

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

Sears Roebuck and Company,  
Appellant,

v.

Douglas County Board of Equalization,  
Appellee.

Case No: 16C 0092

Decision and Order Reversing the  
Determination of the Douglas County Board  
of Equalization

**For the Appellant:**

Shaun M. James,  
Smith Gardner & Slusky

**For the Appellee:**

Jennifer D. Chrystal-Clark,  
Deputy Douglas County Attorney

This appeal was heard before Commissioners Steven Keetle and James Kuhn.

**I. THE SUBJECT PROPERTY**

The Subject Property is a commercial parcel located in Douglas County, Nebraska. The parcel is improved with a 123,484 square foot mall anchor department store. The property record card for the Subject Property, which also contains the legal description of the parcel, is found at Exhibit 2.

**II. PROCEDURAL HISTORY**

The Douglas County Assessor (the County Assessor) determined that the assessed value of the Subject Property was \$6,030,600 for tax year 2016.<sup>1</sup> Sears Roebuck and Company (the Taxpayer) protested this assessment to the Douglas County Board of Equalization (the County Board) and requested an assessed valuation of \$4,310,500.<sup>2</sup> The Douglas County Board determined that the taxable value of the Subject Property for tax year 2016 was \$6,030,600.<sup>3</sup>

The Taxpayer appealed the decision of the County Board to the Tax Equalization and Review Commission (Commission). Prior to the hearing, the parties exchanged exhibits and submitted a

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<sup>1</sup> Exhibit 1.

<sup>2</sup> Exhibit 2:14.

<sup>3</sup> Exhibit 1.

Pre-Hearing Conference Report, as ordered by the Commission. In the Pre-Hearing Conference Report, the parties stipulated to the receipt of exchanged exhibits 1 through 23. The Commission held a hearing on December 11, 2018.

### III. STANDARD OF REVIEW

The Commission’s review of the determination by a County Board of Equalization is de novo.<sup>4</sup> When the Commission considers an appeal of a decision of a County Board of Equalization, a presumption exists that the “board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action.”<sup>5</sup>

That presumption remains until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence adduced on appeal to the contrary. From that point forward, the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon all the evidence presented. The burden of showing such valuation to be unreasonable rests upon the taxpayer on appeal from the action of the board.<sup>6</sup>

The order, decision, determination or action appealed from shall be affirmed unless evidence is adduced establishing that the order, decision, determination, or action was unreasonable or arbitrary.<sup>7</sup> Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.<sup>8</sup>

The Taxpayer must introduce competent evidence of actual value of the Subject Property in order to successfully claim that the Subject Property is overvalued.<sup>9</sup> The County Board need not

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<sup>4</sup> See Neb. Rev. Stat. §77-5016(8) (Reissue 2018), *Brenner v. Banner Cty. Bd. of Equal.*, 276 Neb. 275, 286, 753 N.W.2d 802, 813 (2008). “When an appeal is conducted as a ‘trial de novo,’ as opposed to a ‘trial de novo on the record,’ it means literally a new hearing and not merely new findings of fact based upon a previous record. A trial de novo is conducted as though the earlier trial had not been held in the first place, and evidence is taken anew as such evidence is available at the time of the trial on appeal.” *Koch v. Cedar Cty. Freeholder Bd.*, 276 Neb. 1009, 1019 (2009).

<sup>5</sup> *Brenner v. Banner Cty. Bd. of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted).

<sup>6</sup> *Id.*

<sup>7</sup> Neb. Rev. Stat. §77-5016(9) (Reissue 2018).

<sup>8</sup> *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

<sup>9</sup> Cf. *Josten-Wilbert Vault Co. v. Board of Equalization for Buffalo County*, 179 Neb. 415, 138 N.W.2d 641 (1965) (determination of actual value); *Lincoln Tel. and Tel. Co. v. County Bd. of Equalization of York County*, 209 Neb. 465, 308 N.W.2d 515 (1981)(determination of equalized taxable value).

put on any evidence to support its valuation of the property at issue unless the taxpayer establishes the Board's valuation was unreasonable or arbitrary.<sup>10</sup>

In an appeal, the commission “may determine any question raised in the proceeding upon which an order, decision, determination, or action appealed from is based [and] may consider all questions necessary to determine taxable value of property as it hears an appeal or cross appeal.”<sup>11</sup> The commission may also “take notice of judicially cognizable facts and in addition may take notice of general, technical, or scientific facts within its specialized knowledge...,” and may “utilize its experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to it.”<sup>12</sup> The Commission’s Decision and Order shall include findings of fact and conclusions of law.<sup>13</sup>

## IV. LAW

### A. Valuation

Under Nebraska law,

Actual value is the most probable price expressed in terms of money that a property will bring if exposed for sale in the open market, or in an arm’s length transaction, between a willing buyer and a willing seller, both of whom are knowledgeable concerning all the uses to which the real property is adapted and for which the real property is capable of being used. In analyzing the uses and restrictions applicable to real property the analysis shall include a full description of the physical characteristics of the real property and an identification of the property rights valued.<sup>14</sup>

“Actual value may be determined using professionally accepted mass appraisal methods, including, but not limited to, the (1) sales comparison approach using the guidelines in section 77-1371, (2) income approach, and (3) cost approach.”<sup>15</sup> “Actual value, market value, and fair market value mean exactly the same thing.”<sup>16</sup> Taxable value is the percentage of actual value subject to taxation as directed by section 77-201 of Nebraska Statutes and has the same meaning as assessed value.<sup>17</sup> All real property in Nebraska subject to taxation shall be assessed as of

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<sup>10</sup> *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).

<sup>11</sup> Neb. Rev. Stat. §77-5016(8) (Reissue 2018).

<sup>12</sup> Neb. Rev. Stat. §77-5016(6) (Reissue 2018).

<sup>13</sup> Neb. Rev. Stat. §77-5018(1) (Reissue 2018).

<sup>14</sup> Neb. Rev. Stat. §77-112 (Reissue 2018).

<sup>15</sup> *Id.*

<sup>16</sup> *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).

<sup>17</sup> Neb. Rev. Stat. §77-131 (Reissue 2018).

January 1.<sup>18</sup> All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.<sup>19</sup>

## **B. Equalization**

“Taxes shall be levied by valuation uniformly and proportionately upon all real property and franchises as defined by the Legislature except as otherwise provided in or permitted by this Constitution.”<sup>20</sup> Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value.<sup>21</sup> The purpose of equalization of assessments is to bring the assessment of different parts of a taxing district to the same relative standard, so that no one of the parts may be compelled to pay a disproportionate part of the tax.<sup>22</sup> In order to determine a proportionate valuation, a comparison of the ratio of assessed value to market value for both the Subject Property and comparable property is required.<sup>23</sup> Uniformity requires that, whatever methods are used to determine actual or taxable value for various classifications of real property, the results be correlated to show uniformity.<sup>24</sup> Taxpayers are entitled to have their property assessed uniformly and proportionately, even though the result may be that it is assessed at less than the actual value.<sup>25</sup> The constitutional requirement of uniformity in taxation extends to both rate and valuation.<sup>26</sup> If taxable values are to be equalized it is necessary for a Taxpayer to establish by “clear and convincing evidence that valuation placed on his or her property when compared with valuations placed on similar property is grossly excessive and is the result of systematic will or failure of a plain legal duty, and not mere error of judgment [sic].”<sup>27</sup> There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity.<sup>28</sup>

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<sup>18</sup> See Neb. Rev. Stat. §77-1301(1) (Reissue 2018).

<sup>19</sup> Neb. Rev. Stat. §77-201(1) (Reissue 2018).

<sup>20</sup> *Neb. Const.*, Art. VIII, §1.

<sup>21</sup> *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).

<sup>22</sup> *Id.*; *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623, (1999).

<sup>23</sup> *Cabela's*.

<sup>24</sup> *Banner County v. State Board of Equalization*, 226 Neb. 236, 411 N.W.2d 35 (1987).

<sup>25</sup> *Equitable Life v. Lincoln County Bd. of Equal.*, 229 Neb. 60, 425 N.W.2d 320 (1988); *Fremont Plaza v. Dodge County Bd. of Equal.*, 225 Neb. 303, 405 N.W.2d 555 (1987).

<sup>26</sup> *First Nat. Bank & Trust Co. v. County of Lancaster*, 177 Neb. 390, 128 N.W.2d 820 (1964).

<sup>27</sup> *Newman v. County of Dawson*, 167 Neb. 666, 670, 94 N.W.2d 47, 49-50 (1959) (Citations omitted).

<sup>28</sup> *Id.* at 673, 94 N.W.2d at 50.

## V. ANALYSIS

There are seven mall anchor department stores located in Douglas County, Nebraska, and these mall anchor stores are located at either the Oak View Mall or the Westroads Mall. The Subject Property is located at the Oak View Mall. The Taxpayer alleged that the Subject Property is disproportionately valued in comparison to other mall anchor department store properties in the same shopping mall.<sup>29</sup>

The County Board offered the testimony of Micaela Larsen, a Real Estate Specialist with the Douglas County Assessor/Register of Deeds office, who discussed the assessment of the Subject Property and other mall anchor department stores in Douglas County. Ms. Larsen testified that three of the seven mall anchor department stores located in Douglas County own their own parking lot and that those three properties are located at Oak View Mall. According to Ms. Larsen's testimony, all mall anchor department stores in Douglas County were assessed using an income approach to value. When the County Assessor valued properties using the income approach, the total value of each parcel was determined based on the square footage of the building located on the parcel, and that value was then allocated between land and building, whether or not the parcel included a parking lot. Parcels that include a parking lot have a higher per square foot value when the total value is divided by the square footage of the building. The other mall anchor department stores in the Oak View Mall have higher per square foot values than the Subject Property when looking at the total valuation divided by the square footage of the building. Ms. Larsen stated that adjustments for a large difference in the ratio of land under the building versus land containing parking lot should be accounted for in the expenses or the capitalization rate.<sup>30</sup> She testified that any indication of this adjustment to account for different ratios of land versus building is not contained in the Property Record Files (PRF) offered into the record before the Commission, but rather is contained in the County's office file and not broken down in the PRF that can be obtained from the Assessor's office.

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<sup>29</sup> At the hearing, the Taxpayer did not allege or argue that the actual value of the Subject Property was incorrect. Therefore, the Commission will not review that issue, but rather consider all evidence in the light of the issue of the equalized value of the Subject Property.

<sup>30</sup> The income approach to value typically involves determining the net operating income (NOI) of the economic unit. The NOI can be divided by the capitalization rate to produce the approximate market value. See, e.g., Appraisal Institute, *The Appraisal of Real Estate* 439-462 (14th ed. 2013).

The exhibits presented to the Commission contain the PRFs for each of the seven mall anchor department stores located in Douglas County. Among these properties, only the Subject Property is assessed using the income approach.<sup>31</sup> Each of the other mall anchor department stores is assessed using a “reconciled” value based on a change in value by an administrative tribunal in prior years.<sup>32</sup> None of the reconciled values was determined based on a change in value by an administrative tribunal in the tax year at issue or the prior tax year. Three of these reconciled values were set in 2002 and have not changed since that time; one was set in 2002 and not changed until 2005 when the County Board further reduced it; one was set in 2003 and has not changed; and the other was set in 2014. The PRF for each of these properties with a reconciled value does not include any information about the basis for the values beyond the name of the entity that made the change. The PRFs do indicate differences between the properties, such as condition and quality ratings and add-ons such as escalators, elevators, asphalt paving, and loading docks, but these differences do not affect the assessed value. It is hard to compare these values, some of which have not changed for over a decade, or to determine the basis for these values where no explanation, rationale, or methodology for the determination of value is indicated on the PRF for any mall anchor store other than the Subject Property. There is no indication of how the land values were determined or why there is a difference between the per square foot land values between the Oak View Mall and Westroads Mall anchor department stores. The Nebraska Supreme Court has held that “[w]here a county assessor has not acted on his own information, and where it is arbitrarily determined without explanation of the methods used or the elements considered, there is no presumption that the valuation is correct, and such a valuation is not supported by competent evidence and is legally erroneous.”<sup>33</sup>

Left with this paucity of information regarding Douglas County’s assessments of mall anchor department stores for tax year 2016, the Commission must still analyze the Taxpayer’s claim. Although the PRFs do not demonstrate how the assessed values were determined for the other mall anchor department stores, they do show the total values and the total square footage of each of the mall anchor department stores for the 2016 assessment year. Using this information the

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<sup>31</sup> See E7 & E17.

<sup>32</sup> That is, a change made by the County Board or the Commission. See E9:5, E10:5, E 11:5. E18:5, E19:5, E20:5, E21:5, E22:5 and E23:5.

<sup>33</sup> *Leech, Inc. v. Bd. Of Equal.*, 176 Neb. 841, 846, 127 N.W.2d 917, 921 (1964).

Commission can review the total valuation on a per square foot basis using different criteria. This information for the Subject Property and the other properties for tax year 2016 shows the following information:<sup>34</sup>

Tax Year 2016	Total Value	Building Value	Land value	Total Value PSF of Building	Building Value PSF of Building	Land Value PSF of Land
Subject Property	\$6,030,600.00	\$5,548,100.00	\$482,500.00	\$48.84	\$44.93	\$7.49
Pennys Westroads	\$8,038,000.00	\$7,430,900.00	\$607,100.00	\$47.52	\$43.93	\$5.62
Younkers Westroads	\$8,522,000.00	\$7,852,000.00	\$670,000.00	\$49.69	\$45.79	\$5.25
Von Maur Westroads	\$8,000,000.00	\$7,578,700.00	\$421,300.00	\$44.89	\$42.53	\$5.62
Pennys Oak View	\$6,628,400.00	\$3,837,200.00	\$2,791,200.00	\$53.13	\$30.76	\$7.49
Younkers Oak View	\$7,914,200.00	\$4,671,100.00	\$3,243,100.00	\$52.49	\$30.98	\$7.49
Dillard's Oak View	\$11,025,700.00	\$6,467,900.00	\$4,557,800.00	\$53.21	\$31.22	\$7.49

The Nebraska Supreme Court has held that “To set the valuation of similarly situated property, i.e. comparables, at materially different levels, i.e., value per square foot, is by definition, unreasonable and arbitrary, under the Nebraska Constitution.”<sup>35</sup> The County Board’s argument is essentially that the per square foot value that matters for equalization purposes is the total value of the property divided by square feet of building area. Table 1 demonstrates that the per square foot value of all mall anchor department stores in Omaha based on the total value and square feet of building area range from \$44.89 to \$53.21 per square foot. The County Board argues that the per square foot value of the Subject Property, based on the total value divided by the square feet of building area, is \$48.84, which is in the middle of that range and that therefore its assessed value is equalized with other comparable properties.

<sup>34</sup> The information below was taken from Exhibit 5.

<sup>35</sup> *Scribante v. Douglas County Board of Equalization*, 8 Neb.App. 25, 39, 588 N.W.2d 190, 199 (1999).

The Taxpayer asserts that result of this methodology is that two dissimilar properties, one with a building and a parking lot and another with a comparable building but without a parking lot, would have the same assessed value per square foot. The Taxpayer argues that the per square foot value of the building component and the per square foot value of the land component of comparable properties must be viewed independently. The record before the Commission demonstrates that the land value per square foot at the Oak View Mall, where the Subject Property is Located, is \$7.49 per square foot, while the land value at the Westroads mall is \$5.62 or \$5.25 per square foot.<sup>36</sup> Generally, accepted mass appraisal techniques and the Nebraska Administrative Code hold that land must be valued as if vacant and available for development to its highest and best use.<sup>37</sup> While the basis of this determination is not evident from the record based on the reconciled values, the County Assessor has determined that there is a difference in value between the land located at the Oak View Mall and the Westroads Mall based on the different locations.

The remaining value for each of the mall anchor department store properties is attributable to the improvements on the land. The information available to the Commission from the PRFs demonstrate that the per square foot values for all mall anchor department stores range from \$30.76 to \$45.79. There is a pattern to those per square foot values, if the Subject Property is excluded, that indicates a lack of uniformity in assessed values. Properties located at the Oak View Mall have a per square foot value of the improvements ranging from \$30.76 to \$31.22. Properties located at the Westroads Mall have a per square foot value of improvements ranging from \$42.53 to \$45.53. Again, we do not know the basis of the County's determination, but the County Assessor has determined that there is a difference in value between the buildings located at the Oak View Mall and the Westroads Mall. The Subject Property is being assessed at the higher land value rate attributed to the Oak View Mall and the higher per square foot improvement value attributed to buildings located at the Westroads Mall. Looking, for example, at the Subject Property and the Pennys at the Oak View mall, which are the closest in size, excluding the land value which should be based on the value of the land as if vacant and available for development, the Subject Property is valued at \$44.93 per square foot and the

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<sup>36</sup> E5:1.

<sup>37</sup> See *Income Property Valuation*, Dearborn Financial Publishing, Inc., (1994) p. 213, and Title 350 Neb. Admin. Code, ch 50 §002.05A (7/17)



Pennys is valued at \$30.76 per square foot. This results in a difference in assessed value of over \$1.7 million dollars for buildings that are just under 1,300 square feet apart in size.

Uniformity requires that, whatever methods are used to determine actual or taxable value for various classifications of real property, the results be correlated to show uniformity.<sup>38</sup> Taxpayers are entitled to have their property assessed uniformly and proportionately, even though the result may be that it is assessed at less than the actual value.<sup>39</sup> The Subject Property is being assessed using the land value associated with the Oak View Mall but is the only property at the Oak View Mall being assessed at the higher per square foot improvement values otherwise associated with the Westroads Mall. The Commission finds and determines that the Subject Property is not being assessed uniformly and proportionally with other comparable properties located at the Oak View Mall. Based on the record before it, which contains extremely limited information on how the assessed values were derived, the Commission finds and determines that the improvements on the Subject Property should be assessed at \$30.98 per square foot: the median of the per square foot values of the other mall anchor department stores located at the Oak View Mall.<sup>40</sup> The assessed value of the Subject Property for tax year 2016 should therefore be \$4,308,034, broken down into \$3,825,534 for the improvements and \$482,500 for the land.

## VI. CONCLUSION

The Commission finds that there is competent evidence to rebut the presumption that the County Board faithfully performed its duties and had sufficient competent evidence to make its determination. The Commission also finds that there is clear and convincing evidence that the County Board's decision was arbitrary or unreasonable.

For all of the reasons set forth above, the decision of the County Board should be vacated and reversed.

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<sup>38</sup> *Banner County v. State Board of Equalization*, 226 Neb. 236, 411 N.W.2d 35 (1987).

<sup>39</sup> *Equitable Life v. Lincoln County Bd. of Equal.*, 229 Neb. 60, 425 N.W.2d 320 (1988); *Fremont Plaza v. Dodge County Bd. of Equal.*, 225 Neb. 303, 405 N.W.2d 555 (1987).

<sup>40</sup> The per square foot values for the other Oak View Mall anchor department stores are \$30.76, \$30.98, and \$31.22.

**VII. ORDER**

IT IS ORDERED THAT:

1. The decision of the Douglas County Board of Equalization determining the taxable value of the Subject Property for tax year 2016 is vacated and reversed.<sup>41</sup>
2. The taxable value of the Subject Property for tax year 2016 is:

Land:	\$ 482,500
<u>Improvements:</u>	<u>\$3,825,534</u>
Total:	\$4,308,034
3. This Decision and Order, if no appeal is timely filed, shall be certified to the Douglas County Treasurer and the Douglas County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Reissue 2018).
4. Any request for relief, by any party, which is not specifically provided for by this Decision and Order is denied.
5. Each party is to bear its own costs in this proceeding.
6. This Decision and Order shall only be applicable to tax year 2016.
7. This Decision and Order is effective for purposes of appeal on November 4, 2019.<sup>42</sup>

Signed and Sealed: November 4, 2019

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Steven A. Keetle, Commissioner

SEAL

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James D. Kuhn, Commissioner

<sup>41</sup> Taxable value, as determined by the County Board, was based upon the evidence at the time of the Protest proceeding. At the appeal hearing before the Commission, both parties were permitted to submit evidence that may not have been considered by the County Board of Equalization at the protest proceeding.

<sup>42</sup> Appeals from any decision of the Commission must satisfy the requirements of Neb. Rev. Stat. §77-5019 (Reissue 2018) and other provisions of Nebraska Statutes and Court Rules.