

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Beverly Hills, LLC,
Appellant,

v.

Douglas County Board of Equalization,
Appellee.

Case No: 10C-506

Decision and Order Affirming the Douglas
County Board of Equalization

For the Appellant:

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

For the Appellee:

Matthew Boever,
Deputy Douglas County Attorney

The Appeal was 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 47,826 square foot Neighborhood Shopping Center.¹ The legal description of the parcel is found at Exhibit 2 Page 5. The property record card for the Subject Property is found at Exhibit 2.

II. PROCEDURAL HISTORY

The Douglas County Assessor determined that the assessed value of the Subject Property was \$6,198,300 for tax year 2010. Beverly Hills, LLC (Taxpayer) protested this assessment to the Douglas County Board of Equalization (County Board). The County Board determined that the assessed value for tax year 2010 was \$6,198,300.²

The Taxpayer appealed the decision of the County Board to the Tax Equalization and Review Commission (Commission). The appeal was original captioned Hogan v. Douglas County Board

¹ E2:2.

² E1.

of Equalization. At the hearing it was determined that Beverly Hills, LLC is the current owner of the Subject Property, with Edwin Schoening the managing member of the Beverly Hills, LLC. The case caption has been corrected to Beverly Hills, LLC v. Douglas County Board of Equalization. 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 29, 2012.

III. STANDARD OF REVIEW

The Commission's review of the determination by a County Board of Equalization is de novo.³ 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."⁴

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.⁵

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.⁶ Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.⁷

³ 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).

⁴ *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted).

⁵ *Id.*

⁶ Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.).

⁷ *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

A Taxpayer must introduce competent evidence of actual value of the Subject Property in order to successfully claim that the Subject Property is overvalued.⁸ 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.⁹

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.”¹⁰ 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.”¹¹

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.¹²

“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.”¹³ “Actual value, market value, and fair market value mean exactly the same thing.”¹⁴ Taxable value is the percentage of actual value

⁸ 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).

⁹ *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).

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

¹¹ Neb. Rev. Stat. §77-5016(6) (2012 Cum. Supp.).

¹² Neb. Rev. Stat. §77-112 (Reissue 2009).

¹³ *Id.*

¹⁴ *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).

subject to taxation as directed by section 77-201 of Nebraska Statutes and has the same meaning as assessed value.¹⁵ All real property in Nebraska subject to taxation shall be assessed as of January 1.¹⁶ All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.¹⁷

B. Summary of the Evidence

Edwin Shoening, owner of the Subject Property through LLCs, and a Certified Shopping Center Manager, testified that the actual expenses of the Subject Property should be higher because the building is older and the expenses to the owner are increasing due to plumbing, utility, maintenance, and remodeling issues associated with the Subject Property's old age. He testified that the value of the Subject Property was within the \$4,000,000 range. He stated that the only figure on the County's Income Approach worksheet that he disagreed with was the expense ratio which he testified should be between 10% and 20%.¹⁸ The Commission notes that substituting a 20% expense rate in the County Assessor's income approach would result in a final indicated actual value of \$5,510,973 for the Subject Property.¹⁹

Gregory Weisheipl, Certified General Appraiser and an employee of the Douglas County Assessor's Office, testified that the Subject Property was valued using the income approach.²⁰ Weisheipl asserted that the expenses and all other income approach factors were derived from the market. He further asserted that while the actual expenses for the Subject Property may be higher than the median market expenses, that it was appropriate to derive the expenses from the market.

C. Analysis

The County Assessor is permitted to value the Subject Property using the income approach to valuation.²¹ The steps required for use of the income approach with direct capitalization may be

¹⁵ Neb. Rev. Stat. §77-131 (Reissue 2009).

¹⁶ See, Neb. Rev. Stat. §77-1301(1) (Reissue 2009).

¹⁷ Neb. Rev. Stat. §77-201(1) (Reissue 2009).

¹⁸ See, E2:15.

¹⁹ See, E2:16. The income approach would be calculated by taking the effective gross income of \$602,608 and subtracting 20% or \$120,413.60 resulting in a net operating income of \$482,194.40. Application of the 8.75% cap rate results in an indicated value of \$5,510,973. ($\$482,194.40 / .0875 = \$5,510,973$).

²⁰ The County Assessor's income approach worksheet is found at E2:16.

²¹ Neb. Rev. Stat. §77-112 (Reissue 2009).

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; (4) divide net operating income by an estimated capitalization rate to yield indicated value.²² A variety of techniques may be used to quantify various components of any application of the approach.²³ Weisheipl's testimony and the County Assessor's Assessment Report indicate that the County Assessor followed the required steps to derive the actual value of the Subject Property through the income approach.²⁴

The dissent has asserted that the increase in valuation from a prior tax year is sufficient evidence to determine that the County Board's determination for tax year 2010 is arbitrary or unreasonable. The assessed value for real property may be different from year to year, dependent upon the circumstances.²⁵ For this reason, a prior year's assessment is not relevant to the subsequent year's valuation.²⁶

The assessment of real property requires examination of the market as of the date of assessment. The Commission finds that there is extensive evidence in the record that the County Assessor's income approach factors are supported by the market conditions as of the date of assessment. Shoening himself reviewed the County Assessor's Income Worksheet and agreed with all of the income approach factors except the expense rate.²⁷ Therefore, all witnesses who offered an opinion of value at the hearing substantially agreed on the reasonableness of the County Assessor's rent, vacancy rate, and capitalization rate as contained in the Income Approach Worksheet.²⁸

As an owner, Shoening was qualified to give his opinion of the actual value of the Subject Property.²⁹ However, the Taxpayer did not present evidence indicating the basis for his opinion. Nor did the Taxpayer provide empirical or market data sufficient to support Shoening's opinion of value. Similarly, while Shoening asserted that the County Assessor's expense rate should be

²² See, The Appraisal Institute, *The Appraisal of Real Estate*, at 466 (13th ed. 2008).

²³ *Id.* at chs 20-24.

²⁴ See, E2.

²⁵ See, *Affiliated Foods Coop. v. Madison Co. Bd. Of Equal.*, 229 Neb. 605, 613, 428 N.W.2d 201, 206 (1988).

²⁶ See, *DeVore v. Bd. Of Equal.*, 144 Neb. 351, 13 N.W.2d 451 (1944), *Affiliated Foods*, 229 Neb. at 613, 428 N.W.2d at 206 (1988).

²⁷ See generally, E2:18 (Income Worksheet).

²⁸ See, E2:18.

²⁹ See, *U. S. Ecology v. Boyd County Bd. of Equal.*, 256 Neb. 7, 16, 588 N.W.2d 575, 581 (1999).

higher, the Taxpayer presented no other evidence of the actual expenses of the Subject Property, or market data supporting Shoening's contention. 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, based on a statutorily permissible method of valuation, is unreasonable or arbitrary.³⁰

Similarly, the dissent finds that the County Referee's recommendation from a prior year is the best evidence of value. The County Referee's comment cited for this position clearly states that the referee did not have any evidence from the County Assessor, and it is undiscernible from the entry what evidence was before the referee.³¹ The referee did not testify at the hearing, and the parties were unable to examine him concerning his opinions. It is clear from his comment that he was examining evidence drastically different than that presented to the Commission as the case before the referee lacked any evidence from the County Assessor.³² In the current case the County Assessor's opinion is understandable and explained.

The County Assessor's packet indicates how he obtained his income approach factors and which factors were used to derive an opinion of value.³³ The dissent asserts that because the County Assessor's income approach factors are different for the Subject Property than other comparable properties that the evidence indicates that the County Assessor's income approach factors were arbitrarily derived. First, there was no evidence submitted in this hearing that a County Assessor ever arbitrarily decided income approach factors for either the Subject Property or the comparable properties; whether the Income Worksheets were labelled "Override" or otherwise. Second, all individuals who offered an opinion of value at the hearing agreed to all income approach factors except the expense ratio for the Subject Property for tax year 2010.

The dissent has also asserted that the increase in the portion of actual value indicated to the land component of the Subject Property also indicates that the County Board's determination is incorrect. The Subject Property was valued by the County Assessor using the income

³⁰ 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).

³¹ See, E2:8. For completeness, the Commission notes that the recommendations of two referees for tax year 2010 are also in evidence. See, E3:2-3. Neither of these referees recommended a change, and both indicated that the evidence presented to them was insufficient. See, *Id.*

³² See, E2:8.

³³ See, E2.

approach.³⁴ When an assessor utilizes the income approach, the land component does not contribute to the determination of the actual value. Instead the income approach derives an aggregate actual value of the both the land component and the improvement component. The portion of this aggregate value that is attributable to a property's land component is then derived by using of the sales comparison approach. The remainder of the aggregate value is then assigned to the improvements located on the property.

Standing alone, an assertion that the land component of the Subject Property is too high, is therefore, also an assertion the improvement component of the Subject Property is too low. No matter how the aggregate actual value of the Subject Property is divided between the land and improvement components, the tax burden on the Taxpayer remains fixed by a levy applied to the aggregate actual value, or income approach value.

Further, in this case, there was no evidence presented to indicate that the land component of the Subject Property was overvalued.

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.³⁵ In fact, 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.³⁶ Testimony at trial indicated that animals had been allowed to urinate and defecate throughout the property, and that even after the carpets

³⁴ See, E2.

³⁵ *Id.* at 125, 794 N.W.2d at 409.

³⁶ *Id.* at 124-125, 794 N.W.2d at 408-409.

were removed the smell was unbearable and the floors and subfloors under the carpet were stained from the urine and feces.³⁷ 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.³⁸ The appraisers based their opinion of the condition of the property on notes from another appraiser who inspected the property prior to significant remodeling.³⁹

The Supreme Court held that under some conditions the auction price may be better evidence of sale price than appraisal evidence.⁴⁰ The Supreme Court reasoned that the deficiencies in the property caused there to be "no truly comparable properties in the area[.]"⁴¹ 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.⁴² The Court focused on the lack of truly comparable properties in the market, and the exceptionally horrible condition of the subject property.⁴³ 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*.

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.

³⁷ *Id.* at 124-125, 794 N.W.2d at 408-409.

³⁸ *Id.* at 126, 794 N.W.2d at 409.

³⁹ *Id.*

⁴⁰ *Id.* at 128, 794 N.W.2d at 411.

⁴¹ *Id.* at 129, 794 N.W.2d at 410.

⁴² *Id.*

⁴³ *Id.* at 128-30, 794 N.W.2d at 409-11.

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. However, as previously mention even Shoening agreed with all but one of the County Assessor’s income approach factors.

The Commission finds that given the foregoing, there is not clear and convincing evidence that the determination of the County Board was unreasonable or arbitrary.

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.”⁴⁴ Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value.⁴⁵ 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.⁴⁶ 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.⁴⁷ 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.⁴⁸ Taxpayers are entitled to have their property assessed uniformly and proportionately, even though the result

⁴⁴ *Neb. Const.*, Art. VIII, §1.

⁴⁵ *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).

⁴⁶ *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).

⁴⁷ 8 Neb.App. 582, 597 N.W.2d 623 (1999).

⁴⁸ *Banner County v. State Board of Equalization*, 226 Neb. 236, 411 N.W.2d 35 (1987).

may be that it is assessed at less than the actual value.⁴⁹ The constitutional requirement of uniformity in taxation extends to both rate and valuation.⁵⁰

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. There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity.⁵¹ Additionally, evidence that the County Board or County Assessor, “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.”⁵²

B. Summary of the Evidence

The Taxpayer provided the Commission with a spreadsheet listing five alleged comparable properties and comparing the assessed value per square foot of the alleged comparable properties and the Subject Property,⁵³ and the property record cards for the alleged comparable properties.⁵⁴ The spreadsheet indicated differing assessed values per square foot among the alleged comparable properties and the Subject Property.⁵⁵ The Taxpayer asserted that these differences indicated that similarly situated properties were assessed at materially different levels.

Shoenig testified that Rockbrook, located at 2820 South 108th Street, and Countryside, designated as Countryside Plaza on Exhibit 5, were most comparable because they were similar in age, tenant type, location on a main arterial road, and comparable rents. He testified that he had lost tenants to these properties, but that he lost most of the national tenants to newer properties, and that he had to lower his rental rates in 2010 to keep tenants.

⁴⁹ *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).

⁵⁰ *First Nat. Bank & Trust Co. v. County of Lancaster*, 177 Neb. 390, 128 N.W.2d 820 (1964).

⁵¹ *Newman v. County of Dawson*, 167 Neb. 666, 94 N.W.2d 47 (1959).

⁵² *Scribante v. Douglas County Board of Equalization*, 8 Neb.App. 25, 39, 588 N.W.2d 190, 199 (1999).

⁵³ E5:1.

⁵⁴ E7-12.

⁵⁵ E5:1.

Weisheipl testified that the alleged comparable properties were not similarly situated or comparable. He testified that Countryside Village, designated as Countryside Plaza on Exhibit 5 and offered as a comparable property by the Taxpayer, was in a less ideal location on Pacific Street than the Subject Property on Dodge Street. He stated that: (1) the traffic counts would be significantly less on Pacific Street than Dodge Street; (2) part of Countryside Village was located farther off a main road and obscured from view; (3) the Subject Property's store fronts were more aesthetically pleasing; and (4) the market derived rents for Countryside Village were \$10 per square foot while the Subject Properties were \$14.⁵⁶

Weisheipl testified that the Rockbrook, located at 2820 South 108th Street and offered as a comparable property by the Taxpayer, was designated a Community Shopping Center and not a Neighborhood Shopping Center by the County Assessor. Weisheipl explained that a Community Shopping Center had a greater public draw, and that Rockbrook consisted of several larger buildings.

Weisheipl testified that Orchard Plaza, addresses 2405 South 132nd Street and 2505 South 132nd Street, offered as comparable properties by the Taxpayer, were located on a less desirable street than the Subject Property. Additionally, he testified that the difference in value for 2405 South 132nd Street was due to an adjustment by the County Board, and not because of a difference in assessment.⁵⁷ The Commission notes the County Assessor's income worksheet indicates that 2405 South 132nd Street and 2505 South 132nd Street had different derived market rental rates than the Subject Property.⁵⁸

The Taxpayer also asserted that the property designated on Exhibit 5 as 7540 Dodge Street was comparable to the Subject Property. The Commission notes that 7540 Dodge Street is composed of three buildings; two buildings are designated as Neighborhood Shopping Centers by the County Assessor and the third is designated a Discount Store.⁵⁹ The income worksheet for the two Neighborhood Shopping Centers at 7540 Dodge Street indicates that the same rental rate and expense ratio were used for these alleged comparable properties and the Subject

⁵⁶ See, E7:10-11 (indicating the County Assessor's market derived rents for Countryside Village); See also, E2:18 (indicating the County Assessor's market derived rents for the Subject Property).

⁵⁷ See also, E8:6.

⁵⁸ E8:5; E9:7.

⁵⁹ E10:1.

Property.⁶⁰ The Commission notes that the cap rates were .25% greater for the alleged comparable properties and the vacancy and collection loss rate were also 5% higher.⁶¹ Weisheipl explained in his testimony that Neighborhood Shopping Centers were designated as Class A, B, C, or D properties and that the cap rate varied among the designations. He testified that the 8.75% cap rate applied to the Subject Property indicated that the County Assessor had determined that the Subject Property was a low Class B property. He also testified that Class C property would receive a 9% cap rate. The difference in the cap rate and vacancy and collection loss is therefore explained by the alleged comparable properties Class C designation.

In order to perform an analysis of the value per square foot between alleged comparable properties to determine if the properties are assessed at materially different levels, it is requisite that the alleged comparable properties are actually comparable.⁶² The evidence presented to the Commission indicates that the alleged comparable properties and the Subject Property had numerous differences including: (1) location; (2) access; (3) store type; (4) community draw; (5) size; (6) age; (7) Class; and (8) market derived rental and cap rates. The Commission finds that the differences indicate that the Taxpayer's alleged comparable properties are not comparable for purposes of equalization. Because the properties are not comparable, it is not possible to examine the values per square foot to determine if there is a lack of uniformity; instead it is expected that there would be a lack of uniformity as there is evidence that each of the alleged comparable properties contains differences that would affect the property's market value.

The other test for determining whether property is equalized requires an examination of the ratio of the assessed value to actual value of any alleged comparable properties and the Subject Property.⁶³ The Taxpayer presented no evidence of the actual value of any of the alleged comparable properties or the Subject Property.

The Taxpayer also asserted that a property described as Crossroads Mall located on Dodge Street had not been valued at 100% of actual value and was comparable to the Subject Property. Weisheipl testified that the sale of Crossroads Mall was a distressed sale, and that he did not have knowledge of the sale price or the assessed value of Crossroads Mall. He further testified

⁶⁰ E10:15-16.

⁶¹ *Id.*

⁶² *Scribante v. Douglas County Board of Equalization*, 8 Neb.App. 25, 39, 588 N.W.2d 190, 199 (1999).

⁶³ See, *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623, 635 (1999).

that Crossroads Mall was not considered in the valuation of the Subject Property because the properties are significantly different in size and structure. No evidence was presented indicating the actual value of Crossroads Mall, and no property record card was submitted indicating the assessed value of Crossroads Mall. The Commission's Order for Hearing clearly indicates that property record cards are required for all properties intended to be presented as comparable properties. The Commission cannot ascertain the assessed value or characteristics of these alleged comparable properties without this evidence.

The dissent has asserted that the sale price of alleged comparable properties can be construed as actual value for purposes of constructing an equalization ratio.

The Nebraska Supreme Court has consistently held that sales price is not synonymous with actual value.⁶⁴ 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.⁶⁵ 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."⁶⁶ 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.⁶⁷ 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:

⁶⁴ *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).

⁶⁵ Neb. Rev. Stat. § 77-112 (Reissue 2009).

⁶⁶ *Novak v. Board of Equalization*, 145 Neb. 664, 666, 17 N.W.2d 882, 883 (1945).

⁶⁷ *Collier v. County of Logan*, 169 Neb. 1, 8, 97 N.W.2d 879, 885 (1959).

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.⁶⁸

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.”⁶⁹ 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 property in Nebraska.⁷⁰ 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.”⁷¹

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.⁷² 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.⁷³ Instead she relied upon the cost approach for the subject property.⁷⁴ The appellant produced an expert who was able through empirical evidence to derive a reasonable value of the personal property included in

⁶⁸ *Josten-Wilbert Vault Co. v. Board of Equalization*. 179 Neb. 415, 417, 138 N.W.2d 641, 643 (1965).

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

⁷⁰ *Id.*

⁷¹ *Id.* at 47, 328 N.W.2d at 181 (citations omitted).

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

⁷³ *Id.* at 441-442, 482 N.W.2d at 586-587.

⁷⁴ *Id.* at 441-442, 482 N.W.2d at 586-587.

the sale.⁷⁵ 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.”⁷⁶ The Court concluded that the County Board was arbitrary and unreasonable to fail to consider the sale under those circumstances.⁷⁷ 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 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.”⁷⁸

Since the Court’s decision in *Dowd*, Nebraska Statutes section 77-112 has been revised by eleven separate bills.⁷⁹ 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.⁸⁰

⁷⁵ *Id.* at 440-441, 482 N.W.2d at 586.

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

⁷⁷ *Id.*

⁷⁸ *Id.* at 444, 482 N.W.2d at 588 (citing Neb. Rev. Stat. §77-112 (Reissued 1986)).

⁷⁹ 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.

⁸⁰ Neb. Rev. Stat. §77-112(1) (Cum.Supp. 1998).

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."⁸¹

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 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.⁸²

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."⁸³ "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."⁸⁴ "Actual value, market value, and fair market value mean exactly the same thing."⁸⁵ 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.⁸⁶ The distinctions between *price* and *actual value* are

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

⁸² Neb. Rev. Stat. 77-112 (Reissued 2009).

⁸³ Appraisal Institute, *The Appraisal of Real Estate*, 13th Ed. (2008) at 21.

⁸⁴ *Id.*

⁸⁵ *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).

⁸⁶ Neb. Rev. Stat. §77-112 (Reissued 2009).

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.⁸⁷ 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[.]”⁸⁸

The common law only requires that the Commission give the purchase price strong consideration.⁸⁹ An arm's length transaction is not conclusive of the actual value of the Subject Property.⁹⁰ When giving the sale consideration, the Commission may assign weight to the sale based upon the other evidence presented.⁹¹ The mere fact that only a single sale is presented as evidence of actual value may be given weight by the trier of fact.⁹² 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[.]”⁹³ 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

⁸⁷ Neb. Rev. Stat. 77-112 (Reissue 2009).

⁸⁸ *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)).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *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.”).

⁹³ Neb. Rev. Stat. §77-112 (Reissue 2009).

property, but, rather, its market value in the ordinary course of trade.”⁹⁴ 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.⁹⁵ Finally, the Commission notes that the transfer statement for Crossroads Mall indicates that the sale may have included multiple parcels and easements.⁹⁶ 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 there is insufficient evidence to complete an analysis of the ratios of assessed to actual values for the Subject Property and any alleged comparable properties.

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 finds that 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. 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 decision of the County Board is affirmed.

⁹⁴ *Cabela’s Inc. v. Cheyenne County Bd. Of Equalization*, 8 Neb.App. 582, 591, 597 N.W.2d 623, 632 (1999) (citations omitted).

⁹⁵ E3:22.

⁹⁶ E12:2.

VII. ORDER

IT IS ORDERED THAT:

1. The decision of the Any County Board of Equalization determining the value of the Subject Property for tax year 2010 is affirmed.⁹⁷
2. The assessed value of the Subject Property for tax year 2010 is \$6,198,300.
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 year 2010.
7. This Decision and Order is effective for purposes of appeal on August 6, 2014.

Signed and Sealed: August 6, 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

- A. I would find that the County Board's \$6,198,300 determination for tax year 2010, which reflects a 36% valuation increase in comparison to the \$4,564,100 valuation ordered by that same body for tax years 2004 – 2006, is arbitrary and unreasonable in the aftermath of the

⁹⁷ 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.

2008 economic crisis. Thus, I would find that the County Board’s \$5,272,400 determination of value for tax years 2008 and 2009, which is based on the conclusion of its own Referee, is the best evidence of the Subject Property’s actual value for tax year 2010.

B. The County’s Assessment Report sets forth the following assessment history regarding the Subject Property:⁹⁸

Tax Year	Date of Change	Land Value	Improvement Value	Total Value	REASON
2010	8/11/2010	2635000	3563300	6198300	County Board
2010	3/6/2010	2635000	3563300	6198300	Building Permit
2008	8/7/2008	1244700	4027700	5272400	County Board
2008	3/10/2008	1244700	4953600	6198300	Reappraisal by County Assessor
2007	7/30/2007	1244700	3455300	4700000	County Board
2007	3/13/2007	1244700	4953600	6198300	Reappraisal by County Assessor
2004	6/27/2004	1244700	3319400	4564100	County Board
2004	3/18/2004	1244700	3319400	4564100	Building Permit

C. Following is a chart that compares the Subject Property with other Neighborhood Shopping Centers (“NSC”) in close proximity on or near Dodge Street:

PROPERTY	Subject - 7808 Dodge - PRF: E2:5/21	7610 Dodge - Crossroads Plz; PRF: E2:22/26	7010 Dodge - Jason's Deli - PRF: E2:27/30	7815 Dodge - Beverly Plz Across St from SP - Panera - PRF: E2:31/34	7425 Dodge - 2 Bldgs (Lowe's & NSC); PRF: E2:35/41	151 N 78 St - Old Chicago/Staples /Scooters - PRF: E2:42/50
Year Built	1955	1984	1994	1998	2005	1998
Year Remodeled	2010	N/A	2004 75%	N/A	N/A	N/A
Effective Age	10	26	9	13	7	13
Parcel Size (Sq Ft)	155,000	83,850	75,345	93,243	151,153	366,267
Imp Size (Sq Ft)	47,826	19,855	15,156	30,580	39,878	103,227
Type/Occupancy Code	NSC/412	NSC/412	NSC/412	NSC/412	NSC/412	NSC/412
PRF: "Nbhd Ext"	109G1	100A1	109G1	109G1	100G1	109G1
Condition	Average	Average	Good	Average	Average	Average
Quality	Good	Good	Good	Good	Good	Good
Land Ass'd Value 2010	\$2,635,000	\$922,400	\$1,506,900	\$1,147,800	\$2,267,300	\$5,127,700
Land Ass'd PSF 2010	\$17	\$11	\$20	\$12	\$15	\$13
Imp Ass'd Value 2010	\$3,563,300	\$1,650,900	\$1,869,100	\$3,806,100	\$4,792,600	\$7,405,400
Total Assessed Val 2010	\$6,198,300	\$2,573,300	\$3,376,000	\$4,953,900	\$7,059,900	\$12,533,100
(Imp + Land Ass'd) ÷ Imp SqFt	\$129.00	\$129.00	\$222.00	\$161.00	\$177.00	\$121.00
Date of Sale		6/11/2009	4/1/2008	4/6/2000	9/18/2006	
Sale Price		\$3,100,000.00	\$5,025,000.00	\$5,075,000.00	\$7,060,000.00	
Sale ÷ Imp Sq Ft	\$0.00	\$156.00	\$331.00	\$165.00	\$177.00	\$0.00

⁹⁸ E2:21. This chart is a reproduction of the County Assessor’s chart found at page 21 of Exhibit 2, although I note that “Building Permit” is used in place of the acronym “BP,” and the term “Reappraisal by County Assessor” is used in place of “RA.”

- D. 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.
- E. The Taxpayer testified that the 2008 national economic crisis depressed the value of the Subject Property for tax year 2010, and that rents were lowered as a result. Thus, he testified that his opinion of value for the Subject Property amounted to \$4 million for tax year 2010.
- F. The County Board relies in part on its Assessment Report received in evidence as Exhibit 2 to support its \$6,198,300 valuation.⁹⁹ On September 6, 2012, Gregory Weisheipl of the Douglas County Assessor’s Office signed this Assessment Report prepared by his fellow employee, Linda Rowe.¹⁰⁰ Mr. Weisheipl testified at the hearing before the Commission, but Ms. Rowe did not.
- G. The County Board’s expert, Mr. Weisheipl, testified that he became employed by the Douglas County Assessor’s Office in 2010 after serving as an assessor in Wisconsin for several years.
- H. As discussed below, the County Board’s testimony and documents received in evidence by the Commission to support its valuation for tax year 2010 are insufficient and/or problematic for purposes of supporting a 36% valuation increase in the aftermath of the economic crisis.

II. VALUATION ANALYSIS

A. FAILURE TO CONSIDER CURRENT MARKET CONDITIONS

1. The Taxpayer expressed concern regarding insufficient consideration of the economic crisis by the County. General guidance in this regard in the mass appraisal context is contained in *Property Assessment Valuation*, which is published by the International Association of Assessing Officers.¹⁰¹ 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.¹⁰² 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:

⁹⁹ Page 20 of Exhibit 2 indicates 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.

¹⁰⁰ E2:1.

¹⁰¹ *Property Assessment Valuation*, 3rd Ed., International Association of Assessing Officers, 2010, at pgs. 73 - 83.

¹⁰² *Property Assessment Valuation*, 3rd Ed., International Association of Assessing Officers, 2010, at pgs. 77 - 83.

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.**¹⁰³

2. 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 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

¹⁰³ *Property Assessment Valuation*, 3rd Ed., International Association of Assessing Officers, 2010, at p. 417-18 (emphasis added).

among the public and participants in the financial markets as of the second valuation date.¹⁰⁴

3. 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.¹⁰⁵

4. 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.¹⁰⁶
5. The following demonstrates that the County Board’s determination for tax year 2010 did not sufficiently consider current economic conditions.

B. PRE-CRISIS INCOME MODEL APPLIED FOR TAX YEAR 2010

1. The Subject Property’s assessment history shown in the chart above indicates that the County Assessor applied its income model derived in March 2007 and March 2008, prior to the onset of the economic crisis, for tax year 2010 valuation purposes, and that the

¹⁰⁴ *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).

¹⁰⁵ *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).

¹⁰⁶ *County of Lancaster v. Union Bank & Trust Co. (In re Estate of Craven)*, 281 Neb. 122, 794 N.W.2d 406 (Neb. 2011).

County Board accepted this pre-crisis valuation in the amount of 6,198,300.¹⁰⁷ The assessment history indicates that this valuation increase stemmed from the Taxpayer's acquisition of a building permit at some point in time.¹⁰⁸

2. With respect to the Taxpayer's building permit activity, the County's Assessment Report contains an "Account Notes" entry by the County Assessor's Office dated December 22, 2008, which states as follows: "12/18/08 LR inspected the subject due to a building permit for exterior remodel, appears 3 units are vacant at this time, Play it Again Sports is having a closeout sale. The exterior remodel is not complete hold for 2010."¹⁰⁹ These Account Notes also indicate that the Subject Property's remodel was not complete as of the assessment date of January 1, 2010, and that 6,500 square feet remained vacant at that time.¹¹⁰
3. Mr. Weisheipl was unable to provide a clear explanation concerning the basis of the County's \$6,198,300 pre-crisis income model valuation in March of 2007 or the applicability of that model in the aftermath of the crisis for tax year 2010 purposes.
4. I also note that the above assessment history chart indicates that the County's \$6,198,300 valuation for tax year 2010 relies on the same County Assessor income approach model that assessed land in the amount of \$1,244,700 in tax years 2007 and 2008 versus \$2,635,000 in 2010.¹¹¹ The County Board's expert, Mr. Weisheipl, was unable to explain this land value increase.
5. The basis and uncertainty surrounding the County's 2007 income model valuation in the amount of \$6,198,300 that was adopted by the County Board for tax year 2010 is further highlighted in the Account Notes document contained in the Assessment Report. That document contains the following entry by the County Board's Referee dated September 11, 2009: "The assessor bases assessment on the income approach. However, the assessor info submitted has NO income information. Therefore, the protest income and

¹⁰⁷ See, E2:8.

¹⁰⁸ See, E2:8. It is this Commissioner's understanding that the acronym "BP" shown on the Subject Property's assessment history document charted above stands for "Building Permit." This "BP" acronym appears on page 8 of Exhibit 2 in the same row that includes "03-06-2010" and \$6,198,300 in terms of total assessed valuation. In sum, this information indicates that the County Assessor revalued the Subject Property in 2010 using the same \$6,198,300 value derived prior to the economic crisis in March 2007 and March 2008, and that the County Board adopted this pre-crisis valuation for tax year 2010.

¹⁰⁹ E2:8.

¹¹⁰ E2:8.

¹¹¹ See, E2:18 and E2:21.

expenses info is considered and the assessment is reduced to \$5,272,430.”¹¹² In accordance with this recommendation, the County Board valued the Subject Property at \$5,272,430 for tax years 2008 and 2009 as indicated in the assessment history chart above.¹¹³ 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.”¹¹⁴

6. In light of the “understandable and explainable” standard contained in *Mass Appraisal of Real Property*, the failure of the County Board’s expert to provide a clear explanation of the applicability of an income model derived in March of 2007 for tax year 2010 purposes is problematic.
7. Because the remodel of the Subject Property was not complete as of the assessment date and because substantial vacancy remained, and in light of the other concerns outlined above, I would find that the use of an income model derived in March 2007 prior to the onset of the economic crisis by the County Assessor and the County Board for tax year 2010 purposes failed to sufficiently consider current market conditions.

C. THE COUNTY’S “OVERRIDE” INCOME APPROACH VALUATION

1. The County Board relies on its Assessment Report received in evidence as Exhibit 2 to support its \$6,198,300 valuation that is based on an apparent “Override” income approach as discussed below.¹¹⁵
2. The County’s Assessment Report includes a document entitled “Income Worksheet” that attempts to support the Subject Property’s \$6,198,300 assessed valuation.¹¹⁶ With the exception of a brief and less than clear “Overall Capitalization Rate” summary found at

¹¹² E2:8.

¹¹³ E2:21.

¹¹⁴ *Mass Appraisal of Real Property*, International Association of Assessing Officers, 1999, p. 207; See also, *Leech, Inc. v. Bd. Of Equal.*, 176 Neb. 841, 846, 127 N.W.2d 917, 921 (1964) (“Where 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.” 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.”); *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).

¹¹⁵ Page 20 of Exhibit 2 indicates 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.

¹¹⁶ E2:18.

page 17 of Exhibit 2 that is discussed further below, the County Board’s expert offered only a very limited explanation regarding the applicability of its 8.75% capitalization rate for 2010, which was used in the County’s “Income Worksheet.” While the County’s “Income Worksheet” for the Subject Property does not contain the word “Override” in its title, the County provided documents entitled “Override Income Worksheet” for the five Dodge Street comparables charted above that contain significant differences in terms of variables.¹¹⁷ Thus, even though the County’s “Income Worksheet” for the Subject Property does not contain the word “Override” in its title, it appears that the County used an unclear “Override” approach along the Dodge Street corridor near 72nd Street for tax year 2010 valuation purposes.

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 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.
6. 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 effort to equalize the value of the Subject Property with a smaller property located at 7610 Dodge Street. In this regard, the chart above indicates that the County Board equalized the Subject Property (\$129 per sq. ft. assessment for tax year 2010; 155,000 sq. ft. parcel and 47,826 sq. ft. improvement) for tax year 2010 with the assessed valuation of the property located at 7610 Dodge Street (\$129 per sq. ft. assessment for tax year 2010; 83,850 sq. ft. parcel and 19,855 sq. ft. improvement).
7. Based on economies of scale, equalization of the Subject Property with the property located at 7610 Dodge Street 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,

¹¹⁷ See, E2:25 (7610 Dodge); E2:29 (7010 Dodge); E2:33 (7815 Dodge); E2:39-40 (7425 Dodge); E2:47-49 (151 N. 78).

unit prices decrease. Conversely, as size decreases, unit prices increase.”¹¹⁸ As indicated, the Subject Property is significantly larger than the 7610 Dodge equalization comparable, so use of an “Override” income approach to support the County Board’s equalization actions, if any, is arbitrary or unreasonable.

D. THE COUNTY’S “OVERALL” CAPITALIZATION RATE

1. The County’s Assessment Report for tax year 2010 contains a one-page document entitled “Overall Capitalization Rate” in an attempt to support its 8.75% capitalization rate.¹¹⁹ This document, which only contain very limited explanation concerning the basis of using 8.75% in 2010 to value the Subject Property specifically, indicates 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.¹²⁰ 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” 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.”¹²¹ In addition to referencing the Voss study, however, this document contains language that states as follows with respect to the use of sales prior to the onset of the economic crisis to derive its capitalization rates for tax year 2010:

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.¹²²

4. Based on the County’s Assessment Report outlined in the preceding two paragraphs, I would find that the County did not sufficiently consider market activity most relevant to the 2010 tax year 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

¹¹⁸ *The Appraisal of Real Estate*, Appraisal Institute, 13th Ed., 2008, 212.

¹¹⁹ E2:17.

¹²⁰ E2:17.

¹²¹ E2:17.

¹²² E2:17 (emphasis added).

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. Therefore, I would find that the County Board’s income approach is arbitrary or unreasonable.

E. VALUATION ANALYSIS CONCLUSION

1. The County Board submitted an Assessment Report for tax year 2010 for the Subject Property. The County Board’s determination for the Subject Property for tax year 2010 was derived from an income model developed pursuant to reappraisals in March 2008 and March 2007 that produced the same \$6,198,300 valuation, prior to the full impact of the economic crisis. Based on the testimony of the Taxpayer and Mr. Weisheipl, an employee of the County Assessor’s Office, together with a review of documentary evidence, I would find that the County did not sufficiently consider the adverse impact of the national economic crisis on the local market for tax year 2010. Thus, based on this finding and the above analysis and 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 year 2010.
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 \$4 million during tax year 2010 in part due to adverse local market conditions stemming from the national economic crisis.
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 36% Subject Property valuation increase in tax year 2010 as compared to the pre-crisis \$4,564,100 valuation for tax years 2004 – 2006 is problematic, especially because the income model on which it is based stems from a March 2007 reappraisal by the County Assessor and is otherwise derived from arbitrary

“override” calculations, and because the County Board’s expert gave a less than clear explanation of the model.

4. For the reasons discussed above, I would find that the County Board’s \$6,198,300 valuation determination for tax year 2010 is unreasonable and arbitrary 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.¹²³ While Mr. Shoening’s ownership of the Subject Property and his decades of commercial real estate experience throughout the Omaha area makes his \$4 million opinion of value an important sign of value for tax year 2010, I would find that the best evidence is the \$5,272,430 amount set forth above in the County Board’s Referee’s Account Note dated September 11, 2009, which is close to the assessment date of January 1, 2010.

III. EQUALIZATION ANALYSIS

1. The Taxpayer asserted that the Subject Property was overvalued in comparison to the assessed valuations of other Neighborhood Shopping Centers located in Douglas County.
2. An order for equalization requires evidence that either: (1) similar properties were assessed at materially different values;¹²⁴ or (2) a comparison of the ratio of assessed value to market value for the Subject Property and other real property **regardless of similarity** indicates that the Subject Property was not assessed at a uniform percentage of market value.¹²⁵
3. I concur with the majority opinion that the properties submitted for consideration by the Taxpayer that are located on Pacific and Center Streets are not substantially similar to the Subject Property for equalization analysis purposes. Based on differences in terms of size, retail mix, and location, it is also not clear that the properties submitted for

¹²³ 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).

¹²⁴ See, *Scribante v. Douglas County Board of Equalization*, 8 Neb.App. 25, 39, 588 N.W.2d 190, 199 (1999).

¹²⁵ See, *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623, 635 (1999); *Krings v. Garfield County Board of Equalization*, 286 Neb. 352, 835 N.E.2d 750 (2013) (equalized relief may be based on a comparison of the assessed to actual value ratio of non-comparable properties -- other than agricultural property -- and the Subject Property).

consideration that are located on Dodge Street are substantially similar to the Subject Property for equalization analysis purposes.

4. I note, however, that the above chart of comparables situated on Dodge Street submitted by the County indicates that the Subject Property was not assessed at a uniform percentage of market value in comparison to the parcels located at 7610 Dodge Street and 7010 Dodge Street. In this regard, assuming the sale of the 7610 parcel for \$3,100,000 in June of 2009 reflects actual value, the assessed to actual value ratio thereof amounts to 83% (i.e., $\$2,573,300/\$3,100,000 = 83\%$). Similarly, assuming the sale of the 7010 Dodge parcel for \$5,025,000 in April of 2008 reflects actual value, the assessed to actual value ratio thereof amounts to 67% (i.e., $\$3,376,000/\$5,025,000 = 67\%$).
5. Equalization of the Subject Property with the 7610 Dodge Street parcel would amount to \$5,144,589 ($\$6,190,300 \times 83\%$), while equalization with the 7010 Dodge Street parcel would amount to \$4,152,861 ($\$6,190,300 \times 67\%$).
6. I also note that the above chart of comparables situated on Dodge Street submitted by the County indicates that the Subject Property's land component may not have been assessed in a uniform manner. In this regard, the chart above discloses that the land assessment for these properties for tax year 2010 ranges from \$11 to \$15 per square foot for four of the five comparables, while the land assessment for the Subject Property is \$17 per square foot.
7. I acknowledge that the County relied on the income approach to value the Subject Property and the five comparables included in its Assessment Report found at Exhibit 2. The income approach values land and improvements in a composite manner without distinguishing between the land and improvement components (i.e., land and improvements are valued together, unlike the cost approach). In part due to the County's use of what appears to be arbitrary "override" income approach calculations for each of its five Dodge Street comparables, however, I would find that the Subject Property's unexplained and dramatic land increase from \$1,244,700 in tax year 2009 to \$2,635,000 in tax year 2010 is grossly excessive.

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 year 2010, and that the Taxpayer has shown by clear and convincing evidence that the decision of the County Board was arbitrary or unreasonable. I would further find that the conclusion of the County Board's Referee in the last half of 2009 constitutes the best evidence of value for the Subject Property for tax year 2010. Therefore, I would find that the actual value of the Subject Property for tax year 2010 is \$5,272,400, and that the decision of the County Board should be vacated and reversed.

Thomas D. Freimuth, Commissioner