BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

JDHQ HOTELS LLC
APPELLANT,

V.

SARPY COUNTY BOARD OF EQUALIZATION,
APPELLEE.

CASE NOS: 18C 0068, 18C 0069, 19C 0183, 19C 0184, 19C 0185, 20C 0122, 20C 0123, 20C 0125, 21C 0246, 21C 0247, 21C 0248

DECISION AND ORDER REVERSING THE DECISIONS OF THE SARPY COUNTY BOARD OF EQUALIZATION

For the Appellant:
Howard Roston,
Fredrikson & Byron PA

For the Appellee:
Andrea Gosnold-Parker,
Deputy Sarpy County Attorney

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

I. THE SUBJECT PROPERTY

The Subject Properties are hotel properties, Embassy Suites and Courtyard by Marriott, and a convention center, La Vista Conference Center, located in Sarpy County, Nebraska. The legal description and Property Record Files (PRF) of the Subject Properties are found at Exhibits 39,[1] and 40.[2]

[1] For the Embassy Suites and LaVista Conference Center properties.
[2] For the Courtyard by Marriott property.

II. PROCEDURAL HISTORY

The Sarpy County Assessor determined the assessed values of the Subject Properties for each tax year at issue. JDHQ Hotels LLC (JDHQ) protested these assessments to the Sarpy County Board of Equalization (the County Board). The County Board determined the taxable values of the Subject Properties for each tax year at issue as shown below.

Property	Parcel ID	2018 Value	2019 Value	2020 Value	2021 Value
Embassy Suites	011591075	$23,200,000[3]	$23,478,000[4]	$24,545,000[5]	$19,227,780[6]
La Vista Conference Center	011591074	$23,400,000[7]	$26,349,000[8]	$23,970,000[9]	$18,456,900[10]
Courtyard by Marriott	011591073		$18,180,000[11]	$16,110,000[12]	$12,269,870[13]

JDHQ appealed the decisions of the County Board to the Tax Equalization and Review Commission (the Commission). The Commission held hearings on January 10, 2022 and May 27, 2022. Prior to the hearing, the parties exchanged exhibits and submitted a pre-hearing conference Report, as ordered by the Commission. Exhibits 1-11 and 37-127 were admitted into evidence. Exhibits 12-36 were not offered, and therefore not admitted, into evidence.

[3] Exhibit 1.
[4] Exhibit 3.
[5] Exhibit 8.
[6] Exhibit 11.
[7] Exhibit 2.
[8] Exhibit 4.
[9] Exhibit 7.
[10] Exhibit 10.
[11] Exhibit 5.
[12] Exhibit 6.
[13] Exhibit 9.

III. STANDARD OF REVIEW

The Commission's review of the County Board's determination is de novo.[14] When the Commission considers an appeal of a decision by 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.[15]

> 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.[16]

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.[17] Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.[18]

The Taxpayer must introduce competent evidence of actual value of the Subject Property to successfully claim that the Subject Property is

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[14] See 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).

[15] *Brenner v. Banner County Bd. of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (citations omitted).

[16] *Id.*

[17] Neb. Rev. Stat. § 77-5016(9) (Reissue 2018).

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

overvalued.[19] The County Board need not put on any evidence to support its valuation of the property at issue unless the Taxpayer establishes that the County Board's valuation was unreasonable or arbitrary.[20]

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 cross appeal.[21] The Commission may take notice of judicially cognizable facts, 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.[22] The Commission's Decision and Order shall include findings of fact and conclusions of law.[23]

IV. RELEVANT 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

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[19] 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).
[20] *Bottorf v. Clay County Bd. of Equal.,* 7 Neb. App. 162, 580 N.W.2d 561 (1998).
[21] Neb. Rev. Stat. § 77-5016(8) (Reissue 2018).
[22] Neb. Rev. Stat. § 77-5016(6) (Reissue 2018).
[23] Neb. Rev. Stat. § 77-5018(1) (Reissue 2018).

> the real property and an identification of the property rights valued.[24]

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.[25] Nebraska courts have held that actual value, market value, and fair market value mean exactly the same thing.[26] 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.[27] All real property in Nebraska subject to taxation shall be assessed as of January 1.[28] All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.[29]

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.[30] Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value.[31] 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.[32] Uniformity requires that whatever methods are used to determine actual or taxable value for various classifications of real property that the results be correlated to show

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[24] Neb. Rev. Stat. § 77-112 (Reissue 2018).
[25] Neb. Rev. Stat. § 77-112 (Reissue 2018).
[26] *Omaha Country Club v. Douglas County Bd. of Equal.,* 11 Neb. App. 171, 180, 645 N.W.2d 821, 829 (2002).
[27] Neb. Rev. Stat. § 77-131 (Reissue 2018).
[28] See Neb. Rev. Stat. § 77-1301(1) (Reissue 2018).
[29] Neb. Rev. Stat. § 77-201(1) (Reissue 2018).
[30] Neb. Const., art. VIII, § 1.
[31] *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).
[32] *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991); *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb. App. 582, 597 N.W.2d 623 (1999).

uniformity.[33] 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.[34] If taxable values are to be equalized it is necessary for a Taxpayer to establish by clear and convincing evidence that the valuation placed on the property when compared with valuations placed on other similar properties is grossly excessive and is the result of systematic exercise of intentional will or failure of plain legal duty, and not mere errors of judgment.[35] There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity.[36]

V. SUMMARY OF TESTIMONY

A. Testimony of Robert Becker

Becker is an appraiser and principal of R.D. Becker Valuation LLC. He held a Certified General Appraiser license (temporary, Nebraska) limited to valuing the Subject Properties. He also holds the MAI designation from the Appraisal Institute and the ASA designation from the American Society of Appraisers.[37] He has been an appraiser since 2004 and has appraised at least 300 hotel properties.

Becker noted several unique challenges in valuing hotel properties like the Subject Properties, including separating the business value, the value of a trained workforce, the value of furniture, fixtures, and equipment (FF&E), and the value added by the hotel "flag" (i.e., Embassy Suites, Courtyard by Marriott, etc.), from the value of the real estate itself.[38]

Becker testified to his familiarity with the "Rushmore" approach to valuing hotel properties, but he did not use this approach due to his

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[33] *Banner County v. State Bd. of Equal.*, 226 Neb. 236, 411 N.W.2d 35 (1987).
[34] *Equitable Life v. Lincoln County Bd. of Equal.*, 229 Neb. 60, 425 N.W.2d 320 (1988); *Fremont Plaza v. Dodge Cty. Bd. of Equal.*, 225 Neb. 303, 405 N.W.2d 555 (1987).
[35] *Newman v. County of Dawson,* 167 Neb. 666, 670, 94 N.W.2d 47, 49-50 (1959) (citations omitted).
[36] *Id.* at 673, 94 N.W.2d at 50.
[37] Exhibit 37:119-121.
[38] See, Exhibits 77, 78.

belief that the Rushmore approach does not sufficiently remove business value from the real property values as the Rushmore approach only requires the removal of franchise fees and management fees but does not address workforce and superior management value.

1. Becker's Embassy Suites and LaVista Conference Center Appraisal

Becker completed an appraisal for the Embassy Suites and LaVista Conference Center Properties that purports to comply with the Uniform Standards of Professional Appraisal Practice (USPAP).[39] He inspected these properties on December 22, 2020, including investigating the financial documents as well as improvements and deficiencies on the properties. Becker then completed a market analysis in the Omaha area and the South Omaha submarket and analysis of the highest and best use of the properties.[40]

Becker testified when the COVID-19 pandemic and shutdowns occurred, many hotels had to close their doors entirely, while others that remained open did so with significant reductions in staffing.[41] Even after the shutdowns ended, many hotels had to operate with reduced staff to mitigate expenses. Becker stated a significant number of defaults during the pandemic were related to the hotel industry. Becker stated the Subject Properties were shut down voluntarily for approximately one month, with approximately 240 employees laid off. Additionally, he stated convention center properties were disproportionately affected, due to their need for significant business travel as their main revenue driver. For the Omaha area market, Becker stated a four-year recovery period would be required for the

[39] Exhibit 37:123.
[40] Exhibit 37:31-81.
[41] Exhibit 37:48-56.

hotel industry to return to 2019 levels[42] and noted a 50% decline in revenue per available room (RevPAR) in 2020.[43]

In performing an appraisal of the Embassy Suites & LaVista Conference Center properties, Becker used a cost approach and an income approach. Becker testified a sales comparison approach was excluded because he believed it was an unreliable indicator of value due to the difficulties in extracting the value of intangibles from the reported sales price of similar properties.

a. Becker's Cost Approach

For Becker's cost approach analysis, he began with a valuation of the land component of the properties. Becker examined five comparable land sales, with adjustments made to account for parcel size, and consideration given to factors such as conditions of sale, market conditions, and location.[44] Becker opined the land component of the Embassy Suites and LaVista Conference Center parcel to be $3,200,000 (rounded).[45]

For the improvements, Becker relied upon the Marshall Valuation Services Cost Provider (MVS) for the base costs and appropriate multipliers, such as a local multiplier. Becker subdivided the Embassy Suites and LaVista Conference Center property into three sections for analysis, based upon the variance in ceiling heights between the Embassy Suites first floor and second through seventh floors, and analyzed the Conference Center separately.[46] Using the MVS data,

[42] Exhibit 37:57
[43] Exhibit 37:63.
[44] Exhibit 37:86-91.
[45] Exhibit 37:91.
[46] Exhibit 37:93.

Becker calculated the replacement cost-new (RCN) for each tax year as follows:

Tax Year	Embassy Suites Section 1	Embassy Suites Section 2	Embassy Suites Total[47]	LaVista Conference Center	Total RCN
2018	$11,433,606	$25,671,396	$37,105,002	$14,502,926	$51,607,928[48]
2019	$11,693,584	$26,418,438	$38,112,022	$14,921,938	$53,033,960[49]
2020	$11,886,197	$26,971,927	$38,858,124	$15,234,563	$54,092,687[50]
2021	$12,334,184	$28,259,270	$40,593,454	$15,959,735	$56,553,189[51]

After developing the RCN, Becker used MVS as the basis for physical depreciation based upon a life-expectancy of 50 years for hotel properties. With an effective age of 10 years as of January 1, 2018, a 20% physical depreciation was applicable for 2018, 22% in 2019, 24% in 2020, and 26% in 2021.[52] Becker also assigned a functional obsolescence factor of 10% based upon changes in construction technology and customer preferences since the Subject Properties were built.[53] Becker also examined external obsolescence, but found it would only be applicable for tax year 2021 due to the economic shortfall associated with the COVID-19 pandemic. Becker found a $20,000,000 external obsolescence factor for tax year 2021.[54] Ultimately, Becker's cost approach analysis resulted in opinions of value for the Embassy

[47] Calculated by adding Sections 1 and 2.
[48] Exhibit 37:93.
[49] Exhibit 37:94.
[50] Exhibit 37:95.
[51] Exhibit 37:96.
[52] Exhibit 37:97.
[53] *Id.*
[54] *Id.*

Suites and LaVista Conference Center properties at $40,000,000 for tax years 2018, 2019 and 2020, and $21,000,000 for tax year 2021.[55]

b. Becker's Income Approach

Becker also developed an income approach analysis. His initial step following the market analysis is to determine the historical operating statements for the Subject Properties. Becker reconstructed an income/expense statement covering years 2015-2020.[56] Becker examined sources of revenue such as the rooms themselves, food and beverage revenue, miscellaneous income, occupancy rates, operating expenses, fixed expenses, replacement reserves, and income attributable to personal property and intangibles.[57] Using these figures, Becker calculated net operating incomes (NOIs) for each of the tax years at issue.

Becker next calculated an appropriate capitalization rate based upon a market analysis of Nebraska and regional data to determine a reconciled unloaded capitalization rate.[58] The effective tax rate was then loaded into the capitalization rate to produce the applicable capitalization rates.[59] Using these figures, Becker calculated values for the Subject Properties at $40,000,000 for tax year 2019; $37,000.000 for tax year 2019; $38,000,000 for tax year 2020; and $18,000,000 for tax year 2021.[60]

c. Becker's Reconciliation of Values

Becker reconciled his cost approach and income approach analyses, giving the greatest weight to the income approach, which he believes "is the only approach that effectively removes business value, FF&E. and accurately supports obsolescence currently in the market."[61]

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[55] Exhibit 37:98.
[56] Exhibit 37:100.
[57] Exhibit 37:101-109.
[58] Exhibit 37:111-117.
[59] Exhibit 37:117-118.
[60] Exhibit 37:118.
[61] Exhibit 37:120.

Becker's reconciliation resulted in final opinions of value for the Embassy Suites and LaVista Conference Center properties at $40,000,000 for tax year 2018; $37,000,000 for tax year 2019; $38,000,000 for tax year 2020; and $18,000,000 for tax year 2021.[62]

2. Becker's Courtyard by Marriot Appraisal

Becker also completed an appraisal report for the Courtyard by Marriot property compliant with the USPAP standards.[63] Becker's on-site inspection and market analysis are substantially similar to that performed for the Embassy Suites and LaVista Conference Center properties. Becker again examined five land sales for his site analysis, resulting in a land site value of $1,100,000 for the Courtyard property for all tax years at issue.[64]

a. Becker's Cost Approach

Becker again utilized the MVS to determine RCNs for the Courtyard by Marriott property, with an RCN of $18,499,542 for 2018,[65] $19,120,597 for 2019,[66] $19,503,598 for 2020,[67] and $20,086,249 for 2021.[68] Becker determined the depreciation for the Courtyard by Marriott property in a similar manner to that of the Embassy Suites and LaVista Conference Center properties.[69] The valuation reached by the cost approach resulted in values of $15,000,000 for tax year 2018,

[62] Exhibit 37:122.
[63] Exhibit 38:119.
[64] Exhibit 38:81-87.
[65] Exhibit 38:89.
[66] Exhibit 38:90.
[67] Exhibit 38:91.
[68] Exhibit 38:92.
[69] Exhibit 38:93.

$14,000,000 for tax year 2019, $13,000,000 for tax year 2020, and $9,000,000 for tax year 2021.[70]

b. Becker's Income Approach

Becker's income approach was substantially similar to that used to value the Embassy Suites and LaVista Conference Center properties. Becker determined a gross potential room revenue,[71] food and beverage revenue,[72] and miscellaneous income.[73] He also determined fixed expenses and reserves for replacement,[74] income attributable to FF&E,[75] and income attributable to intangibles.[76] Becker determined a capitalization rate using a similar methodology to his Embassy Suites and LaVista Conference Center appraisal.[77]

Becker's income approach resulted in values of $15,000,000 for tax year 2018, $13,000,000 for tax year 2019, $12,000,000 for tax year 2020, and $8,000,000 for tax year 2021.

c. Becker's Reconciliation of Values

In reconciling these approaches, Becker again gave greater weight to his income approach, asserting that it "is the only approach that effectively removes business value, FF&E, and accurately supports obsolescence currently in the market."[78] Becker provided a value opinion for the Courtyard by Marriott property of $15,000,000 for tax

[70] Exhibit 38:94.
[71] Exhibit 38: 97.
[72] Exhibit 38: 98.
[73] Exhibit 38:99.
[74] Exhibit 38:102.
[75] Exhibit 38:103-04.
[76] Exhibit 38:105.
[77] Exhibit 38:107-114.
[78] Exhibit 38:116.

year 2018, $13,000,000 for tax year 2019, $12,000,000 for tax year 2020, and $8,000,000 for tax year 2021.

B. Testimony of Timothy Ederer

Ederer was a Commercial Real Estate Appraiser with the Sarpy County Assessor's Office since 2013.[79] He held the State Assessor's Certificate but was not a licensed appraiser. Ederer prepared a summary report briefly describing the Subject Properties.[80] The report indicated the Subject Properties were unique within Valuation Group 21 (VG21), which includes hotel/motel properties in Sarpy County. Ederer stated the uniqueness of the Subject Properties within VG21 was because it was the only dual flag with a convention center, and the Embassy Suites property being the only full-service hotel in the county. Ederer stated this uniqueness does present challenges in equalizing the Subject Properties as there are no other direct comparables within Sarpy County.

Ederer testified that due to these circumstances, a fee appraisal for the Subject Properties was appropriate. Ederer did not participate in the outside fee appraisal analysis.

C. Testimony of Sara Olson

Olson was the Director of HVS, a hospitality consulting and evaluation firm. She is a Certified General Appraiser. Olson holds the MAI designation from the Appraisal Institute and has valued over thirty hotels in the Omaha market. Olson completed appraisals for the Courtyard by Marriott and the Embassy Suites and LaVista Conference Center properties. Olson testified that for income-

[79] See generally Exhibit 113.
[80] Exhibit 88.

producing properties, such as the Subject Properties, the income-capitalization approach is considered the most applicable.

1. Olson's Courtyard by Marriott Appraisal

Olson completed an appraisal for the Courtyard by Marriott property for tax years 2019, 2020, and 2021. Olson included a market area analysis.[81] Olson also performed an on-site inspection for the Subject Properties.

Olson's income capitalization analysis considered the historical operating statements of the Subject Properties, as well as information from other hotel properties in the market, market trend analyses and surveys, and other information. Olson followed the Rushmore income-approach valuation methodology. Olson indicated the Rushmore approach allows for a deduction of business value. The Rushmore approach used a capital expenditure deduction to account for renovations needed under a property improvement plan to maintain the hotel branding for the Subject Property.[82] FF&E was accounted for by examining the value reported by JDHQ on its personal property tax reports.[83] Olson explained that some portion of the total FF&E value was also accounted for under the capital expenditure for improvements under the property improvement plan (PIP). Olson conceded that the PIP encompasses more than what would be considered FF&E, as the

[81] Exhibit 114:39-56.
[82] Exhibit 114:97.
[83] Exhibit 114:97.

plan also includes items to improve the real property component, such as lighting, paint, re-grouting, etc.[84]

Olson's capitalization rates were derived from national investor surveys.[85] These rates were then checked against recent sales of similar hotel properties.[86]

According to Olson, the primary difference between the business enterprise approach used by Becker and the Rushmore approach used by Olson comes down to how the business value is deducted. In the Rushmore approach, business value is deducted with the franchise and management fees. Whereas the business enterprise approach also deducts working capital, workforce, and additional business fees. Olson stated the additional deductions in the business enterprise model does not fit the reality of hotel management because things such as marketing costs are ongoing and should be better accounted for as a business expense.

Olson reviewed historical operating data for 2015-2020 for the Subject Properties as well as comparable properties from HVS's database to create a 'stabilized' net operating income (NOI) which is then capitalized to determine a property's value.[87] Olson determined the applicable capitalization rate to be 8.5% for tax years 2019-2021.[88] Using these figures, Olson provided an opinion of value for the Courtyard by Marriott Property at $15,000,000 for tax year 2019,[89] $18,900,000 for tax year 2020,[90] and $13,800,000 for tax year 2021.[91] Olson noted the valuation for tax year 2021 was significantly affected

[84] See Exhibit 114:37; Exhibit 116:41.
[85] Exhibit 116:99.
[86] Exhibit 116:100.
[87] Exhibit 114:83-101.
[88] Exhibit 114:97.
[89] Exhibit 114:97.
[90] Exhibit 114:98.
[91] Exhibit 114:105.

by the COVID-19 pandemic as the Courtyard by Marriott Property suffered reduced occupancy.[92]

While Olson concedes the income approach valuation was heavily relied upon, a sales comparison approach analyzed several sales of hotel properties in the region, as well as sales of other Courtyard by Marriott properties nationally.[93] While a cost approach was considered, an analysis using that approach was not performed based upon Olson's opinion that it would be difficult to calculate the proper depreciation, making any opinion of value too speculative to rely upon. Upon reconciliation, Olson's opinions of value matched those of the income-approach valuations.[94]

2. Olson's Embassy Suites and LaVista Conference Center Appraisal

Olson's appraisal of the Embassy Suites and LaVista Conference Center properties followed the same process as her Courtyard by Marriott appraisal. Like with Becker's appraisal, the Embassy Suites and Conference Center properties were valued as a single economic unit. Olson's report notes the FF&E for this property was nearing the end of its economic life.[95] Olson selected a capitalization rate of 7.5% for the Embassy Suites and LaVista Conference Center properties property for all four years.[96]

Once the stabilized NOIs were determined, a capitalization rate of 7.5% was used for tax years 2018-2021.[97] Olson's opinions of value were $45,500,000 for tax year 2018,[98] $49,800,000 for tax year 2019,[99]

[92] Exhibit 114:101.
[93] Exhibit 114:108-110.
[94] Exhibit 114:111.
[95] Exhibit 116:41.
[96] Exhibit 116:101.
[97] Exhibit 116:98-101.
[98] Exhibit 116:101.
[99] Exhibit 116:102.

$50,300,000 for tax year 2020,[100] and $37,900,000 for tax year 2021, which included the impact from the COVID-19 pandemic.[101]

D. Testimony of Bryan Younge

Younge is a Certified General appraiser holding the MAI designation from the Appraisal Institute. He testified he has conducted over five thousand appraisals, including over one hundred Nebraska hotel properties. Younge prepared two rebuttal reports in reply to the appraisal reports prepared by Olson.

Younge disagreed with Olson's effective age and economic life of the FF&E.[102] Younge stated the value of the FF&E was "strikingly low," finding the contributory value in Olson's appraisal amounted to "$1,264 per room and 0.6% of the total value"[103] for tax year 2020. Younge indicated this value was not in line with HVS's published data for FF&E contributory value for newly built hotel properties.[104]

Younge also took issue with Olson's use of JDHQ's personal property tax return to determine the value of the FF&E. Younge opines that the use of the net book value which is reported on the personal property return does not equate to market value, as the two values have differing components which make up the values, as well as differing depreciation schedules. Younge concluded Olson's value for FF&E did not adequately account for the contributory value of those items to the overall value of the Subject Properties. Younge also noted the property improvement plan (PIP) could also include more than personal property replacements and is not a reliable measure of personal property contributory value.

Younge also questioned Olson's use of a 25% adjustment for the COVID-19 pandemic as he felt that value did not account for the severity of the pandemic upon the hotel industry as a whole and for the

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[100] Exhibit 116:103.
[101] Exhibit 116:110.
[102] Exhibit 119:4.
[103] Exhibit 114:4.
[104] See Exhibit 114:5.

Subject Properties in particular based upon historical group and corporate customer demand.[105]

Younge stated that intangible value contains many elements which must be examined to determine the proper value. These could include an analysis of the management contract or franchise agreement, goodwill, working capital and startup costs, workforce value, and intellectual property.[106] Younge disagreed with Olson's conclusion that the value attributable to these intangibles were removed with the assumed expense of a management fee and franchise fee during her appraisal.[107] Younge ultimately opined Olson's appraisals did not reach the market value of the Subject Properties.

Younge's rebuttal report for the Courtyard by Marriott property reflected similar concerns as his report for the Embassy Suites and LaVista Conference Center property.

VI. ANALYSIS

A. The presumption in favor of the County Board decisions have been rebutted by competent evidence.

The Commission first must determine whether the presumption of correctness was overcome by competent evidence.[108] If the taxpayer successfully rebuts the presumption, the Commission then examines whether the taxpayer has shown by clear and convincing evidence that the County Board's valuation was arbitrary or unreasonable.[109]

When an independent appraiser using professionally approved methods of mass appraisal certifies that an appraisal was performed according to professional standards, the appraisal is considered competent evidence under Nebraska law.[110] When the Commission

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[105] Exhibit 119:6-7.
[106] Exhibit 119:8.
[107] See Exhibit 126:2.
[108] See *Betty L. Green Living Trust v. Morrill Cty. Bd. of Equal.*, 299 Neb. 933, 944, 911 N.W.2d 551, 559 (2018).
[109] *Id.*
[110] *Cain v. Custer Cty. Bd. of Equal.*, 298 Neb. 834, 850, 906 N.W.2d 285, 298 (2018).

considers whether an appellant has successfully overcome the presumption that a county board of equalization has faithfully performed its duties, it assumes that competent evidence—all admissible evidence that tends to establish a fact in issue—is true.[111]

Here, the Appellant has submitted Becker's appraisals, which purport to be compliant with the Uniform Standards of Professional Appraisal Practice (USPAP).[112] As these appraisals are considered competent evidence, the Commission finds JDHQ has successfully overcome the presumption of correctness in favor of the County Board.

B. Appellant has demonstrated by clear and convincing evidence the County Board's determinations were arbitrary or unreasonable.

Even though the presumption in favor of the County Board has been rebutted, JDHQ still must demonstrate by clear and convincing evidence that the County Board's decision was arbitrary or unreasonable. "Clear and convincing evidence means that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved."[113] "A decision is arbitrary when it is made in disregard of the facts or circumstances and without some basis which would lead a reasonable person to the same conclusion."[114] "A decision is arbitrary when it is made in disregard of the facts or circumstances and without some basis which would lead a reasonable person to the same conclusion."[115]

Notably, the County Board did not present evidence and argument to defend its assessment. Instead, it presented evidence and argument

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[111] 442 Neb. Admin. Code, ch. 5, § 0021; see *Knaub v. Knaub*, 245 Neb. 172, 176-77, 512 N.W.2d 124, 127 (1994).
[112] Exhibit 37:123; Exhibit 38:119.
[113] *In re Interest of Zachary D. & Alexander D.*, 289 Neb. 763, 768, 857 N.W.2d 323, 328 (2015).
[114] *Bethesda Found. v. Buffalo Cty. Bd. of Equal.*, 263 Neb. 454, 462, 640 N.W.2d 398, 405 (2002).
[115] *Bethesda Found. v. Buffalo Cty. Bd. of Equal.*, 263 Neb. 454, 462, 640 N.W.2d 398, 405 (2002).

seeking an increased valuation, based primarily upon the appraisals of Olson.[116]

As noted above, Becker's appraisals purported to have been performed in accordance with USPAP standards. Two methods of value, the cost approach and income approach, were used in reconciling Becker's opinion of value. These approaches relied upon analyses of the Subject Properties, their current and highest and best uses, local and regional market data, national market trends, and site data. Becker also provided an in-depth analysis of the impact of COVID-19 on the hospitality industry at national, regional, and local market levels.[117] Becker's cost approach analyses used the Marshall Valuation Service to determine replacement costs and physical depreciation figures.[118]

C. Olson's appraisals of the Subject Properties are unpersuasive because the underlying data upon which the opinion is given is not reliable.

Both Olson and Becker primarily relied upon an income approach methodology to reach their respective opinions of value for the Subject Properties. The steps required for use of the income approach with direct capitalization may be summarized as (1) estimate potential gross income; (2) deduct estimated vacancy and collection loss to determine effective gross income; (3) deduct estimated operating expenses to determine net operating income; (4) divide net operating income by an estimated capitalization rate to yield the value.[119] Capitalization rates can be estimates with various techniques.[120]

Because the Subject Properties were valued as a "going concern," both appraisers sought to remove the contributory value from non-real tangible and intangible property to arrive at the value of the real property. Regarding the allocation of value to non-real tangible

[116] See Case File.
[117] See generally, Exhibits 37-38.
[118] Exhibit 37:92-98; Exhibit 38:88-94.
[119] Appraisal Institute, *The Appraisal of Real Estate* 432, 460 (15th ed. 2020).
[120] Appraisal Institute, *The Appraisal of Real Estate* 460 (15th ed. 2020); see *id.* at 460-74.

property ("personal property"), "[t]he allocation to personal property must account for both return on and return of investment for that asset class, which is more than just a replacement reserve that covers only return on investment."[121]

> The term tangible personal property includes all personal property possessing a physical existence, excluding money. The term tangible personal property also includes trade fixtures, which means machinery and equipment, regardless of the degree of attachment to real property, used directly in commercial, manufacturing, or processing activities conducted on real property, regardless of whether the real property is owned or leased, and all depreciable tangible personal property described in subsection (9) of section 77-202 used in the generation of electricity using wind as the fuel source. The term intangible personal property includes all other personal property, including money.[122]

Taxable tangible personal property (1) possesses a physical existence[123] and (2) is used in a trade or business or for the production of income with a determinable life longer than one year.[124]

Based upon these definitions, it would not be unreasonable to assume JDHQ's personal property return filed with the County Assessor would capture the value of the personal property present on the Subject Properties. However, "[t]angible personal property… shall be subject to taxation, unless expressly exempt from taxation, and shall be valued at its net book value."[125] Net book value is a portion of the Nebraska adjusted basis for depreciable property.[126] Nebraska adjusted basis means the adjusted basis of property under the Internal Revenue Code—excluding any allowances for depreciation, amortization, or expense election.[127] As Ederer testified, net book value is not synonymous with market value. Based on these definitions, it is

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[121] *The Appraisal of Real Estate*, Fifteenth Edition, Appraisal Institute (2020), at 672.
[122] Neb. Rev. Stat. § 77-105 (Reissue 2018).
[123] Neb. Rev. Stat. § 77-105 (Reissue 2018).
[124] Neb. Rev. Stat. § 77-119 (Reissue 2018).
[125] Neb. Rev. Stat. § 77-201(5) (Reissue 2018).
[126] Neb. Rev. Stat. § 77-120 (Reissue 2018).
[127] Neb. Rev. Stat. § 77-118 (Supp. 2020).

clear JDHQ's personal property tax returns may not necessarily capture the totality of the personal property nor its market value.

Olson conceded that she did not review any asset list, which is required with a personal property return,[128] to determine what assets were included in the overall value as of the relevant assessment dates.[129] Nebraska Department of Revenue regulations do not require a taxpayer to list personal property with a net book value of zero.[130] Olson stated that FF&E value not captured by her personal property deduction, was captured in her outstanding capital expenditure deduction. However, Olson explained that personal property acquired by JDHQ as part of its capital expenditure in 2019 did not translate into net book value until the tax year 2021 assessment. Accordingly, the personal property deduction and capital expenditure deductions are significantly lower in her 2020 valuation.[131] It is unclear how Olson accounts for the value of FF&E acquired in 2019 in her 2020 valuation.

"It is well established that the value of the opinion of an expert witness is no stronger than the facts upon which it is based."[132] Because the proper deduction of the personal property component requires accurate valuation of the market value of the personal property, the Commission finds Olson's use of the Nebraska net book value as reported on JDHQ's personal property tax return to be unreliable. As Olson's final opinions of value are based upon

[128] See 350 Neb. Admin. Code, ch. 20, § 002.01C (3/15/2009).
[129] Exhibit 114:98; Exhibit 116:102.
[130] 350 Neb. Admin. Code, ch. 20, § 002.01C (3/15/2009).
[131] Compare Exhibits 114:97, 114:98, and 114:105; Exhibits 116:102, 116:103, and 116:110.
[132] *Bottorf v. Clay Cty. Bd. Of Equal.*, 7 Neb.App. 162, 167, 580 N.W.2d 561, 565 (1998). See *McArthur v. Papio-Missouri River NRD*, 250 Neb. 96, 547 N.W.2d 716 (1996); *Lindsay Mfg. Co. v. Universal Surety Co.*, 246 Neb. 495, 519 N.W.2d 530 (1994).

calculations using that unreliable value, the Commission gives Olson's opinions of value less weight.

D. Becker's appraisals provide the most reasonable determination of value.

As stated above, Becker's appraisal focused primarily upon his income approach valuations, with a cost approach developed as a check. Both Becker and Olson calculated similar effective gross income and operating expense figures. Both appraisers used their expertise and experience to develop a capitalization rate each deemed to be appropriate. Both appraisers accounted for intangible value pursuant to their respective generally accepted income approach methodologies.

However, Becker's approach to accounting for FF&E value is more strongly supported and more credible than Olson's approach. As the Appraisal Institute states, "[t]he allocation to personal property must account for both return on and return of investment for that asset class, which is more than just a replacement reserve that covers only return on investment."[133]

Becker begins with the cost of the FF&E at the time of the construction of the Subject Properties, as provided by JDHQ.[134] Becker used the Consumer Price Index to determine an inflation-adjusted value for 2018. Due to the range in life expectancies of FF&E, Becker used a weighted average life of seven years, resulting in a depreciation of 70% based upon the age of the Subject Property.[135] Becker states this calculation accounts for the return of investment portion of the allocation.

Becker next used the same depreciated FF&E figures, and then determined an appropriate expected rate of return on investment based upon market surveys. He then applied the rate to determine

[133] *The Appraisal of Real Estate*, Fifteenth Edition, Appraisal Institute (2020), at 672.
[134] Exhibit 37:107; Exhibit 38:103.
[135] Exhibit 37:107; Exhibit 38:103.

values for the return-on-investment portion of the allocation.[136] Becker then added these two values to determine the full FF&E allocation amount for each tax year at issue.[137]

Because Becker began with the cost of FF&E at the time of the Subject Properties' construction, and then adjusted for inflation and depreciation, to expressly determine the return-of and return-on portions of the allocation as set forth by the Appraisal Institute, the Commission finds Becker's approach more credible than Olson's reliance on Nebraska net book value and outstanding capital expenditure to determine the value of the FF&E allocation.

VII. CONCLUSION

The parties' appraisers, Becker and Olson, each presented thorough and detailed appraisal reports. Each relied primarily on their income approach analysis to determine their respective opinions of value. While both parties take exception to the selection of a capitalization rate, COVID-19 adjustments, allocation of intangible value, and allocation of FF&E value of the other party's appraisal, the Commission finds Becker's appraisal to be more credible.

The Commission finds that there is competent evidence to rebut the presumption 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 the County Board's decision was arbitrary or unreasonable.

For the reasons set forth above, the determinations of the County Board are vacated and reversed.

[136] Exhibit 37:108; Exhibit 38:104.
[137] *Id.*

VIII. ORDER

IT IS ORDERED THAT:

1. The decisions of the Sarpy County Board of Equalization determining the value of the Subject Properties for tax years 2018,[138] 2019, 2020, and 2021 are vacated and reversed.
2. The assessed values of the Subject Properties for each tax year at issue are:

Property	Parcel ID	2018 Value	2019 Value	2020 Value	2021 Value
Embassy Suites	011591075	**$20,000,000**[139]	**$18,500,000**[140]	**$19,000,000**[141]	**$9,000,000**[142]
La Vista Conference Center	011591074	**$20,000,000**[143]	**$18,500,000**[144]	**$19,000,000**[145]	**$9,000,000**[146]
Courtyard by Marriott	011591073		**$13,000,000**[147]	**$12,000,000**[148]	**$8,000,000**[149]

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).

[138] Only parcel IDs 011591074 and 011591075.
[139] Exhibit 117:122. Becker's final opinion of value for tax year 2018 is $40,000,000 total for both parcels. The Commission has allocated an equal value of $20,000,000 to each parcel as was done in the appraisal for the subsequent years.
[140] Exhibit 117:122. Becker's final opinion of value for tax year 2019 is $37,000,000 total for both parcels.
[141] Exhibit 117:122. Becker's final opinion of value for tax year 2020 is $38,000,000 total for both parcels.
[142] Exhibit 117:122. Becker's final opinion of value for tax year 2021 is $18,000,000 total for both parcels.
[143] See Note 139, *supra*.
[144] See Note 140, *supra*.
[145] See Note 141, *supra*.
[146] See Note 142, *supra*.
[147] Exhibit 38:118.
[148] *Id.*
[149] *Id.*

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 2018,[150] 2019, 2020, and 2021.
7. This Decision and Order is effective for purposes of appeal on December 2, 2024.[151]

Signed and Sealed: December 2, 2024

SEAL

____
Robert W. Hotz, Commissioner

____
James D. Kuhn, Commissioner

[150] Only parcel IDs 011591074 and 011591075.
[151] 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.