup> See, Neb. Rev. Stat. §77-202.12 (2014 Cum. Supp.); See also, Neb. Rev. Stat. §77-202.11 (Reissue 2009).

<sup>148</sup> See, *id.*; See also, *Conroy v. Keith Cty. Bd. Of Equal.* 288 Neb. 196, 864 N.W.2d 634 (2014).

<sup>149</sup> See, Neb. Rev. Stat. §77-202.12(1) (2016 Cum. Supp.).

<sup>150</sup> See, *id.*

<sup>151</sup> See, E43:6. The Commission notes that this provision of the lease agreement appears to be in conflict with the provision of Neb. Rev. Stat. §77-202.11(1) which requires that leased public property either be exempt from taxation or taxed to the leaseholder.

The URNRD is a political subdivision of the State of Nebraska.<sup>152</sup> As such, it may exercise no powers other than those granted by the Legislature.<sup>153</sup> Neb. Rev. Stat. §77-202.11 does not allow the URNRD to assume the lessee's tax liability, but instead only allows the URNRD to pay the tax and then collect the tax from the lessee through rents.<sup>154</sup> The Commission finds, based upon the evidence, that the URNRD intended to exercise its authority granted by Neb. Rev. Stat. §77-202.11(4). Accordingly, neither the County Assessor nor the URNRD was required to send notice to the lessee concerning the County Assessor's determination that the Subject Property was not exempt.<sup>155</sup> Notice to a taxpayer may be given by statute itself, and "personal notice is not necessary."<sup>156</sup> In this instance, the lessee was put on notice of its tax obligation by the statute which states, "[L]eased public property ... shall be taxed or exempted from taxation as if the property was owned by the leaseholder.... The state or its governmental subdivisions shall not be obligated to pay the taxes upon the failure of the lessee to pay."<sup>157</sup> Therefore, the Commission finds that FEM, Inc.'s due process rights were not violated when it did not receive direct notice of the County Assessor's determination that the Subject Property was not exempt.

However, when the URNRD protested the County Assessor's determinations of tax status to the County Board, the lessee did not receive notice of that protest proceeding.<sup>158</sup> An affidavit of Steve Winger indicates that at all relevant times he was the Vice President of FEM, Inc., and that:

9. From 2011 to the present, neither M & L Cattle Company nor FEM, Inc. has received a Determination of the Taxable Status or a Notice of Change in Value for the [FEM, Inc., properties].

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<sup>152</sup> Neb. Rev. Stat. §2-3213(1) (Reissue 2012).

<sup>153</sup> See, for example, *J.P. ex rel. A.P. v. Millard Public Schools*, 285 Neb. 890, 830 N.W.2d 453 (2013).

<sup>154</sup> See, Neb. Rev. Stat. §77-202.11(4) (Reissue 2009).

<sup>155</sup> See, Neb. Rev. Stat. §77-202.12(1) (2016 Cum. Supp.).

<sup>156</sup> See, *Frye v. Haas*, 182 Neb. 73, 75, 152 N.W.2d 121, 124 (1967). The Court noted that, "The statutes give him notice within the time limits of his required opportunity to be heard which is only before the tax becomes irrevocably fixed. The statute ... notifies him of the tax by whom the levy is made, to whom it is certified, 'who shall collect the same as other taxes are collected.' The statutes tell him when taxes go on the books, open to public inspections, when they are due and delinquent. This is sufficient. Again plaintiffs are arguing for mere convenience, and not demonstrating anything that destroys their rights." *Id.* at 79-80, 152 N.W.2d 126 (citations omitted).

<sup>157</sup> Neb. Rev. Stat. §77-202.11(1) and (3) (Reissue 2009).

<sup>158</sup> See, Case Files.

10. Prior to March 5, 2015, neither M & L Cattle Company nor FEM, Inc. has received any notice of any hearings in front of the Dundy County Board of Equalization or any decisions by the Dundy County Board of Equalization.<sup>159</sup>

The Commission notes that FEM, Inc., was not assessed by the County Assessor or the County Board for any of the Subject Property.<sup>160</sup> The property record cards indicate that while the County Assessor determined that the Subject Property was taxable, the notice and tax bill were in the name of the URNRD.<sup>161</sup> Further, there is no indication that the County Board assigned any tax liability to FEM, Inc. in its determination after the protest proceeding.<sup>162</sup>

Following the URNRD's decision to not forward the notice from the County Assessor to the leaseholder, the URNRD filed an appeal of the County Assessor's determination with the County Board.<sup>163</sup> As explained below, the Commission finds that the failure of the County Board to send notice to FEM, Inc. prior to the hearing before the County Board violated FEM, Inc.'s due process rights. The Commission finds no statutes which expressly require the County Board or the URNRD to serve the lessee with notice of the County Board hearing. However, the Nebraska Supreme Court has held that where there is a hearing before the county board of equalization which will affect the substantive rights of an individual, the county board of equalization is required to provide personal notice of the hearing and provide the individual with an opportunity to be heard.<sup>164</sup> The Commission is aware of only one case concerning property taxation where the main issues included alleged defects of due process based on a lack of notice to interested third parties: *Conroy v. Keith Cty. Bd. Of Equal.*<sup>165</sup>

In *Conroy*, the Nebraska Supreme Court stated:

The lessees had not been sent notice by the County assessor or [the governmental subdivision], despite the fact that § § 77-202.11 and 77-202.12 provide direct and indirect methods, respectively, for providing such notice. The lessees were not parties to the protests before the Board, even though lessees of public property have the ability to

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<sup>159</sup> E72:2.

<sup>160</sup> See, Exhibits 8 to 25 (tax year 2013), 53 to 70 (tax year 2014), and 73 to 91 (tax year 2015).

<sup>161</sup> See, *Id.*

<sup>162</sup> See, *Id.*

<sup>163</sup> See. Case Files.

<sup>164</sup> See, *Farmers Co-op. Ass'n v. Boone County Bd. Of Equalization*, 213 Neb. 763, 332 N.W.2d 32 (1983); *Farmers Co-operative Creamery & Supply Company v. McDonald*, 100 Neb. 33, 158 N.W. 369 (1916); *Brown v. Douglas County*, 98 Neb. 299, 152 N.W. 545 (1915); *State v. Several Parcels of Land*, 83 Neb. 13 (1908); *Grant v. Bartholomew*, 57 Neb. 673 (1899); *The South Platte Land Company v. The Board of County Commissioners of Buffalo County, and Others*, 7 Neb. 253 (1878);

<sup>165</sup> 288 Neb. 196, 864 N.W.2d 634 (2014).



protest under §77-202.12(2). The lessees were not made parties in the appeals before TERC, and they did not intervene.

Without the lessees being parties to the action, TERC could not determine whether there should be a separate tax obligation on the parcels or whether the parcels had an assessed value.<sup>166</sup>

The Court did not state whether each individual failure to notify the lessee constituted a violation of due process or whether all of the failures to add the lessee taken together amounted to a violation of due process.

In order to determine whether a failure to provide notice of the County Board of Equalization protest hearing constituted a violation of FEM Inc.'s due process rights, the Commission must next consider the applicable standard of review and burdens of proof applied at the County Board of Equalization protest proceeding.

In *Cain v. Custer County Board of Equalization*, the Supreme Court of Nebraska reviewed the applicable standard of review and burdens of proof for protests to a county board of equalization of a decision of a county assessor.<sup>167</sup> The Court held that the standard of review for appeals to the Commission under §77-5016(9) was different than the applicable burden for protests to a county board of equalization.<sup>168</sup> In describing the burden placed upon the taxpayer for a protest to a county board of equalization of the determination of a county assessor, the Court stated:

In protests before a county board of equalization, “the valuation by the assessor is presumed to be correct.” See *Helvey v. Dawson Cty. Bd. Of Equal*, 242 Neb. 379, 386, 495 N.W.2d 261, 267 (1993). The burden of proof rests upon the taxpayer to rebut this presumption and “to prove that an assessment is excessive.” *Ainsworth v. County of Fillmore*, 166 Neb. 779, 784 90 N.W.2d 360, 364 (1958). Our case law indicates that the standard generally applicable in proceedings before county boards, including monetary disputes, is a preponderance, or greater weight, of the evidence. See *Wetovick v. County of Nance*, 279 Neb. 773, 782 N.W.2d 298 (2010). The statutes governing protests before the board of equalization do not alter this burden. See §77-1502. As such, in protests before the board of equalization, the taxpayer can rebut the presumption by a preponderance or greater weight of the evidence.<sup>169</sup>

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<sup>166</sup> *Conroy v. Keith Cty. Bd. Of Equal*. 288 Neb. 196, 203, 864 N.W.2d 634, 640 (2014).

<sup>167</sup> *Cain v. Custer County Board of Equalization*, 291 Neb. 730 (2015).

<sup>168</sup> See, *Cain*, 291 Neb. 730, 748-749 (2015).

<sup>169</sup> *Id.* (emphasis added).

The result in *Cain* is that the burden of persuasion applicable to protests to a county board of equalization of a determination of a county assessor is a lower burden of proof on the protester than is applicable to appellants at the Commission upon appeal of a determination of a county board of equalization.<sup>170</sup>

In *Cain*, the Nebraska Supreme Court held that Cain's due process rights were not violated when the county assessor failed to provide the statutorily required notice of a change in taxable value because, while Cain was prevented from timely appealing to the county board of equalization, the Nebraska Legislature had created a separate scheme under §77-1507.01 that provided an avenue of review before the Commission in place of the county board of equalization.<sup>171</sup> The Nebraska Supreme Court reasoned that past cases that had held assessments void because of a denial of due process rights caused by a lack of notice that prevented timely filing of a protest to a county board of equalization or an appeal from a county board of equalization to the Commission were not applicable because the Legislature established a means to provide meaningful review.<sup>172</sup>

The Commission notes that the facts in the instant case are distinct from both *Cain* and *Conroy*. While the Nebraska Legislature has created a similar path to review before the Commission where a failure of the county assessor or county board of equalization to provide notice prevents the timely filing of an appeal to the Commission concerning the exempt status of real property, the unnoticed interested party, FEM, Inc., unlike the petitioners in *Cain*, did not petition the Commission for any of the applicable tax years.<sup>173</sup>

Unlike in *Conroy*, the lessee, FEM, Inc., was made a party to the current action once it reached the Commission.<sup>174</sup> Neb. Rev. Stat. §77-5015.01 states:

The commission may determine an appeal or petition before it when it can be done without prejudice to the rights of others or by saving such rights; but when a determination of the appeal or petition cannot be had without the presence of other parties, the commission shall serve such other parties with notice of the proceeding.

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<sup>170</sup> Neb. Rev. Stat. §77-5016(8) (2016 Cum. Supp.), *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002), and see generally, *Cain v. Custer County Board of Equalization*, 291 Neb. 730 (2015).

<sup>171</sup> See, *Cain*, at 743-745.

<sup>172</sup> See, *Cain*, at 744-745.

<sup>173</sup> See, Neb. Rev. Stat. §77-202.04(2) (Reissue 2009); See also, Neb. Rev. Stat. §77-202.04(3) (2014 Cum. Supp.).

<sup>174</sup> See, Case Files.

The Commission found that FEM, Inc. was a necessary party to the appeals and served notice of the proceedings to FEM, Inc.<sup>175</sup> After being notified of the proceedings before the Commission, FEM, Inc. chose to waive its right to a hearing and, with the agreement of the other parties, submitted the matter to the Commission for a decision based upon the agreed upon record.<sup>176</sup> The Commission finds that the failure of the County Board to send notice of its decision did not violate FEM, Inc.'s due process rights. The URNRD appealed the County Board's decisions to the Commission and FEM, Inc. was joined as a party and was provided every opportunity to participate in the process before the Commission.<sup>177</sup>

Nevertheless, FEM, Inc.'s due process rights were violated when the County Board failed to notice it of the County Board's hearing to determine whether the Subject Property was exempt. As expressed in *Cain*, due process concerns arise when a lack of notice prevents meaningful participation of an interested party in appeal of the assessment of real property.<sup>178</sup> The Commission only has that authority granted to it.<sup>179</sup> Outside of the exceptions found in Neb. Rev. Stat. §77-202.04, the Commission lacks the authority to stand in place of a county board of equalization. Additionally, because the Nebraska Supreme Court, in *Cain*, determined that the standard of review for a protest to a county board of equalization of an assessor's decision is different than the Commission's standard of review of a determination of a county board of equalization, FEM, Inc. was prevented from meaningfully participating in a contested hearing with a lower standard of review that may have affected the County Board's determination. If the standards of review for protests to the county board of equalization of the decisions of a county assessor and the standard of review for appeals to the Commission of the determinations of a county board of equalization were the same, it is possible that no due process violation would have occurred since appeals to the Commission are de novo and all interested parties were allowed to participate. However, because the standards of review are different, and because the Commission lacks the authority to stand in place of the County Board in this instance, the Commission finds that a violation of FEM, Inc.'s due process rights has occurred. Given the forgoing, the Commission next considers appropriate remedies.

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<sup>175</sup> See, Case Files.

<sup>176</sup> See, Case Files.

<sup>177</sup> See, Case Files.

<sup>178</sup> See, *Cain v. Custer County Board of Equalization*, 291 Neb. 730, (2015).

<sup>179</sup> See, e.g., *Grand Island Latin Club v. Nebraska Liquor Control Commission*, 251 Neb. 61, 67, 554 N.W.2d 778, 782 (1996).

## 1. Remand and the Statutory Authority of the Commission

The Commission notes that in some instances the Nebraska Supreme Court has remanded cases back to a county board of equalization to resolve due process issues.<sup>180</sup> However, the Commission lacks the authority to remand cases back to a county board of equalization to correct these kinds of errors. The Commission is not a “court” of the judicial branch of the State, as contemplated in Neb. Rev. Stat. § 25-1926, but is instead an “intermediate appellate tribunal” of the executive branch of the State.<sup>181</sup>

The Commission has only that authority which is specifically conferred upon it by the Constitution of the State of Nebraska, the Nebraska State Statutes, or by the statutory construction necessary to achieve the purpose of the relevant provisions or act.<sup>182</sup> Neb. Rev. Stat. § 77-5007 states: “The commission has the power and duty to hear and grant or deny relief on petitions.” Elsewhere Nebraska Statutes state that:

[i]n resolving an appeal or petition, the commission may make such orders as are appropriate for resolving the dispute but in no case shall the relief be excessive compared to the problems addressed. The commission may make prospective orders requiring changes in assessment practices which will improve assessment practices or affect the general level of assessment or the measures of central tendency in a positive way. If no other relief is adequate to resolve disputes, the commission may order a reappraisal of property within a county, an area within a county, or classes or subclasses of property within a county.<sup>183</sup>

The Nebraska Legislature has only directly and specifically granted the Commission the authority to remand a case to any entity in instances where a Taxpayer has appealed a county board of equalization’s decision regarding the tax exemption status of the subject property and the Commission determines that the subject property is taxable but the parties do not stipulate to the taxable value during a hearing before the Commission. Under those circumstances, the Commission must remand the case to the county board of equalization to determine the taxable value of the subject property pursuant to Neb. Rev. Stat. §77-1507.<sup>184</sup> The question before the Commission is whether the Commission has authority to remand the case in this instance.

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<sup>180</sup> See, *Ryan v. Douglas County Board of Equalization*, 199 Neb. 291, 258 N.W.2d 626 (1977).

<sup>181</sup> *Brenner v. Banner Cty. Bd. of Equal.*, 753 N.W.2d 802, at 812, 276 Neb. 275, at 284 (2008).

<sup>182</sup> See, e.g., *Grand Island Latin Club v. Nebraska Liquor Control Commission*, 251 Neb. 61, 67, 554 N.W.2d 778, 782 (1996).

<sup>183</sup> Neb. Rev.Stat. §77-5017(1).

<sup>184</sup> See, Neb. Rev. Stat. 77-5017(2).

When it is essential to interpret a statute, and no court decisions have been issued construing the statute, and the Commission has not adopted any rules or regulations resolving the interpretation, "...the Commission has an affirmative obligation to apply the statute in accordance with its own understanding of it."<sup>185</sup> "The fundamental principle of statutory construction is ascertainment of the intent of the legislature. The court will not read into a statute exceptions not made by the legislature."<sup>186</sup> The Nebraska Supreme Court has stated that,

Where a statute has long been construed by administrative officials charged with its execution, and where the Legislature has several times been in session without amending or changing such statute --despite its full knowledge of the interpretation -- we will not disregard that interpretation unless it is clearly erroneous.<sup>187</sup>

Further, when a legislature considers and rejects a proposed amendment to a statute that includes language clarifying the issue in question, the rejection is evidence of a legislative intent to maintain a different interpretation of the statute.<sup>188</sup>

In 2001, LB 419 was introduced in the Legislature. Section 2 of LB 419 granted authority to the Commission for, and required it to, remand some exemption cases to a county board of equalization in specific situations narrowly defined by the bill. The bill was passed as law and became effective in 2001. The sequence is relevant for at least two reasons: (1) it illustrates that the Legislature determined that specific legislation was necessary in order for the Commission to obtain authority to remand cases, or, in other words, the grant of authority is further evidence of the general rule that the Commission cannot remand cases; and, (2) it defines very narrowly the only statutory exception to the rule.

Further, the Commission has long construed Nebraska Statutes as denying the Commission the authority to remand appeals, except in specific instances. In 2006, LB 812 was introduced which intended to grant the Commission "authority to remand cases back to the county board of equalization (or the Property Tax Administrator in cases of centrally assessed property) for further determination of value."<sup>189</sup> In order to grant the Commission the remand authority, the

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<sup>185</sup> See, e. g., *State v. Moore*, 250 Neb. 805, 819, 553 N.W.2d 120, 132 (1996) *disapproved on other grounds*, *State v. Reeves*, 258 Neb. 511, 604 N.W.2d 151 (2000).

<sup>186</sup> *Farrell v. School Dist. No. 54, Lincoln County*, 164 Neb. 853, 862, 84 N.W.2d 126, 133 (1957).

<sup>187</sup> *Davio v. Nebraska Dept. of Health and Human Services*, 280 Neb. 263, 283, 786 N.W.2d 655, 670 (2010) (citing *McQuiston v. Griffith*, 128 Neb. 260, 258 N.W.2d 553 (1935)).

<sup>188</sup> See, *State v. Chicago & N. W. Ry. Co.*, 147 Neb. 970, 976, 25 N.W.2d 824, 827-828 (1947).

<sup>189</sup> 99<sup>th</sup> Legislature, Second Session, 2006, *Committee Statement*, LB 812 (2006).

legislature determined it would need to amend nine different sections of Nebraska Statute.<sup>190</sup> LB 812 was the “annual bill from the Tax Equalization and Review Commission to improve and clarify their duties and responsibilities.”<sup>191</sup> The Commission, was a proponent of the bill. LB 812 was later amended into another bill, and the language which would have granted the Commission remand authority was removed.

In 2007, LB 168 was introduced. “The proposed bill would have allowed the TERC to remand cases back to the county board of equalization in instances where the TERC feels the issue of valuation was not properly addressed at the earlier time and could be better addressed at the county level.”<sup>192</sup> Again, the Commission was a proponent of the bill. In the Revenue Committee hearing, the Commission testified that the Commission did not have the authority to remand, and that the proposed legislation would grant the Commission that authority in limited circumstances.<sup>193</sup> The bill was indefinitely postponed.

The Commission’s proposals in bills to grant remand authority, and the legislative history of those bills support the Commission’s interpretation of Nebraska Statutes that it lacked authority to order remand. With full knowledge of the Commission’s interpretation of the statute, the Legislature rejected proposed legislation to grant the Commission remand authority.

When a legislature considers and rejects a proposed amendment to a statute that includes language clarifying the issue in question, the rejection is evidence of a legislative intent to maintain a different interpretation of the statute.<sup>194</sup> The legislature had multiple opportunities to grant the Commission general remand authority. The only authority granted to the Commission to remand cases is a narrow exception. And the rejection of LB 812 in 2006, and LB 168 in 2007, is strong evidence that the legislature did not intend for the Commission to have remand authority outside of the already enumerated exceptions. All of these doctrines of statutory construction require an interpretation that the Commission does not have the authority to remand in this case.

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<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *100<sup>th</sup> Legislature, First Session, 2007, Committee Statement*, LB 168 (2006).

<sup>193</sup> *Hearing on LB168 Before the Revenue Committee* (2007) (statement of William Wickersham, commissioner, TERC).

<sup>194</sup> See, *State v. Chicago & N. W. Ry. Co.*, 147 Neb. 970, 976, 25 N.W.2d 824, 827-828 (1947).

Having determined that the Commission lacks remand authority, and having also concluded that the due process rights of FEM, Inc. were violated, the Commission concludes that it lacks the authority to assign a tax liability to FEM, Inc.

## **2. Tax Liabilities of FEM, Inc. are Void**

In previous cases, where the Nebraska Supreme Court held that a violation of due process had occurred and the Commission lacked the authority to stand in place of a county board of equalization, the Court has held that the assessments were void.<sup>195</sup> Lacking any other remedy, the Commission finds that the tax liabilities of FEM, Inc., in relation to the improvements in Case Nos. 13E 022, 14E 076, 15E 059,<sup>196</sup> 13E 033, 14E 070, 15E 053,<sup>197</sup> and 13E 035, 14E 072, 15E 055 are void due to a failure of due process to notice FEM, Inc., of the proceeding before the county board of equalization.

## **V. CONCLUSION**

The Commission finds that there is competent evidence to rebut the presumption that the County Board faithfully performed its duties and had sufficient competent evidence to make its determinations in all of the above captioned cases. The Commission also finds that there is clear and convincing evidence that the County Board's decisions were arbitrary or unreasonable in Case Nos. 13E 019, 13E 020, 13E 021, 13E 023, 13E 024, 13E 025, 13E 026, 13E 027, 13E 028, 13E 029, 13E 030, 13E 031, 13E 032, 13E 034, 13E 036, 14E 069, 14E 071, 14E 073, 14E 074, 14E 075, 14E 077, 14E 078, 14E 079, 14E 080, 14E 081, 14E 082, 14E 083, 14E 084, 14E 085, 14E 086, 15E 052, 15E 054, 15E 056, 15E 057, 15E 058, 15E 060, 15E 061, 15E 062, 15E 063, 15E 064, 15E 065, 15E 066, 15E 067, 15E 068, and 15E 069, and the properties should be exempt from property tax. The Commission also finds that there is clear and convincing evidence that the County Board's decisions were arbitrary or unreasonable in Case Nos. 13E 022, 13E 033, 13E 035, 14E 070, 14E 072, 14E 076, 15E 053, 15E 055, and 15E 059 to the

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<sup>195</sup> See, *Falotico v. Grant Cty. Bd. Of Equal*, 262 Neb. 292, 631 N.W.2d 492 (2001); *Reed v. County of Hall*, 199 Neb. 134, 256 N.W.2d 861 (1977); *Gamboni v. County of Otoe*, 159 Neb. 417, 67 N.W.2d 489 (1954), *disapproved on other grounds*, *Hansen v. County of Lincoln*, 188 Neb. 461, 197 N.W.2d 1972), *modified on denial of rehearing* 188 Neb. 798, 197 N.W.2d 655; *Rosenbery v. Douglas County*, 123 Neb. 803, 244 N.W. 398 (1932).

<sup>196</sup> See, E9, E54, and E75 (Parcel ID 290029422 improved with seven grain bins, 1 acre farm site).

<sup>197</sup> See, E21, E66, and E87 (Parcel ID 290031230 improved with three mobile homes, scales and scale house, twelve grain bins, garage, livestock shed, and two vertical tanks, 1 acre farm site, 4 acres home site).

extent that the County Board assigned a tax obligation for areas of the properties that were used for a public purpose and should therefore be exempt from property tax, and because the County Board assigned the tax liability to the URNRD.

The Commission finds that the tax liabilities of FEM, Inc., in relation to the improvements in Case Nos. 13E 022, 14E 076, 15E 059,<sup>198</sup> 13E 033, 14E 070, 15E 053,<sup>199</sup> and 13E 035, 14E 072, 15E 055 are void due to a failure of due process to notice FEM, Inc., of the proceeding before the county board of equalization.

For all of the reasons set forth above, the decisions of the County Board are Vacated and Reversed.

## **VI. ORDER**

### **IT IS ORDERED THAT:**

1. The decisions of the Dundy County Board of Equalization determining that the Subject Property in Case Nos. 13E 019, 13E 020, 13E 021, 13E 023, 13E 024, 13E 025, 13E 026, 13E 027, 13E 028, 13E 029, 13E 030, 13E 031, 13E 032, 13E 034, 13E 036, 14E 069, 14E 071, 14E 073, 14E 074, 14E 075, 14E 077, 14E 078, 14E 079, 14E 080, 14E 081, 14E 082, 14E 083, 14E 084, 14E 085, 14E 086, 15E 052, 15E 054, 15E 056, 15E 057, 15E 058, 15E 060, 15E 061, 15E 062, 15E 063, 15E 064, 15E 065, 15E 066, 15E 067, 15E 068, and 15E 069, were not exempt for tax years 2013, 2014, and 2015 are vacated and reversed.
2. The decisions of the Dundy County Board of Equalization determining that the Subject Property in Case Nos. in Case Nos. 13E 022, 13E 033, 13E 035, 14E 070, 14E 072, 14E 076, 15E 053, 15E 055, and 15E 059 was not exempt for tax years 2013, 2014, and 2015 are reversed in part and the decision that the taxable value should be assessed to the URNRD is likewise reversed.

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<sup>198</sup> See, E9, E54, and E75 (Parcel ID 290029422 improved with seven grain bins, 1 acre farm site).

<sup>199</sup> See, E21, E66, and E87 (Parcel ID 290031230 improved with three mobile homes, scales and scale house, twelve grain bins, garage, livestock shed, and two vertical tanks, 1 acre farm site, 4 acres home site).



3. The tax liabilities of FEM, Inc., in relation to the improvements in Case Nos. 13E 022, 14E 076, 15E 059,<sup>200</sup> 13E 033, 14E 070, 15E 053,<sup>201</sup> and 13E 035, 14E 072, 15E 055 are void due to a violation of due process rights.
4. This Decision and Order, if no appeal is timely filed, shall be certified to the Dundy County Treasurer and the Dundy County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (2014 Cum. Supp.).
5. Any request for relief, by any party, which is not specifically provided for by this Decision and Order is denied.
6. Each party is to bear its own costs in this proceeding.
7. This Decision and Order shall only be applicable to tax years 2013, 2014, and 2015.
8. This Decision and Order is effective for purposes of appeal on July 7, 2017.
9. Signed and Sealed: July 7, 2017.

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Nancy J. Salmon, Commissioner

SEAL

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Robert W. Hotz, Commissioner

Appeals from any decision of the Commission must satisfy the requirements of Neb. Rev. Stat. §77-5019 (2016 Cum. Supp.), and other provisions of Nebraska Statutes and Court Rules.

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<sup>200</sup> See, E9, E54, and E75 (Parcel ID 290029422 improved with seven grain bins, 1 acre farm site).

<sup>201</sup> See, E21, E66, and E87 (Parcel ID 290031230 improved with three mobile homes, scales and scale house, twelve grain bins, garage, livestock shed, and two vertical tanks, 1 acre farm site, 4 acres home site).