

ORIGINAL

No. 42081-3-II

DIVISION II, COURT OF APPEALS
OF THE STATE OF WASHINGTON

CRYSTAL MOUNTAIN, INC.,

Plaintiff-Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,

Defendant-Respondent.

ON APPEAL FROM THURSTON COUNTY SUPERIOR COURT
(Hon. Carol Murphy)

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

The Leasehold Excise Tax (LET) imposes a tax on persons, not otherwise exempt from property tax if the person owned the property in question, when that property is public and therefore exempt from property tax. The LET applies only when a person has a “leasehold interest,” a statutorily defined term that requires the person to have “possession and use” of the property. RCW 82.29A.020(1); RCW 82.29A.030(1)(a).

The thrust of the argument of Respondent Department of Revenue is that “nonexclusive property interests” create a “leasehold interest” subject to tax. *See, e.g.*, DOR Brief at 1. This theme is repeated throughout the DOR’s brief. Yet RCW 82.29A.020(a) says nothing about the taxation of “nonexclusive property interests”; instead, under the plain and unambiguous language of the statute, the tax applies only when a person has “possession and use” of public property.

Appellant Crystal Mountain, Inc., by virtue of a Ski Area Term Special Use Permit (Permit), is authorized to *use* 4,350 acres of United States Forest Service (USFS or Forest Service) land for the purpose of operating a ski area. Stip. Ex. 4-1. The Permit, by its express terms, “is not exclusive”; the “Forest Service reserves the right to use or permit others to use any part of the permitted area for any purpose, provided such use does not materially interfere with the rights and privileges” of Crystal Mountain. Ex. 4-2. Nothing in the plain language of this document grants Crystal any *possessory* interest or rights in the land, only *use* rights. A key element of the requirements for creating a “leasehold interest” – the

granting of possession of the property – is thus missing. Yet the creation of a “leasehold interest” is the statutory condition for imposing the LET.

This Court should hold that the statute means what it says – that possession *and* use of public property are requirements before the LET may be imposed. The Permit at issue in this case does not grant Crystal Mountain possession of the Forest Service land, and without such possession there is no taxable leasehold interest. The Court should reverse the trial court’s ruling and remand for entry of a judgment and refund of the LET that Crystal Mountain was erroneously compelled to pay.

II. ARGUMENT ON REPLY

A. Restatement of Key Facts.

Crystal Mountain is a for-profit corporation that provides skiing and related recreational facilities within the Mt. Baker-Snoqualmie National Forest adjacent to Mt. Rainier National Park. CP 33 (Stip. 1); *see* CP 33 (Stips. 2, 4; Exs. 1, 2, 3). Crystal operates entirely on property owned by the United States government and overseen by the Forest Service. CP 33 (Stip. 5). Of the 4,350 acres of land Crystal Mountain is allowed to use, approximately 2,600 acres are actually used for skiing. CP 33-34 (Stips. 5, 9). Crystal Mountain uses the land according to the strict terms of the Permit. *See* Ex. 4.

The Permit states that Crystal Mountain is “authorized to use” the land to conduct ski operations (Ex. 4-1), but that this use “is not exclusive” because the “Forest Service reserves the right to use or permit others to use any part of the permitted area for any purpose” so long as

“such use does not materially interfere” with Crystal’s use rights (Ex. 4-2). With limited exceptions, Crystal Mountain may not exclude anyone from the permitted areas as “the lands and waters covered by [the] permit shall remain open to the public for all lawful purposes.” *Id.* (§ I.F). Crystal also operates under the terms of a Master Development Plan (Ex. 14) and annual summer and winter operating plans (Exs. 19-20); everything that Crystal Mountain is allowed to do (make improvements, operations, maintenance, etc.) is under the control and supervision of the designated “Authorized Officer” of the Forest Service. Ex. 4-2 (§ I.B).¹

Crystal pays fees to the USFS for the use of the land. Ex. 4-6 to 4-11. The fees are not based on the fair market lease rate of the property; instead, the fees are a percentage of “Adjusted Gross Revenue,” which is derived entirely from Crystal’s use of the property. *Id.*; see Ex. 4-7; see also Ex. 24.

B. The LET Was Enacted to Address Specific Historical Problems With the Taxation of Leases of Public Property.

DOR presents its version of the historical context of the LET’s enactment. DOR Brief at 10-13. From this recitation, DOR leaps to the conclusion that the definition of “leasehold interest” (RCW 82.29A.020(1)) was intended to encompass “nonexclusive property

¹ The Forest Service may suspend or revoke Crystal’s Permit for a variety of reasons (Ex. 5-1 (§ VIII.A)) including those deemed in the public interest (*id.* (§ C)). Licenses to use real property are ordinarily revocable at the will of the grantor. See *Jackson Park Yacht Club v. Dep’t of Local Government Affairs*, 93 Ill. App. 3d 542, 546-547, 417 N.E.2d 1039 (1981). Moreover, Crystal Mountain’s use rights are further limited by an agreement with the Muckleshoot Indian Tribe (Ex. 16) and a Consent Decree with an environmental organization (Ex. 17).

interests” like those granted in the Permit by the USFS to Crystal Mountain. *Id.* at 14-32. In fact, the full historical record show that the LET was not intended to apply to anything more than true leases of property.

The LET was enacted in 1976 (1975-'76 2nd ex.s. c 61) after what the Supreme Court later described as “a 6-year controversy over the best and most equitable manner of taxing benefits received by . . . [private] lessees” of publicly-owned property. *Japan Line, Ltd. v. McCaffree*, 88 Wn.2d 93, 97-98, 558 P.2d 211 (1977). In fact, the controversy goes all the way back to statehood (Washington became a state on November 11, 1889). Since that time, the Legislature and the courts have struggled mightily with the proper taxation of – in their words – *possessory* interests in tax-exempt publicly-owned real property.

Analysis begins with the Revenue Law of 1891 enacted two years after statehood. *See* Laws of 1891, ch. 140. At that time, the Legislature was concerned with taxing *possessory* interests in land that was being purchased from the state or title to which was being acquired by virtue of the homestead statutes. *See Pier 67, Inc. v. King County*, 78 Wn.2d 48, 52, 469 P.2d 902 (1970).² Persons were making improvements on these still-public lands and the county assessor was charged with assessing those

² *Pier 67* addressed the standards of valuation and assessment of a leasehold of tax-exempt state-owned lands within the boundaries of a harbor area. *Pier 67*, 78 Wn.2d at 48-49. This was actually the second “Pier 67” case to reach the Supreme Court, the first being *Pier 67, Inc. v. King County*, 71 Wn.2d 92, 429 P.2d 610 (1967). The two *Pier 67* decisions will be addressed in greater detail later in this brief.

improvements. Laws of 1891, ch. 140, § 25, p. 290; *see Pier 67*, 78 Wn.2d at 53. The provisions of the 1891 statute “applied to taxing as personal property improvements upon state-owned, tax-exempt real property when in the possession of a homesteader or of a vendee of the state.” *Id.*

In *Moeller v. Gormley*, 44 Wash. 465, 87 P. 507 (1906), the Supreme Court had the first opportunity to address the taxability of leaseholds of state-owned, tax-exempt land under the 1891 law. *Moeller* involved a 30-year *lease* of Seattle tide lands. *Id.* at 467. The county wanted to collect personal property taxes on the leasehold interests but “[t]he court held that under existing statutes the leasehold was not taxable as personal property, but . . . as real property” except that “the then existing revenue law was . . . inadequate to enforce tax collection when the leasehold of state-owned property was assessed as real property.” *See Pier 67*, 78 Wn.2d at 53.³ Following the *Moeller* decision the Legislature quickly stepped in and enacted Laws of 1907, ch. 108, § 1, p. 206 (Rem. & Bal. Code, § 9094), which stated as follows:

³ The court in *Moeller* recognized the rights granted to a *lessee* by the state under a *lease*:

When a *lease* is given by the state to an individual or private corporation, the *lessee* thereby obtains, for his or its private use certain rights and privileges in, to and upon such real estate. These rights and privileges constitute private property over which the lessee has, and may exercise, *absolute dominion and ownership* within the limitations of his or its *lease*.

Moeller, 44 Wash. at 468-69 (emphasis added). The “absolute dominion and ownership” rights of a lessee in public property are repeated in DOR’s administrative rule that defines the “possession” element in RCW 82.29A.020(1) to mean “dominion and control.” WAC 458-29A-100(2)(f)(ii); *see* Crystal’s Opening Brief at 27-34. The DOR’s rule is addressed in greater detail later in this brief.

For the purposes of assessment and taxation all **leases of real property** and leasehold interests therein for a term less than the life of the holder, shall be and the same are hereby declared to be *Personal property*.

See *Pier 67*, 78 Wn.2d at 53-54 (court's italics; bold emphasis added). Thus, under the 1907 statute "*leases* were defined as personal property for purposes of taxation so that the *leasehold interest* might be taxed, and the tax collected, when the *lease* was on tax-exempt land." *Id.* (emphasis added). There should be no question that the interests sought to be taxed were *leases* of real property.

Next came a series of *four* decisions, all involving the same taxpayer and property. As explained in the Supreme Court's second *Pier 67* decision:

In 1907, the Metropolitan Building Company *leased* the old University of Washington campus in what is now downtown Seattle. Being owned by the state, the land was tax-exempt. At substantial expense the *lessee* improved the property with large office buildings. Under the terms of the *lease*, the *lessee* was responsible for roads, sidewalks, sewers and other improvements to the land itself; it financed these improvements by the issuance of bonds.

78 Wn.2d at 55 (emphasis added).

In *Metropolitan Bldg. Co. v. King Co.*, 62 Wash. 409, 410, 113 P. 1114 (1911), the first of the four *Metropolitan* decisions, the question before the court was the proper valuation of the leasehold interest. The buildings, once erected, became the property of the university (*i.e.*, state property). *Id.* at 409. Metropolitan constructed the buildings at a total cost of \$1,000,000. *Id.* at 410. The county argued that cost was the value of the leasehold interest (*id.*) but the court held that the correct value was

“the present worth of the lease from year to year, considering also the term” (*id.* at 412). The important point to take from this decision, for purposes of this case, is that the state owned the land and the improvements, and the underlying agreement was a long-term *lease* of real property, including the land and buildings.

The remaining three cases, *Metropolitan Bldg. Co. v. King Co.*, 64 Wash. 615, 117 P. 495 (1911), *Metropolitan Bldg. Co. v. King Co.*, 72 Wash. 47, 129 P. 883 (1913), and *In re Metropolitan Bldg. Co.*, 144 Wash. 469, 258 P. 473 (1927), all involved the same parties, the same property, and the same 50-year *lease* of real property.⁴

In the two *Pier 67* decisions, the property interest at issue was a 30-year *lease* of harbor land in Seattle, upon which a pier and hotel known as the Edgewater Inn had been built. *Pier 67*, 78 Wn.2d at 49. The buildings were permanently erected and, like the situation in *Metropolitan*, the state owned both the fee land and the improvements, with the taxpayer having a “contractual right of user” under a *lease*. *Id.* On the same day as the second *Pier 67* opinion was issued, the Supreme Court decided *Clark-Kunzl Company, Inc. v. M.J.R. Williams*, 78 Wn.2d 59, 469 P.2d 874 (1970). In this case, the issue involved the valuation of leasehold improvements at eight restaurant locations. *Id.* at 60. All of the restaurants were on leased premises, including two locations where the

⁴ The final *Metropolitan* decision was overruled by the second *Pier 67* decision (78 Wn.2d at 57).

taxpayer was a *sublessee* because the lessor held a long-term *lease* of state-owned land. *Id.*⁵ The issue in *Clark-Kunzl* was whether the restaurant improvements were taxable as real or personal property. In the course of the decision, the court addressed the unique requirements of assessing “the possessory interest” of a lessee on state-owned land:

When the fee interest is privately owned, a single tax is imposed on the entire estate. When title to the fee interest is owned by the state, and therefore tax exempt and indefeasible by tax lien, the *taxable possessory interest* must be taxed separately. The imposition of the tax on the *possessory interest* is effected by making the lessee personally obligated to pay the tax. This statutory framework, however, does not intend to create the very complicated fragmentization which would arise if each of a myriad of subleases under a long-term lease of highly developed state owned land were to be separately assessed and taxed as a *possessory interest*. The unit assessment rule requires that a *lease* of state land must be assessed and taxed on the value of the primary leasehold as a unit. The county’s attempt to assess the value of the sublease on the basis of the cost of the improvements and to assess this value separately from the value of the primary *lease* is not contemplated in our taxing structure.

Clark-Kunzl, 78 Wn.2d at 64 (emphasis added).

After *Pier 67 II* and *Clark-Kunzl* the LET was enacted in 1976. 1975-'76 2nd ex.s. c 61. The LET was a sensible solution to a specific problem: the taxation of private *leases* of state (and other government-owned) land. Under the LET it was no longer necessary to classify the *lease* of non-taxed government-owned properties as real or personal. Nor was it necessary to attempt to assess the value of the leasehold interest, whether it be classified as real or personal property, or segregated from the

⁵ In fact, the leased land in question was the 10-acre tract in downtown Seattle that was the subject of the *Metropolitan* decisions. *Clark-Kunzl*, 78 Wn.2d at 60, n. 1.

land. With the enactment of the LET, an *excise tax* (not a property tax) was imposed on the occupancy or use of public property (RCW 82.29A.030(1)(a), 82.29A.020(1)), measured by “taxable rent” (RCW 82.29A.020(2)) or “contract rent” (RCW 82.29A.020(2)(a)), as the case may be, *provided* the occupier or user met all of the statutory requirements of having a “leasehold interest” under RCW 82.29A.020(1). What is clear from a *complete* history of the taxation of leaseholds of public property is the fact that the focus has always been on *leases*.⁶

Crystal Mountain demonstrated in its Opening Brief that the structure of RCW 82.29A.020(1) was designed, through the “possession and use” language of the definition of “leasehold interest,” to do two things: (1) impose the LET on leases; *and* (2) to shut down preemptively any attempt to use form – relabeling a lease as a “permit, license, or any

⁶ The Legislature’s original findings confirm that the LET was intended to apply to leases:

The legislature hereby recognizes that properties of the state of Washington, counties, school districts, and other municipal corporations are exempted by Article 7, section 1 of the state Constitution from property tax obligations, but that private *lessees* of such public properties receive substantial benefits from governmental services provided by units of government.

The legislature further recognizes that a uniform method of taxation should apply to such leasehold interests in publicly owned property.

The legislature finds that *lessees* of publicly owned property are entitled to those same governmental services and does hereby provide for a leasehold excise tax to fairly compensate governmental units for services rendered to such *lessees* of publicly owned property.

RCW 82.29A.010 (1975-'76 2nd ex.s. c 61 § 1) (emphasis added). As the Supreme Court recently held, legislative findings are independent evidence of a statute’s intended plain meaning. *G-P Gypsum Corp. v. Dep’t of Revenue*, 169 Wn.2d 304, 310, 237 P.3d 256 (2010) (“an enacted statement of legislative purpose is included in a plain reading of a statute”).

other [form of] agreement” – to avoid paying the LET. *See* Crystal’s Brief at 21-26.⁷

In short, the Legislature intended to tax agreements that grant rights that are less than fee simple ownership *but which embody the elements of both possession and use*, which are the characteristics of leases. The power of possession is the power to exclude others – including the landlord or owner – from the premises.⁸ A license in real property, on the other hand, has been distinguished from a lease as follows:

[A] license generally provides the licensee with less rights in real estate than a lease. If the contract gives exclusive possession of the premises against all the world, including the owner, it is a lease, but if it merely confers a privilege to occupy the premises under the owner, it is a license.

⁷ DOR states that the LET is intended to apply even when exclusive possession and control over property is not granted, otherwise it “would create a pocket of non-taxable property rights[,] [s]pecifically, all rights to occupy and use public property that fall short of exclusive possession and control would not be taxed – *even where those rights had previously been taxed under the property tax scheme.*” DOR Brief at 20-21 (emphasis added). The DOR cites to no authority for the statement that “nonexclusive property interests” “had previously been taxed under the property tax scheme.” As shown, *all* of the historical cases involved *leases* and by their very nature leases convey possession to the lessee. That certain restrictions may have been imposed on the lessee, *see, e.g., New Tacoma Parking Corporation v. Johnston*, 85 Wn.2d 707, 709-711, 538 P.2d 1232 (1975) (cited in DOR’s brief (at 19)) does not take away from the fact that the underlying agreement was a lease.

⁸ Under the common law, the “relation of landlord and tenant arises whenever the holder of a possessory estate in land permits another to possess it for a temporal period or at will.” *Washington Real Property Deskbook*, Vol. 2, § 17.2(2) (4th ed. 2009) (citing *Hughes v. Chehalis Sch. Dist. No. 302*, 61 Wn.2d 222, 224, 377 P.2d 642 (1963)). “Because the tenant has an estate in land, [the tenant] is entitled during the term of the leasehold estate to *possession* and enjoyment of the interest.” *Washington Real Property Deskbook, supra*, at § 17.4 (emphasis added). And, the tenant “is entitled during the term of that estate to *exclusive possession against the whole world, including its landlord.*” *Id.* at § 17.4(2) (emphasis added).

53 C.J.S. *Licenses* § 133 (2005).⁹ Thus, the crucial distinguishing characteristic of a lease is the surrender of possession and control of the property to the tenant for the agreed-upon term. J. Ely & J. Bruce, *The Law of Easements and Licenses in Land* § 11:1 (2011); 1 R. Dolan, *New York Landlord & Tenant, Including Summary Proceedings* § 4:11 (4th ed. 2010).

Crystal Mountain, however, does not have possessory rights in USFS land, only *use* rights. The Forest Service, as landlord of U.S. Government land, is *not* excluded from the premises. Nor are the Muckleshoot Indians (Ex. 16), or the general public for that matter, because “the lands and waters covered by [the] permit shall remain open to the public for all lawful purposes.” Ex. 4-2 (§ I.F). In other words, Crystal Mountain does *not* have the right of possession that is

⁹ “A license authorizes the doing of some act or series of acts on the land of another without passing an estate in the land and justifies the doing of an act or acts which would otherwise be a trespass.” *Conaway v. Time Oil Company*, 34 Wn.2d 884, 893, 210 P.2d 1012 (1949) (citing *Barnett v. Lincoln*, 162 Wash. 613, 299 Pac. 392 (1931); *Baseball Publishing Co. v. Bruton*, 302 Mass. 54, 18 N.E.2d 362 (1938); 32 Am. Jur. 30, § 5; 51 C.J.S. 806, § 202 (2)). A licensee is “a person who is privileged to enter or *remain on land* only by virtue of the possessor’s consent.” *Teel v. Stading*, 155 Wn. App. 390, 395, 228 P.3d 1293 (2010) (citing *Tincani v. Inland Empire Zoological Soc’y*, 124 Wn.2d 121, 133, 875 P.2d 621 (1994) (quoting *Younce v. Ferguson*, 106 Wn.2d 658, 667, 724 P.2d 991 (1986)) (emphasis added). “If the instrument does not grant possession, but *grants only the right to use the premises*, then the instrument is a license not a lease” (emphasis added). *In re Harbour House Operating Corp.*, 26 B.R. 324, 328 (Bankr. D. Mass. 1982); see *Highland Recreation Defense Foundation v. Natural Resources Commission*, 180 Mich. App. 324, 330, 446 N.W.2d 895 (1989) (distinguishing license from lease, and concluding that a permit to use recreation area was a license since it “does no more than grant permission to do certain activities on the property without giving . . . any permanent or possessory interest in the land”); see also *Union Travel Associates, Inc. v. International Associates, Inc.*, 401 A.2d 105, 107 (DC 1979) (“a license confers a personal privilege to act, and not a present possessory estate”).

characteristic – and critical element – of a lease, and which the Legislature chose to make a condition of applying the LET.

DOR accuses Crystal Mountain of ignoring “that the Legislature expressly defined the term ‘leasehold interest’ for purposes of this statute,” DOR Brief at 15, asserting “[t] here is no reason to resort to the common law meaning of a term when the Legislature has expressly defined it.” *Id.* (citing *State v. Chester*, 133 Wn.2d 15, 22, 940 P.2d 1374 (1997); *State v. Webb*, 162 Wn. App. 195, 206, 252 P.3d 424 (2011)). This statement should be considered astonishing, given that the historical focus of the Legislature and the courts leading up to the adoption of the LET has been *entirely* concerned with a question rooted in the common law of property. Moreover, the Legislature’s resolution of the decades-long controversy rests on a definition of “leasehold interest” that expressly incorporates the common law concepts of “possession” and “use.” The DOR fails to offer any reason to disregard the well-established distinction that the common law draws between the right to “possess” property and the right to “use” property. In fact, the opposite legal conclusion is compelled. Where the legislature uses a term that has a well-established meaning at common law, the common law meaning is to be applied. *State v. Engel*, 166 Wn.2d 572, 578-79, 210 P.3d 1007 (2009). Here, the Legislature used *two* such terms: “possession” and “use.”

DOR’s argument effectively reads the possession requirement completely out of the statute. As the Supreme Court recently stated:

“[E]ach word of a statute is to be accorded meaning.” *State ex rel. Schillberg v. Barnett*, 79 Wn.2d 578, 584, 488 P.2d 255 (1971). Whenever possible, statutes are to be construed so “no clause, sentence or word shall be superfluous, void, or insignificant.” *Kasper v. City of Edmonds*, 69 Wn.2d 799, 804, 420 P.2d 346 (1966) (quoting *Groves v. Meyers*, 35 Wn.2d 403, 407, 213 P.2d 483 (1950)).

HomeStreet, Inc. v. Dep’t of Revenue, 166 Wn.2d 444, 452, 210 P.3d 297 (2009). In the property context the word “possession” means something distinct from the word “use.” Courts are not allowed to read words out of a statute, and definitely not when the term implicates a substantive element of the statutory scheme. Thus, when there is no possession granted the LET cannot apply since a “leasehold interest” requires *possession* as well as use. Here, Crystal Mountain has been granted only the right to use, not to possess, and that means the LET does not apply.

C. DOR’s Plain Meaning Analysis Is Not Supported by the Language of the Statute.

DOR argues that this Court should look at the context of the enactment of the LET to determine the statute’s plain meaning. DOR Brief at 14-15. The foregoing discussion did just that and demonstrated that the Legislature had leases in mind when, in 1976, it finally settled upon the LET as the proper method of taxation for leasehold interests in tax-exempt public property.

DOR asserts that “[a]s defined in the leasehold excise tax statute, a ‘leasehold interest’ is not limited to common law leases or other exclusive interests in property” because “[p]roperty interests, such as [] permits or licenses allowing nonexclusive use of public property, are expressly included with the definition of ‘leasehold interest.’” DOR Brief at 16

(citing RCW 82.29A.020(1)). According to DOR all licenses and permits create a “leasehold interest” because those words are used in the statute. But as was demonstrated in Crystal Mountain’s Opening Brief (at 21-26), the iteration “which exists by virtue of any lease, permit, license or any other agreement” was clearly inserted in the statute to signify that substance prevails over form in determining whether a “leasehold interest” is present. These words do not, as DOR contends, represent the right to tax “nonexclusive interests” such as licenses and permits. DOR’s own LET regulations recognize this limitation, specifically stating that “[b]oth possession and use are required to create a leasehold interest” and further stating that this requirement “distinguishes a taxable leasehold interest from a *mere franchise, license, or permit.*” WAC 458-29A-100(2)(f)(ii) (emphasis added). And that’s precisely what is before this Court – a “mere” license or permit, which conveys only the right of use and not the right of possession.

As previously shown, a license cannot grant possession *and* use. By definition, a license is a grant of a use right only, with possessory rights remaining with the grantor. *State v. Engel*, 166 Wn.2d 572, 578-79, 210 P.3d 1007 (2009). A “leasehold” is “[a]n estate in realty held under a *lease.*” *Black’s Law Dictionary*, Revised Fourth Edition (1968) at 1036 (emphasis added). A “lease” is “[a]ny agreement which gives rise to a relationship of landlord and tenant” and includes agreements “for exclusive possession of lands or tenements for [a] determinative period.” *Id.* at 1035. The language “which exists by virtue of any lease, permit,

license, or any other agreement” in RCW 82.29A.020(1) is intended to make the point that it does not matter what the agreement is called, but if it creates a “leasehold interest” under the terms of the statute it will be subject to LET. In sum, *substance controls over form*. DOR’s LET regulations also acknowledge this point: “Regardless of what term is used to label an agreement providing for the use and possession of public property . . . *it is necessary to look to the actual substantive arrangement between the parties* in order to determine whether a leasehold interest has been created.” WAC 458-29A-100(2)(f)(i) (emphasis added). Doing that here leads inevitably to the conclusion that the Permit does not grant a leasehold interest to Crystal Mountain, because the Permit (as shown) only grants use and not possession to Crystal.

D. DOR Misreads the Holding in *Mac Amusement v. Dep’t of Revenue*.

At the outset of its decision in *Mac Amusement v. Dep’t of Revenue*, 95 Wn.2d 963, 965, 633 P.2d 68 (1981), the Supreme Court acknowledged that the LET “provides for a 12 percent tax, assessed against *lessees*, on the *rent* paid for publicly owned property” (emphasis added). This statement alone should distinguish this case from *Mac Amusement* because Crystal Mountain is not a “lessee” nor does it pay “rent.”

MAC (the designation used for two companies, Mac Amusement Company and Mackey & Aubin Concessions Company) had a *lease* with the City of Seattle to operate the Fun Forest amusement facility at the

Seattle Center. *Mac Amusement*, 95 Wn.2d at 965 (“MAC is the *lessee* and operator of the Fun Forest amusement facility at the Seattle Center” (emphasis added)). The *lease agreement* provided, “among other things, for a favorable location among pedestrian traffic, for the exclusive right to operate all rides and games at the Center, and for the sole right to sell food within the Fun Forest location.” *Id.* For these rights and others, MAC paid “one rental sum” and the “portion of rent attributable to each right” was not stipulated in the lease agreement. *Id.* MAC sought a partial refund of the LET attributable to its “favorable location” and “monopoly rights.” *Id.* at 965-66. The question was whether such rights granted under the *lease* were “nontaxable ‘concession or other rights’ under RCW 82.29A.020(2)(a).” *Id.* at 966. The Supreme Court held that the “rent attributable to favorable location” was subject to the LET, but that “monopoly rights” were not. *Id.* at 965.

The court separated its ruling into three parts.¹⁰ In Part I (95 Wn.2d at 967-69) the court addressed the phrase “concession or other rights” found in the definition of the term “contract rent” (*id.* at 967 (citing RCW 82.29A.020(2)(a))). The court held that “the portion of the *rent*¹¹ attributable to favorable location, and to having access to the ‘stream of commerce,’ [is] taxable” (*id.* at 968 (emphasis added)) because “access is

¹⁰ DOR’s Brief addresses Parts I, II and II of the decision in *Mac Amusement*. This brief will make the same references.

¹¹ Crystal Mountain does not pay “rent” to the USFS for the right to use the land. Instead, Crystal pays “fees.” Ex. 4-6 to 4-11 (“The Forest Service shall adjust and calculate permit *fees* authorized by this permit” (Ex. 4-6) (emphasis added)).

an inherent element of the location” and any “attempt to segregate from the rent that portion relating to favorable location . . . [is] contrary to the stated legislative purposes for the tax” (*id.* at 969). Thus, the court held “that the rent traceable to ‘good location’ is taxable.” *Id.* Crystal Mountain does not claim that it has a “good location”; nor is it attempting to exempt a portion of the fees it pays to the Forest Service for “good location.” This part of the decision in *Mac Amusement* has no bearing on whether the Permit grants Crystal Mountain a “leasehold interest.”

Part II of the decision addressed whether MAC had a “monopoly right” or “franchise.” *Mac Amusement*, 95 Wn.2d at 969-970. The question here was whether the City’s granting of “the exclusive right to operate all rides and games at the [Seattle] Center, and for the sole right to sell food within the Fun Forest location” (*id.* at 965) constituted “other rights granted by the lessor” (RCW 82.29A.020(2)(a)) and which were not subject to the LET. Here, the court noted that “a monopoly right when conferred by a municipality is generally considered to be a franchise.” *Mac Amusement*, 95 Wn.2d at 969 (citing *Washington Water Power Co. v. Rooney*, 3 Wn.2d 642, 101 P.2d 580 (1940); *Artesian Water Co. v. State Dep’t of Highways & Transp.*, 330 A.2d 432 (Del. Super. Ct.), *aff’d as modified*, 330 A.2d 441 (Del. 1974); *Dunmar Inv. Co. v. Northern Natural Gas Co.*, 185 Neb. 400, 176 N.W.2d 4 (1970)). A franchise “is distinguishable from leaseholds, licenses and permit,” *Mac Amusement*, 95 Wn.2d at 970 (citing *Artesian, supra*; *Dunmar, supra*; *Lanham v. Forney*, 196 Wash. 62, 81 P.2d 777 (1938); *Greene Line Terminal Co. v. Martin*,

122 W. Va. 483, 10 S.E.2d 901 (1940); *Miller v. Owensboro*, 343 S.W.2d 398 (Ky. Ct. App. 1961)) and “remains distinct from a leasehold even when its exercise and value is inherently dependent upon the use and possession of publicly owned property,” *Mac Amusement, supra* (citing *Artesian, supra*; *Hayden v. Houston*, 305 S.W.2d 798 (Tex. Civ. App. 1957); *Glodt v. Missoula*, 121 Mont. 178, 190 P.2d 545 (1948)). The court concluded that the “exclusivity rights” granted to MAC “constitute such a franchise” and are “nontaxable ‘other rights granted by the lessor.’” *Mac Amusement, supra*.

Here, the entire agreement between the Forest Service and Crystal Mountain effectively conveys a franchise or monopoly. Under the Permit Crystal Mountain is “authorized to use National Forest System lands . . . for the purposes of constructing, operating, and maintaining winter sports resort including food service, retail sales, and other ancillary facilities.” Ex. 4-1. “The Forest Service reserves the right to use or permit others to use any part of the permitted area for any purpose, *provided such use does not materially interfere with the rights and privileges hereby authorized* [under the Permit].” Ex. 4-2. The clear purpose of the above proviso is to exclude the Forest Service or any other person or entity from operating a “winter sports resort” on the land subject to Crystal Mountain’s Permit. In other words, Crystal has a monopoly for this type of activity on this land.

DOR contends that Crystal Mountain did not “present testimony at trial to establish what, if any, portion of its payments to the Forest Service could be attributable to payments for a franchise or monopoly right.”

DOR Brief at 25-26. This was not necessary because it presumes that Crystal Mountain's franchise or monopoly is separate or distinct from its "leasehold interest" (RCW 82.29A.020(1)). But, unlike MAC, Crystal Mountain *does not have an underlying leasehold interest*. Stated in statutory terms, because Crystal Mountain has use *but not possession* of the USFS land Crystal does not have a "leasehold interest" in the first instance. It follows that Crystal's use rights are 100 percent exclusivity rights, which are not taxable under RCW 82.29A and the holding in *Mac Amusement* (95 Wn.2d at 970).

The final part of the decision (Part III) addressed whether "pedestrian thoroughfares, intersecting the Fun Forest area," must be included in MAC's taxable leasehold interest. *Mac Amusement*, 95 Wn.2d at 970. MAC alleged that the pedestrian thoroughfares were "improperly considered" part of the taxable leasehold interest since they were "public in nature." *Id.* The court ruled otherwise, concluding that "[i]nasmuch as those intersecting thoroughfares were an element of the *lease*, . . . they were properly taxed." *Id.* at 972-73 (emphasis added).

DOR contends that Part III of the decision in *Mac Amusement* is most relevant to this case. DOR Brief at 23. First, DOR argues that the court recognized, based on the plain language of the definition of "leasehold interest" (RCW 82.29A.020(1)), "that the term was defined at 'not only including leases, but also permits and licenses.'" DOR Brief, *supra* (quoting *Mac Amusement*, 95 Wn.2d at 970-71). DOR also points to the Supreme Court's statement that "'by including uses and permits [the

Legislature gave] ‘leasehold’ a meaning not ordinarily contemplated by that term.” DOR Brief at 23 (quoting *Mac Amusement*, 95 Wn.2d at 971). But DOR reads the court’s statements out of context. Here is a full quote of the court’s statements:

By definition, the taxable rent is that rent paid for a “leasehold interest,” which is defined as not only including leases, but also permits and licenses. RCW 82.29A.020(1). The taxable rent additionally includes those sums paid for the use as well as the possession of public property. RCW 82.29A.030. From these provisions, it would appear the legislature intended to tax those areas the use of which was bargained for. Those provisions, by including uses and permits, give “leasehold” a meaning not ordinarily contemplated by that term.

Taxing the use as well as possession of property is consistent with the purpose of the tax. The tax is intended to defray some of the governmental expense of maintaining areas from which private lessees benefit. In this case, while MAC derives substantial benefits from their existence, the City maintains the walkways and is liable for any injuries arising from them.

Mac Amusement, 95 Wn.2d at 970-71.

It is clear from the *full text* that the court acknowledged that licenses and permits *may* be taxable *but only if* the agreement meets the definition of “leasehold interest” (RCW 82.29A.020(1)). The court did *not* state that all licenses and permits are subject to the LET. To have a taxable “leasehold interest” a person must have both “possession and use” of property. This is the clear import of the plain and unambiguous language of RCW 82.29A.020(1), and even DOR acknowledges this fact through its regulations; if all “permits and licenses” are subject to the LET, why then does DOR’s rule state that “[b]oth possession and use are required to create a leasehold interest” and that this “distinguishes a

taxable leasehold interest from a mere franchise, license or permit”? WAC 458-29A-100(2)(f)(ii).¹² What the court actually is saying in *Mac Amusement* is that, once possession and use of property is established, such use creates a “leasehold interest” even if the use is then shared by, as in MAC’s case, the general public. But the key, as expressly stated by the court, is the granting of “*use* as well as the **possession** of public property.” *Mac Amusement*, 95 Wn.2d at 971 (citing RCW 82.29A.030) (court’s italic emphasis; bold emphasis added).¹³

DOR is misreading *Mac Amusement*, and it compounds this misreading by its related reliance on the decision of the State Board of Tax Appeals in *Rainier Mountaineering, Inc. v. Dep’t of Revenue*, Docket

¹² At the time of the Supreme Court’s decision in *Mac Amusement* the DOR had not yet issued its LET regulations. The court’s decision was issued on August 27, 1981; the DOR’s regulations did not become effective until November 1, 1999, some 18 years later. WSR 99-20-053.

¹³ The court also noted that “[t]axing the use as well as possession of property is consistent with the purpose of the tax” because “[t]he tax is intended to defray some of the governmental expense of maintaining areas from which private lessees benefit.” *Mac Amusement*, 95 Wn.2d at 971. Crystal Mountain pointed out in its Opening Brief, which bears repeating here, that Crystal pays property taxes on the value of *all* of its own equipment and facilities that have been placed on the USFS land. CP 37 (Stip. 22); Ex. 26. During the period for which Crystal Mountain seeks a refund of LET (2002-2006) the assessed market value of Crystal’s property was approximately \$20 million in each assessment year. *See* Ex. 26. At an average levy rate of \$13.00 per \$1,000 of value this equates to property taxes of approximately \$250,000 paid per year. *Id.* That Crystal pays its fair share of taxes in support of government services should be beyond dispute. DOR makes the unsupported assertion (Brief at 21) that Crystal Mountain receives substantial services. But DOR’s statement is factually untrue. Crystal has its own utility service for sewer and water, its law enforcement comes from the USFS, and Crystal even plows the county-owned road at its own expense during the winter. So it is unclear what governmental services DOR is referencing that would require an additional tax payment above the \$250,000 in annual property taxes Crystal already paid.

No. 37206. DOR Brief at 27; *see* Appendix C.¹⁴ Rainier Mountaineering operated “a commercial guiding and climbing service in Mt. Rainier National Park.” *Rainier* at 1. The agreement was exclusive, allowing Rainier to operate a guide service and climbing school above the 8000 foot level of Mt. Rainier. *Id.* at 1-2. Rainier paid an escalating fee for this right based upon client fees and the sale of merchandise. *Id.* Rainier was also allowed to use two structures, one at the 5400 foot level and the other at the 10,000 foot level of the mountain, for which a fixed amount was paid. *Id.* at 2. The Board ruled that the agreement between Rainier and the National Park Service in part created a “monopoly franchise right or ‘concession right’” under the LET, a portion of which was thus excludable from tax. The Board, relying on *Mac Amusement*, held that:

... the agreement between Rainier Mountaineering and the National Park Service, regardless of labeling, grants Rainier Mountaineering an exclusive right to operate a commercial climbing and guiding service in the Park. This is a right to perform an act which a corporation or individual otherwise cannot do. It is therefore a monopoly franchise right or “concession right” within the meaning of the term used in RCW 82.29A.020.

Rainier Mountaineering at 9. Similarly, the Permit between Crystal Mountain and the USFS grants Crystal an exclusive right to operate a “winter sports resort” (Ex. 4-1) on Forest Service land. Thus under the holding in *Rainier*, Crystal has “a monopoly franchise right or ‘concession

¹⁴ Appendix C to DOR’s Brief is a copy of the *Rainier Mountaineering* decision as reported by Thomson Reuters. Attached to this brief as an Appendix is a copy of the Board’s original decision in *Rainier*. All references to this decision herein are to the originally published opinion appended to this reply.

right' within the meaning of the term as used in RCW 82.29A.020.”
Rainier at 9.

In *Rainier*, the Board set about attempting to determine the value of Rainier’s leasehold interest, including for the exclusive use of the two buildings. DOR contended that Rainier had a leasehold interest in “the entire mountain above the 8,000 foot level” because of Rainier’s use rights. *Rainier* at 11. DOR argued there – as it does here – that a “bare license to use government property falls within the definition of ‘leasehold interest’ as set forth in RCW 82.29A.020(1).” *Id.* While the Board did not necessarily agree with DOR’s position, it did hold that Rainier’s leasehold interest included “the right to use the climbing routes for commercial climbing and guiding purposes.” *Id.* at 12. In so ruling, the Board concluded that “the term ‘leasehold interest,’ RCW 82.29A.020(1), is somewhat ambiguous.” *Id.* at 11. But instead of applying the rules of construction for ambiguous tax imposing statutes, the Board proceeded to misapply *Mac Amusement*:

The statutory phrase, “possession and use” . . . could be read to require that the agreement must grant both possession and use in order to create a leasehold interest. Normally, a lease grants both possession and use. However, we are not free to construe the statute as a matter of first impression. The language in question has been construed in MAC Amusement. In that case, the court held that pedestrian thoroughfares intersecting the Seattle Center Fun Forest constituted a part of the leasehold interest, even though the lessee did not have exclusive possession of these thoroughfares. The court noted:

By definition, the taxable rent is that rent paid for a “leasehold interest,” which is defined as not only including leases, but also permits and licenses. RCW 82.29A.020(1). The taxable rent additionally includes those sums paid for

the *use* as well as the possession of public property. RCW 82.29A.030. From these provisions, it would appear the legislature intended to tax those areas the use of which was bargained for. Those provisions, by including uses and permits, give “leasehold” a meaning not ordinarily contemplated by that term.

MAC Amusement, *supra* at 970-71.

Rainier Mountaineering at 11 (Board’s underscoring).¹⁵

If *Mac Amusement* had been properly applied to Rainier’s agreement with the National Park Service, the Board should have ruled the other way. First, the Board apparently did not recognize that the agreement in MAC was a *lease*, while the agreement in *Rainier* was *not* a lease. Second, the Board did not apply the correct rule of construction once it found the statute to be ambiguous; in fact, the Board did not apply *any* rule of construction. As stated in *Mac Amusement*, if there is any doubt or ambiguity as to the meaning of a tax imposing statute, as in the case of RCW 82.29A.020(1), it must be construed in favor of the taxpayer and against the taxing power. 95 Wn.2d at 966 (citing *Foremost Dairies, Inc. v. State Tax Comm’n*, 75 Wn.2d 758, 453 P.2d 870 (1969); *Buffelen Lumber & Mfg. Co. v. State*, 32 Wn.2d 40, 43, 200 P.2d 509 (1948)). *Rainier* involved the imposition of the LET on the fee paid to the National Park Service. Here, the issue is whether the LET applied to the fee Crystal

¹⁵ With all due respect to the Board, the court in *Mac Amusement* did *not* construe the “possession and use” language of RCW 82.29A.020(1). Instead, and as previously discussed, MAC had an underlying *lease* agreement with the City of Seattle, which presumed that possession and use of the property had been granted by the city to MAC, and which MAC apparently did not dispute. MAC argued that portions of the property that were to be kept open to the public should be excluded from MAC’s “leasehold interest,” which the court declined to do.

Mountain paid to the USFS. The default rule *in favor* of the taxpayer – *i.e.*, any doubt as to the meaning of RCW 82.29A.020(1) must be interpreted *in favor* of Crystal Mountain and *against* DOR – should have been applied in favor of Rainier.

Moreover, *Rainier* was decided by the Board in 1991. Subsequently, DOR promulgated rules for administration of the LET.¹⁶ The rules specifically acknowledge that “[b]oth possession and use are required to create a leasehold interest” and this fact “distinguishes a taxable leasehold interest from a mere franchise, license or permit.” WAC 458-29A-100(2)(f)(ii). *Rainier* Mountaineering, as does Crystal Mountain, has a “mere franchise, license or permit” with the National Park Service or USFS, as the case may be. After WAC 458-29A-100(2)(f)(ii) was adopted on November 1, 1999, *Rainier* Mountaineering’s agreement could no longer be subject to LET under the plain and unambiguous language of the rule. Thus, the Board’s decision in *Rainier* is no longer a valid expression of the state of the law yet DOR relies on *Rainier* as if this decision correctly expresses current administrative jurisprudence.¹⁷

¹⁶ RCW 82.29A.140 directed that DOR “shall make such rules and regulations . . . as shall be necessary to permit its effective administration including procedures for collection and remittance of taxes imposed by this chapter.” 1975-'76 2nd ex.s. c 61 § 16. It thus took DOR 23 years to adopt its LET rules.

¹⁷ In support of argument related to DOR’s LET rule and simultaneous with the filing of this Reply Brief, Crystal Mountain is filing a Motion to Supplement the Record under RAP 9.11(a). The motion asks the Court to consider documents from the DOR LET rule-making file, including the Department’s Concise Explanatory Statement and correspondence sent to DOR from various licensees and permittees on U.S. Government land.

E. DOR’s Administrative Interpretation of “Leasehold Interest” as Embodied in WAC 458-29A-100(2)(f) Is Consistent With RCW 82.29A.020(1); DOR’s Position in This Case Is Inconsistent With Its Own Rule and Is Fatally Vague, as Well.

WAC 458-29A-100(2)(f)(ii) states that a “*lessee* must have *some identifiable* dominion and control over a defined area to satisfy the possession element” (emphasis added). First and foremost, the rule identifies the person liable for the tax as the “lessee,” implying that the drafters of the regulation certainly understood the legislature to intend that the underlying document creating a taxable “leasehold interest” must *in substance* be a lease. DOR focuses on the “some identifiable” language in the rule, arguing that Crystal Mountain has “*some identifiable* dominion and control” over the USFS land and therefore has possession. *See* DOR Brief at 36 (emphasis added). But the way DOR would have this Court use that phrase would turn the regulation on its head, leaving nothing *but* the requirement of “some” dominion and control, and with no principled basis for determining if a particular legal arrangement grants enough dominion and control to constitute “possession” for purposes of applying the LET.

“A . . . regulation that . . . requires the doing of an act in terms so vague that people of common sense must guess as to its meaning and differ as to its application violates the first essential of due process.” *Silverstreak, Inc. v. Dep’t of Labor & Industries*, 159 Wn.2d 868, 890, 154 P.3d 891 (2007) (citing *Anderson v. City of Issaquah*, 70 Wn. App. 64, 75, 851 P.2d 744 (1993)) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926)); *see also, Haley v. Med.*

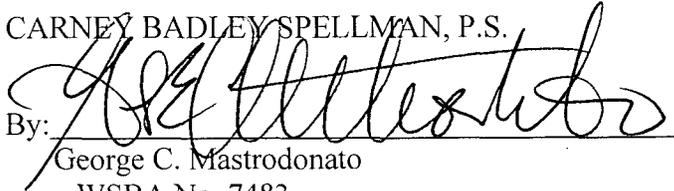
Disciplinary Bd., 117 Wn.2d 720, 739, 818 P.2d 1062 (1991)). The effect of reducing the operative language of the DOR's regulation to the concept of "some identifiable" dominion and control would, in practice, allow DOR to make arbitrary decisions as to when a "leasehold interest" exists. "Regulations are unconstitutionally vague if they allow an administrative agency to make arbitrary discretionary decisions." *Silverstreak, supra* (citing *Anderson*, 70 Wn. App. at 77-78). Having the existence of "possession" turn on the agency's ad hoc determination that the requisite degree of dominion and control exists means taxpayers like Crystal Mountain are left to guess at the meaning of the regulation, and when a taxpayer has to guess at the regulation's meaning the result is "not only manifestly unjust but unconstitutional." *Silverstreak*, 159 Wn.2d at 890.

III. CONCLUSION

This Court should rule that the Permit between the USFS and Crystal Mountain did not create a taxable "leasehold interest," and accordingly reverse the trial court and remand for calculation and determination of the refund owed to Crystal.

RESPECTFULLY SUBMITTED this 12th day of April, 2012.

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APPENDIX

BEFORE THE BOARD OF TAX APPEALS
STATE OF WASHINGTON

RAINIER MOUNTAINEERING, INC.,)	
)	
Appellant,)	Docket No. 37206
)	
v.)	Re: Excise Tax Appeal
)	
STATE OF WASHINGTON)	FINAL DECISION
DEPARTMENT OF REVENUE,)	
)	
Respondent.)	

This matter came before the Board of Tax Appeals (Board) for an informal hearing on February 28, 1991. W. Gerald Lynch, Attorney, appeared for Appellant, Rainier Mountaineering, Inc. (Rainier Mountaineering). Trish Adler, Administrative Law Judge, appeared for Respondent, Department of Revenue (Department).

This matter was originally heard by the Board's Senior Tax Referee. A Proposed Decision was issued on November 16, 1990, substantially in favor of Rainier Mountaineering. The Department filed exceptions to the Proposed Decision. Upon review of the Proposed Decision, this Board ordered the matter reheard before the entire Board. This Board heard the testimony, reviewed the evidence and considered the arguments made on behalf of both parties. This Board now makes its final decision.

ISSUE

The issue in this appeal involves the application of the leasehold excise tax, RCW 82.29A, to fees paid by Rainier Mountaineering to the National Park Service. Rainier Mountaineering argues that the fees which are paid for its "concession right" to operate a guide service and climbing school on Mount Rainier are exempt from the leasehold excise tax. The Department argues that the leasehold excise tax is measured by all payments to the National Park Service, including fees based upon receipts from Rainier Mountaineering's climbing and guiding activities.

FACTS

Rainier Mountaineering has operated a commercial guiding and climbing service in Mount Rainier National Park (Park) since 1968. The company originally operated under a subcontract with the major park concessionaire. In 1980, Rainier Mountaineering and the National Park Service entered into a formal contract agreement granting the company the exclusive

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right to operate a guide service and climbing school above the 8,000 foot level on Mount Rainier. Rainier Mountaineering, in return for payment of an escalating percentage of its gross receipts derived from climbing, guiding, and sales and rentals of equipment to its clients, received the right to: (1) operate snow and ice climbing schools, and guided summit and all other climbs within the Park at elevations greater than 8,000 feet above sea level; (2) conduct guided day hikes to the Paradise Ice Caves; and (3) sell and rent merchandise specifically for use in mountain climbing and hiking.

The rights acquired by Rainier Mountaineering are "exclusive", in the sense that no other commercial guiding service may exercise the rights granted above. The contract provides that Rainier Mountaineering shall have the "right of first refusal" to provide such services as requested by the superintendent of the Park. Only in the event that Rainier Mountaineering declines to provide such services will the National Park Service permit another commercial guide service to operate in the Park. As a practical matter, the National Park Service enforces this contract in such a manner that other commercial guide services are effectively precluded from conducting summit climbs or ice and snow climbing schools. During the years in question, the National Park Service has regularly issued citations to other commercial guide services operating climbs and hikes in the Park. However, Rainier Mountaineering shares the use of the climbing routes with non-commercially guided individual climbers and private climbing parties.

In addition to a percentage of gross receipts, Rainier Mountaineering also pays an amount for the use and occupancy of two structures. It occupies one floor of a four-story building (the "guide shack") located at Paradise on the 5,400 foot level which is used for instruction, equipment rental, and retail sales, as well as its administrative headquarters during the climbing season. It also occupies a small stone hut at Camp Muir at the 10,000 foot level. This hut is used to cook meals for its climbing and guiding clients. Rainier Mountaineering pays an annual fixed fee equivalent to the fair rental value of these properties, as determined by the National Park Service.¹

¹ The rental fee is based upon market value of the properties as determined by the replacement cost of the properties less applicable depreciation. The National Park Service hired a professional appraiser to estimate the market value of the two properties occupied by Rainier Mountaineering. The parties do not dispute this market value.

During the years in question, the rental fees for the two buildings have declined substantially as a percentage of the overall fees paid by Rainier Mountaineering. In 1984, 44.7 percent of the fees paid by Rainier Mountaineering consisted of rental fees. Fees based on guiding and climbing constituted 49 percent; and fees based on retail sales and rentals constituted 6 percent. By 1987, the rental fees had declined to 10.4 percent. Fees based on receipts from climbing and guiding had risen to 75 percent and fees based on retail sales and rentals had risen to 14.3 percent. The majority of Rainier Mountaineering's gross receipts come from climbing and guiding fees. Between 1984 and 1987, 80 to 90 percent of such receipts were from climbing and guiding fees.

The vast majority of Rainier Mountaineering's climbing and guiding revenues is derived from guided summit climbs. The company processes approximately 4,500 clients per year. Of that number, approximately 4,000 are attempting a summit climb (about 2,000 make it). An additional 4,000 to 5,000 individuals attempt a summit climb on their own. The typical summit attempt involves three days of activities. On the first day, the clients check in at Rainier Mountaineering's guide shack at Paradise. The clients may purchase or rent equipment needed for the summit attempt. The first day is spent on snowfields above Paradise instructing clients on the basics of mountaineering skills. The second day begins with a climb to Camp Muir at the 10,000 foot level. The clients and guides are housed in two wooden bunkhouses (owned by Rainier Mountaineering and not part of this appeal). At approximately 2 a.m. the next day, the guided parties leave Camp Muir for the summit. If successful, the parties reach the summit about 9 a.m., returning to Camp Muir by noon and Paradise by 4 p.m. Other than check-in and rental or purchase of equipment, the clients themselves do not use the buildings rented by Rainier Mountaineering.

The Department audited the books and records of Rainier Mountaineering for the period 1984-1987. The Department determined that the company was subject to the leasehold excise tax, and assessed the tax based on both the fees paid for the use and occupancy of the buildings, as well as the fees paid with respect to the climbing and guiding service and retail rental and sales. Rainier Mountaineering protested the assessment of the tax to the extent it was based upon payments in respect to its climbing and guiding service and retail rentals and sales. The Department's Interpretations and Appeals Division upheld the assessment. This appeal followed.

ANALYSIS AND CONCLUSIONS

This case requires us to reconcile an ambiguous statute with the history and purposes of the leasehold excise tax. It is a matter of some importance to both the Department and Rainier Mountaineering.

I.

The Statutory Pattern

The purpose of the leasehold excise tax is to "fairly compensate governmental units for services rendered to . . . lessees of publicly owned property." RCW 82.29A.010. Prior to the enactment of the leasehold excise tax, lessees of publicly owned property paid an ad valorem tax on their leasehold estates. See e.g., Pier 67, Inc. v. King County, 89 Wn.2d 379, 573 P.2d 2 (1977). The present tax was enacted after a six-year controversy over the manner of taxing benefits received by these lessees. Japan Line, Ltd. v. McCaffree, 88 Wn.2d 93, 558 P.2d 211 (1977).

The statute imposing the tax, RCW 82.29A.030(1), provides: "There is hereby levied and shall be collected a leasehold excise tax on the act or privilege of occupying or using publicly owned real or personal property through a leasehold interest . . .".

By its terms, the taxable event is limited to the use or possession of public property only through a leasehold interest. A "leasehold interest" means: "an interest in publicly owned real or personal property which exists by virtue of any lease, permit, license, or any other agreement, written or verbal, . . . granting possession and use, to a degree less than fee simple ownership . . .". RCW 82.29A.020(1).

The amount of the leasehold excise tax is measured by "contract rent", defined as: "the amount of consideration due as payment for a leasehold interest . . .". RCW 82.29A.020(2)(a). The term contract rent does not include payments made by the lessee for concession rights (if any) granted in conjunction with the lease. The statute provides:

Where the consideration conveyed for the leasehold interest is made in combination with payment for concession or other rights granted by the lessor, only that portion of such payment which represents consideration for the leasehold interest shall be part of contract rent.

RCW 82.29A.020(2)(a).

The statute, perhaps deliberately,² does not define the term "concession right". In MAC Amusement Co. v. Department of Revenue, 95 Wn.2d 963, 633 P.2d 68 (1981), the court held that a "concession right" is equivalent to a "franchise right", sometimes termed a "monopoly right". The taxpayer in that case had, among other rights, the exclusive right to operate all rides and games at the Seattle Center. The court distinguished a "concession right" from a leasehold interest on the basis of exclusivity, noting that a concession right could exist even where the exercise and value of the concession right was "inherently dependent" upon the use and possession of publicly owned property. Thus, the term "concession right", as construed in MAC Amusement, at a minimum denotes an exclusive right to operate a business upon government-owned property. Although a grant of exclusivity is not an essential element of a franchise (See 36 Am. Jur.

² Given the constraints of time and the English language, the legislature sometimes leaves certain issues to be resolved by administrative agencies. Hama Hama Co. v. Shorelines Hearing Board, 85 Wn.2d 441, 536 P.2d 157 (1975). This appeal concerns one of those issues left for administrative resolution. The Department, apparently waiving attorney/client privilege and executive privilege (RCW 42.17.310(1)(i)), has introduced a memorandum written to then Governor Evans by his legal counsel, Chi-doo "Skip" Li, contemporaneous with the passage of the leasehold excise tax, Laws of 1975, 2d Ex. Sess., ch. 61. In that memorandum, Mr. Li explained the genesis of the language excluding concession rights from the definition of contract rent as follows:

The language on page 3, lines 12-17 was one of the disputed areas between the House and Senate. The Senate had taken this language out but the House refused to back down and prevailed in the conference committee. It applies to leases such as in the Seattle Center Food Circus where concessionaires pay a percentage of gross income for their space, but the amount paid also includes other services and benefits such as utilities, security, and other costs of occupancy. It also applies to the situation of the Ramada Inn across from the airport in Spokane. Ramada pays to the Port of Spokane an extremely high rental for that property, and the reason is that they have an exclusive right to maintain a motel in the immediate vicinity of the airport. Under the language of this bill, the Dept. of Revenue must determine that portion of the rental which actually relates to the leasehold for taxation purposes. This question will undoubtedly be the subject of litigation. . . .

2d Franchises § 29 (1968)), such a right is frequently granted and could enhance the value of the franchise under the appropriate circumstances.

A franchise or concession right is distinguishable from a leasehold interest. A "leasehold interest", as defined in RCW 82.29A.020(1), is an interest in publicly owned real or personal property "granting possession and use, to a degree less than fee simple ownership . . .". A franchise or concession right, on the other hand, although frequently associated with the use or possession of government-owned property, does not necessarily embody a right to possess and use government-owned property. To the extent that a concession right and a leasehold interest are held by the same person, the concession right must therefore be in addition to rights which inhere in the leasehold interest. MAC Amusement, supra.

A franchise or concession right is also distinguishable from a license to use real property.

A license in respect of real property may be generally defined as a mere personal privilege to do acts upon the land of the licensor, of a temporary character, and revokable at the will of the latter unless, according to some authorities, expenditures contemplated by the licensor when the license was given have been made in the meantime. A franchise, however, is neither personal nor temporary, and it is not revokable at the mere will of the grantor, in the absence of a reservation of such right.

(Citations omitted.) 36 Am. Jur. 2d Franchises § 2 (1968).

A franchise is personal property, taxable as such. Commercial Electric Light and Power Co. v. Judson, 21 Wash. 49, 56 P. 829 (1899); United States v. Puget Sound Power and Light, 147 F.2d 953 (9th Circuit, 1944). It is not one of the types of intangible property which is generically exempt from taxation. See RCW 84.36.070. However, to the extent that a non-public utility franchise includes the right to occupy or use publicly owned property, such a right of use or occupancy is exempt from ad valorem taxation. RCW 84.36.451.

II.

Does Rainier Mountaineering possess a concession right?

A.

At the outset, the Department contends that the exclusion of concession rights from the measure of the leasehold

tax amounts to an exemption from taxation. Accordingly, the Department argues that we must strictly construe the statutes in favor of the tax, and not extend the exemption beyond the scope clearly intended by the legislature. Pacific Northwest Conference of Free Methodist Church of North America v. Barlow, 77 Wn.2d 487, 463 P.2d 626 (1969). In MAC Amusement, the court appeared to adopt the rule of strict construction in construing the leasehold excise tax.³ In dissent, Justice Dolliver pointed out that the issue before the court was not to construe the scope of an exemption, but rather the scope and extent of the tax itself.

We believe the issues before us primarily involve the scope and extent of the tax itself. Exclusion of payments for concession rights from the measure of the tax does not necessarily create a tax exemption for Rainier Mountaineering. Concession rights, to the extent that they can be considered as franchise rights, remain theoretically subject to ad valorem taxation if they have value. The question, then, is under what system of taxation--excise or ad valorem--shall these concession rights be taxed.⁴

Accordingly, we hold in the case before us that the statutory provisions of RCW 82.29A, to the extent they are ambiguous, are to be construed according to the usual rules of statutory construction in accordance with legislative intent and in light of the purposes of the tax.

B.

The next issue is whether Rainier Mountaineering has a "concession right" separate and apart from its right to occupy and use Park property. Rainier Mountaineering argues that the federal law authorizing the National Park Service to enter into agreements for commercial use of Park facilities is couched in terms of the grant of "concession rights". See Public Law, 89-249. The Department argues that contract "labeling" is not determinative of the nature of the rights granted. We agree with the Department. "Labeling" of an

³ The court mentioned the rules of strict statutory construction but nevertheless proceeded to construe the term "concession right" solely in light of the purpose for the tax. MAC Amusement, supra at 966-67.

⁴ The only true tax exemption created in the 1975 leasehold excise tax act was a property tax exemption for: "Any and all rights to occupy or use any [publicly owned] real or personal property . . .". Laws of 1975, 2d Ex. Sess., ch. 61, § 14, Codified as RCW 84.36.451.

agreement is not determinative of its content. The definition of "leasehold interest" set forth in RCW 82.29A.020(1) is broad and all encompassing. It includes an interest in publicly owned property stemming from any agreement, written or verbal, without regard to whether the agreement is labeled a lease, license, or permit.

As noted above, the court in MAC Amusement equated the term "concession right" to a monopoly franchise right. The court defined the term "franchise" to mean: "the right granted by the state or a municipality to an existing corporation or to an individual to do certain things which a corporation or individual otherwise cannot do . . .". (Citations omitted.) MAC Amusement, supra at 969.

In the present case, the agreement between Rainier Mountaineering and the National Park Service grants the company an exclusive right to conduct a commercial climbing and guide service above the 8,000 foot level in the Park. Rainier Mountaineering argues that this grant constitutes a "concession right" indistinguishable from the exclusive right to operate all rides and games at the Seattle Center involved in the MAC Amusement case.

The Department argues that agreement does not establish a concession right because the terms of the agreement do not empower Rainier Mountaineering to do anything that any other similarly situated service provider is precluded from doing. The Department argues:

Anyone who operates the same type of business as the taxpayer's could compete for this lease and occupy the premises. The lease permits other concessionaires operating prior to the lease to continue operations; it permits the Park Service to add land and lease to other concessionaires; and it permits the Park Service to authorize other concessionaires to offer services if Rainier Mountaineering chooses not to do so.

Respondent's Memorandum in Support of Petition for Rehearing, at 6.

We disagree with the Department. We find the agreement between Rainier Mountaineering and the National Park Service establishes a "concession right". Under the terms of the agreement, no other commercial guide service can operate above the 8,000 foot level in the Park. There are no other commercial guide services still in existence which operated prior to Rainier Mountaineering. The agreement does permit the National Park Service to authorize other guide services to operate on land added to the Park, but the probability of

actual implementation of this provision is purely speculative and remote at best. Finally, Rainier Mountaineering's "right of first refusal" does not destroy the exclusivity of Rainier Mountaineering's rights. It merely grants Rainier Mountaineering the right to determine if it wishes to remain the exclusive provider of climbing and guiding services in the Park.

In sum, the agreement between Rainier Mountaineering and the National Park Service, regardless of labeling, grants Rainier Mountaineering an exclusive right to operate a commercial climbing and guiding service in the Park. This is a right to perform an act which a corporation or individual otherwise cannot do. It is therefore a monopoly franchise right or "concession right" within the meaning of the term as used in RCW 82.29A.020. MAC Amusement, supra.

III.

To what extent, if any, are payments for Rainier Mountaineering's concession right excludable from the measure of the leasehold excise tax?

A.

What is the proper methodology to be employed in separating payments made for a concession right from payments made for a leasehold interest?

Our conclusion that Rainier Mountaineering possesses a "concession right" clarifies, but does not resolve, the basic dispute between the parties. This dispute centers on the issue of separating payments made in return for a concession right from payments made in return for a leasehold interest.

The parties approach this issue from opposite directions. Rainier Mountaineering would sort out the payment for its concession right by first determining the fair market rental of the leasehold property, which it considers to include only the guide shack and the cooking hut. Any excess payment would then be attributed to the value of the concession right. On the other hand, the Department would value the totality of the rights granted to Rainier Mountaineering, and then deduct the value of the concession right. The Department considers the leasehold property to include not only the buildings in question, but also the territory upon which Rainier Mountaineering conducts its climbing and guiding business; i.e., all land in the Park above the 8,000 foot level. The Department would place the burden on the lessee to show the value of the concession right. In the Department's view, in order to qualify for a deduction from "total consideration paid by the lessee", the payment must be

clearly based upon a concession, right, or privilege which is of value to the lessee and which does not inhere in or depend upon the quantity or value of goods or products sold on the leasehold property.

Either approach, properly applied, would be an acceptable method of separating payments for the leasehold interest from payments made for the concession right. In MAC Amusement, the trial court determined the rent subject to the leasehold excise tax to be the rent one might pay for similar property surrounding the Seattle Center. MAC Amusement, supra at 970. The court's approach is similar to that suggested by Rainier Mountaineering. The methodology at a minimum consists of two steps:

1. Define the property included in the leasehold interest, including all rights inherent therein.
2. Determine the fair market rental for the leasehold interest according to market rents for similarly valued property. This may require one to determine the fair market value of the leasehold interest by means of comparable sales, capitalization of income, or cost of construction of the improvements on the leasehold property. (See RCW 84.40.030.)

If the payment made by the lessee to the governmental lessor is in excess of fair market rental for similarly valued property, the excess can most likely be attributed to payment for a concession right. The burden of proof is on the taxpayer/lessee to establish that the concession right has value in addition to the value of the leasehold interest.

B.

What property rights are included in Rainier Mountaineering's leasehold interest?

Rainier Mountaineering's position assumes that its leasehold interest only extends to property in which it has the right of exclusive possession.⁵ If we were to accept

⁵ Rainier Mountaineering would view Washington's leasehold excise tax scheme to extend only to the property interests included in a typical possessory interest tax such as California's. The California tax extends only to property in which the lessee has a right of exclusive possession. Thus, the taxable possessory interest of a car rental business at an airport is limited to occupancy of counterspace and cannot be valued with reference to a possessory interest in the entire airport. Hertz Corp. v. County of San Diego, 275 Cal. Rptr. 307 (Cal. Ct. App. 4th Dist. 1990).

Rainier Mountaineering's assumption, the amount subject to tax would at most be the fixed payments made for use and occupancy of the buildings and the percentage payments attributable to sales and rentals of climbing equipment at the guide shack.

On the other hand, the Department contends that the property subject to the leasehold interest includes the entire mountain above the 8,000 foot level. According to the Department, Rainier Mountaineering has a license to use this property for commercial guiding and climbing. In the Department's view, a bare license to use governmental property falls within the definition of "leasehold interest" as set forth in RCW 82.29A.020(1).

The first step--defining the property included in the leasehold interest--is thus crucial. Resolving this question requires us to construe the scope and extent of the leasehold excise tax. The statute defining the term "leasehold interest", RCW 82.29A.020(1), is somewhat ambiguous. As defined in the statute, the term means "an interest in publicly owned real or personal property which exists by virtue of any lease, permit, license, or any other agreement, written or verbal, . . . granting possession and use, to a degree less than fee simple ownership . . .". (Emphasis supplied.)

The statutory phrase, "possession and use", above, could be read to require that the agreement must grant both possession and use in order to create a leasehold interest. Normally, a lease grants both possession and use. However, we are not free to construe the statute as a matter of first impression. The language in question has been construed in MAC Amusement. In that case, the court held that pedestrian thoroughfares intersecting the Seattle Center Fun Forest constituted a part of the leasehold interest, even though the lessee did not have exclusive possession of these thoroughfares. The court noted:

By definition, the taxable rent is that rent paid for a "leasehold interest," which is defined as not only including leases, but also permits and licenses. RCW 82.29A.020(1). The taxable rent additionally includes those sums paid for the use as well as the possession of public property. RCW 82.29A.030. From these provisions, it would appear the legislature intended to tax those areas the use of which was bargained for. Those provisions, by including uses and permits, give "leasehold" a meaning not ordinarily contemplated by that term.

MAC Amusement, supra at 970-71.

We have previously concluded that the agreement between Rainier Mountaineering and the National Park Service grants an exclusive right to use all territory in the Park above the 8,000 foot level for commercial guiding and climbing services. It is not a totally exclusive right to use the territory in the sense that the general public may also use the same territory, albeit for noncommercial, recreational purposes. Nevertheless, the public's use does not interfere with, nor necessarily detract from, the exclusive rights granted Rainier Mountaineering. In any event, the alpine territory comprises an area the use of which has been bargained for by Rainier Mountaineering.

We must therefore reject Rainier Mountaineering's argument that only the payments made for the occupancy of the buildings are subject to the leasehold excise tax. The property rights comprising the leasehold interest include not only the right to occupy and use the guide shack and cooking hut, but also the right to use the climbing routes for commercial climbing and guiding purposes.

C.

What is the fair market rental for Rainier Mountaineering's leasehold interest?

Having determined the nature and extent of the property rights included in the leasehold interest, the next step is to determine the fair market value of those rights. The Department's position assumes that there is no independent value to a concession right when the lessee's franchise right consists of nothing more than a right to sell goods and services on the leased premises. In most cases, this seems to be a safe assumption. For example, in the case of the general store within the boundaries of a national park, the value of the store premises, and hence its fair market rental, is fixed by the income which can be generated from sales at the store. The exclusive right to make sales at the store is inherent in the right of possession of the store premises. That value is presumably no different, except in unusual circumstances, from the value of similar store premises in the private sector. The same would be true of similar facilities, such as restaurants, resorts, and other recreational facilities of a type commonly operated in the private sector. One exception would be where, in addition to the leasehold interest in the premises, the governmental owner agrees to exclude all others from operating a competing business. MAC Amusement, supra. The grant of exclusivity would undoubtedly have value to the lessee when such a competing business would likely be operated on a financially feasible basis given the demand for the product or service in the market area under the government's jurisdiction.

Rainier Mountaineering has the burden of showing the value of its concession right. On the record before us, we believe that Rainier Mountaineering's exclusivity rights have some value. The testimony revealed that competing commercial guiding services from time to time attempt to operate in the Park. This fact alone indicates a demand for additional guiding and climbing services in the Park. Given the relatively low capitalization required to operate a guide service, limited financial resources are apparently not a significant barrier to entry in the commercial guiding and climbing business. But for the grant of exclusivity, it appears that Rainier Mountaineering would face significant competition, the result of which would undoubtedly reduce its market share and gross revenues, and hence the value of its right to use the climbing routes above 8,000 feet. Rainier Mountaineering has thus demonstrated that the concession right has value in addition to its leasehold interest.⁶

The question remains: how much value? On the record before us, we are unable to answer this question. Other than Rainier Mountaineering's evidence as to the fair market value of the buildings, there is no evidence in front of us which would permit us to determine with any degree of precision the fair market value of the entire leasehold interest or its fair market rental. It is not possible to determine the value of the underlying realty, given the lack of market evidence concerning sales of semi-dormant volcanoes. The value of Rainier Mountaineering's license to use the climbing routes is in large part dependent upon its exclusivity rights. Approaching the question from the Department's point of view, there is also no evidence by which we could determine the value of Rainier Mountaineering's exclusivity rights.

For the foregoing reasons, we conclude that Rainier Mountaineering has failed to establish the value of its

⁶ This conclusion requires us to reject the Department's argument to the extent it implies that payment for a concession right is never excludable when the concession right's value inheres in or depends upon the quantity or value of goods or products sold on the leasehold property. We do not believe the legislature intended this result. Most government "concession" or franchise rights involve to some extent the occupancy or use of government property. Indeed, the value of the exclusivity right examined in MAC Amusement was inherent in and depended upon the income which could be generated from sales of rides and games at the Seattle Center Fun Forest. According to the Department's own evidence, the legislature intended to exclude this concession right from the reach of the leasehold excise tax.

concession rights. It has therefore failed to demonstrate what portion of its payments to the National Park Service are in return for a concession right. On the other hand, the Department's assessment is based on the erroneous position that Rainier Mountaineering possesses no concession right of value in addition to its leasehold interest. This raises the possibility, if not the probability, that the assessment is based in part on payments for "concession rights". Accordingly, we must remand the matter to the Department for re-determination of the assessment.

DECISION

The assessment made by the Department against Rainier Mountaineering is vacated. The matter is remanded to the Department of Revenue for determination of the fair market rental for the leasehold interest held by Rainier Mountaineering and the amount of payment, if any, for its concession right.

DATED this 30th day of April, 1991.

BOARD OF TAX APPEALS

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Lucille Carlson

LUCILLE CARLSON, Member

A timely Petition for Reconsideration may be filed to this Final Decision within ten days pursuant to WAC 456-10-755.

ORIGINAL

NO. 42081-3-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

CRYSTAL MOUNTAIN, INC.,

Appellant,

vs.

STATE OF WASHINGTON
DEPARTMENT OF REVENUE,

Respondent.

DECLARATION OF SERVICE

FILED
APR 12 2012
BY: [illegible]
STATE OF WASHINGTON
COURT OF APPEALS
DIVISION TWO

I certify that on the date set forth below I served a copy of the foregoing *Appellant's Motion to Supplement the Record, Appellant's Motion for Acceptance of Overlength Reply Brief, Appellant's Reply Brief* and this *Declaration of Service* by United States Mail, postage prepaid, on the following counsel for the defendant, Department of Revenue:

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated this 12th day of April, 2012.


Patti Saiden, Legal Assistant