

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW
COMMISSION

Board of Regents of the
University of Nebraska,
Appellant,

v.

Lancaster County Board of
Equalization,
Appellee.

Case Nos: 19E 0027 & 20E 0074

Decision and Order Affirming
the Determinations of the
Lancaster County Board of
Equalization

For the Appellant:

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These appeals were heard before Commissioners Steven Keetle and James Kuhn.

I. THE SUBJECT PROPERTY

The Subject Property in these appeals is square footage within the Nebraska Student Union (Nebraska Union) used by “licensee” food court vendors (Vendors) and a Starbucks constructed, opened, and operated by the Board of Regents of the University of Nebraska pursuant to a license granted from Starbucks Corporation (Starbucks). The Union is located in Lincoln, Lancaster County, Nebraska. The legal description and Property Record File (PRF) for the Subject Property are found at Exhibits 3 and 31.

II. PROCEDURAL HISTORY

The Lancaster County Assessor (the County Assessor) determined that the Subject Property was not exempt from taxation for both tax year 2019 and 2020. The Board of Regents of the University of Nebraska (the Board of Regents) protested these determinations to the Lancaster County Board of Equalization (the County Board) and requested the Subject Property be exempt from taxation. The County Board determined the Subject Property is not exempt from taxation.¹

The Board of Regents appealed the decisions of the County Board to the Tax Equalization and Review Commission (the Commission). The Commission held a consolidated hearing on June 9, 2021, with Commissioner Keetle presiding. Prior to the hearing, the parties exchanged exhibits and submitted a Pre-Hearing Conference Report, as ordered by the Commission. The parties stipulated to the receipt of exchanged exhibits 1-6, 8, 9, 11, 12, 14, 16-18, 20-22, 24-32, 59, 60, 62, and 64-79. Exhibits 61 and 63 were offered and received without objection. The parties submitted briefs after the hearing, which were received by the Commission on June 25, 2021, July 9, 2021, and July 21, 2021.

III. STANDARD OF REVIEW

The Commission's review of the determination by a county board of equalization is de novo.² When the Commission considers an appeal of a decision of a county board of equalization, a presumption exists that the board has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action.³ That presumption remains until there is competent

¹ Ex. 1-2.

² Neb. Rev. Stat. § 77-5016(8) (Reissue 2018), *Brenner v. Banner County 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 County Freeholder Bd.*, 276 Neb. 1009, 1019 (2009).

³ *Brenner* at 283, 753 N.W.2d at 811 (citations omitted).

evidence to the contrary presented, and the presumption disappears when there is competent evidence adduced on appeal to the contrary.⁴

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.⁵ Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.⁶

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.⁷ 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.⁸ The Commission's Decision and Order shall include findings of fact and conclusions of law.⁹

IV. EXEMPTION LAW

The Nebraska Constitution specifies that property of the state and its governmental subdivisions used for authorized public purposes is exempt from taxation.¹⁰ Nebraska Statutes provide that:

Public purpose means use of the property (A) to provide public services with or without cost to the recipient, including the general operation of government, public education, public safety, transportation, public works, civil and criminal justice, public health and welfare, developments by a public housing authority,

⁴ *Id.*

⁵ Neb. Rev. Stat. § 77-5016(9) (Reissue 2018).

⁶ *Omaha Country Club v. Douglas County Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

⁷ Neb. Rev. Stat. § 77-5016(8) (Reissue 2018).

⁸ Neb. Rev. Stat. § 77-5016(6) (Reissue 2018).

⁹ Neb. Rev. Stat. § 77-5018(1) (Reissue 2018).

¹⁰ Neb. Const., Art. VIII, § 2.

parks, culture, recreation, community development, and cemetery purposes, or (B) to carry out the duties and responsibilities conferred by law with or without consideration. Public purpose does not include leasing of property to a private party unless the lease of the property is at fair market value for a public purpose. Leases of property by a public housing authority to low-income individuals as a place of residence are for the authority's public purpose[.]¹¹

Statutes that exempt property from taxation are to be “strictly construed, and the burden of proving the right to exemption is on the claimant.”¹²

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 the power and right of the state to tax is always presumed.¹³

Nebraska courts have developed several principles concerning requests for exemptions: (1) an exemption is never presumed;¹⁴ (2) the alleged exempt property must clearly come within the provision granting the exemption;¹⁵ (3) the laws governing property tax exemptions must be strictly construed;¹⁶ (4) the courts must give a “liberal and not a harsh or strained construction ... to the terms ‘educational,’ ‘religious,’ and ‘charitable’ in order that the true intent of

¹¹ Neb. Rev. Stat. §77-202(1)(a)(ii) (Reissue 2018)

¹² *Fort Calhoun Baptist Church v. Washington Cty. Bd. of Equal.*, 277 Neb. 25, 30, 759 N.W.2d 475, 480 (2009) (citations omitted).

¹³ 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).

¹⁴ *Pittman v. Sarpy Cty. Bd. of Equal.*, 258 Neb. 390, 398, 603 N.W.2d 447, 453 (1999).

¹⁵ *Nebraska State Bar Found. v. Lancaster Cty. Bd. of Equal.*, 237 Neb. 1, 4, 465 N.W.2d 111, 114 (1991).

¹⁶ *Neb. Unit. Meth. Ch. v. Scotts Bluff Cty. Bd. of Equal.*, 243 Neb. 412, 416, 499 N.W.2d 543, 547 (1993).

the constitutional and statutory provisions may be realized[;]”¹⁷ and (5) this interpretation should always be reasonable.¹⁸

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.”¹⁹ The property is exempt only to the extent there is active use for a public purpose or active development for a public purpose.²⁰

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.”²¹ 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.²²

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.²³ The phrase “to the extent” indicates that it is possible for property owned by the state or its governmental subdivisions to be partially exempt.²⁴

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.²⁵

¹⁷ *Lincoln Woman’s Club v. City of Lincoln*, 178 Neb. 357, 363, 133 N.W.2d 455, 459 (1965).

¹⁸ *Id.* (citing, *Young Men’s Christian Assn. of City of Lincoln v. Lancaster County*, 106 Neb. 105, 182 N.W. 593 (1921)).

¹⁹ Neb. Rev. Stat. § 77-202(1)(a).

²⁰ *Id.*

²¹ Neb. Rev. Stat. § 77-202(1)(a)(ii).

²² See *id.*

²³ *Id.*

²⁴ See *id.*

²⁵ 350 Neb. Admin. Code, ch. 15 § 003.07 (03/09).

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.”²⁶

A partial use analysis and a 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, where some portion of the property is used for multiple purposes simultaneously throughout the tax year.

Additional factors in 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 property assists the government 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.²⁷

V. SUMMARY OF THE ISSUES

In accordance with the Commission’s Order for Hearing, the parties filed a Pre-Hearing Conference Report and Stipulation of the Parties (Conference Report) on or about June 4, 2021.²⁸ The Commission notes that in the Conference Report the parties made four stipulations: (a) The Subject Property is owned by the University, a state or governmental subdivision of the State of Nebraska; (b) The University

²⁶ *Id.*

²⁷ 350 Neb. Admin. Code, ch. 15 § 003.07A (03/15/2009).

²⁸ See Casefile.

exists for the public purpose of public education; (c) The agreements (whether licenses or leases) between the Vendors are at fair market value; (d) The agreement between the University and Starbucks is a franchise agreement and therefore is not a lease. However, stipulations that are legal conclusions are not binding on the Commission.²⁹

In the Conference Report the Parties narrowed the issues before the Commission to the following: (1) whether (a) the agreements between the Board of Regents and the Vendors and (b) the agreement between the Board of Regents and Starbucks are licenses or leases; (2) whether areas of the Union can be sectioned off and valued for the purposes of taxation; and (3) whether the use of the Subject Property is for a public purpose.

VI. DISCUSSION AND ANALYSIS

The Nebraska Union is a building located at 1400 R street in the city of Lincoln, Nebraska on the southern border of the University of Nebraska's main campus. The Nebraska Union contains event spaces, administrative offices, and facilities for students such as a bookstore, food vendors, a bank, and seating space for gatherings, including an adjacent outdoor area to its north.

For tax years 2019 and 2020, the County Board upheld the County Assessor's determination that the space in the Nebraska Union

²⁹ See *Vitalix, Inc. v. Box Butte Cty. Bd. of Equal.*, 280 Neb. 186, 188–89, 786 N.W.2d 326, 328 (2010) (finding whether the city owned the subject property was a legal conclusion and could not be stipulated to by the parties).

The decision of these matters will necessarily affect the substantial interest of the general public. This situation emphasizes the necessity and importance of adherence in this class of cases to the following commonly accepted principles of procedure, viz.: While litigants have the undoubted right to stipulate as to the facts, it is very generally held that it is not competent for them to stipulate as to what the law is so as to bind the court, and that such stipulations will be disregarded. Decisions of questions of law must rest upon the judgment of the court, uninfluenced by stipulations of the parties or counsel as to the existence of a law, as to its validity or invalidity, as to the legal conclusion from a given state of facts, as to the legal effect In other words, the people of the state are entitled to know what is the law on public questions, rather than what we find it to be upon agreement of parties.

North Platte Lodge, B. P. O. E., v. Board of Equalization, 125 Neb. 841, 844, 252 N.W. 313 (1934) (internal quotations and citations omitted).

utilized exclusively by food vendors, Chick-Fil-A, Steak ‘n Shake, Imperial Palace, Subway, Valentino’s, and Starbucks, were subject to real property taxation. These appeals only concern this space located in the food court of the Nebraska Union. No determination of the taxable status of any other portions of the Nebraska Union are made by the Commission in these appeals.

The parties have stipulated and agree that the Subject Property is owned by the Board of Regents, a state or government subdivision of the State of Nebraska. The Board of Regents is a constitutionally created body charged with the government of the University of Nebraska.³⁰ The object of the University of Nebraska is to afford the inhabitants of this state the means of acquiring knowledge of the various branches of literature, science, and arts.³¹

It is well-established law the Board of Regents is not a governmental subdivision of the state, but an agency of the state itself.³² However, “[i]n exercising the powers granted it under sections 85-401 to 85-411, ... [the Board of Regents] shall constitute and be and is hereby created as a public corporation organized for educational purposes and is declared to be a governmental subdivision and instrumentality of the State of Nebraska”³³ As either an agency of the State or a public corporation, Neb. Const. art. VIII, § 2, and Neb.

³⁰ See Neb. Const. art VII, § 10.

³¹ Neb. Rev. Stat. § 85-102 (Reissue 2014)

³² *State ex rel. Spire v. Conway*, 238 Neb. 766, 786, 472 N.W.2d 403, 415 (1991) (“While the Board of Regents is an independent body charged with the power and responsibility to manage and operate the University, it is, nevertheless, an administrative or executive agency of the state.”) (internal quotation omitted); see *Catania v. University of Nebraska*, 204 Neb. 304, 308-09, 282 N.W.2d 27, 30 (1979) (the term governmental subdivision “contemplates geographical area and boundaries, public elections, taxing power and a general purpose or benefit. The University is statewide in its service, has no geographical limitations in the boundary sense of the word, and has no power to levy taxes.”); see also Neb. Rev. Stat. § 71-1625 (“The term governmental subdivision . . . shall be defined to mean any county, city, village, school district, metropolitan utilities district, or any other subdivision of the state, which receives any revenue raised by taxation.”).

³³ Neb. Rev. Stat. § 85-410 (Reissue 2018); see *Regents of University of Nebraska v. McConnell*, 5 Neb. 423 (1877) (finding the Board of Regents able to act simply by delegated authority, only able to exercise such powers as are expressly given to it, or which may be necessary to carry into effect those powers specially given).

Rev. Stat. § 77-202(1)(a) governs the tax-exempt status of the Subject Property.

Under this framework the parties have stipulated that there are three issues that are determinative of the exemption status of the Subject Property.³⁴ The Commission must first examine whether the proper review is a partial use or predominant use of the Subject Property, then the Commission will examine whether the use of the Subject Property is for a public purpose, the final issue argued by the Parties is whether the Subject Property is leased to a private party.

A. Partial Use Versus Predominant Use

The first issue of contention between the parties concerns the lens through which the use of the Subject Property must be viewed. The Board of Regents' first contention is that the County Assessor and County Board cannot "dissect" the Nebraska Union property according to separate uses because only the use of the property as a whole is controlling, not only the use of the portion of the Nebraska Union that is the Subject Property. It asserts that "the County should not be permitted to carve out incidental use portions" of property. In making this contention, it relies on Title 350 of the Nebraska Administrative Code, chapter 15, §§ 003.06–07 (3/09).

The pertinent part of section 003.06 reads:

When the assessor or county board of equalization determines the use of property pursuant to this regulation, the dominant or primary use of property shall be considered, such that any incidental use for other purposes shall not [a]ffect the tax status of the property.³⁵

³⁴ (1) Whether areas of the Nebraska Union can be sectioned off and valued for the purposes of taxation; (2) whether the use of the Subject Property is for a public purpose, and; (3) whether (a) the agreements between the Board of Regents and the Vendors and (b) the agreement between the Board of Regents and Starbucks are licenses or leases.

³⁵ 350 Neb. Admin. Code, ch. 15, § 003.06 (3/09).

Section 003.07 governs when a property is found to have multiple uses.

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. 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.³⁶

To reach the conclusion argued by the Board of Regents would require that the Commission read out language from § 003.07, ignoring the distinction between “separate and distinct use” and “simultaneous use.” The Commission would also have to overlook the fact that the case law the Board of Regents cites deals primarily, if not exclusively, with *simultaneous* private uses.

The Board of Regents interprets “the property” in these sections to mean an entire parcel or an entire improvement. Therefore, the Board of Regents reads these two sections together to mean that the predominant use of any improvement must be either for private use or for public use *in its entirety*. Then, only if the predominant use of the entire improvement is for private use may the property be subdivided, and the public use portions made exempt. Thus, the Board of Regents asserts that an improvement is only divisible for exemption purposes, but not for taxable purposes. In support of this assertion, it contends that allowing a parcel to be divisible for taxable purposes causes the predominant/incidental distinction to be superfluous. This interpretation is without merit.

³⁶ 350 Neb. Admin. Code, ch. 15, § 003.07 (3/09) (emphasis added).

“Agency regulations properly adopted and filed with the Secretary of State of Nebraska have the effect of statutory law.”³⁷ “Generally, for purposes of construction, a rule or order of an administrative agency or political subdivision is treated like a statute.”³⁸

Effect should be given to all parts of a statute and the Commission should avoid rejecting as superfluous or meaningless any word, clause, or sentence.³⁹ However, it is equally important that components of a series or collection of statutes pertaining to a particular subject matter are in *pari materia* and should be conjunctively considered and construed so that different provisions are consistent, harmonious, and sensible.⁴⁰ Additionally, meaning cannot be read into a statute that is not there, nor can anything direct and plain be read out of a statute.⁴¹

When determining whether a public purpose is being served, §003.06 governs the first step of the analysis, which instructs the assessor or county board of equalization to determine the use of the property by disregarding “any incidental use for other purposes” and focusing on “the dominant or primary use of property.”⁴² Section 003.07 governs step two, in the event “the property, when considered as a whole, is not used entirely for a public purpose.”⁴³

Stated another way, the first step of the analysis directs the assessor or county board of equalization to examine and determine what is the predominant purpose of a property. If a property is not predominantly used for a public purpose, then no exemption may be given, and the analysis must end there.

Should the assessor or county board determine that a property’s predominant purpose *is* for a public purpose, the next step of the analysis is to determine whether the *entirety* of the property is used for the predominant public purpose.

³⁷ *Ash Grove Cement Co. v. Nebraska Dept. of Rev.*, 306 Neb. 947, 963, 947 N.W.2d 731, 743 (2020).

³⁸ *Prokop v. Lower Loup NRD*, 302 Neb. 10, 23, 921 N.W.2d 375, 389 (2019).

³⁹ *County of Webster v. Nebraska Tax Equal. & Rev. Comm.*, 296 Neb. 751, 766, 896 N.W.2d 887, 898 (2017).

⁴⁰ *Id.*

⁴¹ *State v. Hassan*, 309 Neb. 644, 651-52, 962 N.W.2d 210, 215-16 (2021).

⁴² 350 Neb. Admin. Code, ch. 15, § 003.06.

⁴³ 350 Neb. Admin. Code, ch. 15, § 003.07.

Section 003.07 contemplates two ways a property can “not [be] used entirely for a public purpose.”⁴⁴ The first is when governmentally owned property has separate and distinct use portions. The second is when governmentally owned property is used for several purposes simultaneously. To accept the Board of Regents’ argument, the Commission would be required to read out the first possibility from the regulation.⁴⁵ The Commission declines to do so.

The Subject Property is a separate and distinct use *portion* of the Nebraska Union. While the Nebraska Union as a whole serves many purposes simultaneously, the Subject Property is a portion thereof that does not serve multiple purposes—it is a separate and distinct use portion. The Subject Property, during the entirety of the taxable years at issue, was used as food service square footage.⁴⁶

The case law cited by the Board of Regents deals primarily with simultaneous uses of property, but at the same time upholds the Commission’s prior determinations that a partial use analysis is appropriate in the context of exemptions. The Board of Regents heavily relied on *Brown County Ag. Soc’y v Brown Cty. Bd. of Equal.*,⁴⁷ which dealt with a portion of a community hall that was found to be necessary to fulfill the predominant public purpose of the hall.⁴⁸

Contrary to the Board of Regents interpretation, *Brown County* does not stand for the proposition that a portion can never be “carved” out.⁴⁹ The matter at issue in *Brown County* was whether the contested portion *should* be carved out.⁵⁰ Similarly, the cited cases of *York I, II*,

⁴⁴ See *id.*

⁴⁵ Specifically, the Board of Regents would have the Commission read out the language “is not used *entirely* for a public purpose, but the property has *separate and distinct use portions*” from the regulation. *Id.* (emphasis added).

⁴⁶ See Ex. 7, 10, 15, 19.

⁴⁷ *Brown Cty. Ag. Soc’y v. Brown Cty. Bd. of Equal*, 11 Neb. App. 642, 660 N.W.2d 518 (2003).

⁴⁸ *Id.* at 651, 660 N.W.2d at 526. The statute as issue included the express language “as may be necessary for the purpose of holding county fairs.” Neb. Rev. Stat. § 2-262; see *Brown Cty. Agric. Soc’y*, 11 Neb. App. at 650, 660 N.W.2d at 526.

⁴⁹ *Id.* at 651, 660 N.W.2d at 526.

⁵⁰ The Court of Appeals held the contested portion of the property (a kitchen, food service, and storage area) should not have been carved out because it was inextricably tied to the balance of the building in serving the public purpose of holding the county fair. “The Community Hall would be of little benefit during the fair without the kitchen, food service, and storage areas.” *Id.*

and *III*⁵¹ dealt only with simultaneous uses of the subject properties and provide no guidance on the issue of separate and distinct use portions.

In *Upper Republican NRD v Dundy Cty. Bd. of Equal.*,⁵² cited by the Board of Regents, the principal issue before the Court was simultaneous use of several properties, but there is discussion of the separate and distinct use of portions of the parcels. The Upper Republican Natural Resources District “retired irrigated acres and converted them to grassland to achieve soil conservation and range management objectives” and then “leased much of that grassland for grazing.”⁵³ The Commission found portions of two parcels with improvements were not exempt from taxation.⁵⁴

A closer reading of the Court’s opinion in *Upper Republican* shows it affirmed the Commission’s findings to the extent the Commission had jurisdiction and noticed no error in its ability to examine and determine if portions of a parcel were exempt or not exempt by separate and distinct uses.⁵⁵ The Court expressly affirmed the Commission’s decision “that *portions* of two other [lessee] parcels are non-exempt, to the extent that the [Commission] reasoned the land was not being used for a public purpose.”⁵⁶ The Court found no error in the Commission’s “conclusion that [*portions* of] the property [were] nonexempt” for the reason that those portions were not being used predominantly for a public purpose.⁵⁷

⁵¹ *City of York v. York Cty. Bd. of Equal. [York I]*, 266 Neb. 297, 664 N.W.2d 445 (2003) (holding that the lease of land surrounding an airport for agricultural purposes was incidental to its use as an FAA-required buffer zone); *City of York v. York Cty. Bd. of Equal. [York II]*, 266 Neb. 305, 664 N.W.2d 452 (2003) (holding that development of land for an industrial park qualifies for exemption under the ‘community development’ public purpose); *City of York v. York Cty. Bd. of Equal. [York III]*, 266 Neb. 311, 664 N.W.2d 456 (2003) (holding that an agricultural lease of city land intended for expansion of the adjacent landfill was an incidental use and the primary purpose of the land for future landfill expansion had not changed)

⁵² *Upper Republican NRD v. Dundy Cty. Bd. of Equal.*, 300 Neb. 256, 912 N.W.2d 796 (2018)

⁵³ *Id.* at 257-58, 912 N.W.2d at 799.

⁵⁴ *Id.* at 268, 912 N.W.2d at 805.

⁵⁵ *Id.* at 287, 912 N.W.2d at 816.

⁵⁶ *Id.* at 277, 912 N.W.2d at 810 (emphasis added).

⁵⁷ *Id.*

It has long been the policy of Nebraska to exempt real property from taxation, “except in so far as some part thereof may be used for purposes foreign to or inconsistent with its dominant purpose.”⁵⁸ The Court has held:

[T]hat if property is partly exempt and partly nonexempt, the value of the nonexempt portion is subject to taxation. The mere fact, therefore, that [portions of the tract] are being used as a part of the farm operations of the school in which a part of said lands are exempt, does not prevent the taxation of the lands found not to be used for an exempt purpose.⁵⁹

As discussed in greater detail below, the Commission finds that the use of the Subject Property is found to be inconsistent with a public purpose, and the Board of Regents has failed to show any reason “why the taxing authorities cannot arrive at a just valuation of that portion of the building which is taxable, in its relation to the entire property, and assess the property in that amount.”⁶⁰

B. Use for a Public Purpose

The parties stipulate that the public purpose for which the Board of Regents operates is public education.⁶¹ The Board of Regents contends that the Subject Property, which is used by Vendors and as a Starbucks, is exempt from real property taxation because it is used for the public purpose of education by forwarding education, recruitment, and retention, and not for profit-making. Alternatively, the Board of Regents contends that the Subject Property is used to carry out duties conferred upon the University by law because it has the duty to

⁵⁸ *Young Men’s Christian Ass’n v. Lancaster County*, 106 Neb. 105, 112, 182 N.W. 593, 595 (1921).

⁵⁹ *Nebraska Conf. Ass’n v. Board of Equalization*, 179 Neb. 326, 330, 138 N.W.2d 455, 458-59 (1965) (citation omitted).

⁶⁰ *Young Men’s Christian Ass’n v. Lancaster County*, 106 Neb. 105, 115, 182 N.W. 593, 597 (1921).

⁶¹ See, Neb Rev. Stat. §77-202(1)(a)(ii)(A) (2022 Cum Supp.)

provide the “means” of education which “would presumably include boarding.”⁶² The County Board asserts that the Subject Property leased or otherwise used by food Vendors and as a Starbucks does not serve the purpose of public education.

The Subject Property is used by Vendors and Starbucks to serve food and beverages on the first floor of the Nebraska Union. The Subject Property consists of the counter and kitchen area(s), but not the common area where patrons and others can sit and consume the food and beverage. Scott Gaines, Chief Administrative Deputy with the County Assessor/Register of Deeds office testified that the portions of the Nebraska Union that are the Subject Property in these appeals had not been previously assessed but that sometime prior to the 2019 tax year the County Assessor’s office had been made aware of the Subject Property and reviewed it for exemption purposes. The County Assessor’s Office determined that the Subject Property is being exclusively used by the Vendors and Starbucks to prepare and serve food and beverages in a food court setting open and accessible to university students as well as the general public. Anyone can enter the Nebraska Union, access the food court area and order from the Vendors and Starbucks without a student ID or any specific form of payment required. Gaines testified that it was determined that the Subject Property was being used for the operation of a commercial for-profit business in a government owned building, and should therefore be subject to taxation, much like the Union Bank branch also operating on the first floor of the Nebraska Union and a Duncan Donuts operating in the nearby University Library which had both been subject to taxation prior to 2019 and continue to be subject to taxation. Gains presented a map of an area one block south and to the west of the Nebraska Union that showed restaurants that the Subject Property would compete with, including another Starbucks Coffee location.⁶³

⁶² Appellant Brief at 16 (citing Neb. Rev. Stat. § 85-102 (Reissue 2014)).

⁶³ E55

Dr. Ryan Lahne, Director of the Nebraska Unions, testified that the use of the Nebraska Union as a whole was for co-curricular and informal co-curricular uses and to attract and retain students at the University of Nebraska-Lincoln. Co-curricular activities being things such as educational speakers or student clubs and informal co-curricular being activities such as sharing a cup of coffee or a meal with a professor or fellow students and discussing classes. Lahne testified that student unions are central pieces of a university, and that all Big Ten institutions have student unions with food and beverages available. Student unions like the Nebraska Union are part of the facilitates that potential students find important when choosing a university to attend, and being active and present on campus have been determined to be factors in retaining students. Lahne testified that a majority of students surveyed utilized the Nebraska Union and that the food and beverage brands located in the Nebraska Union were chosen, not based on potential profits to the Board of Regents or the Vendors, but as those desired by the students of the University of Nebraska-Lincoln.⁶⁴ Lahne acknowledged that the Subject Property, because of its proximity to downtown Lincoln, faced a lot of competition that continues to grow and expand but felt the presence of the Vendors and Starbucks kept students in the Nebraska Union and on campus. Lahne stated that for these reasons the use of the Subject Property by the Vendors and Starbucks was in support of the Board of Regents overall educational mission by forwarding education, recruitment, and retention at the University of Nebraska-Lincoln.

The Board of Regents correctly identifies that in determining whether real property is being used for a public purpose, the proper inquiry is whether the use of the property is being used for a public purpose as determined by the government's use—even when the property is used by or leased to a third party.⁶⁵ Yet, the Board of Regents fails to show how its use of the property is for the public

⁶⁴ See, E63

⁶⁵ See, e.g., *York I*, 266 Neb. 297, 664 N.W.2d 445 (2003). While this is simultaneous use case, the Court makes it clear that the airport authority's FAA-imposed requirement to maintain a clear zone around the runway rather was the determinative factor.

purpose of education or providing the “means” of education, which the Board of Regents presumes to include boarding.

i. The public purpose of education.

“What constitutes a public purpose, as opposed to a private purpose, is primarily for the Legislature to determine.”⁶⁶ The legislative mission of the University includes engaging “in instruction, research, and public service,” and a recognition that these three parts are interdependent.⁶⁷ The regulatory definition of “public education” encapsulates these statutes.⁶⁸

Instructional activities are “degree-credit and non-degree-credit courses and programs delivered to complete specific degree and nondegree learner objectives.”⁶⁹ Research activities are “those activities intended to create new knowledge or provide for the application of existing or newly created knowledge.”⁷⁰ Public service activities are “those programs established to make available to the public the particular resources of a system, area, or institution for the purpose of responding to a statewide, regional, or community need.”⁷¹

The Subject Property is not clearly within the scope of “education” or “public education.” The Legislature has not included providing restaurants or coffee shops, nor even boarding, within the definition of either education or public education. Additionally, the particular inclusion of education within the exemption for government property is as a description of “public services.”⁷² Insofar as the Subject Property’s use can constitute public services under the broad label of education seems dubious.

⁶⁶ *White v. White*, 296 Neb. 772, 778, 896 N.W.2d 600, 604 (2017).

⁶⁷ Neb. Rev. Stat. § 85-942 (Reissue 2018).

⁶⁸ 350 Neb. Admin. Code, ch. 15, § 002.03 (“Public education shall mean schools and institutions of higher learning belonging to the public, established, and conducted under public authority and includes teaching and instructional activities, research activities or public service activities.”).

⁶⁹ Neb. Rev. Stat. § 85-919 (Reissue 2018).

⁷⁰ Neb. Rev. Stat. § 85-920 (Reissue 2018).

⁷¹ Neb. Rev. Stat. § 85-921 (Reissue 2018).

⁷² See Neb. Rev. Stat. § 77-202(1)(a)(ii) (Reissue 2018).

The Board of Regents contends that the Union serves “three critical roles in achieving the University’s purpose of providing a public education”: providing a forum for co-curricular education, assisting in student retention, and as a key component of student recruitment efforts.⁷³ The Vendors and Starbucks advance these roles “by attracting students to the Nebraska Union and providing services around which students, faculty, staff, and alumni can come together.”

A similar argument was made related to a leased cafeteria facility under the charitable purpose property tax exemption in *Young Men’s Christian Ass’n v. Lancaster County*.⁷⁴ The Court defined the general purpose of the YMCA as: “to promote the moral, physical and educational welfare of young men, to bring them under moral and religious influences, to improve their characters and to stimulate in them higher ideals of life and conduct.”⁷⁵ The YMCA argued:

“[It is] necessary to the complete carrying out of its plan to make it attractive to young men and to the public generally to come to the building and thereby strengthen and extend the influence of the association. Not only for the members, but for their near relatives and friends it is a valuable auxiliary to the work to get groups of men together at meal-time, which is the best and in some cases the only practicable opportunity to arouse their interest in the work of the association, and the revenue from the eating establishment is a great help in keeping up the general expenses.”⁷⁶

The Court rejected the YMCA’s argument and found that cafeteria facilities were taxable and outside the scope of the organization’s charitable purpose because:

⁷³ See Hearing Testimony of Mr. Lahne 9:20:58–9:21:17 (characterizing the Union’s mission as “recruiting, retaining, and ultimately graduating our students”)

⁷⁴ 106 Neb. 105, 182 N.W. 593 (1921).

⁷⁵ *Id.* at 107, 182 N.W. at 594.

⁷⁶ *Id.* at 112–13, 182 N.W. at 595.

It was undeniably, to a certain extent, a commercial enterprise, carried on in competition with other similar business that is taxable. The fact that the money derived therefrom was used for the general purposes of the association, or that it was incidentally desirable in the promotion of those purposes, does not alter the fact that it was a use of a portion of the building differing essentially in character from the primary uses and purposes to which the building and the association itself were devoted.⁷⁷

To a certain extent, the Subject Property is undeniably a commercial enterprise carried on in competition with other similar businesses that are taxable. While the Commission heard testimony that engagement with the University increases graduation rates, the record contains no other support of that claim. Nor is anything in the record that clearly shows the Subject Property being used by food vendors leads to such engagement. Ultimately, the record does not show that the Subject Property amounts to anything other than incidentally desirable in the promotion of the University's educational purposes of instruction, research, and public service.⁷⁸

⁷⁷ *Id.* at 114, 182 N.W. at 596. The Commission notes that the Court held portions of the building occupied by a barbershop and tailor shop to be tax-exempt because the evidence showed “that they [were] accessories required in the building in view of the number of lodgers there, that the amount of space they occupy is insignificant, and that their maintenance is justified in carrying out the general purposes of the association.” *Id.* at 114–15, 182 N.W. at 596. The Commission’s review of the briefs filed in that case show that the county generally abandoned the argument as to those portions, but the limited evidence included: the building contained two cafeterias—one of which took up a third of the main floor; only the YMCA generally was advertised to the public; the cafeteria paid \$700 a month on average; the tailor shop and barbershop rented for \$15 and \$25 per month respectively and occupied a combined floor space of 22x9½. Appellant’s Brief at 6–7. Accordingly, the case illuminates the distinction between the Subject Property and the portions of the community hall in *Brown County*.

⁷⁸ Simply providing a for-profit food option to students seems to be insufficient to make the Subject Property be for a public purpose. See *Vitalix, Inc. v. Box Butte Cty. Bd. of Equal.*, 280 Neb. 186, 191, 786 N.W.2d 326, 330 (2010) (“[Taxpayer] fails to show, and there is no other evidence to support the conclusion, that by operating its business, [taxpayer] is providing a public service. To the contrary, [taxpayer] is running a for-profit business manufacturing nutritional supplements for livestock. Simply purchasing the improvements with community redevelopment funds is insufficient to make the improvements be for a ‘public purpose.’”).

ii. The means of education.

The Board of Regents fails to point to any authority defining the means of education, nor does it provide any support for its presumption that “means” includes boarding students. However, it does cite to the University of Nebraska’s object statement— “to afford the inhabitants of this state the *means* of acquiring a thorough knowledge of the various branches of literature, science and arts.”⁷⁹

The Court has long held that the University of Nebraska’s object statement is “not now the limit of its purposes, powers or activities” and has recognized the legislature’s ability to impose new duties upon the Board of Regents.⁸⁰ In *Fisher v. Bd. of Regents*, the Court held that “[i]t has long since passed the stage of scholastic instruction and in addition, is conducting practical experiences and applying knowledge for the benefit of the public, and incidentally aiding individuals, professions and industries.”⁸¹ The Court affirmed the district court’s decision allowing the Board of Regents to sell serum manufactured at the state agricultural college, but enjoined it from purchasing serum for resale.⁸² The duties at issue in *Fisher* would properly be classified in the University’s mission under research and public service.⁸³

Similarly, the Court held that a farm and dairy were held for school or educational purposes when they were reasonably needed and predominately used in connection with the college’s instruction in dairying and agriculture.⁸⁴

⁷⁹ Neb. Rev. Stat. § 85-102 (Reissue 2018) (emphasis added).

⁸⁰ *Fisher v. Bd. of Regents*, 108 Neb. 666, 673, 189 N.W. 161, 164 (1922); see *Board of Regents v. Exon*, 199 Neb. 146, 149, 256 N.W.2d 330, 333 (1977) (“[T]he Legislature may add to or subtract from the powers and duties of the Regents . . .”).

⁸¹ *Fisher*, 108 Neb. at 673, 189 N.W. at 164.

⁸² *Id.* at 669, 189 N.W. at 162.

⁸³ See Neb. Rev. Stat. § 85-942 (Reissue 2018).

⁸⁴ *Central Union Conference Ass’n v. Lancaster County*, 109 Neb. 106, 108, 189 N.W. 982, 983 (1922) (“Products of the dairy, therefore, inure to the benefit of the school as a whole and any profit therefrom is a mere incident of the general purpose for which school property is used.”); see *Nebraska Conf. Ass’n. v. Board of Equalization*, 179 Neb. 326, 336, 138 N.W.2d 455, 461 (1965) (“The responsibility for farm operations, the care of the livestock, the operation of the dairy, the maintenance and safety of buildings and their occupants, and the operation of the cafeteria and dormitories is of primary importance in carrying out the academic program for the students of this school.”).

We think that use for educational purposes implies that a reasonable need exists for such use. If this is not so, there would be no limit on the amount of land that might be acquired and claimed as exempt for educational purposes when it is actually put to little or no educational use. We think the exemption implies that to be exempt it must be shown that the lands were reasonably needed and predominately used for educational purposes.⁸⁵

Even presuming that educational purposes includes the means of education, presuming that the means of education includes boarding, and presuming that boarding includes the Board of Regent’s use of the Subject Property, the inclusion of for-profit entities within the Union seems to go beyond both the reasonable need and the predominate use requirements as they have been articulated by the Court. The Board of Regent’s use of the Subject Property seems to be more analogous to the purchasing of serum for resale in *Fisher*. Further, the Commission cannot find support for the predicate presumptions listed above.

The Board of Regents fails to define the term “boarding” for the purposes of its argument. Similarly, there is no statutory definition of boarding as it applies to the Board of Regents.⁸⁶ The Board of Regents relies primarily on the Vendors and Starbucks’s ability to accept “Dining Dollars” and student NCards for purchases.⁸⁷

The Commission concludes the Dining Dollars program and the NCard purchase program do not support the fulfillment of any boarding duties because they operate on cash prices, fail to provide daily meals, and simply serve as a debit card and credit card system, respectively.

⁸⁵ *Nebraska Conf. Ass’n*, 179 Neb. at 331, 138 N.W.2d at 459.

⁸⁶ See Neb. Rev. Stat. §§ 41-205 (“Boarding house shall mean . . . to be a place where sleeping and other accommodations are furnished”); 41-204 (“Rooming house shall mean . . . where sleeping accommodations are furnished . . . but which does not maintain dining rooms or cafes in connection therewith”).

⁸⁷ Dining Dollars were only accepted by the Vendors and Starbucks in the Subject Property beginning in August of tax year 2020—not for tax year 2019.

“Room and board” is best interpreted to mean the provision of lodging for sleeping and daily meals for a set price.⁸⁸ The cash prices and the ad hoc nature of providing meals under these programs suggest a purpose outside of the reasonable needs of boarding students. Additionally, the Board of Regents fails to show, factually or legally, how providing payment methods for goods and services to students transforms goods and services purchased by such methods into goods and services for a public purpose.

The Board of Regents also undermines its argument that the Vendors fulfill the Board’s duty to provide regular meals when the Board acknowledges that the meal plans offered to boarded students already includes payment for regular meals.⁸⁹ Additionally, the Board fails to provide clear and convincing evidence that the Vendors are reasonably necessary to, or do, supplement the meal plans.⁹⁰

While these payment methods may be convenient for students (and arguably more so for their parents) this argument finds no legal support that the payment methods can convert a private use into a public use. The use of the Subject Property is not clearly within the Board of Regents’ duty to provide the means of education. To interpret “public purpose” to include the use of the Subject Property would unduly extend the exemption.

In additional support of its position, the Board of Regents also makes indirect and implied notes of student employment opportunities provided by the Subject Property. In *Union College v. Board of Equal*,⁹¹ the Court held that student employment, “although laudable, is an incidental and not direct use of property for educational

⁸⁸ See Merriam Webster Online Dictionary, *Room and Board* (“lodging and food usually furnished for *a set price* . . .” (emphasis added)); *id.* *Boarding* (“daily meals especially when furnished for pay // paid for her room and *board*”); *id.* *Board* (“to provide with *regular* meals and often also lodging usually for compensation” (emphasis added)).

⁸⁹ The dining dollars program was not in effect until August of 2020.

⁹⁰ Further evidence of the meal plans inclusion of Dining Dollars is not in the record.

⁹¹ 183 Neb. 579, 162 N.W.2d 772 (1968).

purposes.”⁹² The corresponding real property was held to be subject to taxation.⁹³

iii. Profit, Preparation Costs, and Seasonality

The Board of Regents also point to the fact that “the University receives from the Vendors a fraction of what it invests into the Nebraska Union,” that its decision-making process in determining which vendors receive lease agreements “are guided by the Student Advisory Board’s recommendations” in support of an indication of a public purpose, and that “the Vendors’ sales drop to below 50% their normal level” when “the University is not in session or is in summer session.”⁹⁴

In making these arguments, the Board of Regents is relying upon the predominant use of property analysis contained within Neb.

Admin. Code, ch. 15, § 003.07A, which reads:

003.07A In the analysis of such mixed use properties, a number of factors may be included in determining the predominant use of the property, including:

003.07A(1) Whether the use of the property assists the government entity in meeting a long term or ongoing purpose;

003.07A(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

003.07A(3) Whether the public purpose use is ongoing throughout the year as opposed to the seasonal nature of its nonpublic use.⁹⁵

As noted earlier in this opinion, the predominant use analysis applies only to governmentally owned property that “is used for several

⁹² *Id.* at 582, 162 N.W.2d at 773–74.

⁹³ See also *Nebraska Conf. Ass’n v. Board of Equalization*, 179 Neb. 326, 329, 138 N.W.2d 455, 458 (1965) (“While the record shows that some of the boys perform some labor on the 93 acres for which they are given credit on their tuition and expenses, there is no evidence that the land was needed to carry out the school’s educational program.”).

⁹⁴ Appellants Brief at 14–15 (footnote omitted).

⁹⁵ 350 Neb. Admin. Code, ch. 15, § 003.07A.

purposes simultaneously” under § 003.07. Section 003.07A expressly applies “[i]n the analysis of such mixed use properties.”⁹⁶ To read the factors included in § 003.07A into § 003.06 in contravention of this express limiting clause runs counter to the rules of statutory construction, particularly when the factors of § 003.07A are regulatory codifications of the Court’s previous holdings regarding real property with simultaneous uses.⁹⁷ As further explained below, these factors are not applicable to this case.

First, the analysis the Commission must conduct here is whether the use of the Subject Property is for a public purpose separate from the public purpose of the rest of the Union.⁹⁸ Therefore, § 003.07A(1) is inapplicable. Second, the Board of Regents has not been “making the property ready for its public use” because the Subject Property is a separate use portion that has no future use differing from its current use.⁹⁹ Additionally, the Board of Regents cannot be said to have “spent significant money in making the property ready” when the lease agreements require that the Vendors “shall pay all costs of making any additions, alterations or improvements” and, once made, they “shall become the property of” the Board of Regents.¹⁰⁰ Section 003.07A(2) is inapplicable. Third, the Subject Property is rented throughout the year and still conducts sales when the University is not in session or in summer session rendering § 003.07A(3) inapplicable.¹⁰¹

The Board of Regents cites *Upper Republican* as support that the leases are for a public purpose since they are for “a public purpose other than simply creating revenue.”¹⁰² However, in making this particular argument in its brief, the Board of Regents fails to identify

⁹⁶ *Id.*

⁹⁷ Compare Neb. Admin. Code, ch. 15, § 003.07A(1)–(3) with *Brown Cty. Ag. Soc’y v. Brown Cty. Bd. of Equal.*, 11 Neb. App. 642, 660 N.W.2d 518 (2003); *York I*, 266 Neb. 297, 664 N.W.2d 445 (2003); *York II*, 266 Neb. 305, 664 N.W.2d 452 (2003); *York III*, 266 Neb. 311, 664 N.W.2d 456 (2003); *Upper Republican NRD*, 300 Neb. 256, 912 N.W.2d 796 (2018).

⁹⁸ Cf. *York I*, 266 Neb. 297, 664 N.W.2d 445 (2003); *York III*, 266 Neb. 311, 664 N.W.2d 456 (2003).

⁹⁹ Cf. *York II*, 266 Neb. 305, 664 N.W.2d 452 (2003).

¹⁰⁰ Exhibit 43:5–6.

¹⁰¹ *Brown Cty. Ag. Soc’y v. Brown Cty. Bd. of Equal.*, 11 Neb. App. 642, 660 N.W.2d 518 (2003)

¹⁰² Brief 13.

another public purpose apart from those previously discussed at length.

The Board of Regents also cites *Upper Republican* for the proposition “that a lease is for a public purpose when it procures performance of the exempt function for which the owner would or might have used the property if not leased.”¹⁰³ In its citation, the Board of Regents fails to acknowledge the reasoning and context of these provisions.

These propositions are designed to remedy exempt entities from “acquiring revenues in excess of those permitted through legal taxation” and to “avoid[] the burden of collecting tax revenues from, and disbursing them to, the same public entity.”¹⁰⁴ The first requirement chiefly ensures that the lease fulfills a responsibility or duty conferred by law. The second is inapplicable because the exempt public entity, the Board of Regents, is not the same taxing entity, the Lancaster County Board. The reasoning of the cited propositions is inapplicable here.

The context that the Board of Regents fails to acknowledge is that “the public should not have to subsidize a private party’s profitmaking use at an unfair competitive advantage because the public entity can offer the tax exempt land at a lower rate.”¹⁰⁵ This subsidization is precisely what the County Board alleges is present and is the fundamental premise of the County Board’s argument.

The economic realities of the Board of Regents’ arguments cut against their position. While “the University receives from the Vendors a fraction of what it invests into the Nebraska Union,” the Board of Regents points to a wrong point of comparison. The proper inquiry would be whether the received rents cover the investment of the *portion* of the Union that the rental agreements cover, which the record proves insufficient to consider. Further, that portion still must

¹⁰³ Brief 14.

¹⁰⁴ *Upper Republican NRD v. Dundy Cty. Bd. of Equal.*, 300 Neb. 256, 279-280, 912 N.W.2d 796, 811-812 (2018).

¹⁰⁵ *Id.* at 279, 912 N.W.2d at 811.

be used for a public purpose *other* than revenue generation, and this fact does nothing to establish such a purpose.

The record before the Commission shows that Board of Regents' decision-making process, in which Vendors receive lease agreements, "are guided by the Student Advisory Board's recommendations." The record does support that the Vendors receive a sales-drop when "the University is not in session or is in summer session." However, these facts do not support a finding of a public purpose.

First, the fact that financial considerations are "only 30% of the decision-making process in deciding which Vendors to award a bid to" suggests, if not implies, that the leases are not at fair market value as required by statute. Second, the record is devoid of evidence that comparable businesses near campus do not suffer a similar reduction in sales. These factors would properly be considered in determining whether the lease is at fair market value—not whether it is for a public purpose. Further, these facts do not particularly support a finding that the lease would be at fair market value and would potentially support the contrary. Because the student body guides the decision-making process, a for-profit business would be incentivized to bid for the property in the Union rather than nearby off-campus. If the bid is accepted, the business is assured that there is a demand for its products in the student body. If not, the business avoided an economic risk they would have otherwise borne. Economically, this risk avoidance would be capitalized into and increase the fair market value of a Union lease. Even assuming *arguendo* that nearby off-campus businesses do not suffer a 50% reduction in sales that the Union Vendors do, such seasonal sales-reductions may well be offset by the increase in sales during the non-reduced sales seasons based on its competitive location in the Union—where a business is guaranteed interest and ready access to the student body.¹⁰⁶

¹⁰⁶ The Commission does not consider the fair market value of the leases because the Court has determined that a lease's fair market value is a separate and distinct inquiry from that of the meaning of public purpose under § 77-202(1)(a)(ii). *Upper Republican NRD v. Dundy Cty. Bd. of Equal.*, 300 Neb. 256, 276-77, 912 N.W.2d 796, 809-10 (2018); see Neb. Rev. Stat. § 77-5016(8). Additionally, there is no precedent to the point of whether the fair market value of a

iv. Profits of Private Party

The County Board asserts that because the property is used by “several for-profit multimillion dollar businesses,” the Board of Regents’ use is not to be considered because the statute would be rendered meaningless. After all, so the argument goes, “there would *never* be taxable property on government property.”¹⁰⁷ The County Board is incorrect.

“Public purpose is defined in relevant part as carrying out the duties and responsibilities conferred by law.”¹⁰⁸ The presence of and possession by a private party does not per se eliminate the possibility that the Board of Regents is using the property for a public purpose—nor does the County Board point to an authority that would preclude it. Additionally, the Court has not articulated profit-generation by multi-million-dollar businesses to be a factor within the public purpose analysis and, as discussed above, the requirement that the lease be at fair market value is designed to prevent any unfair profitmaking. Assuredly, the County Board’s interpretation would severely limit the state’s ability to contract with private sector participants to carry out public purposes.

The County Board’s interpretation is further unsupported by the initial language of LB 180 as it was introduced in 1997.¹⁰⁹ Its language read that property of the state and its governmental subdivisions were exempt “except that the possessory interest in real property, improvements, or personal property owned by the state or its political subdivisions is taxable to the holder of the possessory interest.”¹¹⁰ The property would “be subject to taxation, and” be valued “as if owned by the holder of the possessory interest.”¹¹¹ The County Board’s

lease for the purposes of § 77-202(1)(a)(ii) is a question fact such that the parties’ stipulation of fair market value is binding on the Commission regardless of evidence to the contrary.

¹⁰⁷ Response 8–9.

¹⁰⁸ *Upper Republican NRD v. Dundy Cty. Bd. of Equal.*, 300 Neb. 256, 284, 912 N.W.2d 796, 814 (2018) (citing Neb. Rev. Stat. § 77-202(1)(a)(ii)(B)).

¹⁰⁹ LB 180 preceded the constitutional amendment and its constitutionality was the impetus of the constitutional amendment introduced the next year.

¹¹⁰ LB 180, § 77-201(5), 95th Legislature, First Session, First Reading (Jan. 10, 1997).

¹¹¹ LB 180, § 77-202(1)(a), 95th Legislature, First Session, First Reading (Jan. 10, 1997).

interpretation aligns with the language of that bill, but not with the language of § 77-202(1)(a)(ii)(B).

The proper inquiry is whether the Subject Property is being used to effectuate a public policy of the state and fulfill the Board of Regents' duties and responsibilities conferred by law. As discussed above, the use of the Subject Property does not meet this requirement.

v. *Gourmet Dining, LLC v. Union Twp*

The County Board also suggests that the Commission adopt the position of the New Jersey Supreme Court.¹¹² In *Gourmet Dining, LLC v. Union Twp.*,¹¹³ a restaurant was operating on a university campus, and the court found the restaurant taxable under New Jersey law.

Under the New Jersey Constitution, all property is presumed taxable, and “[e]xemption from taxation may be granted only by general laws.”¹¹⁴ By contrast, Nebraska has constitutional tax-exemptions, like the one at issue in this case. Established New Jersey case law states that “the accomplishment of the public purpose must be the *paramount* factor.”¹¹⁵ By contrast, there is no such requirement in Nebraska case law.

The statutory scheme of New Jersey tax exemptions is also explicitly different. “[A]ll buildings actually used for colleges” are tax exempt. But, “if any portion of such buildings are leased to profit-making organizations . . . said portion shall be subject to taxation”¹¹⁶ That is not the law in Nebraska. In New Jersey, leased “school district property” is only exempt from taxation when it is “leased to a nonprofit organization which is exempt from taxation” or “is leased to another board of education or governmental agency.”¹¹⁷ That is not the case here in Nebraska.

New Jersey’s property tax exemption law is not analogous to Nebraska’s. The lack of legal similarities foregoes any dispositive use

¹¹² Response at 17.

¹¹³ 243 N.J. 1, 233 A.3d 410 (2020).

¹¹⁴ N.J. Const. art. VIII, § 1, ¶ 2.

¹¹⁵ *Gourmet Dining, LLC v. Union Twp.*, 243 N.J. at 21, 233 A.3d at 422.

¹¹⁶ N.J. Stat. § 54:4-3.6.

¹¹⁷ N.J. Stat. § 54:4-3.3.

of *Gourmet Dining's* analysis.¹¹⁸ However, the lack of factual similarities¹¹⁹ would also forgo any use of *Gourmet Dining's* analysis. The Commission declines to adopt the position of the New Jersey Supreme Court.

C. Licenses Or Leases

The Board of Regents contend that no portion of the Subject Property is leased but is rather “licensed” for use by the Vendors. The Board of Regents has established two different types of licenses for the use of the Subject Property. The first type of license pertains to portions of the Subject Property, used as Chick-Fil-A, Steak ‘n Shake, Imperial Palace, Subway, and Valentino’s. A second type of license agreement applies to the portion of the Subject Property used as a Starbucks.

Because law and regulation establish that property of the state and governmental subdivisions not used, or being developed for use, for a public purpose is taxable¹²⁰, the question of whether the agreements between the Board of Regents and the food vendors are ‘leases’ or ‘licenses’ is not dispositive of whether the Subject Property is used for a public purpose. “An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.”¹²¹ Therefore the Commission will not determine whether the agreements that allow exclusive use of the Subject Properties by the Vendors and Starbucks are leases.

VII. CONCLUSION

The Commission finds that there is not competent evidence to rebut the presumption that the County Board faithfully performed its duties and had sufficient competent evidence to make its determination. The

¹¹⁸ See *Young Men's Christian Ass'n v. Lancaster County*, 106 Neb. 105, 113–14, 182 N.W. 593, 596 (1921) (finding non-Nebraska cases inapplicable when there are obvious distinctions between statutory provisions).

¹¹⁹ See Reply 7–8.

¹²⁰ Neb. Rev. Stat. § 77-202(1) (Reissue 2018); 350 Neb. Admin. Code, ch. 15, § 003.03

¹²¹ *Seldin v. Estate of Silverman*, 305 Neb. 185, 939 N.W.2d 768 (2020).

Commission also finds that there is not clear and convincing evidence that the County Board's decisions were arbitrary or unreasonable.

For the reasons set forth above, the appeal of the Board of Regents is denied.

VIII. ORDER

IT IS ORDERED THAT:

1. The decision of the Lancaster County Board of Equalization determining that the Subject Property is taxable for tax year 2019 and 2020 is affirmed.¹²²
2. This Decision and Order, if no appeal is timely filed, shall be certified to the Lancaster County Treasurer and the Lancaster County Assessor, pursuant to Neb. Rev. Stat. § 77-5018 (Reissue 2018).
3. Any request for relief, by any party, which is not specifically provided for by this Decision and Order is denied.
4. Each party is to bear its own costs in this proceeding.
5. This Decision and Order shall only be applicable to tax years 2019 and 2020.
6. This Decision and Order is effective for purposes of appeal on March 27, 2023.¹²³

Signed and Sealed: March 27, 2023

Steven A. Keetle, Commissioner

SEAL

James D. Kuhn, Commissioner

¹²² Taxable status, as determined by the County Board, was based upon the evidence at the time of the Protest proceeding. At the appeal hearing before the Commission, both parties were permitted to submit evidence that may not have been considered by the County Board of Equalization at the protest proceeding.

¹²³ Appeals from any decision of the Commission must satisfy the requirements of Neb. Rev. Stat. § 77-5019 (Reissue 2018) and other provisions of Nebraska Statutes and Court Rules.