

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Kohl's Illinois, Inc.
a/k/a Kohl's Department Stores, Inc.,
Appellant,

v.

Sarpy County Board of Equalization,
Appellee.

Case Nos: 17C 0155 & 18C 0058

Amended Decision and Order Affirming the
Decisions of the Sarpy County Board of
Equalization

For the Appellant:

Christopher A. Stafford,
Fredrikson & Byron, P.A.

For the Appellee:

Andrea Gosnold-Parker,
Deputy Sarpy County Attorney

This Amended Order is being issued to correct an error in the issuance date.

These appeals were heard before Commissioners Robert W. Hotz and James D. Kuhn.

I. THE SUBJECT PROPERTY

The Subject Property is a commercial parcel located in Douglas County, Nebraska improved with an 88,974 square foot retail store and warehouse. The legal description and property record files (PRF) for the Subject Property are found at Exhibit 6 (2017) and Exhibit 7 (2018).

II. PROCEDURAL HISTORY

The Sarpy County Assessor (the County Assessor) determined that the assessed value of the Subject Property was \$6,500,000 for each tax year 2017 and 2018.¹ Kohl's Illinois, Inc. a/k/a Kohl's Department Stores, Inc. (Kohl's) protested this assessment to the Sarpy County Board of Equalization (the County Board) and requested an assessed valuation of \$3,360,000 for tax years 2017 and 2018.² The County Board determined that the taxable values of the Subject Property for tax years 2017 and 2018 were \$6,500,000.³

Kohl's appealed the decision of the County Board to the Tax Equalization and Review Commission (the Commission). The Commission held a hearing on September 17, 2019, with Commissioner Hotz presiding. Prior to the hearing, the parties exchanged exhibits and submitted

¹ Exhibits 1, 2.

² Exhibits 4:2, 5:2.

³ Exhibits 1, 2.

a Pre-Hearing Conference Report, as ordered by the Commission. The parties stipulated to the receipt of Exhibits 1 through 33.

III. STANDARD OF REVIEW

The Commission's review of the determination by a county board of equalization is de novo.⁴ When the Commission considers an appeal of a decision of a county board of equalization, a presumption exists that the board has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action.⁵

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.⁶

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.⁷ Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.⁸

Kohl's must introduce competent evidence of actual value of the Subject Property in order to successfully claim that the Subject Property is overvalued.⁹ The County Board need not put on any evidence to support its valuation of the property at issue unless Kohl's establishes that the County Board's valuation was unreasonable or arbitrary.¹⁰

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. The Commission may consider all questions necessary to determine taxable value of property as it hears an appeal or

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

⁵ *Brenner* at 283, 811 (Citations omitted).

⁶ *Id.*

⁷ Neb. Rev. Stat. § 77-5016(9) (Reissue 2018).

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

⁹ Cf. *Josten-Wilbert Vault Co. v. Bd. of Equal. 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 Equal. of York County*, 209 Neb. 465, 308 N.W.2d 515 (1981) (determination of equalized taxable value).

¹⁰ *Bottofv. Clay County Bd. of Equal.*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).

cross appeal.¹¹ 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.¹² The Commission's Decision and Order shall include findings of fact and conclusions of law.¹³

IV. APPLICABLE LAW

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.¹⁴

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 Neb. Rev. Stat. § 77-1371, (2) income approach, and (3) cost approach.¹⁵ Actual value, market value, and fair market value mean exactly the same thing.¹⁶ Taxable value is the percentage of actual value subject to taxation as directed by Neb. Rev. Stat. § 77-201 and has the same meaning as assessed value.¹⁷ All real property in Nebraska subject to taxation shall be assessed as of January 1.¹⁸ All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.¹⁹

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 the Nebraska Constitution.²⁰ Equalization is the process of ensuring that all taxable property is

¹¹ Neb. Rev. Stat. § 77-5016(8) (Reissue 2018).

¹² Neb. Rev. Stat. § 77-5016(6) (Reissue 2018).

¹³ Neb. Rev. Stat. § 77-5018(1) (Reissue 2018).

¹⁴ Neb. Rev. Stat. § 77-112 (Reissue 2018).

¹⁵ *Id.*

¹⁶ *Omaha Country Club* at 180, 829 (2002).

¹⁷ Neb. Rev. Stat. § 77-131 (Reissue 2018).

¹⁸ Neb. Rev. Stat. § 77-1301(1) (Reissue 2018).

¹⁹ Neb. Rev. Stat. § 77-201(1) (Reissue 2018).

²⁰ *Neb. Const.*, Art. VIII, § 1.

placed on the assessment rolls at a uniform percentage of its actual value.²¹ 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.²² There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity.²³

V. FINDINGS OF FACT

Jason Harvey and Timothy Ederer testified at the hearing. Harvey was employed by Kohl's as store manager of Papillion Place (i.e., the Subject Property), a position he held for the previous four years. He was employed as a store manager for Kohl's for a total of twelve years, including a store manager position in Council Bluffs, Iowa, which like the Subject Property is in the Omaha area. Ederer was employed by the County Assessor's Office as a commercial property appraiser, a position he held since 2013. He worked for the County Assessor's office since 2004. He held the State Assessor's Certificate, but he was not a licensed appraiser.

Business generally declined for the past five or six years of Harvey's employment with Kohl's, primarily due to competition with online retailers such as Amazon. Harvey estimated that sales declined by 7% in the five years prior to the hearing date. Harvey also testified that Kohl's is trending toward a smaller physical footprint for efficiency. The Subject Property is over 88,000 square feet, but Kohl's stores built in the five years before the hearing have been smaller, ranging from 35,000 to 64,000 square feet. The Subject Property had some roof leaks and the parking lot needed to be repaired. Harvey testified that, in his opinion, the store was aging and needed investment over the next few years.

The Subject Property is located in Papillion; it was built in 2006.²⁴ The assessment of the Subject Property for tax years 2017 and 2018 was based on the value indicated by the income approach, and the same methodology was used for both tax years.²⁵ The income approach calculates potential gross income based on market rental rates, deducts vacancy and collection losses and operating expenses at market rates to determine net operating income, and then

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

²² *Newman v. County of Dawson*, 167 Neb. 666, 670, 94 N.W.2d 47, 49-50 (1959) (Citations omitted).

²³ *Id.* at 673, 94 N.W.2d at 50.

²⁴ Exhibits 6, 7, testimony of Ederer.

²⁵ *Id.*

divides net operating income by a market-derived capitalization rate (sometimes referred to as a “cap rate”) to determine market value.²⁶

For both tax years, the assessments of the Subject Property and other commercial properties in Sarpy County were performed by Tax Valuation, Inc. (TVI), a contractor working on behalf of the County Assessor. In 2017, TVI prepared a report entitled “Mass Appraisal Valuation of Apartment and Retail Commercial Improved Parcels, Sarpy County, Nebraska” (the Report).²⁷ The Report includes a summary of retail data from Sarpy County, with Bellevue analyzed separately from Papillion, La Vista, and Gretna (the P/L/G group).²⁸ The primary difference is in vacancy rates, with Bellevue having higher vacancy rates than the P/L/G group. The Report lists the vacancy rate for buildings built after 1991 in the P/L/G group as 5%. The Report also indicates expenses of 15% for the P/L/G group for buildings built between 2001 and 2010. The market rental rate indicated by the Report for “Big Box Stores – 20K+ SF” is \$7.50 per square foot.

According to the Report, “there is no known data to estimate the appropriate capitalization rate for retail properties in Sarpy County.”²⁹ The capitalization rate listed in the Report and used in the income approach for the Subject Property was derived from a Benchmark Analysis and Capitalization Rate Study completed in 2015 for Douglas County.

[B]ecause Omaha and Sarpy County are part of the Omaha [metropolitan statistical area], this analysis is considered relevant to the valuation of the retail properties in Sarpy County. Based on this information, the appropriate cap rate for retail properties based on a triple net leases [*sic*], is estimated to be 9%. And retail buildings built before 1990 are assigned a capitalization rate of 10% (0.10) due to the increased risk associated with older improvements.³⁰

The Report includes a table of properties described as “discount stores,” including the Subject Property, which shows the market rates used in the income approaches for the properties.³¹ Details of the line item, area (in square feet), rental rate (dollars per square foot),

²⁶ See generally, The Appraisal Institute, *The Appraisal of Real Estate* 463-508 (14th ed. 2013).

²⁷ Exhibit 9.

²⁸ All subsequent data in this paragraph is from Exhibit 9:40.

²⁹ All data in this paragraph is from Exhibit 9:6.

³⁰ Exhibit 9:6.

³¹ Exhibit 9:41. We note that the Report lists the area of the Subject Property at 81,090 square feet; Exhibit 6:7 indicates that 81,090 square feet are retail store and 7,884 square feet are warehouse.

vacancy and collection loss percentage rate, expense percentage rate, capitalization percentage rate, and 2017 assessed value for properties built after 1996 are displayed in the table below:

Line	Area	Built	Rent (\$)	V&C %	Exp. %	Cap. %	Value (\$)
3	151,405	2010	8.50	5	15	9	11,800,000
5	81,090	2006	8.25	5	15	9	6,500,000
6	139,009	2006	8.25	5	15	9	10,300,000
7	198,438	2006	7.50	5	15	9	14,600,000
8	126,647	2003	7.50	10	15	9	8,000,000
9	190,789	2000	7.25	20	15	9	11,600,000
11	107,882	1996	6.50	5	15	10	10,500,000
12	97,649	2002	7.00	5	15	9	6,100,000

The Subject Property is listed in boldface. Ederer testified that mass appraisal is performed using a model that begins with benchmarks, which are then adjusted for any atypical circumstances that a particular property may have. Ederer did not have direct knowledge of how TVI assigned the rental rates used in the income approach calculations or why the rental rates sometimes varied from \$7.50 per square foot. Ederer believed that the adjustments were based on size, location, and quality of finish, which are factors that can affect rental rates. According to Ederer, the Subject Property has one of the premier locations within Sarpy County and it has a higher level of interior finish than most of the other big box retail stores in Sarpy County. On a per square foot basis, the Subject Property is assessed at \$73.06 per square foot.³²

In addition to the information in the Report, the County Board offered the property record files (PRFs) for three other big box retail stores in Sarpy County; two of which were not listed in the Report. Comparable #1 is a 56,256 square foot Hobby Lobby store, built in 2013, located south of the Subject Property.³³ Comparable #1 was chosen as an equalization comparable for the Subject Property because it is a relatively new property with a relatively high level of interior

³² \$6,500,000 assessed value ÷ 88,974 square feet = \$73.06 per square foot. See Exhibit 5:1-2. Our per-square-foot calculations are based on the exhibits in the record and they differ slightly from the Ederer's testimony due to rounding differences.

³³ Exhibit 12:3, testimony of Ederer.

finish, similar to the Subject Property in both respects. Comparable #1 was assessed using the income approach with the same vacancy and collection loss, expense, and capitalization rates as the Subject Property, although the rental rate was set at \$11 per square foot.³⁴ On a per square foot basis, Comparable #1 is assessed at \$99.54 per square foot.³⁵ Ederer testified that smaller properties typically have a greater per square foot value than larger properties due to the “economies of scale,” a term used to describe the base costs of any construction project and the tendency for construction costs to decrease as size increases.

Comparable #2 is a 127,876 square foot Cabela’s store, built in 2006.³⁶ Comparable #2 was selected as a comparable property to show the upper end of the larger retail stores in the county. According to Ederer, Comparable #2 has “the highest quality construction,” which Ederer considered “very similar” to the quality of construction of the Subject Property. The PRFs provided by the County Board show that all improvements of both the Subject Property and Comparable #2 are listed at average quality and average condition.³⁷ Comparable #2 was assessed using the income approach with the same vacancy and collection loss, expense rate, and capitalization rate as the Subject Property, but with a rental rate of \$9.50 per square foot. On a per square foot basis, Comparable #2 is assessed at \$85.24 per square foot.³⁸ Ederer testified that the per square foot value of Comparable #2 is higher than the Subject Property because Comparable #2 has “a lot higher degree of interior finish.”

Comparable #3 is a 67,107 square foot Shopko store, built in 1984. Comparable #3 was assessed using the income approach. The rental rate, vacancy and collection loss rate, expense rate, and capitalization rate used in the income approach are all different from the rates used for the Subject Property and Comparable #s 2 and 3. The details for Comparable #3’s income approach are listed in the Report as line item 10:

Line ³⁹	Area	Built	Rent (\$)	V&C %	Exp. %	Cap. %	Value (\$)
10	67,107	1984	7.00	20	15	10	3,200,000

³⁴ Exhibit 12:11.

³⁵ \$5,600,000 assessed value ÷ 56,256 = \$99.54 per square foot. See Exhibit 12:1-2.

³⁶ Exhibit 13:1, 13:5, testimony of Ederer.

³⁷ Exhibits 5:6, 13:3.

³⁸ \$10,900,000 assessed value ÷ 127,876 square feet = \$85.24 per square foot. See Exhibit 13:1-2.

³⁹ The information in this table is from Exhibit 9:41.

In Ederer’s opinion, Comparable #3 is not truly comparable to the Subject Property because it was built in 1984 (making it 22 years older) and it is located in Bellevue, an inferior market area to the Papillion market area where the Subject Property is located. Comparable #3 was sold in 2017 for \$4,610,471, or 144% of its assessed value, but the sale price might not be indicative of Comparable #3’s actual value due to the influence of a sale/leaseback arrangement.⁴⁰

VI. ANALYSIS

Kohl’s only contention at the hearing was that the Report indicates only one rental rate – \$7.50 per square foot – for big box stores in Sarpy County, but the income approach for the Subject Property utilized a rental rate of \$8.25 per square foot. Kohl’s asserted that, by relying on an assessment based on an income approach with a rental rate other than \$7.50 per square foot, the County Board failed to “show their work,” and thus, the resulting assessments were “arbitrary and capricious.”

We disagree. The evidentiary burden in an appeal of this kind is not on the County Board to defend the determination. The initial burden is on Kohl’s to produce competent evidence that the County Board failed to faithfully perform its official duties in making an assessment and act upon sufficient competent evidence to justify its action. If that burden is met, the reasonableness of the valuation fixed by the County Board becomes one of fact based upon all the evidence presented, but the burden of showing such valuation to be unreasonable still rests upon Kohl’s.⁴¹ If taxable values are to be equalized it is necessary for Kohl’s to establish by clear and convincing evidence that valuation placed on the Subject 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.⁴²

The evidence presented tends to show that the rental rates applied to the Subject Property and other similar properties in Sarpy County differ based on individual qualities of the properties such as size, age, location, and quality of finish. The Report could be read to indicate that a rental rate of \$7.50 per square foot should be applied to all big box stores in the county regardless of their individual qualities, but TVI only applied that rate to two of the eight stores built after 1996 listed in the report. The other six stores were assessed based on rental rates ranging from \$6.50

⁴⁰ Exhibit 15:1, testimony of Ederer.

⁴¹ *Brenner v. Banner County Bd. Of Equal.*, 276 Neb. 275, 286, 753 N.W.2d 802, 813 (2008).

⁴² *Newman v. County of Dawson*, 167 Neb. 666, 670, 94 N.W.2d 47, 49-50 (1959) (Citations omitted).

per square foot, for a property built in 1996, to \$8.50 per square foot, for a property built in 2010. The County Board's comparables had rental rates of \$11.00 per square foot for a property built in 2013, and \$9.50 per square foot for a property built in 2006 with an unusually high quality of interior finishes. The authors of the report, presumably employees of TVI, were not called as witnesses to explain the apparent discrepancy between the single rental rate listed on page 40 of the report and the range of rental rates actually used to assess the properties listed on page 41.

Generally, the rental rates used for the assessments decrease with the age and size of the buildings assessed. Of the three buildings built in 2006, two use a rental rate of \$8.25 per square foot. The third uses a rental rate of \$7.50 per square foot, but the building is 198,438 square feet. This property is not comparable to the Subject Property because it is more than twice the size of the Subject Property. As Ederer testified, smaller properties typically have a greater per square foot value than larger properties due to the economies of scale. The Report does not detail the level of finish or location of every property it lists, but the County Board's comparables show that rental rates increase with superior location and quality of finish; Ederer's testimony establishes that the Subject Property has a high level of finish and a superior location. Kohl's has not proven that the use of \$8.25 per square foot as the rental rate in the income approach for the Subject Property resulted in a value that was arbitrary or unreasonable.

VII. CONCLUSION

The Commission finds that there is not competent evidence to rebut the presumption that the County Board faithfully performed its duties and had sufficient competent evidence to make its determinations. The Commission also finds that there is not clear and convincing evidence that the County Board's decisions were arbitrary or unreasonable.

For all of the reasons set forth above, the Commission should affirm the Decisions of the Sarpy County Board of Equalization.

VIII. ORDER

IT IS ORDERED THAT:

1. The decisions of the Sarpy County Board of Equalization determining the taxable value of the Subject Property for tax years 2017 and 2018 are affirmed.
2. The taxable value of the Subject Property for both tax years 2017 and 2018 is \$6,500,000.

3. This Decision and Order, if no appeal is timely filed, shall be certified to the Sarpy County Treasurer and the Sarpy 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 years 2017 and 2018.
7. This Decision and Order is effective for purposes of appeal on **January 29, 2021**.⁴³

Signed and Sealed: **January 29, 2020**

Robert W. Hotz, Commissioner

SEAL

James D. Kuhn, Commissioner

⁴³ 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.