

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Construction Developers Inc., Dillard's
Department Store,
Appellant,

v.

Douglas County Board of Equalization,
Appellee.

Case Nos: 10C-222 & 11C-271

Decision and Order Affirming the Douglas
County Board of Equalization

For the Appellant:

William E. Peters,
Peters & Chunka, PC LLO

For the Appellee:

Matthew J. Boever,
Deputy Douglas County Attorney

The Appeal was heard before Commissioners Salmon and Freimuth; Commissioner Salmon Affirming, Commissioner Freimuth Dissenting.

I. THE SUBJECT PROPERTY

The Subject Property is a commercial parcel located in Douglas County. The parcel is a 207,206 square foot department store attached to a regional mall. The legal description of the parcel is found in the Case file. The property record cards for the Subject Property are found at Exhibits 3 and 5.

II. PROCEDURAL HISTORY

The Douglas County Assessor determined that the assessed value of the Subject Property was \$11,025,700 for tax years 2010 and 2011.¹ Construction Developers Inc., Dillard's Department Store (the Taxpayer) protested these assessments to the Douglas County Board of Equalization (the County Board) and requested an assessed valuation of \$9,750,000 for tax year 2010 and an unknown amount for tax year 2011.² The Douglas County Board determined that the assessed value for tax years 2010 and 2011 was \$11,025,700.³

¹ E1; E2.

² E9.

³ E1; E2.

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 Pre-Hearing Conference Report, as ordered by the Commission. The Commission held a hearing on October 18, 2012.

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 of equalization 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

A Taxpayer 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

⁴ See, Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.), *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).

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

⁶ *Id.*

⁷ Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.).

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

⁹ 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.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 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

IV. VALUATION

A. Law

Under Nebraska law,

[a]ctual 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.¹³

“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.”¹⁴ “Actual value, market value, and fair market value mean exactly the same thing.”¹⁵ 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.¹⁶ All real property in Nebraska subject to taxation shall be assessed as of

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

¹¹ Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.).

¹² Neb. Rev. Stat. §77-5016(6) (2012 Cum. Supp.).

¹³ Neb. Rev. Stat. §77-112 (Reissue 2009).

¹⁴ *Id.*

¹⁵ *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).

¹⁶ Neb. Rev. Stat. §77-131 (Reissue 2009).

January 1.¹⁷ All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.¹⁸

B. Summary of the Evidence

James B. Robinson, Director of Property Tax for Dillard's, testified on behalf of the Taxpayer.¹⁹ His testimony was based on his experience working for Dillard's, and, aside from comments about his observation of the general economic environment, the data he supplied was limited to Dillard's stores alone. The Commission notes that while Dillard's stores may or may not be representative of the market as a whole, the Taxpayer provided no evidence to demonstrate that they were or were not representative of the market as a whole.

Robinson asserted in his testimony that the only issue in the appeal was the appropriate capitalization rate. He stated there was a difference between the capitalization rate that he used to arrive at an opinion of value of \$9,600,000 and the County Assessor's capitalization rate used to arrive at an opinion of value of \$11,025,700.

Robinson may have some experience in many relevant areas, but he is not a licensed appraiser. The Nebraska Court of Appeals has held that a corporate officer may testify concerning the value of a Subject Property only if he has: (1) knowledge of the Subject Property; and (2) a general knowledge of values in the vicinity.²⁰ While Robinson is qualified to offer an opinion of value for the Subject Property, the credibility of his opinion is determined by the trier of fact.²¹

Robinson determined that the capitalization rate should be 9%. He arrived at this value by first reviewing Korpacz and Realityrate.com for statistically derived average capitalization rates for the tax years in question. He testified that Korpacz listed an average capitalization rate for regional malls as 8.06% for the 4th quarter of 2009 and 7.81% for the 3rd quarter of 2010, and

¹⁷ See, Neb. Rev. Stat. §77-1301(1) (Reissue 2009).

¹⁸ Neb. Rev. Stat. §77-201(1) (Reissue 2009).

¹⁹ Robinson is also a senior licensed property tax consultant in the State of Texas, and a Certified Member of the Institute for Professionals in Taxation. However, the Commission is unfamiliar with the requirements for membership in this organization, or whether the distinction relates to ad valorem property taxes.

²⁰ *Kohl's Dept. Stores v. Douglas County Bd. of Equal.*, 10 Neb.App. 809, 813 - 814, 638 N.W.2d 877, 881 (2002) (Citations omitted).

²¹ *Cabela's, Inc. v. Cheyenne Cty. Bd. of Equalization*, 8 Neb. App. 582, 596-97, 597 N.W.2d 623, 635 (Neb. App. 1999) (citing *Coffey v. Mann*, 7 Neb. App. 805, 585 N.W.2d 518 (1998)).

that Realityrate.com listed average capitalization rate for the first quarter of 2010 was 9.02%. Robinson asserted that after he obtained the average capitalization rates from these sources he added an additional 1% to the capitalization rate to account for the higher risk to the Subject Property as an anchor store to arrive at his 9% capitalization rate.

Robinson defined an anchor store as a large retail store that is part of a larger retail complex (i.e. a regional shopping mall) that accounts for a significant portion of the retail complex sales and acts as a driving force to attract consumers to the retail complex. Robinson posited that anchor stores incur greater risks than in-line stores because the loss of one anchor store could lead to the financial instability of the entire retail complex.

Robinson stated that it was his opinion and experience that this increased risk would create an additional 1% to 1.5% factor to the capitalization rate. Robinson indicated that he derived his \$9,600,000 opinion of value by using his 9% capitalization rate. Robinson stated that the County Assessor's rental rate was too high, but testified that the County Assessor's vacancy and collection loss and expense amounts resulted in a net operating income similar to his calculated net operating income. He asserted that the only substantial difference was the capitalization rate. Robinson did not provide an income approach worksheet, but recounted orally his calculations. He provided no other evidence suggesting that the County Assessor's capitalization rate was arbitrary or unreasonable.

The County Board provided an Assessment Report for each tax year for the Subject Property contained in Exhibits 3 and 5. The reports indicate that the County Assessor classified the Subject Property as a Class A property and assigned a capitalization rate of 7.75% for tax year 2010²² and 8.15% for tax year 2011.²³ The reports additionally indicate that the capitalization rates were derived by Kenneth Voss & Associates, LLC for use by the County Assessor.²⁴

²² E3:14.

²³ E5:14.

²⁴ E3:14; E5:14.

C. Analysis

1. Capitalization Rate

While Robinson offered a different opinion of the appropriate capitalization rate, he provided no evidence to support his 1% to 1.5% quantification of the increased risk associated with an anchor store in the Omaha market. Additionally, the Taxpayer offered no evidence to support Robinson's assertion that anchor stores are inherently more risky. Robinson's assertions are not supported by any statutorily noticed appraisal sources. Moreover, Robinson testified that Realityrates.com and Korpacz did not list separate capitalization rates for anchor stores. The Taxpayer asks the Commission to adopt a position which seems contrary to logic. In-line stores are dependent upon anchor stores to draw sufficient numbers of consumers to support their businesses.²⁵ Anchor stores are the most important component of a shopping center, and the in-line stores and mall owners are, to a degree, at the mercy of the anchor store.²⁶ Because of this advantage, anchor stores may be able to secure favorable operating conditions, including lower rents.²⁷ The Commission does not agree that the most favored type of store in a regional mall is inherently at a greater risk than the other stores.

The dissent asserts that Minnesota Supreme Court cases support the assertion that all anchor stores are more risky. However, the evidence presented in *Carson Pirie Scott & Co. (Ridgedale) v. County of Hennepin* is meaningfully different than the evidence presented in the present case.²⁸ In *Carson*, experts for both parties agreed that in that case anchor stores were inherently more risky based on knowledge **from the specific market area in that case**, whereas Robinson testified that his calculation of the additional risk to anchor stores was limited to and derived from his experience with Dillard's stores west of the Mississippi, and hearsay statements from appraisers.²⁹ Finally, the Commission notes that the court in *Carson* did not adopt either of the experts' opinions of the appropriate capitalization rate; instead the court made its own

²⁵ *Shopping Center Appraisal and Analysis*, The Appraisal Institute, 2009, pp. 20-21.

²⁶ *Id.*

²⁷ *Id.*

²⁸ 576 N.W.2d 445 (Minnesota Supreme Court 1998).

²⁹ See, *Id.*

determination based upon the evidence presented to it and set the actual value of the property higher than either party asserted.³⁰

Korpacz, Realityrates.com, the Voss study, and the County Assessor's opinion all came to very similar conclusions of the appropriate capitalization rates for the Subject Property. Even Robinson adopted the Korpacz and Realityrates.com averaged capitalization rates for his base capitalization rate. The County Assessor's capitalization rate is supported by: (1) Korpacz and Realityrates.com, two commonly accepted professional sources, (2) the Voss study, and (3) the testimony of Robinson himself who also adopts Korpacz and Realityrates.com capitalization rates as acceptable indicators of the appropriate base capitalization rates for the Subject Property. The Commission finds it persuasive that Korpacz and Realityrates.com, two commonly accepted sources for market derived capitalization rates, do not increase the capitalization rate for anchor stores or identify anchor stores as being subject to a higher capitalization rate. Indeed, the Commission finds no readily discernible objective academic source of professionally accepted appraisal techniques which supports the assertion that anchor stores are inherently more risky than in-line stores.

The dissent characterizes the County Assessor's income approach factors as being derived outside of relevant market data. However, the capitalization rates which Robinson asserted were obtained from Realityrates.com and Korpacz support the capitalization rate derived for the County by Voss, a group certified to provide a professional opinion of the capitalization rate in a study specifically developed for the County Assessor, and utilized by the County Assessor in the County Assessor's determination of the actual value of the Subject Property.³¹ The dissent asserts that it was unreasonable or arbitrary for the County Board to rely on the County Assessor's opinion of value because the County Assessor relied on the Voss study to determine the capitalization rate. The dissent finds issue with the County Assessor weighing older sales in determining the capitalization rate, because the dissent determines that a global economic crisis impacted the local Omaha market.

³⁰ *Id.* at 451.

³¹ E3:15; E5:15.

The Assessment Reports provided specific explanation of how the County Assessor arrived at the income approach value for the Subject Property and how that value was used in determining the actual value of the Subject Property:

The Assessor continually gathers income and expense information from local commercial properties for establishing typical ranges of those items for utilization in valuing similar properties. This information, combined with statewide and industry-wide data, is used to determine typical income and expense for various property types.

If applicable, in the inclusion and conclusion of the Income Approach the Assessor has considered both groups of data and has put more emphasis on the local factors and data than the state and national data. This information was then applied to the subject property to arrive at an appropriate Value by the Income Approach.³²

The Assessment Reports state that the County Assessor used the market comparison method to arrive at his opinion of the appropriate capitalization rate.³³ Further, the County Assessor indicates that he adjusted the capitalization rates “based on my knowledge of the current real estate markets.”³⁴ There is a presumption that the assessing official has performed his or her duties according to law.³⁵ The Assessment Reports do not rebut the presumption, but provide specific evidence that the County Assessor established procedures to obtain data from the local market, reviewed the data from the local market when calculating the income approach, and applied his conclusions based on the local market.³⁶ Even Robinson testified that his opinion of value was the same for both tax years. There is no evidence that the County Assessor failed to take into account local market factors.

Global or national economic crises may affect a local market to greater or lesser extent than the global or national economy. It is possible for a local market to excel during a time of national or global economic crisis, and it is possible for a local market to fail abysmally in a time

³² E3:16; E5:16.

³³ E3:14; E5:14.

³⁴ E3:14; E5:14.

³⁵ See, *State ex rel. Bee Building Co. v. Savage*, 65 Neb. 714 (1902); *Woods v. Lincoln Gas & Electric Co.*, 74 Neb. 526 (1905); *Brown v. Douglas Co.*, 98 Neb. 299 (1915); *Gamboni v. County of Otoe*, 159 Neb. 417 (1954); *Ahern v. Board of Equalization*, 160 Neb. 709 (1955); *Collier v. Logan County*, 169 Neb. 1 (1959); *Josten-Wilbert Vault Co. v. Board of Equalization*, 179 Neb. 415 (1965).

³⁶ E3:14-17; E5:14-17.

of great economic boon. The assessment of real property, and particularly the determination of a capitalization rate, is concerned with the market in which the Subject Property operates.³⁷ “A real estate market is created by the interaction of individuals who exchange real property rights for other assets such as money. Specific real estate markets are defined on the basis of various attributes: property type, location, income-producing potential, typical investor characteristics, typical tenant characteristics, and other attributes recognized by those participating in the exchange of real property.”³⁸ The specific real estate market in which the Subject Property would operate is the only market which is relevant in determining the appropriate capitalization rate.

Capitalization rates may be calculated using the following techniques: (1) Derivation from comparable sales; (2) Band-of-investment technique with mortgage and equity components; (3) NOI ratio method; (4) Debt coverage ratio method; (5) Yield change techniques; and (6) Band-of-investment technique with land and improvement components.³⁹ Each of these techniques relies on market data to derive the appropriate capitalization rate.⁴⁰ When market data is correctly obtained and applied, all of these techniques should yield the exact same capitalization rate.⁴¹ The impact on the local market of any national or global economic event would be reflected in the actual data obtained from the local market. Because all techniques for determining the capitalization rate rely on market data, any impact from a national or global economic event would be reflected in an appropriately derived capitalization rate which was derived using professionally accepted mass appraisal techniques.

The only empirical evidence offered by the Taxpayer concerning the economic slowdown is contained in Exhibit 7, page 2. The Taxpayer submitted into evidence the gross sales history of the Subject Property from 2005-2009.⁴² Robinson testified that the gross sales for 2010 were substantially similar to 2009. The Commission notes that the gross sales per square foot fluxuated from 2007 to 2009.⁴³

³⁷ *The Appraisal of Real Estate*, 13th Edition, The Appraisal Institute, 2008, p. 21.

³⁸ *The Appraisal of Real Estate*, 13th Edition, The Appraisal Institute, 2008, p. 21.

³⁹ *Property Assessment Valuation*, 3rd Edition, International Association of Assessing Officers, 2010, p. 347.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² E7:2.

⁴³ E7:2.

The Commission finds that the utility of this evidence as an indicator of the effects of the economic slowdown on all anchor stores in the Subject Property's market is limited. At issue in this case is the capitalization rate applicable to the Subject Property and not the rental rate or gross sales per square foot. There is no evidence that Robinson's additional 1% quantification is the result of professionally accepted mass appraisal techniques. There is evidence that the County Assessor's capitalization rate was derived using professionally accepted mass appraisal techniques which relied on market data and are, therefore, representative of any impact on the actual value of the Subject Property from a national or global economic slowdown.

The Commission is not convinced that the decrease in retail sales at the Subject Property is only related to the economic slowdown, and the Taxpayer's case lacks empirical evidence which would establish that the Subject Property is representative of the market.

The dissent supports its characterization of the Subject Property as representative of the market by an appeal to decade old data. The dissent finds itself in the position of asserting that: (1) it was contrary to statute and professionally accepted mass appraisal techniques for the County Board to rely on the County Assessor's capitalization rate which relied on "older sales," but it is appropriate to rely on decade old data; and (2) it is appropriate to rely on decade old data which is contrary to empirical evidence and testimony offered by both parties.

A difference of opinion is not clear and convincing evidence that the County Board's decision was arbitrary or unreasonable.⁴⁴ In order to support his assertion that anchor stores should be given a higher capitalization rate to adjust for increased risk, the Taxpayer would need to present some evidence of this risk and quantify the risk using a professionally accepted method.

Again, the Taxpayer's only concern may be summarized as an assertion that Korpacz, Realityrates.com, Voss, the County Assessor, and every statutorily noticed objective academic mass appraisal source all fail to understand that anchor stores have an inherently greater risk than in-line stores.

⁴⁴ *Brenner v. Banner County Bd. Of Equal.*, 276 Neb. 275, 284, 276 N.W.2d 802, 812 (2008) (quoting *Bumgarner v. County of Valley*, 208 Neb. 361, 366, N.W.2d 307, 310 (1981)).

While Robinson asserted that his capitalization rate calculation was superior to the County Assessor's, there was no evidence provided showing that the process used by Kenneth Voss & Associates, LLC or the County Assessor's capitalization rate were unreasonable or arbitrary or failed to meet commonly accepted mass appraisal standards. The Commission finds that the differences between the Taxpayer's capitalization rates and the County Assessor's capitalization rates are mere differences of opinion. The appraisal of real estate is not an exact science.⁴⁵ It is possible for reasonable minds to disagree about the value of factors used to determine the actual value of a property.

2. Other Income Factors

Even though the Appellant asserted that the only issue in the case was the appropriate capitalization rate, the dissent asserts that the County Assessor's income calculation is the result of an arbitrary process whereby the County Assessor makes random adjustments to arrive at a pre-determined opinion of value or to distort the calculation to reflect the County Board's opinion of value.

In the present case, the County Board and County Assessor agreed on the actual value of the real property for both tax years.⁴⁶ Since the assessed value is determined before the County Board reviews the case, it is obvious that the assessed value was not a mere adoption of the County Board's opinion of actual value, and, therefore, equally obvious that the "Override Income Worksheet" does not indicate an arbitrary adjustment of income factors to arrive at the County Board's independent opinion of value.

While the County Assessor's income approach worksheets are labeled "Override" worksheets, there is no evidence of what adjustments were made and no evidence that adjustments were not the result of reasoned subjective determinations allowable in professionally accepted appraisal techniques.⁴⁷ An assertion that the adjustments were arbitrarily made to arrive at a predetermined opinion of value are not supported by any evidence in the record. The inclusion of equalization comparable properties does not indicate that income factors were

⁴⁵ *Matter of Bock's Estate*, 198 Neb. 121, 124, 251 N.W.2d 872, 874 (1977).

⁴⁶ E1:1; E2:1.

⁴⁷ E3:15, E5:15.

arbitrarily adjusted, but instead indicates that comparable properties are not valued at materially different levels.

Despite the fact that the dissent relies on data from 2002 in its opinion, the dissent asserts that according *Leech* it was unreasonable and arbitrary for the actual value of the Subject Property to be unchanged since 2002.

The County Assessor did not testify concerning the assessment of the Subject Property, but the County Board did provide Assessment Reports for both tax years 2010 and 2011.⁴⁸ Each Assessment Report in evidence before the Commission describes the assessment process and provides a complete income approach worksheet indicating the actual value of the Subject Property.⁴⁹ The County Assessor arrived at an income approach opinion of value of \$11,030,600 for tax year 2010,⁵⁰ and an income approach opinion of value of \$11,029,200 for tax year 2011.⁵¹ The Assessment Reports explain that the County Assessor then reconciled these values to \$11,025,700 for both tax years.⁵² These facts set the present case apart from *Leech*.⁵³

Far from being unexplained, the County Board provided detailed Assessment Reports which contained evidence of: (1) yearly calculations of the actual value of the Subject Property; and (2) constant gathering and consideration of local market data.⁵⁴ The Commission finds that the Assessment Reports indicate that the valuations were not “automatically accepted throughout the years[.]”⁵⁵ but are the result of commonly accepted mass appraisal techniques. It is possible for the actual value of real property to move very little over a period of time. Even Robinson testified that the actual value of the Subject Property was the same for tax years 2010 and 2011.

3. Robinson’s 3-2-1 Approach and Cost Approach

Robinson provided the Commission with a “3-2-1 approach,” which he testified was used to value department stores. Robinson testified that he did not rely on his “3-2-1 approach” when

⁴⁸ E3; E5.

⁴⁹ *Id.*

⁵⁰ E3:15.

⁵¹ E5:17.

⁵² E3:17; E5:17.

⁵³ *Leech, Inc. v. Bd. Of Equal.*, 176 Neb. 841, 846, 127 N.W.2d 917, 921 (1964).

⁵⁴ E3; E5.

⁵⁵ *Leech, Inc. v. Bd. Of Equal.*, 176 Neb. 841, 846, 127 N.W.2d 917, 921 (1964).

constructing his opinion of value, but that he included it to support his \$9,600,000 opinion of value. Robinson's "3-2-1 approach" is provided in Exhibit 7 at page 2. Robinson determined the dollar value of income from sales per square foot for the Subject Property.⁵⁶ He then derived a rent per square foot by applying a ratio (in the form of a percentage) of rent per square foot to retail sales per square foot.⁵⁷ Robinson reduced the amount of rent per square foot for any amount of sales per square foot above \$125.⁵⁸ Robinson relied only on the actual retail sales per square foot of the Subject Property for year 2009 instead of market retail sales per square foot. He testified that 2009 and 2010 sales were comparable for this particular Dillard's store. Robinson testified that the rent for anchor department stores is generally determined by applying first a base percentage, and then an overage percentage to retail sales per square foot. He then subtracted 5% expenses and applied a 9% capitalization rate to arrive at an indicated value per square foot. He multiplied the indicated value per square foot by the area of the Subject Property to arrive at an opinion of value of \$8,488,680. The capitalization rate was derived as previously explained. Robinson did not indicate where he obtained his expenses, or how he determined the appropriate percentage rents for the base and overage.

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 expenses to determine net operating income; and (4) divide net operating income by an estimated capitalization rate to yield indicated value.⁵⁹ A variety of techniques may be used to quantify various components of any application of the approach.⁶⁰ Estimated potential gross income is derived by obtaining the market median rental rates for the Subject Property.⁶¹ The expenses are derived from the market averages, and may be derived from the actual expenses only if a review of the market indicates that the actual expenses are typical for the market.⁶²

⁵⁶ E7:2.

⁵⁷ E7:2.

⁵⁸ E7:2.

⁵⁹ See, *The Appraisal of Real Estate*, 13th Edition, The Appraisal Institute, 2008, p. 466.

⁶⁰ *Id.* at chs 20-24.

⁶¹ *The Appraisal of Real Estate*, 13th Edition, The Appraisal Institute, 2008, Chps. 20-21.

⁶² *Mass Appraisal of Real Property*, International Association of Assessing Officers, 1999, p. 158.

The Commission finds that the Robinson’s “3-2-1” approach is not a professionally accepted mass appraisal technique and is irrelevant to the actual value of the real property.

The dissent cites to cases where other jurisdictions have found that the “3-2-1 approach” is reliable,⁶³ but the Commission notes that actual value of real property in Nebraska must be determined by professionally accepted mass appraisal techniques.⁶⁴ The dissent cites to case law from a single jurisdiction to determine that the “3-2-1 approach” is professionally accepted.⁶⁵ However, none of the cited cases relied solely upon a rental rate derived from a percentage of retail sales of the subject property. Review of all relevant statutorily noticed sources of professionally accepted appraisal methods reveals no principles, guidelines, or mention of the “3-2-1 approach,” or any other similar approach to determining the rental rate for use in the income approach. The facts of the Minnesota case law may be instructive concerning the apparent lack of inclusion of the “3-2-1 approach” in general appraisal literature.

In the earliest provided Minnesota case, the experts agreed that “in the Twin Cities’ metropolitan area” there was insufficient market data concerning the rental rates of anchor stores.⁶⁶ Based on this market data deficiency, the experts agreed that a constructive or imputed rental rate would need to be derived if the income approach to valuation were utilized.⁶⁷ The experts’ use of a “3-2-1 approach” was a response to a specific market condition in the Twin Cities area.⁶⁸ The case was remanded for a new trial based on evidentiary issues.⁶⁹ On remand the tax court compared imputed rents of comparable properties and made adjustments to the imputed rent for the subject property based on the perception that the calculations used to derive the rental rent may have been influenced by factors which were not attributable to the real

⁶³ *Montgomery Ward v. County of Hennepin*, 450 N.W.2d 299, 304 (Minnesota Supreme Court 1990) (citations omitted).

⁶⁴ Neb. Rev. Stat. §77-112 (Reissue 2009)

⁶⁵ While an appraiser in *Board of Educ. of Ridgeland School Dist. No. 122, Cook County v. Property Tax Appeal Bd.* testified that anchor department stores would often negotiate their rental rates based upon a percentage of retail sales, he also testified that he had used actual rental rents from comparable department stores to determine the rental rate in his income approach. 363 Ill.Dec. 461, 465, 975 N.E.2d 263, 268 (Ill.App. 1 Dist. 2012). When the PTAB adopted the appraiser’s numbers, it was relying on the market derived actual rents. *Id.* at 467, 975 N.E.2d 263 at 268.

⁶⁶ *Montgomery Ward v. County of Hennepin*, 450 N.W.2d 299, 304 (Minnesota Supreme Court 1990).

⁶⁷ *Id.*

⁶⁸ See generally, *Id.*

⁶⁹ *Id.* at 308.

property, and based on the reasoning that a percentage of the retail sales of the subject property alone was not entirely indicative of the actual rental rate.⁷⁰

While the dissent asserts that a general statement taken from *Dollars and Cents* has specific meaning for the Subject Property's market area, the Commission finds that there is no evidence supporting an assertion that an appropriate market rent was not readily discernible. In the current case, no evidence or witness purported that an appropriate rental rate was not readily discernible from the market. In fact, Robinson expressed his opinion that an appropriate rental rate would be \$4.50; this rental rate is 16% higher than the rental rate derived from his own "3-2-1 approach,"⁷¹ and 47% higher than *Dollars and Cents* figures.⁷² Additionally, by using the actual retail sales per square foot from the Subject Property instead of using an average retail sales per square foot derived from other retail establishments within the market but outside the Dillard's chain, Robinson's "3-2-1 approach" values something other than the real property associated with the Subject Property.

Substituting a rental rate derived from income based on retail sales per square foot of the Subject Property alone, instead of determining the market average retail sales per square foot, has the effect of valuing the business and not the real property. Retail sales per square foot may be impacted by the type of products sold, the brand of products sold, the management of staff and products, and brand value or appeal of the owning retail establishment. Robinson did not use market rental rates to calculate the estimated potential gross income in his "3-2-1 approach," but instead calculated the rental rate based upon the income from retail sales per square foot from the Subject Property; this is ***not*** a commonly accepted appraisal technique.⁷³

An opinion of value which is based upon a rental rate derived from the retail sales of Subject Property alone is not relevant to the determination of the actual value of the real property. The Subject Property is owner occupied instead of rented, and *Dollars and Cents* from 2002 indicated an increasing trend of owner occupied anchor stores,⁷⁴ but a consideration of business income of the Subject Property alone is never an appropriate method for determining the actual

⁷⁰ *Montgomery Ward v. County of Hennepin*, 482 N.W.2d 785, 789-790 (Minnesota Supreme Court 1992).

⁷¹ See, E7:2.

⁷² *Dollars & Cents of Shopping Centers: 2002*, Urban Land Institute, 2002, 95.

⁷³ See, E7:2.

⁷⁴ *Dollars & Cents of Shopping Centers: 2002*, Urban Land Institute, 2002, p. 95.

value of real property. Further, the probative value of decade old data is very limited without empirical evidence indicating that the data would be the same today; no such empirical evidence is available for consideration in this case or offered as part of the record.

In support of his \$9,600,000 opinion of value, Robinson also provided an opinion of value for both tax years derived from the cost approach.⁷⁵ “The cost approach usually works best for newer improvements, because construction costs are easier to estimate and there is less depreciation.”⁷⁶ The Commission notes that the Subject Property was over 20 years old and had served nearly half of its economic life by tax years 2010 and 2011.⁷⁷ Additionally, there is no evidence of the method used to derive the land value component of Robinson’s cost approach. The Commission, therefore, does not find the cost approach valuations clear and convincing evidence that the County Board’s valuation was unreasonable or arbitrary.

Finally, while the County Assessor only relied upon the income approach to value the property, only one approach is required.⁷⁸ The County Assessor’s income approach is a statutorily permissible method of determining the actual value of a Subject Property in Nebraska.⁷⁹ The income approach is also the preferred method for valuing commercial properties which were not recently constructed.⁸⁰

D. Conclusion

The burden on the Taxpayer is to show by clear and convincing evidence that the County Board’s decision is unreasonable or arbitrary.⁸¹ Additionally, there is a presumption that the County Board “has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action.”⁸² A decision is unreasonable only if the evidence presented leaves no room for differences of opinion among reasonable minds.⁸³ “A decision is arbitrary when it is made in disregard of the facts or circumstances and without some

⁷⁵ E7:8-16.

⁷⁶ *Property Assessment Valuation*, 3rd Ed., International Association of Assessing Officers (2010) at p. 228.

⁷⁷ E7:8, 15.

⁷⁸ *Schmidt v. Thayer County Bd. of Equalization*, 10 Neb.App. 10, 18, 624 N.W.2d 63, 69 - 70 (2001).

⁷⁹ Neb. Rev. Stat. §77-112 (Reissue 2009).

⁸⁰ *Property Assessment Valuation*, 3rd Ed., International Association of Assessing Officers (2010) at p. 303.

⁸¹ *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

⁸² *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted).

⁸³ See, *Pittman v. Sarpy Cty. Bd. of Equal.*, 258 Neb 390, 401-02, 603 N.W.2d 447, 455-56 (1999).

basis which would lead a reasonable person to the same conclusion.”⁸⁴ There is no evidence that the County Board did not rely on competent evidence and faithfully preformed its duties, nor is there any evidence that its decision was “made in disregard of the facts or circumstances.”⁸⁵

V. EQUALIZATION

A. Law

“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.”⁸⁶ Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value.⁸⁷ 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.⁸⁸ 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.⁸⁹ 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 uniformity.⁹⁰ 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.⁹¹ The constitutional requirement of uniformity in taxation extends to both rate and valuation.⁹² 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

⁸⁴ *Phelps Cty. Bd. of Equal. v. Graf*, 258 Neb 810, 606 N.W.2d 736 (2000) (citations omitted).

⁸⁵ *Id.*

⁸⁶ *Neb. Const.*, Art. VIII, §1.

⁸⁷ *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).

⁸⁸ *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).

⁸⁹ *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).

⁹⁰ *Banner County v. State Board of Equalization*, 226 Neb. 236, 411 N.W.2d 35 (1987).

⁹¹ *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).

⁹² *First Nat. Bank & Trust Co. v. County of Lancaster*, 177 Neb. 390, 128 N.W.2d 820 (1964).

error of judgment [sic].”⁹³ There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity.⁹⁴

B. Summary of the Evidence

The dissent asserted that a comparison of the average assessed values of the Subject Property and the County Board’s equalization comparable properties indicated that the Subject Property was overvalued.

A determination of actual value may be made for mass appraisal and assessment purposes by using approaches identified in Nebraska Statutes.⁹⁵ The approaches identified are the sales comparison approach, the income approach, the cost approach, and other professionally accepted mass appraisal methods.⁹⁶ The comparison of assessed values is not recognized as an appropriate approach. A comparison of assessed values may be useful for equalization purposes.

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].”⁹⁷ There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity.⁹⁸ To determine that properties are not equalized, evidence may be presented indicating the assessed to actual ratios for the Subject Property and comparable properties,⁹⁹ or evidence that comparable properties were valued at materially different levels.¹⁰⁰ No ratios of assessed to actual values were provided.

The dissent asserts that the differences in value per square foot between the Subject Property and the equalization comparable properties provided in the County Assessor’s packet are not supported by economies of scale. However, other factors that affect the actual value of the

⁹³ *Newman v. County of Dawson*, 167 Neb. 666, 670, 94 N.W.2d 47, 49-50 (1959) (Citations omitted).

⁹⁴ *Id.* at 673, 94 N.W.2d at 50.

⁹⁵ Neb. Rev. Stat. §77-112 (Reissue 2009).

⁹⁶ *Id.*

⁹⁷ *Newman v. County of Dawson*, 167 Neb. 666, 670, 94 N.W.2d 47, 49-50 (1959) (Citations omitted).

⁹⁸ *Id.* at 673, 94 N.W.2d at 50.

⁹⁹ See generally, *Krings v. Garfield*, 286 Neb. 352 (2013).

¹⁰⁰ *Scribante v. Douglas County Board of Equalization*, 8 Neb.App. 25, 39, 588 N.W.2d 190, 199 (1999).

Subject Property and the comparable properties may explain these differences including: (1) Comparable 3 includes a service garage;¹⁰¹ and (2) different types, sizes, and quality of add-ons.¹⁰² While all of these properties are part of the same regional mall and compete in the same local market, these differences would explain the minor differences in value per square foot. The Commission finds that there is not clear and convincing evidence that the Subject Property's valuation was grossly excessive or that comparable properties were valued at materially different levels.

VI. 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 determination. The Commission also finds that there is not clear and convincing evidence that the County Board's decision was arbitrary or unreasonable.

For all of the reasons set forth above, the appeal of the Taxpayer is denied.

VII. ORDER

IT IS ORDERED THAT:

1. The decision of the Douglas County Board of Equalization determining the value of the Subject Property for tax years 2010 and 2011 is affirmed.¹⁰³
2. The assessed value of the Subject Property for tax years 2010 and 2011 is:

Land	\$4,557,800
<u>Improvements</u>	<u>\$6,467,900</u>
Total	\$11,025,700

¹⁰¹ E3:12; E5:12.

¹⁰² E3:6; E5:6 (containing the Subject Property's add-ons). E3:20, 23, 27; E5:20, 23, 27 (containing the comparable properties add-ons).

¹⁰³ Assessed 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.

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 (2012 Cum. Supp.)
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 2010 and 2011.
7. This Decision and Order is effective for purposes of appeal on October 31, 2013.

Signed and Sealed: October 31, 2013

Nancy J. Salmon, Commissioner

SEAL

Appeals from any decision of the Commission must satisfy the requirements of Neb. Rev. Stat. §77-5019 (2012 Cum. Supp.), other provisions of Nebraska Statute and Court Rules.

Commissioner Thomas D. Freimuth, dissenting.

I find that the Taxpayer's \$9,600,000 opinion of value for tax years 2010 and 2011 is persuasive and is the best evidence of value in this matter.

As indicated in the majority opinion, the capitalization rate is a key point of contention in this case. The Taxpayer's use of a 9% capitalization rate is supported by case law wherein competing experts agreed that rates published by Korpacz require an upward adjustment to account for the increased risk of a regional mall anchor such as the Subject Property.

The Taxpayer's evidence is particularly convincing in this case where the County's \$11,025,700 valuation relies solely on an arbitrary "Override" income approach worksheet and an "Overall" capitalization rate document with limited information. As discussed below, these documents are insufficient and/or problematic, and the County offered no testimony to otherwise

attempt to support a valuation that has remained constant from 2002, when a favorable lending environment fueled real estate values, through the onset of the economic crisis and its aftermath.

I. THE SUBJECT PROPERTY

The Property Record Files found at Exhibits 3 and 5 indicate that the Subject Property is a commercial parcel located at 3030 Oak View Drive in Omaha, Nebraska. The parcel is improved with a 207,202 square foot Dillard's department store constructed in 1991 that is attached to a regional mall known as Oak View Mall.¹⁰⁴ Page 5 of Exhibits 3 and 5 indicate that the Dillard's department store functions as a "mall anchor." The Taxpayer is the owner of the Subject Property and does not lease from Oak View Mall LLC, the mall owner.¹⁰⁵

II. THE TAXPAYER'S EVIDENCE IN GENERAL

James B. Robinson, Director of Property Tax for Dillard's, Inc., testified on behalf of the Taxpayer.¹⁰⁶ Robinson testified that he had served as the Director of Property Tax for Dillard's, Inc. for two years, and that he had worked for the company since 1997. He also testified that his position as Director of Property Tax involves responsibility for 150 Dillard's stores west of the Mississippi River, including the Subject Property.¹⁰⁷

Robinson's testimony and his resume contained in the Case File indicate that he is a Certified Member of the Institute for Professionals in Taxation and is a senior licensed property tax consultant in Texas. His resume sets forth his property tax and real estate appraisal experience from 1986 to 1997, when he began his employment with Dillard's. Robinson's resume also states that he has taken courses offered by the Appraisal Institute and the International Association of Assessing Officers, and that he received his Bachelor of Business Administration degree with an emphasis in Petroleum Land Management from the University of Texas in 1984.

¹⁰⁴ E3:4-6; E5:4-6.

¹⁰⁵ E3:5; E5:5.

¹⁰⁶ See Case File, wherein Mr. Robinson was disclosed as an expert.

¹⁰⁷ Contrary to the assertion in the majority opinion, Mr. Robinson's testimony discloses familiarity with the local market. For instance, he testified regarding his experience relating to Omaha's Crossroads Mall. He also offered testimony regarding Mall of the Bluffs in Council Bluffs, Iowa, which is adjacent to Omaha. This dissent includes further discussion regarding Mr. Robinson's testimony relating to Mall of the Bluffs.

Robinson's testimony and his resume indicate that he has substantial experience with respect to valuation for property tax purposes, especially as it relates to an anchor mall such as the Subject Property. Thus, I find his \$9,600,000 reconciled opinion of value persuasive, including the applicability of a 9% capitalization rate for tax years 2010 and 2011, which he indicated is based on standard industry practice that adds 1% to 1.5% to the approximate 8% average rate he derived from Korpacz and Realtyrates.com to account for the following factors: (1) the increased risk associated with the Subject Property's status as an anchor mall; and (2) the Subject Property's average retail sales performance.

Robinson's \$9,600,000 reconciled opinion of value is supported by substituting a 9% capitalization rate in the County's "Override Income Worksheet" for tax year 2010 (\$9,498,579 income valuation using 9% rather than 7.75% County rate) and for 2011 (\$9,987,522 income valuation using 9% rather than 8.15% County rate).¹⁰⁸ Additionally, his opinion of value is supported by an \$8,488,680 "3%-2%-1%" percentage of sales income approach valuation (discussed further below) that uses a 9% capitalization rate and a \$9,597,214 cost approach valuation.¹⁰⁹

III. THE TAXPAYER'S CAPITALIZATION RATE EVIDENCE

As indicated above, Robinson testified that one component of the two-tiered basis for adding 1% to the approximate 8% average capitalization rate he derived from Korpacz and Realtyrates.com is the risk associated with the Subject Property's status as an anchor mall. The validity of Robinson's opinion regarding this risk and the use of a 9% capitalization rate is supported by the following statement by the Minnesota Supreme Court in *Carson Pirie Scott & Co. (Ridgedale) v. County of Hennepin*:

¹⁰⁸The County's "Override Income Worksheet" for tax year 2010 is found at page 15 of Exhibit 3 (7.75% capitalization rate) and at page 15 of Exhibit 5 for tax year 2011 (8.15% capitalization rate). I note that Robinson testified that market rent amounted to \$4.50 per square foot, as opposed to \$5.25 used by the County in its "Override Income Worksheet" for tax year 2010 and \$5.42 for 2011. Substituting \$4.50 per square foot rent in the County's "Override Income Worksheet" for tax year 2010 results in a \$9,454,813 valuation using the County's 7.75% capitalization rate and \$8,141,644 using a 9% rate. Substituting \$4.50 per square foot rent in the County's "Override Income Worksheet" for tax year 2011 results in a \$9,157,055 valuation using the County's 8.15% capitalization rate and \$8,292,222 using a 9% rate.

¹⁰⁹Robinson's \$9,600,000 reconciled opinion of value is found at Exhibit 7, page 13. His Valuation Analysis at Exhibit 7, page 2 includes an \$8,488,680 income approach calculation wherein a 9% capitalization rate is used, and his \$9,597,214 cost approach calculation is found at Exhibit 7, page 12.

The court adopted a capitalization rate of 8.75% for 1991 and 9% for 1992, 1993 and 1994. These rates are slightly higher than the national rates for investment quality malls, based in part on the opinion expressed by both experts at trial that the Korpacz survey information covers mall property with lower risk than anchor store properties.¹¹⁰

Robinson's testimony indicated that the increased risk associated with an owner-occupied mall anchor as compared to other mall properties such as in-line stores stems in part from scarcity of potential buyers. This contention is supported by case law from other jurisdictions.¹¹¹ For example, in *Montgomery Ward v. County of Hennepin*, the Minnesota Supreme Court stated that both parties involved in this property tax case acknowledged "anchor department stores rarely sell."¹¹²

In addition to the increased risk associated with mall anchor status, Robinson asserted that the addition of 1% to the approximate 8% average rate he derived from Korpacz and Realtyrates.com is appropriate because the Dillard's store situated on the Subject Property is deemed "average" in the national market based on gross retail sales. Support for this assertion is found in *Eden Prairie Mall, LLC v. County of Hennepin*, where the Minnesota Supreme Court stated as follows with respect to correlation of Korpacz capitalization rates with retail sales:

Both appraisers relied upon the Korpacz Real Estate Investor Survey, which establishes a range of appropriate capitalization rates for various classes of malls based on their geographic location and using retail sales per square foot as a proxy for perceived risk. In particular, under the Korpacz survey, the higher the average retail sales per square foot generated by a mall's tenants, the lower the degree of perceived risk in the mall as an investment, and the lower the range of appropriate capitalization rates.¹¹³

The Taxpayer's Valuation Analysis at page 2 of Exhibit 7 indicates that the Subject Property generated gross sales in 2009 in the amount of \$130 per square foot, and Robinson testified that gross sales in 2010 were similar to 2009. He stated that the Subject Property's stabilized gross

¹¹⁰ *Carson Pirie Scott & Co. (Ridgedale) v. County of Hennepin*, 576 N.W.2d 445, 451 (Minnesota Supreme Court 1998).

¹¹¹ *Montgomery Ward v. County of Hennepin*, 450 N.W.2d 299, 303 (Minnesota Supreme Court 1990); *Board of Educ. of Ridgeland School Dist. No. 122, Cook County v. Property Tax Appeal Bd.*, 363 Ill.Dec. 461, 464, 975 N.E.2d 263, 266 (Ill.App. 1 Dist. 2012) (Taxpayer's appraiser "unable to find any sales of anchor department store sites" in the Chicago area).

¹¹² *Montgomery Ward v. County of Hennepin*, 450 N.W.2d 299, 303 (Minnesota Supreme Court 1990).

¹¹³ *Eden Prairie Mall, LLC v. County of Hennepin*, 797 N.W.2d 186, 198 (Minnesota Supreme Court 2011).

sales in 2009 and 2010 were average in the market, and that this status supported a 9% capitalization rate. In contrast, he testified that a 7.75% capitalization rate, which was used by the County for tax year 2010, was more appropriate for an above average Dillard's store in the market, such as a store in Texas under his purview that generated gross sales in the area of \$300 per square foot in the 2010 – 2011 time period. He also testified that the Mall of the Bluffs in Council Bluffs, Iowa, which is adjacent to Omaha, experienced below average sales performance in the 2010 – 2011 time period and consequently required an 11% capitalization rate.

In addition to the comments by the Minnesota Supreme Court in *Eden Prairie Mall, LLC v. County of Hennepin* noted above, Robinson's testimony that the Subject Property is an average store in the market based on \$130 per square foot sales is supported by *Dollars & Cents of Shopping Centers: 2002*. This publication states that the median level of sales per square foot amounted to \$135.68 for department stores in regional shopping centers in the Midwest, which includes Nebraska.¹¹⁴ I find that this information, which preceded the 2007 – 2008 economic crisis, is persuasive in terms of supporting Robinson's testimony that the Subject Property was an average anchor department store in the regional mall market based on retail sales performance for purposes of tax years 2010 and 2011.¹¹⁵

In summary, Robinson asserts that the addition of at least 1% to the approximate 8% average capitalization rate derived from Korpacz and Realtyrates.com is based on two factors: (1) the increased risk associated with the Subject Property's status as a mall anchor; and (2) the average

¹¹⁴ *Dollars & Cents of Shopping Centers: 2002*, Urban Land Institute, 2002, 89, 321.

¹¹⁵ For notice purposes under the Commission's rules, the 2002 edition of *Dollars & Cents of Shopping Centers* is the only version of this publication available to the Commission at this time. I find it useful for tax year 2010 and 2011 analysis purposes because retail sales increases due to inflation or other factors, if any, were in all likelihood offset by the impact of the economic crisis that began in 2007. The majority asserts that it is inconsistent to rely on retail sales information from *Dollars & Cents of Shopping Centers: 2002* that pre-dates the economic crisis, while at the same time condemning the County's use of commercial real estate sales prior to 2007 for purposes of deriving its capitalization rates. This assertion does not have merit because consideration of whether a department store is "average" in the regional market based on **retail sales** is a wholly different analysis as compared to the derivation of capitalization rates for tax years 2010 and 2011 based on **commercial real estate sales** prior to 2007. As indicated previously, due to the impact of the economic crisis on retail sales growth, if any, I find that it is reasonable to use the \$135 per square foot median figure contained *Dollars & Cents of Shopping Centers: 2002* to support Robinson's assertion that the Subject Property's \$130 per square foot gross sales were "average" in 2009 and 2010. In contrast, the following 2012 statement by the Illinois Court of Appeal in the commercial context demonstrates that the County's reliance on real estate sales prior to 2007 to derive its capitalization rates for tax years 2010 and 2011 is unreasonable: "[m]any properties were purchased during a time when real estate values greatly increased (referred to as 'the real estate bubble') and those same properties plummeted in value after 2006 [and] continuing to the present." *Sewickley, LLC v. Chicago Title and Trust Company*, 974 N.E.2d 397, 406 (Court of Appeal of Illinois, First District, Second Division 2012).

performance of the Dillard's store situated on the Subject Property based on retail sales. Based on Robinson's substantial valuation experience, together with the support found in case law and *Dollars & Cents of Shopping Centers: 2002* summarized above, I am persuaded that the use of a 9% capitalization rate is the best evidence in this case.

IV. THE TAXPAYER'S 3%-2%-1% INCOME APPROACH VALUATION

Robinson's \$8,488,680 income approach valuation uses a 3%-2%-1% percentage of sales per square foot calculation to derive market rent (\$3.86 per square foot), a 5% expense ratio, and a 9% capitalization rate.¹¹⁶ Robinson indicated that this 3%-2%-1% valuation is a commonly accepted income approach for national chains such as Dillard's to value owner-occupied department stores that function as regional mall anchors.

While the majority opinion asserts that Robinson's 3%-2%-1% valuation based in part on sales per square foot as a proxy for market rent is not a commonly accepted appraisal technique, other jurisdictions have recognized this approach to value the real estate component of owner-occupied anchor department stores that operate in the regional mall context for property tax purposes.¹¹⁷ For example, the Minnesota Supreme Court stated as follows in its 1990 opinion in *Montgomery Ward v. County of Hennepin*:

In the case of anchor department stores, however, both parties' experts agreed that, in the Twin Cities' metropolitan area, anchor department stores are typically owner-occupied. As a result, recently signed leases with actual rent figures are unavailable. Accordingly, both parties agreed that, in order to utilize the income approach, an imputed or constructive rent for the subject property would have to be determined. . . . Ward's relied on the national publication *Dollars and Cents of Shopping Centers*, published by the Urban Land Institute, as authority for the proposition that market rent for anchor department stores should be determined by

¹¹⁶ According to Robinson's testimony and the income approach portion of his Valuation Analysis found at Exhibit 7, page 2, the 3-2-1 calculation is as follows as it relates to the Subject Property's \$130 per sq. ft. annual sales: 3% multiplied by the first \$125 per sq. ft. sales (.03 x \$125 = \$3.75 per sq. ft.); 2% multiplied by the next \$50 sq. ft. sales (.02 x \$5 = \$0.11 per sq. ft.); and 1% multiplied by the remainder (not applicable to the Subject Property). The result, \$3.86 per square foot is effectively a proxy for market rent.

¹¹⁷ *Montgomery Ward v. County of Hennepin*, 482 N.W.2d 785 (Minnesota Supreme Court 1992); *Montgomery Ward v. County of Hennepin*, 450 N.W.2d 299 (Minnesota Supreme Court 1990); *See Board of Educ. of Ridgeland School Dist. No. 122, Cook County v. Property Tax Appeal Bd.*, 363 Ill.Dec. 461, 975 N.E.2d 263 (Ill.App. 1 Dist. 2012); *Carson Pirie Scott & Co. (Ridgedale) v. County of Hennepin*, 576 N.W.2d 445 (Minnesota Supreme Court 1998).

multiplying gross sales by 2.5 percent. This method had been used in the Eden Prairie Donaldson's case and characterized by the court as reliable.¹¹⁸

After issuing the opinion referenced above in 1990, the Minnesota Supreme Court issued a related *Montgomery Ward v. County of Hennepin* opinion in 1992, which supports Mr. Robinson's 3%-2%-1% percentage of sales approach to derive market rent. In this case, the Court stated as follows regarding the percentage of retail sales parameters used by the Taxpayer's appraiser to derive income approach imputed rent for an owner-occupied mall anchor department store: "Mr. Battuello supported his figure by citing a publication entitled *Dollars and Cents*, which showed that for a national chain anchor in a regional shopping center, the percentage figure ranged from 1 percent to 3 percent."¹¹⁹

As indicated above, because many anchors are owner-occupied, comparable market rent information is difficult to acquire for purposes of valuing the Subject Property's realty under the income approach.¹²⁰ *Dollars & Cents of Shopping Centers: 2002* states as follows regarding the decrease in availability of market rent information for regional mall anchors and therefore supports the need to use sales per square foot to derive or impute constructive rent information in the case of the owner-occupied Subject Property:

Over time, there was a noticeable movement away from the traditional arrangement in which all department stores leased space from the shopping center owner in the same general manner as other stores in the center. The most recent trend includes arrangements whereby the department store building is owned by the store itself, not by the shopping center owner.¹²¹

Further, Robinson's \$8,488,680 income approach valuation is derived from a combination of actual and market information, contrary to the assertion in the majority opinion. Robinson's testimony and *Dollars & Cents of Shopping Centers: 2002* indicate that this is a market based approach in part because the stabilized \$130 per square foot sales figure used to derive the \$3.86 per square foot effective rent component of the 3%-2%-1% valuation is consistent with an

¹¹⁸ *Montgomery Ward v. County of Hennepin*, 450 N.W.2d 299, 303 (Minnesota Supreme Court 1990) (emphasis added).

¹¹⁹ *Montgomery Ward v. County of Hennepin*, 482 N.W.2d 785, 789 (Minnesota Supreme Court 1992) (emphasis added).

¹²⁰ The Property Record Files found at page 5 of Exhibits 3 and 5 indicate that the Taxpayer is the owner of the Subject Property and does not lease from Oak View Mall LLC, the mall owner. In contrast, page 19 of Exhibits 3 and 5 indicates that another anchor mall, Younker's, leases from the mall owner, Oak View Mall LLC.

¹²¹ *Dollars & Cents of Shopping Centers: 2002*, Urban Land Institute, 2002, at p. 95.

average performing department store in the Midwest regional shopping center market, which includes Nebraska.¹²² Robinson also testified that the 9% capitalization rate used in the 3%-2%-1% valuation is appropriate for an average store in the market.¹²³ Thus, Robinson's \$8,488,680 income approach valuation avoids improperly valuing management by using a combination of stabilized actual income/expense operating history in combination with the Subject Property's status in the market as average based on sales performance.

Robinson's resume indicates that he has extensive valuation experience in the property tax area dating back to 1986. Based on this experience and his testimony, together with the support found in case law and *Dollars & Cents of Shopping Centers: 2002* outlined above, I am persuaded that the 3%-2%-1% percentage of sales calculation is simply an attempt to ascertain the cost (i.e., \$3.86 per square foot market rent) to occupy the real estate component of the Subject Property for income approach purposes. Moreover, I am persuaded that the total \$8,488,680 valuation derived from this calculation is focused on determining the value attributable to the Subject Property's real estate and is not a comprehensive business valuation that includes personal property and intangibles as asserted by the majority.¹²⁴ Therefore, I am persuaded that his \$8,488,680 income approach valuation is useful as a sign of value for property tax purposes.

V. THE COUNTY'S "OVERRIDE" INCOME APPROACH VALUATION

Robinson's \$9,600,000 opinion of value, including the applicability of a 9% capitalization rate for tax years 2010 and 2011, is particularly persuasive in this case where the County Board relies solely on its "Assessment Reports" received in evidence as Exhibit 3 (tax year 2010) and Exhibit 5 (tax year 2011) to support its \$11,025,700 valuation that is based exclusively on an

¹²² *Dollars & Cents of Shopping Centers: 2002*, Urban Land Institute, 2002, at pgs. 89, 321. As indicated previously, this publication states that the median level of sales per square foot amounted to \$135.68 for department stores in regional shopping centers in the Midwest, which includes Nebraska.

¹²³ As the previous section indicates, Robinson testified that a 9% capitalization rate is appropriate for an average store, while a lower 7.75% rate is required for an above average anchor department store, and a higher 11% rate is required for a store at Mall of the Bluffs in Council Bluffs that is below average.

¹²⁴ See generally Fisher and Martin, *Income Property Valuation*, Dearborn Financial Publishing, Inc., 2004, at pgs. 2-5 (discussion regarding components of business value, including real property, personal property and intangible assets). I note that even if the majority is correct in terms of its assertion that the 3-2-1 approach includes value attributable to personal property and intangibles in addition to real property, the \$8,488,680 total valuation is significantly less than the County Board's determinations for tax years 2010 and 2011 and Robinson's reconciled opinion of value.

“Override” income approach as discussed below.¹²⁵ On August 12, 2012, Gregory Weisheipl, a Staff Appraiser employed by the Douglas County Assessor’s Office, signed these Assessment Reports prepared by his fellow employee, Linda Rowe.¹²⁶ The County Board did not call Weisheipl or Rowe as witnesses.

In *Leech, Inc. v. Board of Equalization*, the Nebraska Supreme Court 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.”¹²⁷ In reaching this conclusion, the *Leech* Court found that the assessed valuations at issue in the case were “automatically accepted through the years by the taxing authorities without any consideration of the relevant and applicable statutory factors.”¹²⁸

Similar to *Leech*, the County’s assessment actions regarding the Subject Property are problematic. The County’s Assessment Reports include a document entitled “Override Income Worksheet” that attempts to support the Subject Property’s \$11,025,700 assessed valuation, which has remained constant since 2002 according to page 18 of Exhibits 3 and 5.¹²⁹ With the exception of a brief and less than clear “Overall Capitalization Rate” summary found at page 14 of Exhibits 3 and 5 that is discussed further below, the County Board offered only a very limited explanation regarding the applicability of its 7.75% capitalization rate for 2010 and its 8.15% rate for 2011, which were used in the County’s “Override Income Worksheets.”

“Override” income approach documentation, which involves arbitrary adjustment of income approach variables (i.e., market rent, collection/vacancy loss rate, expense ratio, and capitalization rate), is submitted to the Commission in cases where the County Board does not

¹²⁵ Page 17 of Exhibits 3 and 5 indicate that the County Board determinations were based only on the income approach and did not consider the cost or market approaches to valuation. In contrast, as discussed previously, in addition to an \$8,488,680 income approach valuation found at Exhibit 7, page 2, Robinson’s Valuation Analysis includes a \$9,597,214 cost approach valuation found at Exhibit 7, page 12 that supports his \$9,600,000 reconciled opinion of value. As also discussed previously, Robinson testified that his \$9,600,000 reconciled opinion of value is supported by substituting a 9% capitalization rate in the County’s “Override Income Worksheet” for tax year 2010 (7.75% County rate) and tax year 2011 (8.15% County rate).

¹²⁶ E3:1 and E5:1.

¹²⁷ *Leech, Inc. v. Bd. Of Equal.*, 176 Neb. 841, 846, 127 N.W.2d 917, 921 (1964). See also *Baum Realty Co. v. Board of Equalization*, 169 Neb. 682, 100 N.W.2d 730 (1960); *Matzke v. Board of Equalization*, 167 Neb. 875, 95 N.W.2d 61 (1959); *Adams v. Board of Equalization*, 168 Neb. 286, 95 N.W.2d 627 (1959).

¹²⁸ *Id.* at 852.

¹²⁹ E3:15 and E5:15.

accept the County Assessor's opinion of actual value for reasons that often include equalization. Whether the use of an "Override" in this case stems from the County Board's equalization actions or other reasons, I find that the County's unexplained income approach documentation is by definition arbitrary.

The use of "Override" income documentation in this case appears to stem from the attempt by the County Assessor's Office to adjust the variables in its income worksheet for purposes of supporting the County Board's misguided effort to equalize the value of the Subject Property with smaller Oak View Mall properties. In this regard, the County's Assessment Reports for tax years 2010 and 2011 contain identical one-page documents entitled "Equalization Comparables."¹³⁰ These documents indicate that the County Board equalized the Subject Property (\$53.21 per sq. ft.; 207,202 sq. ft. improvement) for tax years 2010 and 2011 with the assessed valuations of other Oak View Mall stores, including Younkens (\$52.49 per sq. ft.; 150,780 sq. ft. improvement) and Penny's (\$53.13 per sq. ft.; 124,751 sq. ft. improvement).

Based on economies of scale, equalization of the Subject Property with Younkens and Penny's is inappropriate. According to *The Appraisal of Real Estate*, "[r]educing sale prices to consistent units of comparison facilitates the analysis of comparable sites and can identify trends in market behavior. Generally, as size increases, unit prices decrease. Conversely, as size decreases, unit prices increase."¹³¹ As indicated, the Subject Property is significantly larger than the Younkens and Penny's equalization comparables, so use of an "Override" income approach to support the County Board's equalization actions, if any, is arbitrary or unreasonable.

Finally, in addition to the assessed values of Younkens and Penny's, the County's "Equalization Comparables" for tax years 2010 and 2011 include the assessed value of the Sears store (\$48.84 per sq. ft.; 123,484 sq. ft. improvement) at Oak View Mall.¹³² The assessed values of these three equalization comparables indicate that the Taxpayer's \$9,600,000 (\$46.33 per sq. ft.; 207,202 sq. ft. improvement) opinion of value is appropriate based on consideration of economies of scale.

¹³⁰ E3:12 and E5:12.

¹³¹ *The Appraisal of Real Estate*, Appraisal Institute, 13th Ed., 2008, 212.

¹³² E3:12 and E5:12.

VI. THE COUNTY'S "OVERALL" CAPITALIZATION RATE

The County's Assessment Reports for tax years 2010 and 2011 contain identical one-page documents entitled "Overall Capitalization Rate" in an attempt to support its 7.75% and 8.15% capitalization rates.¹³³ This document, which only contain very limited explanation concerning the basis of using 7.75% in 2010 or 8.15% in 2011 to value the Subject Property specifically, indicate that various County rates for Class A, B, C, and D retail properties were supported by a study conducted by Kenneth Voss & Associates, LLC, of Atlanta, Georgia.¹³⁴ Mr. Voss was not available to testify at the hearing before the Commission, and the "Overall Capitalization Rate" document does not contain any analysis regarding the Subject Property's unique status as a mall anchor or increased competition from new malls constructed in the area.¹³⁵

The County's capitalization rate evidence is also problematic because it fails to sufficiently consider the impact of the economic crisis on the local market. The Taxpayer's Valuation Analysis indicates that Dillard's experienced an 11.5% decline in revenue from 2005 (\$147 gross sales per sq. ft.) through 2009 (\$130 gross sales per sq. ft.), which is understandable given the onset of the economic crisis in 2007.¹³⁶

Guidance regarding consideration of the economic crisis by the County in the mass appraisal context is contained in *Property Assessment Valuation*, which is published by the International Association of Assessing Officers. Addressing mass appraisal income approach models used in the commercial context, *Property Assessment Valuation* states as follows:

Although the structure of a mass appraisal model may be valid for many years, the model is usually recalibrated every year. To update for short periods, trending factors may suffice. Over longer periods, as the relationships among the variables in market value change, complete market analyses are required. The goal is for mass appraisal equations and schedules to reflect current market conditions.¹³⁷

¹³³ E3:14 and E5:14.

¹³⁴ E3:14 and E5:14.

¹³⁵ The Taxpayer's "Property Valuation Protest" found at page three of Exhibit 9 that was filed with the County in June of 2011 states: "Sales show continuing decline while new competitive malls draw potential customers."

¹³⁶ E7:2.

¹³⁷ *Property Assessment Valuation, 3rd Ed.*, International Association of Assessing Officers, 2010, 417-18 (emphasis added).

The Illinois Court of Appeal stated as follows regarding consideration of “current market conditions” in a 2012 opinion affirming a lower court’s approval of a \$300,000 judicial foreclosure sale of commercial real estate secured by a note with a principal balance in the amount of \$824,540:

Our courts today face a similar situation as that faced by the court in [1937] *Levy* during the Great Depression, in that many properties were purchased during a time when real estate values greatly increased (referred to as “the real estate bubble”) **and those same properties plummeted in value after 2006 [and] continuing to the present.** Consequently, many property owners owe much more to the lenders than what the property is worth. While this fact is unquestionably tragic, the value of a given piece of property must be determined by considering all of the pertinent factors as they exist at the time of the sale, whether such sale is made in the open market or through a judicial sale as a result of a foreclosure action.¹³⁸

The Nebraska Supreme Court has also recently considered “current market conditions” in the aftermath of the economic crisis. For instance, in *County of Lancaster v. Union Bank & Trust Co. (In re Estate of Craven)*, the Court upheld a ruling issued by the Lancaster County Court that the \$113,000 purchase price of property sold at an estate auction in a weak real estate market after the decedent’s death in 2008 stemmed from an arm’s length transaction and was the best evidence of value for inheritance tax purposes.¹³⁹

The County’s “Overall Capitalization Rate” document states that the Voss study utilized sales “between January 1, 2003 and December 31, 2009” to derive his capitalization rates, with a focus on “2007-2009 data.”¹⁴⁰ In addition to referencing the Voss study, however, this document contains language apparently authored by the County’s Appraiser that states as follows with respect to the use of sales prior to the onset of the economic crisis to derive capitalization rates for tax years 2010 and 2011:

¹³⁸ *Sewickley, LLC v. Chicago Title and Trust Company*, 974 N.E.2d 397, 406 (Court of Appeal of Illinois, First District, Second Division 2012) (emphasis added). I note that the “real estate bubble” referenced in the *Sewickley* opinion included tax year 2002 when a favorable lending environment existed in the aftermath of the severe 2000 – 2001 stock market crash and the events of September 11, 2001. Thus, the Subject Property’s static valuation from 2002 through tax years 2010 and 2011 is problematic.

¹³⁹ *County of Lancaster v. Union Bank & Trust Co. (In re Estate of Craven)*, 281 Neb. 122, 794 N.W.2d 406 (Neb. 2011).

¹⁴⁰ E3:14 and E5:14.

Please note that the number of market transactions decreased in late 2008 and through 2009. I decided to analyze **older** sales because of the data obtained during the verification process. I adjusted the final rates based on my knowledge of the current real estate market.¹⁴¹

Based on the County's Assessment Reports outlined in the preceding two paragraphs, I find that the County did not sufficiently consider market activity most relevant to the tax years at issue to determine its capitalization rates. I acknowledge that the County's Assessment Report for each appeal authored by the County's Appraiser states that the Voss study focused on "2007-2009 data" as a part of his capitalization rate study of sales between January 1, 2003, and December 31, 2009. Nonetheless, based on the language noted above in the County's Assessment Reports that was apparently authored by the County's Appraiser regarding the use "older" sales due to insufficient sales during the economic crisis period from "late 2008 through 2009," I find that the County analyzed older sales in lieu of sales more recent and relevant to the date of assessment for purposes of determining its capitalization rates. Therefore, particularly in this case where the Subject Property's \$11,025,700 assessed valuation has remained constant from 2002 through the economic crisis, and because there is nothing in the record to indicate that the increased risk associated with anchor status was considered, I find that the County Board's income approach is arbitrary or unreasonable.

VII. CONCLUSION

Based on the above analysis, I would find that the Taxpayer has rebutted the presumption that the County Board faithfully performed its duties with sufficient and competent evidence on which to base its decisions for tax years 2010 and 2011, and that the Taxpayer has shown by clear and convincing evidence that the decisions of the County Board were arbitrary or unreasonable. I further would find that the Taxpayer's evidence constitutes the best evidence of value for the Subject Property for tax years 2010 and 2011. Therefore, I would find that the actual value of the Subject Property for tax years 2010 and 2011 is \$9,600,000, and that the decisions of the County Board should be vacated and reversed.

Thomas D. Freimuth, Commissioner

¹⁴¹ E3:14 and E5:14 (emphasis added).