

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

NEBRASKA GAME & PARKS)	
COMMISSION, An Agency of the)	
State of Nebraska,)	CASE NO. 03E-55
)	
Appellant,)	
)	
vs.)	FINDINGS AND ORDER
)	AFFIRMING DECISION TO
HOLT COUNTY BOARD OF)	DENY EXEMPTION
EQUALIZATION,)	
)	
Appellee.)	

Filed February 10, 2005

Appearances:

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For the Appellee: Thomas P. Herzog, Esq.
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Before: Commissioners Hans, Lore, and Reynolds.

**I.
STATEMENT OF THE CASE**

The Chicago and Northwestern Railway Company ("CNW") owned a 716.25 acre tract of land along its right-of-way in Holt County, Nebraska. (E4). The tract of land included the CNW railroad depot in O'Neill which was built in 1910. CNW deeded the property to the Nebraska Game and Parks Commission in 1993 as part of the "Rails to Trails Conservancy" plan to develop a "Cowboy Recreation and Nature Trail". (E25:2; E3; E24).

The Game and Parks Commission renovated the O'Neill Train Depot at a cost of between \$350,000 and \$500,000 and built a 7,556 square foot concrete driveway and a 1,815 square foot brick patio on the land adjacent to the Depot. (E12). The Game and Parks Commission leased this property to Yucca Dune, a for-profit entity, for the first ten-months of 2002. Yucca Dune engaged in private commercial activities. Thereafter Yucca Dune vacated the premises and the Game and Parks Commission leased the property to Jill Gillilan, doing business as "Circle G Western Ware and Tack" ("the tenant") on October 8, 2002. (E3:9). The lease was for a five-year term, with an option to renew the lease for three additional five-year terms. (E3:1 - 2). The tenant's duties under the lease include: a promise to pay two-percent of gross receipts from sales; a promise to keep and maintain the premises; a promise to provide public restrooms; and a promise to keep and maintain the landscaping. (E3). The tenant sells western ware and tack.

The Holt County Assessor notified the Game and Parks Commission on February 25, 2003, that the property was subject to real property taxation pursuant to law. Neb. Rev. Stat. §77-202(1)(a) (Reissue 2003). (E7:2). The Game and Parks Commission notified the Assessor in writing on March 27, 2003, that it protested the Assessor's determination. (E7:1). The Holt County Board of Equalization ("the Board of Equalization") heard the

Game and Parks Commission's protest on April 16, 2003, and denied the requested exemption. (E1).

The Game and Parks Commission appealed the Board of Equalization's decision on May 30, 2003. The Commission served a Notice in Lieu of Summons on the Board of Equalization on June 17, 2003. The Board of Equalization filed its Answer out of time but with leave of the Commission on October 20, 2003.

The Commission thereafter issued an Order for Hearing and Notice of Hearing which set the case for hearing on January 12, 2004. The Appellant moved to continue the scheduled hearing date, and the motion was granted. The case was called for a hearing on the merits of the appeal in the City of Lincoln, Lancaster County, Nebraska, on September 9, 2004. The Game and Parks Commission appeared at the hearing through counsel, Mr. Bruce Smith, Esq.. The Board of Equalization appeared through Thomas P. Herzog, Esq., the Holt County Attorney. Commissioners Hans, Lore, and Reynolds heard the appeal. Commissioner Reynolds served as the presiding officer. Commissioner Wickersham was excused from the proceedings.

The Game and Parks Commission called one witness. The Commission then afforded the Parties an opportunity to supplement the record with additional evidence, and eventually reconvened the proceedings on January 24, 2005. The Commission received additional exhibits and heard the testimony of three witnesses on

that date. The Parties made closing statements, and the Commission then took the matter under advisement. The matter now comes on for decision.

II. ISSUE

The issue before the Commission is whether the Board of Equalization's decision to deny the Games and Parks Commission's exemption application for tax year 2003 was incorrect and either unreasonable or arbitrary.

III. APPLICABLE LAW

The Game and Parks Commission is required to demonstrate by clear and convincing evidence (1) that the decision of the Board of Equalization was incorrect and (2) that the decision of the Board was unreasonable or arbitrary. (Neb. Rev. Stat. §77-5016(7) (Cum. Supp. 2004). The "unreasonable or arbitrary" element requires clear and convincing evidence that the Board of Equalization either (1) failed to faithfully perform its official duties; or (2) failed to act upon sufficient competent evidence in making its decision. *Garvey Elevators v. Adams County Bd.*, 261 Neb. 130, 136, 621 N.W.2d 518, 523-524 (2001); *City of York v. York Cty. Bd. of Equal.*, 266 Neb. 297, 664 N.W.2d 445(2003). If the presumption is extinguished, the Game and Parks Commission

has the burden to prove by clear and convincing evidence that the property is "at fair market value for a public purpose." Neb. Rev. Stat. §77-202(1) (a) (Reissue 2003).

**IV.
FINDINGS OF FACT**

The Commission finds and determines that:

1. The exclusive or predominant use of the subject property is as a western ware and tack retail store.
2. Less than 100 square feet of the 2,978 square feet of the Depot's gross building area is occasionally used to provide public access restroom facilities, a water fountain, a display rack for informational brochures, and access to a telephone, but only during the store's operating hours.
3. The lease rate is not at a "fair market value for a public purpose."

**V.
ANALYSIS**

**A.
APPLICABLE LAW**

The Nebraska Constitution was amended in 1998 to provide:

"The property of the state and its governmental subdivisions shall constitute a separate class of property and shall be exempt from taxation to the

extent such property is used by the state or governmental subdivision for public purposes authorized to the state or governmental subdivision by this Constitution or the Legislature. To the extent such property is not used for the authorized public purposes, the Legislature may classify such property, exempt such classes, and impose or authorize some or all of such property to be subject to property taxes or payments in lieu of property taxes except as provided by law...."

Neb. Const. art. VIII, § 2(1). State law governing exemption of government-owned property was amended to codify the constitutional amendment. The law now provides:

(1) The following property shall be exempt from property taxes: (a) Property of the state and its governmental subdivisions to the extent used or being developed for use by the state or governmental subdivision for a public purpose. For purposes of this subdivision, public purpose means use of the property (i) 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.... 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.”

Neb. Rev. Stat. §77-202(1) (a) (Reissue 2003). The statute defines the term “public purpose” as:

“use of the property (I) 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 safety and welfare, developments by a public housing authority, parks, culture, recreation, community development, and cemetery purposes, or (ii) to carry out the duties and responsibilities conferred by law with or without consideration.”

Neb. Rev. Stat. §77-202(1) (a) (Reissue 2003). The primary or dominant use, and not an incidental use, is controlling in determining whether property is exempt from taxation under this statute. Incidental use is defined as a use other than the primary use and is so minor or secondary in nature as not to distract from the primary use. *City of York v. York County Bd. of Equalization*, 266 Neb. 297, 304, 664 N.W.2d 445, 450 - 451 (2003) (Citations omitted).

The Game and Parks Commission's authority under the Cowboy Trail Project is outlined in a series of related state laws. These statutes provide:

The Legislature finds that the abandonment of railroad rights-of-way in this state provides a unique opportunity to develop a statewide system of recreational trails by which citizens of Nebraska may enjoy the greenways or linear parks that will result and that such trails may act to preserve wildlife habitat and create conservation corridors. The Legislature further finds that it is in the public's interest to develop abandoned railroad rights-of-way and to do so through fostering public and private cooperation.

Neb. Rev. Stat. §37-1002 (Reissue 2004). Termination date January 1, 2010.

There is hereby created a fund to be known as the Recreational Trails Fund. Federal funds advanced to the State of Nebraska through grants-in-aid under the provisions of Public Law 102-240, 102nd Congress, for approved projects shall be remitted to the State Treasurer for credit to the fund. The money in the fund shall be used by the Game and Parks Commission for

the purposes of establishing recreational trails and trail-related projects pursuant to such public law.

Neb. Rev. Stat. §37-911 (Reissue 2004).

“(1) Pursuant to the National Trails System Act, 16 U.S.C. 1241 et seq., the Game and Parks Commission is hereby authorized and directed to accept as a gift, when and if offered, from any present or future owner the entire right-of-way of the Chicago and Northwestern Railroad which lies between milepost 83.3 and milepost 404.5 in Nebraska. In the event a portion of the right-of-way continues in actual rail service, the commission is authorized and directed to accept as a gift the remaining section. So long as the integrity of the right-of-way as an interim recreational trail and for future rail use is not disturbed, the commission is authorized to lease and to grant easement rights on the right-of-way. All revenue collected from such leases shall be remitted to the State Treasurer for credit to the Cowboy Trail Fund and shall be used for the development and maintenance of the Cowboy Trail. The commission shall hold the right-of-way for interim trail use as a state recreational trail, to preserve wildlife habitat, and to provide a conservation, communications, utilities, and

transportation corridor and for other uses approved by the commission and allowed by the National Trails System Act. The commission shall keep in good repair all crossings over the trail in accordance with its legal obligations, including all the grading, bridges, ditches, and culverts that may be necessary for such crossings within the right-of-way. (2) The right-of-way may be accepted without any further legislative action or approval of the Governor but only if the State of Nebraska is indemnified in a manner satisfactory to the commission against the costs of remedial action and environmental cleanup for conditions arising prior to conveyance to the state and the title is free and clear of all liens and mortgage or deed of trust encumbrances. (3) The commission may accept money from any public or private source for gift-acceptance costs, for the development and maintenance of the trail, or for other uses consistent with the purposes stated in this section. The commission may use funds available in the Trail Development Assistance Fund to carry out this section as provided in section 37-1003. Any money from the Trail Development Assistance Fund so used shall be transferred to the Cowboy Trail Fund. (4) The

commission may enter into an agreement with any public entity at any time for the development and maintenance of the trail pursuant to this section. (5) This section shall not be construed to limit the power of eminent domain of the state or its agencies or of any political subdivision.”

Neb. Rev. Stat. §37-912 (Reissue 2004).

(1) Pursuant to the National Trails System Act, and with the consent of the Governor pursuant to section 37-303, the Game and Parks Commission may acquire by gift, devise, or purchase all or any part of a railroad right-of-way in the state proposed to be abandoned for interim trail use. The commission, pursuant to the National Trails System Act, shall hold the right-of-way for one or more of the following uses: (a) To provide a state recreational trail open to the public; (b) To preserve wildlife habitat; (c) To provide a conservation, communications, utilities, and transportation corridor; and (d) Other uses approved by the commission. (2) The right-of-way may be acquired only if the State of Nebraska is reasonably protected in a manner satisfactory to the commission for the costs of remedial action and environmental cleanup for conditions arising prior to conveyance to

the state and the title is free and clear of all liens and encumbrances. (3) The commission may use funds available by gift, appropriation, the Trail Development Assistance Fund, and other appropriate cash funds for uses consistent with those stated in this section and sections 37-303 and 37-1003. (4) As long as the integrity of the right-of-way as an interim recreational trail and future rail use is not disturbed, the commission may lease and grant easement rights on the right-of-way. Any lease or use allowed shall be subject to all prescriptions of the National Trails System Act. All revenue collected from such leases shall be remitted to the State Treasurer for credit to the Trail Development Assistance Fund pursuant to sections 37-1003 and 37-1004. (5) The commission shall continue to allow all crossings across the right-of-way acquired at the time of acquisition on substantially the same terms and conditions as they existed prior to acquisition unless otherwise agreed between the commission and interested parties. (6) The acquisition of the right-of-way shall be subject to the restoration of rail service. If a proposal for the operation of a railroad is approved by the Nebraska Railway Council and the Interstate Commerce Commission,

the right-of-way shall be sold for the market value of the land and improvements and conditioned upon (a) the operation of a railroad along the right-of-way, (b) the grant of an easement to the commission for recreational trail use adjacent to the railroad if such use is feasible, and (c) the return of the right-of-way to the commission if rail service is discontinued.

Neb. Rev. Stat. §37-914 (Reissue 2004).

The Game and Parks Commission appeal requires clear and convincing evidence that the Board of Equalization's decision was incorrect and either unreasonable or arbitrary. The Parties stipulated that Neb. Rev. Stat. §77-201(1) (a) (Reissue 2003) is controlling. The property is leased to a private party, and the Parties further stipulated that the issues presented are (1) whether the property is used for a public purpose; and (2) whether the lease is "at fair market value for a public purpose." Neb. Rev. Stat. §77-202(1) (a) (Reissue 2003).

**B.
USE OF THE DEPOT AS A PUBLIC PURPOSE**

The property at issue in this appeal is the O'Neill Depot, the driveway and the brick patio. The Game and Parks Commission adduced no evidence concerning the 'public purpose' use of the brick patio. The Games and Parks Commission's only evidence concerning the "public purpose" use of the driveway was a

statement that the parking lot could be used by those accessing the Cowboy Trail. There was no other evidence supporting this assertion. The Commission must as a matter of law base its decision on the record before it. Neb. Rev. Stat. §77-5009(4)(b) (Reissue 2003); Neb. Rev. Stat. §77-5016(3) (Cum. Supp. 2004). The Commission cannot therefore presume facts from a silent record. The lack of any evidence concerning the use of the brick patio, and the assertion that the driveway can be used by the public, does not rise to the level of clear and convincing evidence that the Board of Equalization's decision to deny the exemption of this portion of the subject property was incorrect and either unreasonable nor arbitrary.

The Game and Parks Commission did adduce evidence concerning the use of the O'Neill Depot. The Depot is approximately 2,978 square feet in size. (E12:1). The Game and Parks Commission adduced evidence that the Depot is leased for the retail display and sales of western ware and tack. (E3). The lease is for five-years with an option to renew for three additional terms of five-years each. (E3: 1 - 2). The Game and Parks Commission adduced the testimony of one of its employees based in Chadron, Nebraska, that the Depot is put to a public use. The Commission employee testified that the two bathrooms, the water fountain and the informational brochure rack and the store's telephone are available to public for use as part of the Trail System. The

record is not at all clear as to how making a telephone accessible to the public constitutes a public purpose. The Holt County Assessor testified without objection that any store in O'Neill would allow use of its telephone. And, the bathrooms and the water fountain are also available for use by the tenant's customers. The informational brochure rack may have a public purpose in that information is provided via brochures. None of the brochures were made a part of the record. Neither the number of brochures available at the rack nor the size of the rack was made a part of the record, nor was any evidence adduced of the number of brochures distributed to the public via the brochure rack. The record establishes that the total area which may have an occasional public use was less than 100 square feet of the 2,978 square feet total area of the Depot.

The Game and Parks Commission employee admitted that restroom facilities with showers are located across the street from the Depot and are available for use during the summertime. This employee adduced no evidence concerning how often the bathrooms, the water fountain or the informational brochure stand were used by the public, but admitted that these services could only be accessed during hours the store was open. The employee admitted that the majority of the remainder of the building is used for the retail display and sale of western ware and tack. One small part of the building is apparently not used.

The Commission cannot presume facts from a silent record. There is no record that any part of the Depot is predominantly or exclusively used for a public purpose. The only evidence concerning public use of the property is the mixed use of the two bathrooms, the water fountain, and the informational brochure stand. From this record the exclusive or dominant use of the majority of the Depot is for retail display and sale of western ware and tack.

The Game and Parks Commission, however, also suggests (1) that the revenue generated from the lease supports the Cowboy Trail Program, and that leasing the property to a private party is a "public purpose;" and (2) that but for this lease, the Depot would be closed which would (a) result in higher costs of maintenance; and (b) deny the public the opportunity to view the inside of the historic structure.

**I.
DESTINATION OF THE PROCEEDS AS A
"PUBLIC PURPOSE"**

The Game and Parks Commission adduced evidence that in the three years preceding the exemption application a total of less than \$3,000 was generated by leasing the Depot. The theory that money generated from private leases of government owned property benefits the public is widely known as the "destination of the proceeds" theory. The United States Supreme Court first

described the concept in 1924. The Court held that the federal exemption statute "makes the destination the ultimate test of exemption." *Trinidad v. Sagrada Orden des Predicadores, etc.*, 263 U.S.578, 581, 44 S.Ct. 204, 205 (1924). The Supreme Court, however, held that even where the exemption statute is based on the "destination of the income" theory, certain facts were critical to the analysis.

"It is not claimed that there is any selling to the public or in competition with others. The articles are merely bought and supplied for use within the plaintiff's own organization and agencies - some of them for strictly religious use, and the others for uses which are purely incidental to the work the plaintiff is carrying on. That the transactions yield some profit is in the circumstances a negligible factor. Financial gain is not the end to which they are directed."

Supra, at 582, 206.

The United States Supreme Court's decision concerning the destination of the proceeds theory is echoed by a number of state supreme court decisions. The Oregon Supreme Court considered the issue in *Board of Publication of the Methodist Church v. State Tax Commission*, 239 Or. 65, 396 P.2d 212 (1964). That court echoed the concern of the United States Supreme Court in *Trinidad*

concerning competition with private industry. The Oregon Supreme Court began its review by distinguishing the Oregon exemption statute from the federal statute which formed the basis of the *Trinidad* decision. The Court noted in its decision that under the Oregon exemption statute "It is the actual occupancy of the property which determines its right to exemption, and not the use made of its proceeds." *Supra*, 72, 215. The Court specifically concluded that under the Oregon statutory language "it was the use of the property and not the destination of income that was the key to exemption." *Supra*, 72, 215. The Court then reviewed its prior decisions on the issue, and concluded that under the "use" test, it was the source of the income and not the destination which governed. *Supra*, at 72, 215. Finally, the Oregon Supreme Court considered the decisions of other state courts.

"We think it also persuasive that in the only similar state court cases we can find or that have been cited, . . . the state courts have considered and refused to follow the federal cases that adopt destination of income as the test."

Supra, at 73, 216. The Oregon Court held that the appellant in that case was ". . . in direct competition with other owned publishers and retail stores doing a similar business." *Supra*,

at 67, 213. The Oregon Court denied the exemption, based on its review of the *Trinidad* decision.

The Court of Appeals of Oregon, reiterated this holding in 1972. "Simply stated, this theory holds that it is the destination of the income, not the source thereof, which eventually determines the right of exemption." *Umatilla County v. Sturtevant*, 495 P.2d 287, 1 Or. App. 287 (1972). The Court of Appeals unequivocally rejected the "destination of the income" theory as justification for exemption from *ad valorem* real property taxation.

The Pennsylvania Supreme Court has also considered this issue. The Pennsylvania Constitution contains language similar to that adopted in 1998 Neb. Laws, L.R. 45 C.A.. The Pennsylvania Court, in construing the constitutional language and its statutory progeny, held that:

" . . . there is equally no doubt that property, even though owned by a body ordinarily tax-exempt, is taxable if used by it for commercial purposes, or if rented to a lessee for a purely business enterprise and not a public use; this is true even though the rentals or other proceeds from the property are devoted to the tax-exempt activities of the lessor."

Appeal of Allegheny County, 229 A.2d 890, 891 (1967) (Citations Omitted).

The state courts which have considered the "destination of the income" theory have universally rejected it as a basis for exempting otherwise non-exempt property. The logic underlying these decisions is clear: if the "destination of the income" were the test for exemptions, then any use of the property which generated any income would justify the exemption.

This is the same concern raised by the Legislature in Nebraska which led to the adoption of 1999 Neb. Laws, L.B. 271. *Transcript of Revenue Committee Hearings on 1999 Neb. Laws, L.B. 271*, April 12, 1999, p. 3772:

". . . that is the issue of governments competing with private enterprise through the use of governmental properties. This bill is in part designed to make sure that when government does that, begins to act like a private person, look like a private person, that it competes on the same basis as a private person does, that it pays taxes."

The tenant of the Game and Parks Commission's property is engaged in the retail display and sale of western ware and tack. The record is silent as to the number of retail clothing stores in the City of O'Neill. That store would be in direct competition with other stores selling retail clothing. The competition factor described in the *Trinidad* case is present in this appeal.

The Commission, in construing a statute, must interpret the statute according to its understanding of the law. See, e.g., *State v. Moore*, 250 Neb. 805, 819, 553 N.W.2d 120, 132 (1996). The Game and Parks Commission's contention that the destination of the proceeds theory justifies an exemption, is construction, if adopted, would render the Nebraska constitutional amendment, and its statutory and regulatory progeny, meaningless. Such a result would violate a fundamental rule of statutory construction. "In construing a statute, it is presumed that the Legislature intended a sensible rather than an absurd result" *Metropolitan Utilities Dist. v. Twin Platte Natural Resources Dist.*, 250 Neb. 442, 451, 550 N.W.2d 907, 913 (1996).

The Commission, in the absence of controlling decisions from the Nebraska Courts, finds the determinations of other courts concerning the "destination of the proceeds" theory to be persuasive. The Commission, in order to comply with the spirit as well as the letter of 1999 Neb. Laws, L.B. 271, must therefore conclude that "destination of the income" theory does not justify exemption of the subject properties from *ad valorem* real property taxation.

ii.
CLOSURE OF THE DEPOT

The Game and Parks Commission also suggests that without the tenant the Depot would be closed which would result in higher

maintenance costs and that the public would be denied the opportunity to inspect the interior of a historically significant railroad depot. The Game and Parks Commission, however, failed to relate this contention to a public purpose. The Game and Parks Commission's charge under state law is to "develop a statewide system of recreational trails by which citizens of Nebraska may enjoy the greenways or linear parks that will result and that such trails may act to preserve wildlife habitat and create conservation corridors . . . [and] to develop abandoned railroad rights-of-way and to do so through fostering public and private cooperation." Neb. Rev. Stat. §37-1002 (Reissue 2004) (Termination date January 1, 2010). The Game and Parks Commission may also establish "recreational trails and trail-related projects." Neb. Rev. Stat. §37-910 (Reissue 2004). The Game and Parks Commission failed to adduce any evidence establishing that leasing the O'Neill Depot in any way develops "greenways or linear parks" or that leasing the O'Neill Depot in any way acts "to preserve wildlife habitat and create conservation corridors." The Game and Parks Commission has further failed to adduce any evidence that the restoration of the O'Neill Depot is an approved project. The Game and Parks Commission adduced no resolution, rule or regulation, or other evidence of an official act designating the Depot as an approved project. Again, the Commission cannot presume facts from a

silent record. The Commission cannot conclude the record before it that restoration and preservation of the O'Neill Depot falls within the "public purpose" of the Game and Parks Commission. The Game and Parks Commission's allegation that failure to lease the Depot to a private party would result in closure of the Depot is not relevant to the request for exemption.

B.
LEASE AT FAIR MARKET VALUE

The Game and Parks Commission also alleges that the lease for the Depot is at fair market value. The uncontroverted evidence establishes that the Game and Parks Commission failed to comply with the provisions of state law governing leases of state property. (E40:8).

State law explicitly provides that:

"Commencing on April 18, 1992, all leases of real property entered into by any state agency, board, commission, or department shall be subject to this section. Leases held by a state agency, board, commission, or department on such date shall be valid until the lease contract is terminated or is subject to renewal. The division shall monitor all such leases and determine when the lease is subject to renewal. Once the determination is made, the division shall cancel the lease as of the renewal date and shall treat

the need of the agency, board, commission, or department as an original request for space and subject to this section. This subsection shall not apply to (a) state-owned facilities to be rented to state agencies or other parties by the University of Nebraska, the Nebraska state colleges, the Department of Aeronautics, the Department of Roads, and the Board of Educational Lands and Funds, (b) facilities to be leased for use by the University of Nebraska, the Nebraska state colleges, and the Board of Educational Lands and Funds, (c) facilities to be leased for non-office use by the Department of Roads, or (d) facilities controlled by the State Department of Education, which were formerly controlled by the Nebraska School for the Visually Handicapped, to be rented to state agencies or other parties by the department."

Neb. Rev. Stat. §81-1108.22(5) (Cum. Supp. 2004). State law further provides:

"(3) (a) If a building or land is to be sold or leased, the state building division shall cause an appraisal to be made of the building or land. The sale, lease, or other disposal of the building or land shall comply with all relevant statutes pertaining to the sale or

lease of surplus state property, except that if the state building division fails to receive an offer from a state agency in which the agency certifies that it (I) intends to use the building for the purposes for which it was designed, intended, or remodeled or to remodel the building for uses which will serve the agency's purposes or (ii) intends to use the land for the purposes for which it was acquired or received, the state building division shall then notify the Department of Economic Development that the building or land is available for sale or lease so that the department may refer to the state building division any potential buyers or lessees of which the department may be aware. The state building division may then sell or lease the building or land by such method as is to the best advantage of the State of Nebraska, including auction, sealed bid, or public sale and, if necessary, by private sale, but in all situations only after notice of the property sale is publicly advertised on at least two separate occasions in the newspaper with the largest circulation in the county where the surplus property is located and not less than thirty days prior to the sale of the property. The state building division may use the services of a real estate broker

licensed under the Nebraska Real Estate License Act. Priority shall be given to other political subdivisions of state government, then to persons contracting with the state or political subdivisions of the state who will use the building or land for middle-income or low-income rental housing for at least fifteen years, and finally to referrals from the Department of Economic Development. (b) All sales and leases shall be in the name of the State of Nebraska. The state building division may provide that a deed of sale include restrictions on the building or land to ensure that the use and appearance of the building or land remain compatible with any adjacent state-owned property."

Neb. Rev. Stat. §72-815 (Reissue 2003). The lease between the Game and Parks Commission and the tenant was executed by the Game and Parks Commission on October 18, 2002, ten years after the implementation of Neb. Rev. Stat. §81-1108.22(5). The Game and Parks Commission adduced no evidence explaining its departure from state law. If state law had been followed, then an appraisal of the Depot would have been required by Neb. Rev. Stat. §72-815. An appraisal is an opinion of value. Neb. Rev. Stat. §76-2204 (Reissue 2003). Appraisals of property with commercial potential uniformly require application of the Income

Approach. See, e.g., *Uniform Standards of Professional Appraisal Practice, 2004*, Appraisal Foundation, Standards Rule 1-4. The Income Approach requires an analysis of "comparable rental data as are available and/or potential earnings capacity of the property. . ." *USPAP*, Standards Rule 1-4(c)(I). The Game and Parks Commission, if it complied with state law, would have independent proof of fair market value rental or lease rates.

The Game and Parks Commission, however, admits it failed to comply with the applicable provisions of state law. There is, therefore, no independent evidence of fair market value of the lease. The Commission afforded the Game and Parks Commission an additional four months to present evidence on lease rates in O'Neill. At the end of that time, the Game and Parks Commission adduced the testimony of an employee who is licensed by the Nebraska Real Estate Appraiser Board. This witness however, testified that he was not offering an appraisal of the subject property, and that no appraisal was made of the Depot. The witness adduced a document titled "Report on O'Neill Depot" which summarized three leases between the Nebraska Department of Administrative Services and private entities, and a summary of seven leases of private property to commercial entities.

(E38:2). The Game and Parks Commission also offered a spreadsheet summarizing information obtained by telephone calls to various entities concerning rental rates, but this information

was not verified and the witness failed to adduce copies of any of the leases he referred to. (E39). The terms and conditions of those leases are therefore not a part of the record, and cannot be used to establish the fair market value of the lease.

The lease between the Game and Parks Commission and the tenant provides an original term of five years, with an option to renew for three additional five year terms. (E3:1 - 2). The lease doesn't provide for any change in rent, which is fixed at 2% of the tenant's gross income from retail sales of western ware and tack. (E3:3). There is no evidence that the terms of this lease represent actual or fair market value.

The Game and Parks Commission's witness testified concerning the four leases summarized in Exhibit 38. However, this witness admitted that he did not consult any industry sources or reference works concerning the terms of any of the leases he referenced, and the witness made no adjustments for any of the differences in lease terms between the four referenced leases and the lease for the subject property.

C. CONCLUSION

The Game and Parks Commission's appeal of the Board of Equalization's decision to deny the requested exemption suffers from a complete lack of proof as to the issues before this Commission. There is no clear and convincing evidence that the

exclusive or predominant use of the Depot is for a public purpose. The lease itself was made in disregard of state law, and there is no clear and convincing evidence that the lease is at fair market value. There is, therefore, no clear and convincing evidence that the Holt County Board of Equalization's decision was incorrect and either unreasonable or arbitrary. That decision must accordingly be affirmed.

VI.
CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the Parties and over the subject matter of these appeals.
2. The Commission is required to affirm the decision of the Board of Equalization unless evidence is adduced establishing that the action of the Board of Equalization was unreasonable or arbitrary. Neb. Rev. Stat. §77-5016(7) (Cum. Supp. 2004).
3. The property is not leased for a public purpose.
4. The lease is not for fair market value.
5. The Game and Parks Commission has failed to demonstrate by clear and convincing evidence that the County Board's decisions was incorrect, and either unreasonable or arbitrary.
6. The Holt County Board of Equalization's decision must accordingly be affirmed.

**VII.
ORDER**

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. The Holt County Board of Equalization's decision denying the Nebraska Game and Parks Commission's requested exemption of the Depot, the driveway, and the brick patio for tax year 2003 is affirmed.
2. This matter, as required by Neb. Rev. Stat. §77-5017(2) (Cum. Supp. 2004) is remanded to the Holt County Board of Equalization for a determination of the taxable value of the subject property for tax year 2003.
3. The Holt County Board of Equalization shall (a) assess such property using procedures for assessing omitted property; (b) determine the taxable value of the subject property within ninety days of the date of this Order; and (c) apply interest, but not penalty, to the taxable value as of the date of this Order, or the date the taxes were delinquent, whichever is later.
4. Any request for relief by any Party not specifically granted by this Order is denied.
5. This decision, if no appeal is filed, shall be certified to the Holt County Treasurer, and the Holt County Assessor, pursuant to Neb. Rev. Stat. §77-5016(7) (Cum. Supp. 2004).
6. This decision shall only be applicable to tax year 2003.

7. Each Party is to bear its own costs in this matter.

IT IS SO ORDERED.

Dated this 10th day of February, 2005.

Robert L. Hans, Commissioner

Susan S. Lore, Commissioner

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Mark P. Reynolds, Vice-Chair