

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Center LLC,
Appellant,

v.

Douglas County Board of Equalization,
Appellee.

Case Nos: 10C 487 & 11C 567

Decision and Order Affirming the Douglas
County Board of Equalization

For the Appellant:

Sean T. Mullen,
Hancock & Dana,
and
Thomas Barrett,
Attorney at Law

For the Appellee:

Matthew J. Boever,
Deputy Douglas County Attorney

The appeals were heard before Commissioners Thomas D. Freimuth and Nancy J. Salmon. Commissioner Salmon, affirming; Commissioner Freimuth, dissenting.

I. THE SUBJECT PROPERTY

The Subject Property is a commercial parcel located in Douglas County. The parcel is improved with a 215,000 square foot office building originally built in 1955 as a regional shopping mall. The legal description of the parcel is found at Exhibit 3, page 8. The property record card for the Subject Property is found at Exhibit 3.

II. PROCEDURAL HISTORY

The Douglas County Assessor determined that the assessed value of the Subject Property was \$7,370,000 for tax year 2010.¹ Center LLC (the Taxpayer) protested this assessment to the Douglas County Board of Equalization (the County Board) and requested an assessed valuation of \$3,496,027.² The Douglas County Board determined that the assessed value for tax year 2010 was \$7,370,000.³

¹ E1.

² E5.

³ E1.

The Douglas County Assessor determined that the assessed value of the Subject Property was \$10,535,200 for tax year 2011.⁴ Center LLC (the Taxpayer) protested this assessment to the Douglas County Board of Equalization (the County Board) and requested an assessed valuation of \$3,257,107.⁵ The Douglas County Board determined that the assessed value for tax year 2011 was \$8,696,600.⁶

The Taxpayer appealed the decisions 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 November 20, 2012.

III. STANDARD OF REVIEW

The Commission's review of the determination by a County Board of Equalization is de novo.⁷ 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."⁸

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.⁹

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

⁴ E2.

⁵ E6.

⁶ E2.

⁷ 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).

⁸ *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted).

⁹ *Id.*

arbitrary.¹⁰ Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.¹¹

A Taxpayer must introduce competent evidence of actual value of the Subject Property in order to successfully claim that the Subject Property is overvalued.¹² The County Board need not 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.¹³

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.”¹⁴ 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.”¹⁵

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.¹⁶

“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

¹⁰ Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.).

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

¹² 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).

¹³ *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).

¹⁴ Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.).

¹⁵ Neb. Rev. Stat. §77-5016(6) (2012 Cum. Supp.).

¹⁶ Neb. Rev. Stat. §77-112 (Reissue 2009).

77-1371, (2) income approach, and (3) cost approach.”¹⁷ “Actual value, market value, and fair market value mean exactly the same thing.”¹⁸ 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.¹⁹ All real property in Nebraska subject to taxation shall be assessed as of January 1.²⁰ All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.²¹

B. Summary of the Evidence

Gregory Wieshiepl, Senior Commercial Property Appraisal Manager for the Douglas County Assessor’s Office and a licensed Certified General Appraiser in Nebraska, testified that while the County Assessor used an income approach to value the property for tax year 2011, the County Board did not rely on that opinion of value in its determination. Additionally, while the County Assessor ran an income approach for tax year 2010, the assessed value was reconciled to the same value placed on the Subject Property by the County Board in a 2007 appeal.²² The County Board then affirmed this value.²³

Edwin Shoening, owner of the Subject Property for over 20 years and a Certified Shopping Center Manager, testified that the Subject Property was built as a regional shopping center and converted to offices with 90 to 100 tenants. He testified that the average terms for the leases are 1.6 years for smaller offices, and that the Subject Property has increased expenses based on deteriorating building components and required tenant improvements. Exhibit 8, page 1, supplied by the Taxpayer and testified to by Shoening indicates that the actual expenses of the Subject Property were 74% for both tax years. Shoening also asserted that the capitalization rate should be 12%, and gave an opinion of value for the Subject Property for both years of about \$5,000,000.

¹⁷ *Id.*

¹⁸ *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).

¹⁹ Neb. Rev. Stat. §77-131 (Reissue 2009).

²⁰ See, Neb. Rev. Stat. §77-1301(1) (Reissue 2009).

²¹ Neb. Rev. Stat. §77-201(1) (Reissue 2009).

²² E3:22.

²³ E1:1.

Shoening and Weisheipl agreed that the Subject Property is a unique property with no true comparable properties. Shoening asserted that since there were no other comparable properties that the Subject Property could only be valued using the income approach.

The Taxpayer provided an income approach derived from actual values from 2009 and 2010.²⁴ However, the Taxpayer's income approach may have included inappropriate expenses,²⁵ does not state a vacancy and collection loss rate, and was calculated based on an incorrect area.²⁶

The Taxpayer attempted to compare its income worksheet with the County Assessor's income worksheet for tax year 2010 found at Exhibit 3, page 20. However, neither the County Assessor nor the County Board relied upon the income approach provided in Exhibit 3, page 20. Instead the County Assessor reconciled the income approach value with 2007 County Board value and determined the actual value was equal to the 2007 County Board value. The County Board adopted the County Assessor's opinion of value for tax year 2010.

For tax year 2011, the County Board did not rely upon the County Assessor's opinion of value as derived from the income worksheet in its decision and determination.²⁷

C. Analysis

As an owner, Shoening was permitted to testify concerning the actual value of the Subject Property.²⁸ However, Shoening's opinion of value was based upon factors which Shoening himself testified were not accurate. Shoening's opinion of value was additionally based on income factor's from the County Assessor's income approach worksheets, without any testimony that the factors were derived using professionally accepted techniques, and in spite of the fact that the County Assessor did not rely on the income approach to derive his opinion of value. The Commission finds that an owner's opinion of value alone, without supporting basis or data, is not clear and convincing evidence that the County Board's determination that the County Assessor's valuation determined using a statutorily permissible method of valuation is unreasonable or

²⁴ E8:1.

²⁵ See, International Association of Assessing Officers, *Property Assessment Valuation*, at 326-331 (3rd ed. 2010) (listing the proper and improper expenses to consider in the income approach).

²⁶ Shoening testified that the 154,012 square feet should actually be 215,000.

²⁷ E3:22-23.

²⁸ See, *U. S. Ecology v. Boyd County Bd. of Equal.*, 256 Neb. 7, 16, 588 N.W.2d 575, 581 (1999).

arbitrary.²⁹ The Commission gives little weight to Shoening’s opinion of value due to the deficiencies in his calculations.

A general economic slowdown was referenced as evidence that the County Board’s determinations were unreasonable or arbitrary. Changes in the local market are depicted within the local market data. In the assessment of real property any changes in the global or national economic environments are only relevant to the extent there is a measurable impact within the local market; it is possible for values in a local market to be decreasing during a global boom or increasing during a global depression. It is the impact on the local market factors which contribute to the actual value of a property, as depicted by local market factors, which is relevant. Information that explains why the local market factors are changing may be important for policy reasons, but it is the quantified impact on the local market that matters in appropriately determining the actual value of real property.

The macro economic climate is irrelevant to the determination of the actual impacts on the local market unless that impact on the local market conditions can be quantified. Cases wherein courts from other jurisdictions reference a “Great Recession” and rely upon the macro economic climate to determine the appropriate weight to be given to sales data for use in the determination of actual value have limited, if any, probative value in quantifying the impact of any economic events on local markets within Nebraska. The evidence in the hearing was limited to the Subject Property, and no data was supplied describing the general economic environment or quantifying its impact on the Subject Property’s market area.

The dissent asserts that in *County of Lancaster v. Union Bank & Trust Col. (In re Estate of Craven)*, 281 Neb. 122, 794 N.W.2d 406 (Neb.2011), the Nebraska Supreme Court considered “‘current market conditions’ in the aftermath of the economic crisis.” In its recitation of the evidence presented to the lower court, the Nebraska Supreme Court included testimony of witnesses that the real estate market in Lincoln, Nebraska was not strong at the time of an auction sale of the real property in that case, but the Court in *In re Estate of Craven* did not rely on the weak market in making its determination, nor did it address an economic crisis.³⁰ In fact,

²⁹ The Nebraska Supreme Court has held that even an expert’s unsupported opinion of value is not competent evidence of the actual value of real property. See, *McArthur v. Papio-Missouri River Naturla Resources District*, 250 Neb. 96, 547 N.W.2d 716 (1996).

³⁰ *Id.* at 125, 794 N.W.2d at 409.

other than mentioning that witnesses felt that the Lincoln, Nebraska real estate market was not strong sometime after July 17, 2008, the Court did not discuss the strength of the real estate market at all.

The Commission has reviewed the specific facts of this case and finds that this case is substantially different than *In re Estate of Craven*. In *In re Estate of Craven*, the residential property at issue had significant condition issues.³¹ Testimony at trial indicated that animals had been allowed to urinate and defecate throughout the property, and that even after the carpets were removed the smell was unbearable and the floors and subfloors under the carpet were stained from the urine and feces.³² Further, the appellee's only evidence of actual value was derived from a retroactive appraisal made after significant improvements had been made to the residence.³³ The appraisers based their opinion of the condition of the property on notes from another appraiser who inspected the property prior to significant remodeling.³⁴

The Supreme Court held that under some conditions the auction price may be better evidence of sale price than appraisal evidence.³⁵ The Supreme Court reasoned that the deficiencies in the property caused there to be "no truly comparable properties in the area[.]"³⁶ The Supreme Court also held that sales price or auction price is not always the best evidence of value, and that each determination must be made on a case by case basis.³⁷ The Court focused on the lack of truly comparable properties in the market, and the exceptionally horrible condition of the subject property.³⁸ There is no sale price of the Subject Property in this case, and the Subject Property is not subject to the same or similar deplorable conditions as the property at issue in *In re Estate of Craven*.

No evidence was presented indicating that the process the County Board followed to determine the assessed value of the Subject Property was arbitrary or unreasonable, nor was there any evidence presented indicating through commonly accepted appraisal techniques that the County Board's determination of value was unreasonable or arbitrary. The question before

³¹ *Id.* at 124-125, 794 N.W.2d at 408-409.

³² *Id.* at 124-125, 794 N.W.2d at 408-409.

³³ *Id.* at 126, 794 N.W.2d at 409.

³⁴ *Id.*

³⁵ *Id.* at 128, 794 N.W.2d at 411.

³⁶ *Id.* at 129, 794 N.W.2d at 410.

³⁷ *Id.*

³⁸ *Id.* at 128-30, 794 N.W.2d at 409-11.

the Commission is whether the County Board's opinion of value was arbitrary or unreasonable and not whether the County Assessor's noticed value was arbitrary or unreasonable. Where the County Board makes a determination of the actual value of the Subject Property which is different from the County Assessor's noticed value, the County Assessor's opinion of value is irrelevant. In instances where the County Board does not rely upon the County Assessor's opinion of value in its determination of the actual value of the Subject Property, any errors in the County Assessor's opinion of value are irrelevant.

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.”³⁹ Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value.⁴⁰ 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.⁴¹ 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.⁴² 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.⁴³ 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.⁴⁴ The constitutional requirement of uniformity in taxation extends to both rate and valuation.⁴⁵ 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

³⁹ *Neb. Const.*, Art. VIII, §1.

⁴⁰ *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).

⁴¹ *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).

⁴² *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).

⁴³ *Banner County v. State Board of Equalization*, 226 Neb. 236, 411 N.W.2d 35 (1987).

⁴⁴ *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).

⁴⁵ *First Nat. Bank & Trust Co. v. County of Lancaster*, 177 Neb. 390, 128 N.W.2d 820 (1964).

error of judgment [sic].”⁴⁶ “There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity.”⁴⁷ “To set the valuation of similarly situated property, i.e. comparables, at materially different levels, i.e., value per square foot, is by definition, unreasonable and arbitrary, under the Nebraska Constitution.”⁴⁸

B. Summary of the Evidence

The Taxpayer asserted that the Subject Property was comparable to either Crossroads Mall or 106 South 15 Street (the Federal Building). The Taxpayer further asserted that a comparison of the assessed per square foot value of the alleged comparable properties and the Subject Property indicated that the assessed values of the properties were not equalized.

Gregory Wieshiepl, Senior Commercial Property Appraisal Manager for the Douglas County Assessor’s Office and a licensed Certified General Appraiser in Nebraska, testified that the Taxpayer’s alleged comparable properties were not comparable. Regarding Crossroads Mall, Wieshiepl testified that prior to the sale in 2010, Crossroads Mall was experiencing severe vacancy issues, including the loss of the anchor store Dillard’s, and that the sale was a distressed sale and not arm’s length. He further testified that Crossroads Mall was not comparable to the Subject Property because Crossroads Mall continued to operate as a retail mall, while the Subject Property has been converted into an office building with only one remaining retail establishment.

C. Analysis

In *Scribante*, the Nebraska Court of Appeals reasoned that where comparable properties were valued at materially different levels without an explanation of the differences, there is evidence of a lack of uniformity in the manner in which the properties were assessed.⁴⁹

The Taxpayer asserted that the alleged comparable properties were similarly situated to the Subject Property. However, Crossroads Mall is dedicated almost exclusively to retail space and has severe vacancy issues, while the Subject Property is an office building with only one retail

⁴⁶ *Newman v. County of Dawson*, 167 Neb. 666, 670, 94 N.W.2d 47, 49-50 (1959) (Citations omitted).

⁴⁷ *Id.* at 673, 94 N.W.2d at 50.

⁴⁸ *Scribante v. Douglas County Board of Equalization*, 8 Neb.App. 25, 39, 588 N.W.2d 190, 199 (1999).

⁴⁹ *Id.*

tenant and average vacancy issues.⁵⁰ Additionally, Crossroads Mall consists of 241,549 square feet of rentable area.⁵¹ The Subject Property only consists of 192,489 square feet of rentable area.⁵² Finally, the County Assessor's records indicate that Crossroads Mall and the Subject Property are different styles of commercial buildings with vastly different layouts.⁵³ These differences explain any differences between the assessed values or levels or value for the Subject Property and Crossroads Mall. The Commission finds that the Subject Property and Crossroads Mall are not similarly situated.

There are also differences between the Subject Property and the Federal Building which explain the difference in assessed value per square foot. The Federal Building is entirely vacant, while the Subject Property is only experiencing average vacancy issues. Additionally, the Federal Building is a ten story building located in downtown Omaha, while the Subject Property is shorter and located in a different neighborhood extension.⁵⁴ These differences indicate that the properties are not similarly situated.

The Commission finds that the Taxpayer's alleged comparable properties, Crossroads Mall and the Federal Building, are not similarly situated with the Subject Property, and any difference in the level value between the alleged comparable properties and the Subject Property are explained by the differences.

Additionally, the Taxpayer did not provide any ratios of the assessed to actual values of the alleged comparable properties or the Subject Property. Equalization to obtain proportionate valuation based on a comparison of the ratio of assessed to actual value for the Subject Property and comparable property requires assertions indicating the actual value of the Subject Property and comparable properties, and then analysis of the proportion of the actual value of comparable properties and the Subject Property assessed for ad valorem tax purposes.

While the Taxpayer did provided sales prices for Crossroads Mall and the Federal Building, sales price does not equal market value.

⁵⁰ See, E3:22.

⁵¹ E9:30.

⁵² E3:20.

⁵³ See, E3 and E9.

⁵⁴ See, E3 (Subject Property's property record card indicating the style and neighborhood or the Subject Property) and E12:15-21 (The Federal Buildings property record card indicating the style and neighborhood or the Federal Building).

The Nebraska Supreme Court has consistently held that sales price is not synonymous with actual value.⁵⁵ Nebraska Statutes permit the county assessor to value the Subject Property using the sales comparison approach, cost approach, income approach, or any commonly accepted mass appraisal technique and define actual value.⁵⁶ A review of pertinent case law is instructive.

In *Novak v. Board of Equalization*, the Nebraska Supreme Court held that, “It is true that the purchase price of property may be taken into consideration in determining the actual value thereof for assessment purposes, together with all other relevant elements pertaining to such issue; however, standing alone, it is not conclusive of actual value of property for assessment purposes, and many other matters relevant to the actual value of property appear in the record and must be considered in connection with the purchase price to determine actual value.”⁵⁷ In *Collier v. County of Logan*, the Nebraska Supreme Court reaffirmed the position that sale price is not conclusive of actual value, and reasoned that the real issue is to arrive at actual value and not simply sales price.⁵⁸ Again in *Josten-Wilbert Vault Co. v. Board of Equalization*, the Nebraska Supreme Court held that evidence of sales price alone is not sufficient to establish the actual value of a property:

While a sale price, in some circumstances, may be a very important factor in determining actual value or fair market value, it is only evidence to be considered along with other evidence. ‘Sale price’ is not synonymous with actual value or fair market value.⁵⁹

In *Potts v. Board of Equalization of Hamilton County*, the Nebraska Supreme Court determined that in setting the actual value of the subject property the county assessor had not given enough weight to the location and desirability of the subject property and “too much emphasis ha[d] been placed upon reproduction costs and other elements.”⁶⁰ The Court then determined that the District Court had determined that the sale price was the actual value of the subject property in accordance with the Nebraska Statutes section §77-112 which at that time required that a purchase price be taken into consideration in determining the actual value of real

⁵⁵ *Josten-Wilbert Vault Co. v. Board of Equalization*, 179 Neb. 415, 417, 138 N.W.2d 641, 643 (1965); *Potts v. Board of Equalization of Hamilton County*, 213 Neb. 37, 46, 328 N.W.2d 175, 180 (1982); *Dowd v. Board of Equalization*, 240 Neb. 437, 482 N.W.2d 583 (1992).

⁵⁶ Neb. Rev. Stat. § 77-112 (Reissue 2009).

⁵⁷ *Novak v. Board of Equalization*, 145 Neb. 664, 666, 17 N.W.2d 882, 883 (1945).

⁵⁸ *Collier v. County of Logan*, 169 Neb. 1, 8, 97 N.W.2d 879, 885 (1959).

⁵⁹ *Josten-Wilbert Vault Co. v. Board of Equalization*. 179 Neb. 415, 417, 138 N.W.2d 641, 643 (1965).

⁶⁰ 213 Neb. 37, 46, 328 N.W.2d 175, 180 (1982).

property in Nebraska.⁶¹ The Court in *Potts* acknowledged that other jurisdictions had held that sale price equals actual value, but that Nebraska did not. The Court in *Potts* did not overturn its previous decisions, but additionally adopted language from the dissent in *Josten-Wilbert Vault Co. v. Board of Equalization*, which said, “Evidence of sale price alone may not be sufficient to overcome the presumption that the board of equalization has valued the property correctly. But where, as in this case, the evidence discloses the circumstances surrounding the sale and shows that it was an arm’s length transaction between a seller who was not under compulsion to sell and a buyer who was not compelled to buy, it should receive strong consideration.”⁶²

In *Dowd v. Board of Equalization*, the appellant asserted that the actual value of a hog farm operation which clearly delineated the value of any real property received as part of the sale was indicative of the actual value of the real property.⁶³ The county assessor testified that she had failed to consider the sale price of the subject property because she could not separate out the value of the real estate from the purchase price with any degree of certainty.⁶⁴ Instead she relied upon the cost approach for the subject property.⁶⁵ The appellant produced an expert who was able through empirical evidence to derive a reasonable value of the personal property included in the sale.⁶⁶ The Nebraska Supreme Court reviewed *Potts*, and stated that: “We realize that a taxpayer may not control the valuation of his or her property for tax purposes by assigning an arbitrary sale price to the real estate and to the personal property included in a purchase, nor is the actual sale price conclusive on the issue of value. Nevertheless, in this case it is difficult to ignore the portion of the total sale price represented by the value of a herd of hogs, the market price of which was as realistic and specific as the quotations for stocks, bonds, or commodities listed on recognized exchanges.”⁶⁷ The Court concluded that the County Board was arbitrary and unreasonable to fail to consider the sale under those circumstances.⁶⁸ The Court in *Dowd* was operating under a similar statutory scheme as *Potts*. In 1986 the applicable Nebraska Statutes, section 77-112, read “[A]ctual value of property for taxation shall mean and include the value of property for taxation that is ascertained by using the following formula where

⁶¹ *Id.*

⁶² *Id.* at 47, 328 N.W.2d at 181 (citations omitted).

⁶³ 240 Neb. 437, 482 N.W.2d 583 (1992).

⁶⁴ *Id.* at 441-442, 482 N.W.2d at 586-587.

⁶⁵ *Id.* at 441-442, 482 N.W.2d at 586-587.

⁶⁶ *Id.* at 440-441, 482 N.W.2d at 586.

⁶⁷ 240 Neb. 437, 444, 482 N.W.2d 583, 589 (1992).

⁶⁸ *Id.*

applicable: (a) Earning capacity of the property; (b) relative location; (c) desirability and functional use; (d) reproduction cost less depreciation; (e) comparison with other properties of known or recognized value; (f) market value in the ordinary course of trade; and (g) existing zoning of the property.”⁶⁹

Since the Court’s decision in *Dowd*, Nebraska Statutes section 77-112 has been revised by eleven separate bills.⁷⁰ By 1999, Nebraska Statutes section 77-112 (1) read:

Actual value for purposes of taxation shall mean the market value of real property in the ordinary course of trade. Actual value may be determined using professionally accepted mass appraisal methods, including, but not limited to: (a) Comparison with sales of real property of known or recognized value, taking into account location, zoning, and current functional use; (b) Earning capacity of the real property; and (c) Reproduction cost less depreciation.⁷¹

In *Cabela’s Inc. v. Cheyenne County Bd. Of Equalization*, the Nebraska Court of Appeals held that: “Pursuant to § 77-112, the statutory measure of actual value is not what an individual buyer may be willing to pay for property, but, rather, its market value in the ordinary course of trade.”⁷²

Nebraska Statutes section 77-112 now reads:

Actual value of real property for purposes of taxation means the market value of real property in the ordinary course of trade. 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. 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 willing seller, both of whom are

⁶⁹ *Id.* at 444, 482 N.W.2d at 588 (citing Neb. Rev. Stat. §77-112 (Reissued 1986)).

⁷⁰ Laws 1989, LB 361, § 3; Laws 1991, LB 404, § 1; Laws 1991, LB 320, § 1; Laws 1992, LB 1063, § 46; Laws 1992, Second Special Session, LB 1, § 45; Laws 1996, LB 934, § 1; Laws 1997, LB 270, § 4; Laws 1997, LB 342, § 1; Laws 2000, LB 968, § 23; Laws 2003, LB 292, § 4; Laws 2003, LB 295, § 1.

⁷¹ Neb. Rev. Stat. §77-112(1) (Cum.Supp. 1998).

⁷² 8 Neb.App. 582, 591, 597 N.W.2d 623, 632 (1999) (citations omitted).

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 consideration of the full description of the physical characteristics of the real property and an identification of the property rights being valued.⁷³

These changes to Nebraska Statutes section 77-112 comport with current commonly accepted mass appraisal methods. “The terms *price*, *cost*, and *value* are used and defined carefully by appraisers.”⁷⁴ “The term price refers to the amount a particular purchaser agrees to pay and a particular seller agrees to accept under the circumstances surrounding their transaction.”⁷⁵ “Actual value, market value, and fair market value mean exactly the same thing.”⁷⁶ Actual value is defined by Nebraska Statutes section 77-112 and means “the most probable price expressed in terms of money that a property will bring if exposed for sale in the open market” and not the particular amount of a specific transaction.⁷⁷ The distinctions between *price* and *actual value* are meaningful. They acknowledge that circumstances and factors may effect a particular purchase price to such an extent that it is of limited value or irrelevant in determining the actual value of a property. Factors which tend to illustrate that a transaction is not an arm’s length transaction harm the credibility and relevance of a purchase price in determining the actual value of a subject property.

Changes in Nebraska Statutes section 77-112 since 1992 have removed the language requiring the purchase price of a property to be taken into consideration when determining the actual value of real property.⁷⁸ Regardless of the change in statute, the common law still requires that a purchase price be given strong consideration only if “the evidence discloses the circumstances surrounding the sale and shows that it was an arm’s length transaction between a seller who was not under compulsion to sell and a buyer who was not compelled to buy[.]”⁷⁹

⁷³ Neb. Rev. Stat. 77-112 (Reissued 2009).

⁷⁴ Appraisal Institute, *The Appraisal of Real Estate*, 13th Ed. (2008) at 21.

⁷⁵ *Id.*

⁷⁶ *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).

⁷⁷ Neb. Rev. Stat. §77-112 (Reissued 2009).

⁷⁸ Neb. Rev. Stat. 77-112 (Reissue 2009).

⁷⁹ *Dowd v. Board of Equalization*, 240 Neb. 437, 447, 482 N.W.2d 583, 589 (1992) (quoting *Potts v. Board of Equalization*, 213 Neb. 37, 47-48, 328 N.W.2d 175, 181 (1982)).

The common law only requires that the Commission give the purchase price strong consideration.⁸⁰ An arm's length transaction is not conclusive of the actual value of the Subject Property.⁸¹ When giving the sale consideration, the Commission may assign weight to the sale based upon the other evidence presented.⁸² The mere fact that only a single sale is presented as evidence of actual value may be given weight by the trier of fact.⁸³ Given the current statutory scheme, which defines actual value as "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 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[,]"⁸⁴ this Commissioner concurs with the Nebraska Court of Appeals in *Cabela's Inc.*, "the statutory measure of actual value is not what an individual buyer may be willing to pay for property, but, rather, its market value in the ordinary course of trade."⁸⁵ The Commission finds this interpretation harmonious with current common law and statute.

Weisheipl testified that the sale of Crossroads was distressed and not arm's length. Additionally, comments in the County Assessor's Assessment Report indicate that this sale was distressed.⁸⁶ Finally, the Commission notes that the transfer statement for Crossroads Mall indicates that the sale may have included multiple parcels and easements.⁸⁷ Weisheipl also testified that the Federal Building was 100% vacant at the time of sale. He testified that this unique vacancy issue made the sale an inappropriate indicator of the taxable value of the Federal Building on the relevant dates of assessment. The Commission finds that the sales prices for the Federal Building and Crossroads Mall are not strong indicators of the actual value of the alleged comparable properties.

The Commission finds that there is not sufficient evidence of the actual or assessed values of Crossroads Mall or the Federal Building to conduct an examination of the ratio of assessed to actual values.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Firethorn Inv. v. Lancaster County Bd. of Equalization*, 261 Neb. 231, 240, 622 N.W.2d 605, 611 (2001)(Citations Omitted) ("Rather, the fact that evidence of other sales is not presented goes to the weight of the evidence.").

⁸⁴ Neb. Rev. Stat. §77-112 (Reissue 2009).

⁸⁵ *Cabela's Inc. v. Cheyenne County Bd. Of Equalization*, 8 Neb.App. 582, 591, 597 N.W.2d 623, 632 (1999) (citations omitted).

⁸⁶ E3:22.

⁸⁷ E12:2.

The Commission finds that the Taxpayer failed to present clear and convincing evidence that the valuation placed on the Subject Property when compared with valuations placed on similar property is grossly excessive and is the result of systematic will or failure of a plain legal duty, and not mere error of judgment.

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.

The Commission finds there is not clear and convincing evidence that valuation placed on the Subject Property when compared with valuations placed on similar property is grossly excessive and is the result of systematic will or failure of a plain legal duty, and not mere error of judgment.

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

VII. ORDER

IT IS ORDERED THAT:

1. The decisions of the Douglas County Board of Equalization determining the value of the Subject Property for tax years 2010 and 2011 are affirmed.⁸⁸

2. The assessed value of the Subject Property for tax year 2010 is:

Land	\$553,900
<u>Improvements</u>	<u>\$6,816,100</u>
Total	\$7,370,000

3. The assessed value of the Subject Property for tax year 2011 is:

⁸⁸ 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.

Land	\$553,900
<u>Improvements</u>	<u>\$8,142,700</u>
Total	\$8,696,600

4. 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.)
5. Any request for relief, by any party, which is not specifically provided for by this Decision and Order is denied.
6. Each party is to bear its own costs in this proceeding.
7. This Decision and Order shall only be applicable to tax years 2010 and 2011.
8. This Decision and Order is effective for purposes of appeal on August 4, 2014.

Signed and Sealed: August 4, 2014.

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 Freimuth, dissenting,

I. OVERVIEW

The County Board's \$7,370,000 determination for tax year 2010 and its \$8,696,600 determination for tax year 2011 reflect 72% and 103% valuation increases for the Subject Property, respectively, in comparison to the \$4,280,000 valuation ordered by the County Board for tax years 2000 - 2006, prior to the onset of the economic crisis in 2007 - 2008. In light of the unique nature of the Subject Property and the actual operating history presented at the hearing before the Commission, together with problematic County valuation procedures, I would find that these substantial increases are arbitrary and unreasonable in the aftermath of the economic

crisis. Thus, I would find that the owner’s \$5,000,000 opinion of value, which is supported by 2009 and 2010 actual income and expenses, is the best evidence of the Subject Property’s actual value for tax years 2010 and 2011.

II. SUMMARY OF THE EVIDENCE

A. The County’s Assessment Report sets forth the following assessment history regarding the Subject Property:⁸⁹

YEAR EFFECTIVE	DATE OF CHANGE	LAND VALUE	IMPROVE VALUE	TOTAL VALUE	REASON
2012	8/7/2012	553900	8142700	\$8,696,600	County Board
2011	8/9/2011	553900	8142700	\$8,696,600	County Board
2011	3/13/2011	553900	9981300	\$10,535,200	Building Permit
2010	8/11/2010	553900	6816100	\$7,370,000	County Board
2007	7/30/2007	553900	6816100	\$7,370,000	County Board
2007	3/13/2007	553900	8946100	\$9,500,000	Reappraisal by County Assessor
2002	7/30/2002	553900	3726100	\$4,280,000	County Board
2002	3/24/2002	553900	5960000	\$6,513,900	Building Permit
2001	3/16/2001	553900	3726100	\$4,280,000	Land Review
2000	5/17/2000	555300	3724700	\$4,280,000	State Board of Equalization

B. The County’s Assessment Reports for tax years 2010 and 2011 provide that the Subject Property’s improvement components were constructed in 1955.⁹⁰ The 2010 Assessment Report assigns an effective age of 54 to the Subject Property, while the 2011 Assessment Report assigns an effective age of 57.⁹¹

C. Edwin Shoening (herein referred to as the “Taxpayer”) testified that he has decades of shopping center ownership, management and development experience in the Omaha area, and that he maintains a Certified Shopping Center Management certificate.

D. Greg Weisheipl testified on behalf of the County Board. Weisheipl stated that he became employed by the Douglas County Assessor’s Office in 2010 after serving as an assessor in Wisconsin for several years.

E. The Taxpayer testified that the Subject Property is unique. The County’s expert, Weisheipl, agreed with this assertion.

⁸⁹ E3:24.

⁹⁰ E3:9 & E4:7.

⁹¹ E3:9 & E4:7.

- F.** Weisheipl testified that the Subject Property is no longer viable for retail purposes, but that it can still be used as commercial office space.
- G.** The County’s Assessment Report contains “Account Notes” that indicate a substantial portion of the Subject Property was vacant as of December 22, 2010.⁹² Weisheipl testified that he was uncertain regarding the reasons for the high vacancy rates that the Subject Property experienced in tax years 2010 and 2011.
- H.** The “Account Notes” section of the County’s Assessment Report states that the Subject Property requires a “significant amount of maintenance.”⁹³
- I.** The Taxpayer testified that the Subject Property’s age, location, condition and related substantial maintenance requirements have combined to limit rental opportunities to a high risk tenant pool involving lease periods that average only 1.6 years.⁹⁴ As a result, he further testified that the Subject Property is not an option for institutional investors, and that non-institutional investor interest is substantially diminished.
- J.** Based on the foregoing, the Taxpayer testified that his opinion of value for the Subject Property amounted to \$5 million for tax years 2010 and 2011. This opinion of value is supported by applying his 12% capitalization rate opinion to the Subject Property’s 2009 and 2010 actual net operating income (“NOI”) as calculated by the Taxpayer (I note that these calculations do not include a vacancy rate).⁹⁵

III. VALUATION ANALYSIS

A. CURRENT MARKET CONDITIONS REQUIREMENT

1. The assessment history of the Subject Property charted above indicates a reappraisal by the County Assessor in March 2007, prior to the onset of the 2007 – 2008 economic crisis. As the chart also indicates, this \$9,500,000 reappraisal was not accepted by the County Board in 2007, but that body did substantially increase the Subject Property’s assessed value from \$4,280,000 in 2006 to \$7,370,000 for tax years 2007 – 2010 and to \$8,696,600 for tax year 2011. Thus, the question is raised whether the County Assessor

⁹² E4:11.

⁹³ E4:11.

⁹⁴ The Taxpayer testified that 13 – 14 Subject Property leases grant the tenant termination rights after two years.

⁹⁵ See, E8:1. 2009 NOI $\$610,720/.12 = \$5,089,333$; 2010 NOI $\$591,633/.12 = \$4,930,275$.

and the County Board sufficiently considered the impact of the 2007 - 2008 national economic crisis for purposes of valuing the Subject Property for tax years 2010 and 2011.

2. General 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.⁹⁶ For example, *Property Assessment Valuation* states that assessment officials are required to review factors such as vacancy factors and distressed sale rates as a part of developing and maintaining market area databases.⁹⁷ Additionally, in addressing mass appraisal techniques such as the model used by the County to value the Subject Property, *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 or updated 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.**⁹⁸

3. The New Jersey Tax Court stated as follows regarding consideration of “current market conditions” in a 2013 opinion that reduced the assessed value of the Borgata casino from \$2.26 billion to \$880 million in tax year 2009 and to \$870 million in tax year 2010 due to the adverse impact of the national economic crisis and increased gaming competition (the \$2.26 billion assessment stemmed from a reappraisal for tax year 2008, similar to the experience of the Taxpayer herein):

The national economy began to soften in late 2007, primarily due to the subprime housing crisis. By October 1, 2008, the economy suffered a significant downturn triggered by the collapse of the mortgage markets and the failure of Bear Stearns and Lehman Brothers. The government-sanctioned bailout of Bear Stearns as a banking institution “too big to fail” set off alarms concerning the stability of the American banking system. The mid-September 2008 collapse of Lehman Brothers led to a sharp drop-off in the stock market and the beginning of the worst recession since the Great Depression. . . .

By October 1, 2009, the national economic condition had further deteriorated. According to one expert who testified at trial “as of October

⁹⁶ *Property Assessment Valuation*, 3rd Ed., International Association of Assessing Officers, 2010, at pgs. 73 - 83.

⁹⁷ *Property Assessment Valuation*, 3rd Ed., International Association of Assessing Officers, 2010, at pgs. 77 - 83.

⁹⁸ *Property Assessment Valuation*, 3rd Ed., International Association of Assessing Officers, 2010, at p. 417-18 (emphasis added).

1, 2009, the macro economy had entered into what many commentators termed a ‘New Normal,’ meaning that the developed nations would enter into a prolonged period of low growth, high unemployment and a need for de-leveraging. This would add to the uncertainty surrounding the gaming industry in general and in Atlantic City specifically, as of the valuation date.” Unemployment rates started to increase significantly in 2008 and were still rising as of September 2009. This fact is significant because low unemployment rates are indicative of increased consumer spending on such discretionary items as gaming and entertainment. The perception that the nation’s economic trouble was not a transitory downturn, but a long-term recalibration of the economy, was hardening among the public and participants in the financial markets as of the second valuation date.⁹⁹

4. 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.¹⁰⁰

5. The Nebraska Supreme Court has also recently considered “current market conditions” in the aftermath of the economic crisis. 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.¹⁰¹

⁹⁹ *Marina District Development Co., LLC v. City of Atlantic City*, DOCKET NOS. 008116-2009, 008117-2009, 003188-2010, 003194-2010, at pgs. 1 – 2, 8 – 9 (New Jersey Tax Court 2013).

¹⁰⁰ *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).

¹⁰¹ *County of Lancaster v. Union Bank & Trust Co. (In re Estate of Craven)*, 281 Neb. 122, 794 N.W.2d 406 (Neb. 2011).

B. THE COUNTY'S "OVERRIDE" INCOME APPROACH VALUATIONS

1. The County Board submitted its Assessment Reports received in evidence at Exhibits 3 and 4, which indicate that its valuations for tax years 2010 and 2011 are based on an "Override" income approach as discussed below.¹⁰²
2. 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."¹⁰³ 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."¹⁰⁴
3. Further, *Mass Appraisal of Real Property*, which is published by the International Association of Assessing Officers, states that mass appraisal models should generate valuations that are "understandable and explainable," and assessors "should understand the components of the model and how it works."¹⁰⁵
4. In light of *Leech* and the "understandable and explainable" standard contained in *Mass Appraisal of Real Property*, 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 valuations for tax years 2010 and 2011.¹⁰⁶ The County Board's expert offered only a limited explanation regarding the basis of the variables used in the "Override Income Worksheets" for tax years 2010 and 2011.
5. "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

¹⁰² Page 23 of Exhibits 3 and 4 indicate that the County Board's determination was based only on the income approach and did not consider the cost or market approaches for valuation purposes.

¹⁰³ *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).

¹⁰⁴ *Id.* at 852.

¹⁰⁵ *Mass Appraisal of Real Property*, International Association of Assessing Officers, 1999, p. 207.

¹⁰⁶ E3:20 & E4:20.

does not accept the County Assessor's opinion of actual value for reasons that often include equalization. Whether the use of an "Override," if any, stems from the County Board's equalization actions or other reasons in this case, I would find that the County's largely unexplained income approach documentation is by definition arbitrary.

C. THE COUNTY'S "OVERALL" CAPITALIZATION RATE

1. The County's Assessment Reports for tax years 2010 and 2011 contain a one-page document entitled "Overall Capitalization Rate" in an attempt to support its 10% and 10.25% capitalization rates for those years, respectively.¹⁰⁷ These documents, which only contain very limited explanation concerning the basis of using these rates 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.¹⁰⁸ Mr. Voss was not available to testify at the hearing before the Commission.
2. 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.
3. The County's "Overall Capitalization Rate" documents state 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."¹⁰⁹ In addition to referencing the Voss study, however, the documents contain language 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:

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.¹¹⁰

4. Based on the County's Assessment Reports outlined in the preceding two paragraphs, I would find that the County did not sufficiently consider market activity most relevant to the 2010 and 2011 tax years at issue to determine its capitalization rates. I acknowledge

¹⁰⁷ E3:19 & E4:19.

¹⁰⁸ E3:19 & E4:19.

¹⁰⁹ E3:19 & E4:19.

¹¹⁰ E3:19 & E4:19 (emphasis added).

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 Report regarding the use "older" sales due to insufficient sales during the economic crisis period from "late 2008 through 2009," I would 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.

D. VALUATION ANALYSIS CONCLUSION

1. The parties acknowledge that the Subject Property is unique, but the County Board's "override" determinations for tax years 2010 and 2011 nonetheless are substantially higher than the Taxpayer's valuations based on actual income and expenses. Thus, based on the testimony of the Taxpayer and Weisheipl, together with a review of documentary evidence, I would find that the County did not sufficiently consider the unique nature of the Subject Property and the adverse impact of the national economic crisis on the local market for tax years 2010 and 2011. Based on this finding and the above authorities, I would also find that the County Board did not sufficiently consider "current market conditions" for purposes of valuing the Subject Property for tax years 2010 and 2011.
2. Mr. Shoening has decades of commercial real estate experience throughout the Omaha area. He stated that the value of each of the Subject Property did not exceed \$5 million during tax years 2010 and 2011.
3. This Commissioner is mindful that the events surrounding the economic crisis adversely affected real estate values throughout the United States, including some markets in Nebraska. The County Board's 72% and 103% Subject Property valuation increases in tax years 2010 and 2011 in comparison to the pre-crisis \$4,280,000 valuation for tax years 2000 – 2006 is problematic, especially because the income models on which they are based are derived from arbitrary "override" calculations, and because the County Board's evidence gives a less than clear explanation of the same.
4. For the reasons discussed above, I would find that the County Board's valuation determinations for tax years 2010 and 2011 are unreasonable and arbitrary as applied to a unique parcel such as the Subject Property in the aftermath of economic crisis.

5. In the case where it is determined that the County Board's determination is unreasonable or arbitrary, the Commission must review the evidence and adopt the most reasonable estimate of actual value presented.¹¹¹ Based on Mr. Shoening's ownership of the Subject Property and his decades of commercial real estate experience throughout the Omaha area, I would find that his \$5 million opinion of value is the best evidence of value of the Subject Property for tax years 2010 and 2011.

IV. 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 decision 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 would further find that the Taxpayer's opinion of value 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 \$5,000,000, and that the decisions of the County Board should be vacated and reversed.

Thomas D. Freimuth, Commissioner

¹¹¹ See, *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted); *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002); *Garvey Elevators, Inc. v. Adams County Bd. of Equalization*, 261 Neb. 130, 621 N.W.2d 518 (2001).