



Supreme Court Decides Public Purpose Case

The Court found that the TERC erred in considering questions beyond whether the parcels were being used for a public purpose. The Court found plain error in the TERC's consideration of the fair market value of the lease. It vacated the TERC's decision to the extent it addressed whether the parcels were leased at fair market value and, without deciding on the merits, reversed portions of the TERC's decision regarding a lessee's due process rights. It affirmed the TERC's analysis that some parcels were nonexempt to the extent the land was not being used predominantly for a public purpose. The only issue remaining on the appeal was whether the TERC was correct that the parcels it found to be exempt were being used for a public purpose.

Public Purpose

The Nebraska Constitution, Art. VIII, §2 provides that the property of the state and its governmental subdivisions is exempt from taxation to the extent the property is used for a public purpose. By statute, the use of the property is necessary 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." (Neb.Rev.Stat. §77-202) The state's administrative code, which has the effect of statutory law, adds that income generated through leases or other receipts will not convert a nonpublic use of property into a tax exempt public purpose use.

Previously, the Court has held that the primary or dominant use of the property, and not an incidental use, controls in determining whether a property is exempt from taxation. It has considered the policy of limiting the exempt status of leases to prohibit an unfair competitive advantage compared to the creation of revenue without the burden of collecting tax revenues from, and disbursing them to, the same public entity.

The Court reviewed three decisions from York County in which surface agricultural use was merely incidental to the predominant public purposes of the property and the property was tax exempt. The cases focused on a buffer zone around an airport, lots acquired for an industrial park, and land acquired for water monitoring adjacent to a landfill and future waste management. (*Citations omitted.*) As outlined in the landfill case, the property may be used for several public purposes. All public purposes should be considered together in evaluating whether any private use of the property is merely incidental.

The Court found no merit in arguments that the relevant public purpose must be tied to the reason for acquisition or that the lessees' surface water uses should be the only activities considered in the public purpose analysis. Instead, weight was given to the use of the underground aquifer, pipelines, and wells to carry out the NRD's statutory duties of water management, which specifically include water supply and conservation. Because failure to comply with the compact could expose the State of Nebraska to significant liability, the water management use of the property is significant. In addition, the NRD's planned reseeding program and grazing of the property fall within the NRD's purpose of developing and executing soil erosion prevention and control, soil conservation, development of fish and wildlife habitat, and range management. The comparatively minor income from the lease in relation to the other factors means the private uses are incidental to the public uses of the property.

Justice Cassel offered a concurring opinion, noting that the taxes that are lost would have funded school districts and other local needs. The decision effectively compels the remaining property owners to pay more. He cautioned that other projects for the Republican River Compact might imperil more of the area's tax base. He concluded that "[o]nly the Legislature is empowered to determine whether current law is adequate or whether the law should be changed to balance the competing public interests differently."

The full text of the case, *Upper Republican NRD v. Dundy Cty. Bd. of Equal*, 300 Neb. 256, __ N.W.2d __, is available on the Supreme Court's [website](#), "Opinions" located on lower left corner of home page and dated June 15, 2018.

Editor's Note: Legal Line is a feature that will periodically appear in NACO E-Line. This article has been prepared by Beth Ferrell of the NACO legal staff. Legal Line is not intended to serve as legal advice. Rather, it is published to alert readers to court decisions and legal or advisory matters important to county government. For a specific opinion on how the information contained in this article or that which will be discussed in future issues relates to your county, consult your county attorney or personal counsel.