

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

United of Omaha Life Insurance,
Appellant,

v.

Douglas County Board of Equalization,
Appellee,

Case Nos: 12C 187, 12C 188 & 12C 189

Decision and Order Reversing the
Determinations of the Douglas County
Board of Equalization

For the Appellant:

Michael L. Schleich,
Fraser Stryker, PC, LLOFraser Stryker, PC, LLO

For the Appellee:

Malina M. Dobson,
Douglas County Attorney

This appeal was heard before Commissioners Robert W. Hotz and Nancy J. Salmon.

I. THE SUBJECT PROPERTY

The Subject Property is comprised of three parcels each improved with commercial structures. The Subject Property in appeal 12C 187 is improved with a 395,553 square foot parking garage and a 46,998 square foot building containing HVAC and electrical generation systems, hereafter “the Plant.”¹ The Subject Property in appeal 12C 188 is improved with a 760,537 square foot office building, with an additional 265,983 square feet of finished rentable basement office space, hereafter “the Home Office.”² The Subject Property in appeal 12C 189 is improved with two office buildings, hereafter “South Site”; one with an area of 51,780 square feet and the other with an area of 464,076 square feet.³ The legal descriptions of the parcels are found at respectively at Exhibits 4, 5 and 6, pages 6. The property record cards for the parcels comprising the Subject Property are found at Exhibits 4, 5, and 6.

II. PROCEDURAL HISTORY

For tax year 2012 the Douglas County Assessor (the Assessor) determined that the assessed value of the Subject Property was \$16,415,700 for the parcel in Case No. 12C 187,⁴ \$50,613,500

¹ E4:2.

² E5:2.

³ E6:2.

⁴ E1.

for the parcel in Case No. 12C 188,⁵ and \$26,680,000 for the parcel in Case No. 12C 189.⁶ United of Omaha Life Insurance (United) protested these assessments to the Douglas County Board of Equalization (the County Board) and requested an assessed valuation of \$9,000,000 for the parcel in Case No. 12C 187,⁷ \$23,811,000 for the parcel in Case No. 12C 188,⁸ and \$20,000,000 for the parcel in Case No. 12C 189.⁹ The County Board determined that the taxable value for tax year 2012 was \$16,415,700 for the parcel in Case No. 12C 187,¹⁰ \$50,613,500 for the parcel in Case No. 12C 188,¹¹ and \$26,680,000 for the parcel in Case No. 12C 189.¹²

The United 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 consolidated Case Nos. 10C 260, 10C 261, 10C 262, 11C 233, 11C 234, 11C 235, 12C 187, 12C 188, and 12C 189 for purposes of the hearing.¹³ The consolidated hearings spanned seven days throughout 2013, occurring on March 13-15, 2013, September 17-18, 2013, and November 13-14, 2013.

III. STANDARD OF REVIEW

The Commission's review of the determination by a County Board of Equalization is de novo.¹⁴ 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."¹⁵

⁵ E2.

⁶ E3.

⁷ E4:19.

⁸ E5:17.

⁹ E6:19.

¹⁰ E1.

¹¹ E2.

¹² E3.

¹³ See, Case File.

¹⁴ 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).

¹⁵ *JQH La Vista Conf. Ctr. v. Sarpy Cty. Bd. Of Equal.*, 250 Neb. 120, 124, 825 N.W.2d 447, 451-452 (2013) (Citations omitted).

That presumption remains until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence adduced on appeal to the contrary. From that point forward, the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon all the evidence presented. The burden of showing such valuation to be unreasonable rests upon the taxpayer on appeal from the action of the board.¹⁶

The order, decision, determination or action appealed from shall be affirmed unless evidence is adduced establishing that the order, decision, determination, or action was unreasonable or arbitrary.¹⁷ Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.¹⁸

A Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued.¹⁹ 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.²⁰

In an appeal, the commission “may determine any question raised in the proceeding upon which an order, decision, determination, or action appealed from is based. The commission may consider all questions necessary to determine taxable value of property as it hears an appeal or cross appeal.”²¹ The commission may 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.”²² The Commission’s Decision and Order shall include findings of fact and conclusions of law.²³

IV. VALUATION

A. Law

Under Nebraska law,

¹⁶ *Id.*

¹⁷ Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.).

¹⁸ *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 286, 753 N.W.2d 802, 813 (2008).

¹⁹ 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).

²⁰ *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).

²¹ Neb. Rev. Stat. §77-5016(8) (2011 Supp.).

²² Neb. Rev. Stat. §77-5016(6) (2011 Supp.).

²³ Neb. Rev. Stat. §77-5018(1) (2012 Cum. Supp.).

[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.²⁴

“Actual value may be determined using professionally accepted mass appraisal methods, including, but not limited to, the (1) sales comparison approach using the guidelines in section 77-1371, (2) income approach, and (3) cost approach.”²⁵ “Actual value, market value, and fair market value mean exactly the same thing.”²⁶ Taxable value is the percentage of actual value subject to taxation as directed by section 77-201 of Nebraska Statutes and has the same meaning as assessed value.²⁷ All real property in Nebraska subject to taxation shall be assessed as of January 1.²⁸ All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.²⁹

B. Summary of the Evidence

The Commission received extensive testimony concerning the nature and characteristics of the Subject Property. The Commission finds that the Subject Property consists of four buildings located on three separate parcels. The improvements in Case No. 12C 187 include a power plant and parking (the Plant).³⁰ The improvements in Case No. 12C 188 include a large commercial office building with over 1,000,000 square feet of finished area (Home Office).³¹ The improvement in Case No. 12C 189 include two smaller commercial office buildings totaling over 500,000 square feet of finished area (South Site).³² The improvements on all three parcels are connected by tunnels from the Plant which provides the energy, HVAC, and telecommunications needs of all three improvements.³³

²⁴ Neb. Rev. Stat. §77-112 (Reissue 2009).

²⁵ *Id.*

²⁶ *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).

²⁷ Neb. Rev. Stat. §77-131 (Reissue 2009).

²⁸ See, Neb. Rev. Stat. §77-1301(1) (Reissue 2009).

²⁹ Neb. Rev. Stat. §77-201(1) (Reissue 2009).

³⁰ E4:2; See also, E10:112 (picture depicting the Plant at bottom and left).

³¹ E5:2.

³² E6:2.

³³ See E10:105 (plans depicting the Plant, Home Office, South Site, and the connecting tunnels).

Mark Kriglstein, a retired employee of the Assessor, testified that he was responsible for the valuation of the Subject Property in 2009, and that the assessed value of the Subject Property increased in 2009 following a reappraisal. Kriglstein testified that in setting the assessed value for the Subject Property he only inspected the South Site and cafeteria, and did not inspect the Home Office or the Plant. Kriglstein testified that reappraisal work he performed in 2009 was recycled and relied upon in his valuation for 2010, 2011, and 2012 of the Subject Property. Kriglstein also testified that he did not perform a highest and best use analysis for the Subject Property, but assumed that the current use was the highest and best use. He testified that his assumption was that the Home Office had a highest and best use as a single tenant, owner-occupied office building as part of a corporate campus. Kriglstein testified he only inspected the South Site and cafeteria, and did not inspect the Home Office or the Plant.

Kriglstein testified that he valued the Subject Property as a campus by running an income approach for all three parcels using capitalization rates based upon the aggregate risk associated with the Subject Property as a campus, an aggregate expense ratio, and multi-tenant rents. He asserted that the Plant was valued as a warehouse by another employee of the Assessor, and that he adopted this valuation category when valuing the Plant for tax years 2010, 2011, and 2012. He additionally indicated that he was unaware that the South Site and Home Office were dependent upon the Plant for heating, cooling, electrical, and telecommunications infrastructure at the time he determined the assessed values for the Subject Property. Kriglstein testified that in his opinion the actual value of the Plant would likely have increased if he had known it was not a warehouse.³⁴

Kriglstein testified that he valued the Home Office using an income approach and incorporating a rental rate of \$17 which was obtained from leases in multi-tenant buildings in 2009.³⁵ Similarly, he obtained his 12% vacancy rate and 52% operating expenses from an examination of 2008 market data which included multi-tenant office buildings.³⁶ Kriglstein indicated that he adjusted the expenses from 48% or 50% to 52% to account for the added age of the Home Office and the cost to convert it to a multi-tenant building. He testified that he did not perform a sales comparison or cost approach for any of the appealed parcels.

³⁴ See also, E4.

³⁵ See, E5:13.

³⁶ See, E5:13.

Kriglstein testified that he relied solely on his 2009 income approach to determine the assessed value of the South Site. He testified that although he knew that United was asking \$18.50 per square foot for available portions of the South Site, he was not aware of the actual rents, and concluded that \$17 was the better rental rate for the South Site. Kriglstein testified that because he valued the Subject Property as a campus he used the same factors, derived the same way, in both his income approach for the South Site and his income approach for the Home Office.³⁷

John D. Waldbaum, an employee for Colliers International, a commercial real estate firm, testified that his primary responsibilities for his employer include consulting and property management for large clients concentrated mostly in downtown Omaha.³⁸ Waldbaum indicated that he is familiar with the Subject Property, and has been working with United on various projects over the past twelve years.

Waldbaum described the Home Office as a composite of four separate buildings built over multiple decades and then joined together to create the current structure.³⁹ He described these portions of the Home Office as Building I, Building II, Building III, and Building IV;⁴⁰ each of these buildings was constructed at different times with each succeeding building having additional floors.⁴¹ He testified that the floor plates for the Home Office decrease in area on higher level floors. He further explained that this type of construction required three separate banks of elevators. He testified that floor plates for the lower floors reach up to 80,000 square feet with very limited natural sunlight penetrating the interior of the office space. Waldbaum testified that even though the size of floor plates decreased in the higher floors of the Home Office, these floors still maintained floor plates of approximately 60,000 square feet. Waldbaum testified that commercial lessees desire smaller areas, generally 5,000 to 6,000 square feet, with access to natural light. In his opinion the ideal size floor plate for a multi-tenant office building was about 20,000 square feet with a bay depth to the core of about 45 feet.

³⁷ See, E6:14-15.

³⁸ E47 (Resume for John Waldbaum).

³⁹ See, E10:113 (picture of Home Office).

⁴⁰ Throughout the United's exhibits, Building I, Building II, Building III, and Building IV refer to these components of the Home Office. See, Exhibit 10.

⁴¹ See, E10:113 (picture of Home Office).

Waldbaum asserted that portions of the South Site are not finished office space, but were used as print shops by United.⁴² Waldbaum also asserted that the current ratio of office space to parking spots for the South Site was lower than desired by lessees at only 1.7 stalls per 1,000 square feet of office space. He opined that competing properties in the market have access to 4 or 5 stalls per 1,000 square feet of office space. Waldbaum testified that current tenants of the South Site rent additional parking in order to accommodate the needed parking spaces. Waldbaum testified that if the parking ratio was examined after inclusion of the parking and office space of the Home Office, the problem would be exacerbated because the Home Office is densely populated.

Waldbaum testified that Colliers International had created a market summary report for Omaha market for the 4th quarter of 2011.⁴³ The overall vacancy rate for all of Omaha Office Market for the 4th quarter of 2011 was a little over 15%.⁴⁴ The report indicates that the vacancy rate for the 4th quarter of 2011 was 20.1% for the Midtown Submarket.⁴⁵ Waldbaum testified that, for purposes of the report, the Subject Property was included in the Midtown Submarket for year 2011.⁴⁶

Waldbaum also indicated that the report provided the absorption rates for the Omaha Market and the Midtown Submarket. Waldbaum defined an absorption rate as the amount of office space absorbed by the market each year. He indicated that a high absorption rate would indicate to developers that the market was ready for additional office space. The net absorption for the Omaha Market was 15,700 square feet for the 4th quarter of 2011, with a year-to-date absorption of 62,700 square feet.⁴⁷ The net absorption for the Midtown Submarket for the 4th quarter was 19,021 square feet, with a year-to-date absorption for 2011 of 143,987 square feet.⁴⁸ The report indicated a total of 440,430 square feet of vacant rentable office space for the 4th quarter of 2011 in the Midtown Submarket.⁴⁹ Waldbaum testified that the vacant rentable office space did not include the 1,000,000 square of office space within the Home Office because it was owner

⁴² See, E10:80 (picture of second floor print shop in South Site).

⁴³ E38.

⁴⁴ E38:46.

⁴⁵ E38:3.

⁴⁶ E38:2 (map of the submarkets).

⁴⁷ E38:46-47.

⁴⁸ E38:3.

⁴⁹ E38:3.

occupied and not open for rent. Waldbaum asserted that at the applicable absorption rates it would take 50 years to fill the Home Office if it were placed on the market today, and that some large office buildings were converted from owner occupied buildings to apartment buildings because the owners had been unsuccessful in finding commercial tenants to occupy the space.

Waldbaum testified that the South Site transitioned from owner occupied to multi-tenant between 2009 and 2011. He testified that the actual vacancy rate for 2012 of the South Site was 0%. He further testified that the tenants searching for approximately 20,000 square feet of office space would begin their search in the Downtown Market area because of available space and proximity to the Old Market. He also opined that Midtown Crossing, located adjacent to the Subject Property, was a wonderful development that had positively impacted the residential values in the area, but that the development had not had a positive impact on the market for large commercial office buildings.

Timothy Holland, an architect and owner of Holland Basham Architects,⁵⁰ testified that he was contracted by the United to determine the costs to convert the Subject Property from owner-occupied office space to multi-tenant office space. Many of Holland's conclusions are incorporated as part of the infrastructure study for the Home Office.⁵¹ He asserted that he evaluated the properties using the Building Owner and Management Association (BOMA) standard. Holland testified that his firm had also been involved in renovations and upgrades between 2007 and 2009 to the auditorium, human resources department, north lobby, and south lobby located in the Home Office as part of ongoing upgrades, maintenance, and additions of technology and security features. Holland also said his firm had been involved in some work for the Mutual of Omaha Bank and National Indemnity Insurance Company, located in the South Site, in approximately 2011, and that some other renovations, in which his firm had no direct involvement, had been made to parts of the South Site, but that additional renovations would still be necessary to convert the Subject Property into viable multi-tenant office space.⁵²

Holland testified that the Home Office had larger floor plates than typical office space in the Omaha market. He testified that the size of the floor plates would pose unique challenges in

⁵⁰ See, E82 (full Resume).

⁵¹ See, E41:5.

⁵² See, E82.

converting the Home Office into a multi-tenant building.⁵³ He asserted that because the Home Office was built in four stages, the building contained three sets of core elements (elevators, restrooms, and staircases) and had additional interior columns added that were necessary for the expansion. He asserted that the additional columns would restrict the development of the Home Office into multi-tenant office space. He also explained that because the floor plates were so large it would be difficult to provide adequate natural light to all areas if the Home Office was subdivided for multi-tenant use.

Holland further indicated that in order to be competitive with Class A Office Buildings the Home Office would require renovations including: (1) changes to restrooms to meet ADA requirements; (2) additional fire separation to meet building standards; (3) new electrical and mechanical distribution systems to allow tenants to control lighting and ac/heat in their leased area; (4) separated security and fire alarm systems for each tenant; (5) different elevator configurations; (6) new ceilings; (7) thermally insulated window systems; and (8) an additional 1,700 parking spaces. Holland asserted that many of his architectural considerations were found in the infrastructure report.⁵⁴ Holland estimated that architectural costs alone would total approximately \$50.5 million to convert the Home Office to a multi-tenant building.⁵⁵

Holland testified that even if all of the changes were made to convert the Home Office into a multi-tenant office building he did not think it would be a desirable office building because of the size of the floor plates. Holland testified that the rentable space located in the third phase, floors 9-15, approaches the optimal area of 20,000 square feet or less and would be more likely to be occupied by interested tenants. Holland testified that in his opinion it was not economically feasible to convert the Home Office into multi-tenant office space.

Holland also testified that additional changes are needed to the South Site in order to convert it into viable multi-tenant office space comparable to typical Grade A office space in the market. Many of Holland's conclusions are incorporated as part of the infrastructure study for the South Site.⁵⁶ Holland testified that the changes would include: (1) upgraded restrooms to be ADA

⁵³ See generally, E8:130 (floor plate for the Home Office).

⁵⁴ See, E41:9.

⁵⁵ A break out the component architectural costs is found at E41:18.

⁵⁶ See, E42.

compliant; (2) a rated exit way; (3) reconfiguration of elevators; and (4) 2,073 new parking stalls.⁵⁷ Holland testified that these change would cost approximately \$25.8 million.⁵⁸

Holland asserted that all costs were figured using costs in 2013, because the construction was only hypothetical. He asserted that this opinion was reliable for the tax year in question because there was very little change in the construction costs over the applicable time period. He additionally asserted that the United had directed his firm to base his opinion on the assumption that the conversion would result in Grade A office space. He testified that owners of similar structures located in the Omaha Market, built in multiple phases, and used as single tenant owner-occupied office space, had vacated their buildings and attempted to lease them as multi-tenant office space. However, these properties sat vacant for an extended period of time, and were eventually torn down because they did not generate any rental interest. He posited that his suggested renovations to convert the Subject Property to Grade A office space were requisite for the Subject Property to be viable as multi-tenant office space.

Holland's firm did additional work for the development of Midtown Crossing. Holland testified that the development costs were \$296 million for its construction and that the development is mixed use consisting of condominiums, apartments, short-term stay hotels, and 200,000 square feet of retail space. Holland testified that the project also included parking garages, and the expansion of a public park. Holland testified that the project also included parking garages, and the expansion of a public park. He asserted that the Midtown Crossing added 3,200 total new parking spaces, but that 500 of them were either public right of way parking or privatized parking for the condominiums and that none of them had been intended for use by United. He opined that Midtown Crossing enhances the neighborhood.

Ronald Feuerbach, a mechanical and design engineer and principal owner of Morrissey Engineering, testified that he was responsible for the mechanical systems studies for both reports found in Exhibit 41 and Exhibit 42.

Feuerbach testified that the air temperature in the Home Office is controlled by a constant volume reheat mechanical system which pumps cooled air into a space based upon a calculated

⁵⁷ See, E42:8.

⁵⁸ See, E42:18.

heating gain, and when the space no longer needs cooled air a heating coil is engaged to increase the temperature of supplied air to keep the space at a constant temperature. Feuerbach asserted that the system was effective, but terribly inefficient and obsolete. He asserted that tenants would expect a more efficient temperature control system.

Feuerbach explained that while there is an ongoing project to upgrade the temperature control system, the upgrade is based upon single tenant use and would cost more to convert the upgrades for multi-tenant use.⁵⁹ He also asserted that: (1) the control system would need to be changed from pneumatic to digital; (2) the current HVAC configuration and system could not accommodate varying hours of operation for multiple tenants; (3) a multi-tenant use may result in more populated areas which would require air flow capability that exceeds the current systems abilities; (4) modifications would be necessary to allow a tenant to control the temperature in an individual leased space; and (5) smoke dampeners would need to be added to all the shafts to comport with current fire codes for multi-tenant buildings.⁶⁰ Feuerbach posited these modifications to the Home Office would cost \$4.9 million.⁶¹

Feuerbach testified that the air in South Site is controlled by a variable volume air handling system that uses air cooled by the system and warm air generated by the population and electronic devices and trapped in the ceiling space by conduction, to regulate the temperature of air in the building. Feuerbach testified that while this system is more energy efficient than a constant volume reheat mechanical system the South Site would still require conversion from a pneumatic control system to a digital control system to compete with Grade A office space in the Omaha market.⁶² He also asserted that the duct work may need to be modified if smaller-sized tenants were contracted for the South Site.⁶³ Costs for these modifications to the South Site were estimated at \$1.55 million.⁶⁴

Feuerbach posited that in order to divest ownership of the South Site without operating as an energy provider, United would also need to construct a separate central utility plant and central

⁵⁹ See, E41:10-12.

⁶⁰ See, E41:10-12 and 15-17.

⁶¹ See, E41:18.

⁶² See, E42:9-11.

⁶³ See, E42: 9-11.

⁶⁴ See, E42:14.

control system for the South Site.⁶⁵ Feuerbach testified that a new stand-alone Central Plant would cost approximately \$8.1 million for the South Site.⁶⁶

George Morrissey, structural engineer, and founder of Morrissey Engineering, testified that in order to support multi-tenant occupancy in the Home Office several electrical changes would be required, including: (1) rewiring of branch circuits and installation of new and additional panels to meet fire code requirements and maintenance necessities; (2) significant modifications to the lighting to allow each tenant control of the lighting in their leased space; (3) installation of new emergency power to light paths of egress and exit signs; and (4) installation of dedicated telecommunications conduits to each floor and each tenant.⁶⁷ Morrissey estimated these changes to costs \$3.31 million.⁶⁸

Morrissey also testified that South Site was multi-tenant occupancy at the time of his testimony, but that some electrical changes would be required to allow occupancy by smaller tenants and/or to lease out currently owner-occupied space to the average sized tenant including: (1) extensive rewiring of branch circuits and installation of new and additional panels to meet fire code requirements and maintenance necessities in the first floors, with lesser work in the higher levels; (2) significant modifications to the lighting to allow each tenant control of the lighting in an individual leased space; (3) installation of new emergency power to light paths of egress and exit signs; (4) electrical costs associated with HVAC modifications; and (5) installation of dedicated telecommunications conduits to each floor and each tenant.⁶⁹ Morrissey estimated these changes to costs \$2.09 million.⁷⁰ He asserted that some renovations were previously made to the first floor of the South Site to support current tenants, including changes to lighting, HVAC distribution, and telecommunications.

David Diamond, Chief Financial Officer (CFO) for United, testified the Home Office suffers from significant physical obsolescence including: (1) energy leakage from windows; (2) water leaks when it rains; (3) difficulties moderating temperature; and (4) deterioration to walls beneath cladding. Diamond testified that as the CFO he has reviewed several estimates to fix the

⁶⁵ See, E42: 9-11.

⁶⁶ See, E42:14.

⁶⁷ See, E41:12-14.

⁶⁸ See, E41:18-19.

⁶⁹ See, E42:11-13.

⁷⁰ See, E42:14.

obsolescence and that the repairs would cost approximately \$50 million. He gave his opinion that it would be better to look for a new building than to repair the issues. Diamond opined that if United were to receive an offer of \$50 million for the Subject Property, he would recommend that United take the offer.

Gary A. Battuello, a partner in the real estate appraisal firm of Ramsland and Vigen, testified concerning an appraisal he conducted for the Subject Property contained in Exhibit 8.⁷¹ Battuello conducted a highest and best use analysis of the Subject Property and made separate conclusions for the Home Office, Plant, and South Site. He opined that the highest and best use of the Home Office was a single tenant building.⁷² He concluded that the highest and best use for the South Site was its current use as a full floor multi-tenant office.⁷³ Battuello gave his opinion of value for the Subject Property for tax year 2012 as \$51,011,000.⁷⁴

Battuello defined the term “extremely large office” as a property that is larger than what is supported by the local market, and he asserted that a 1,000,000 square foot office building would constitute an extremely large office building if it were located in the Omaha Market. Battuello stated that when an extremely large building exists the market area for the property expands from local to regional. Battuello asserted that the Subject Properties are extremely large buildings that operate in a limited market; meaning the market has very few participating buyers at any given time. Battuello gave his opinion that the Omaha Market was a tertiary location for corporate headquarters, and that very few buyers would be willing to purchase the Subject Property because of location. Battuello indicated that he relied upon the Colliers report as well as the Ries report for data relating to the Omaha Market for 3rd quarter of 2009, found in Exhibit 39. Battuello testified that he last inspected the Subject Property on November 7, 2012.

Battuello valued the Subject Properties using the sales comparison, and cost approaches for all of the buildings, and the income approach for the South Site. Battuello asserted that it was not appropriate to use an income approach to value the Home Office or the Plant because neither ever were, nor had any plan to be used in the future as income producing properties.

⁷¹ See also, E48 (Battuello’s resume).

⁷² See, E8:34-40.

⁷³ See, E8:41-43.

⁷⁴ See, E8:101.

Battuello valued all three parcels in these appeals as a single campus using the sales comparison approach and the cost approach, and he derived an income approach value for the South Site. Battuello asserted that it was not appropriate to use an income approach to value the Home Office or the Plant because neither ever were nor had any plan to be used in the future as income producing properties. To determine the actual value of the Home Office and Plant for tax year 2012, Battuello first formulated an opinion of value for tax year 2010, and then indexed the determination of actual value to adjust for time.⁷⁵

In his sales comparison approach determination of the actual value of the Subject Property for tax year 2012, Battuello considered the sale of 9 other properties with varying degrees of comparability to the Subject Property.⁷⁶ While some of the sales occurred closer in time to 2004, Battuello asserted that a review of the market data from 2004 to the year in question indicated that the older sales were typically selling at similar values, and that calculable time adjustments could be and were made to each sale if necessary.⁷⁷ After adjustments, Battuello determined the applicable sales price per square foot ranged from \$24 to \$28. Battuello multiplied the area of the Subject Property by the applicable sales price to derive a range of actual value for the Subject Property.⁷⁸ Battuello asserted that his sales comparison approach indicated an aggregate value for the Subject Property as a single campus between \$41,500,000 and \$48,500,000 as of January 1, 2010.⁷⁹

Battuello indicated that while he performed a cost approach analysis of the Subject Property, he did not give the approach any weight in the reconciliation process because: (1) the cost approach was not a typical approach used by buyers for this kind of property; and (2) the cost approach has inherent difficulties associated with determining the applicable depreciation for older buildings built in various stages over the course of multiple decades, as the Subject Properties were. In his cost approach, Battuello adopted the Assessor's opinion of the land value, and then determined the replacement cost new of all components of the Subject Property using the Marshal and Swift Costing manual.⁸⁰ Battuello determined that: (1) the replacement

⁷⁵ See, E8:97-100.

⁷⁶ See, E8:46-59.

⁷⁷ See, E8:57-59 (indicating type of adjustments to comparable properties for time of sale).

⁷⁸ See, E8:46-59.

⁷⁹ See, E8:58.

⁸⁰ See, E8:60-82.

cost new of the Subject Property before depreciation was \$318 million; (2) a 90% depreciation factor was indicated by the comparable properties; and (3) the replacement cost new after depreciation plus land value was approximately \$39.4 million as of January 1, 2010.

Battuello also conducted an income approach analysis of the South Site using market data from 2012 to determine the actual value of the South Site as of January 1, 2012. In determining his rental rates, Battuello reviewed the Colliers report, the Reis Report, and the actual rental rates for the South Site. Battuello gave the most weight to the actual rental rates and determined the rental rate of \$16.00 per square foot for office space, \$10 per square foot for industrial space, and \$75 per month per parking space.⁸¹ He additionally determined the vacancy rate by reviewing market reports, including the Colliers Report, and concluded that the applicable vacancy rate was 15% for the office space and 0% for the parking.⁸² He derived the operating expenses of \$2.6 million from the stabilized actual expenses for the South Site after examining five years of data.⁸³ Battuello reviewed published capitalization rates in Korpacz Real Estate Investor Survey, and Market Extracted Rates from the Reis Report. He then developed a capitalization rate using the Mortgage-Equity Technique, and the Debt Service Coverage Technique.⁸⁴ Battuello then reconciled these rates to an 8% base capitalization which he then loaded with the effective tax rate to derive an indicated overall capitalization rate of 10.1%.⁸⁵ Using the income approach the derived value of the South Site was \$20,400,000 as of January 1, 2012.⁸⁶

Battuello determined the combined value of the Plant, Home Office, and a parking lot not included in these appeals, as of January 1, 2011, was \$30,300,000.⁸⁷ Using indexes created by MIT Battuello determined that the value of commercial office space increased 5% from January 1, 2011 to January 1, 2012.⁸⁸ Battuello applied a 5% increase to the combined value of the Plant, Home Office, and a parking lot not included in these appeals to arrive at a rounded opinion of value of \$31,800,000 for these components as of January 1, 2012.⁸⁹ Battuello then added the income approach value of the South Site to the indexed value of the Plant, Home Office, and a

⁸¹ See, E8:97.

⁸² See, E8:97.

⁸³ See, E8:88 and 98.

⁸⁴ See, E8:90-94.

⁸⁵ See, E8:97-98.

⁸⁶ See, E8:98.

⁸⁷ See, E8:100-101.

⁸⁸ See, E8:99-100.

⁸⁹ See, E8:100.

parking lot not included in these appeals to derive an actual value of \$52,200,000 as of January 1, 2012.⁹⁰ Battuello backed out the value of the parking lot which was not appealed to the Commission, for a final opinion of value of the Subject Property of \$51,011,000 as of January 1, 2012.⁹¹

Christopher Mustoe, a general certified appraiser in Nebraska, testified he conducted a retroactive fee appraisal for all buildings comprising the Subject Property.⁹² Mustoe asserted that in his opinion the cost approach was not applicable to the determination of the actual value of the Subject Property because it would be difficult to determine the applicable depreciation.⁹³ Mustoe also asserted that the sales comparison approach would be difficult to conduct because the Subject Property is so unique.⁹⁴ Mustoe utilized an income approach and valued the three parcels as a single campus. Mustoe testified that he did not allocate any portion of his opinion of value to any individual parcel.

Mustoe posited that it was appropriate to describe the Subject Property as being multi-tenant office space when valuing the Subject Property as a campus, even though he was aware that the Home Office was single-tenant owner occupied office space. Mustoe opined that the costs to convert the Home Office into multi-tenant office would not be relevant to his appraisal because he valued the property as-is instead of conducting a highest and best use analysis.

As part of his appraisal, Mustoe inspected portions of the Subject Property, but did not inspect every floor. Mustoe asserted that the Kiewit Building, a First National Bank building and associated parking garage, and the Woodmen of the World Tower property are all similar to the Subject Property, located in the same general area, and are largely owner occupied with a small portion of the space rented by tenants.⁹⁵ Mustoe also asserted that the Midtown Crossing development had resulted in substantial change in the neighborhood from year to year, and renewed interest in development in the area, especially for multi-family residential

⁹⁰ See, E8:100.

⁹¹ See, E8:101.

⁹² E7 contains Mustoe's retroactive appraisals.

⁹³ See, E7:14.

⁹⁴ Mustoe indicated that he was able to find sales in Kansas City, Minneapolis, Des Moines, and Denver that he felt were more comparable to the Subject Property than Battuello's comparable sales. He generally asserted that the lowest sales price per square foot of these comparable properties was \$50, and the most comparable sale in Denver was near \$200 per square foot. He admitted that adjustments would need to be made due to location, but he did not think that the adjustments would fall below his opinion of value derived from the income approach.

⁹⁵ See, E7:24 (chart of alleged area comparable properties).

developments. Outside of Midtown Crossing itself and the Nebraska Medical Center, Mustoe was aware of only a few commercial rehabilitation projects in the Subject Property's market area.

Mustoe reviewed information for Class B office building leases of approximately 30,000 square feet within the Omaha area that he felt were comparable. He also reviewed published reports including Grubb and Ellis and Excelligence to derive a rental rate, vacancy rate, and capitalization rate for the Subject Property.⁹⁶ Mustoe testified that the Plant was not an income producing property, but that he considered it as part of a campus when forming his opinion of value. Mustoe assigned warehouse space located on the Subject Property a rental rate of \$4.00 per square foot, lower level of the South Site a rental rate of \$3.00 per square foot, the Dome portion of the Home Office \$8.00 per square foot, and all remaining area in the Subject Property a rental rate of \$16.50 per square foot.⁹⁷ Mustoe testified that he did not know the exact rentable area of the Subject Property, but that he had calculated the area by taking the reported gross area and subtracting 15%. He did not explain this quantification. Mustoe asserted that he used lower rental rates to account for the extremely large floor plates in the Subject Property. But, again, he did not explain the quantification.

He assigned a vacancy and collection loss rate of 10% for 2012.⁹⁸ Mustoe asserted that he did not take into account the absorption rate or the length of time it would take under market indicators to fully lease the 1,000,000 square feet of office space in the Home Office.⁹⁹ Mustoe asserted that under the income approach he must assume that the market factors would remain the same if the Subject Property was included in the market. Mustoe asserted that a review of market data, and conversations with agents and appraisers, indicated an expense ratio of 50%.¹⁰⁰ Mustoe determined the applicable base capitalization rate was 7.65% and the loaded capitalization rate was 9.75% after reviewing a band of investment method, market-derived method, and published sources.¹⁰¹ Mustoe gave a final opinion of value for the Subject Property

⁹⁶ See, E7:132-143.

⁹⁷ See, E7:155.

⁹⁸ See, E7:155.

⁹⁹ See, E7:11 (limiting assumptions).

¹⁰⁰ See, E7:147 and 155.

¹⁰¹ See, E7:156-158.

of \$90,680,000 as of January 1, 2012.¹⁰² Mustoe asserted that his value could not be broken up into component parts for each parcel.

Mustoe also expressed his opinion that the comparable properties used in Battuello's appraisal had inherent weaknesses including: (1) Woodbury Corporate Campus, being an offering instead of a sale, having substantially more land than the Subject Property, and consisting of a different type of structure;¹⁰³ (2) the Kemper Lake Business Center, having substantially more land than the Subject Property, and consisting of a different type of structure;¹⁰⁴ (3) Morris Crossroads Corporate Campus, located in a different market with different economic factors, having substantially more land than the Subject Property, located in a more rural area, consisting of a different type of structure, and having concerns about the transaction itself;¹⁰⁵ (4) the G.D. Searle Corp. Headquarters, sale was too remote in time and distance from the Subject Property;¹⁰⁶ (5) K-Mart Headquarters, sale was surplus property from a merger, located in a different market, and in 2005;¹⁰⁷ (6) 2223 Dodge Street, was purchased for use as luxury apartments and was vacant for a number of years prior to purchase;¹⁰⁸ (7) 1815 Capitol Avenue, was vacant for a number of years, smaller size, and greater land ratio;¹⁰⁹ (8) Former Alcatel – Lucent Headquarters, had a different design, location, and land ratio;¹¹⁰ and (9) the sale of the Quest building would require a positive adjustment instead of a negative adjustment.¹¹¹ Mustoe further asserted that rental rates for Class A office buildings in the Omaha Market ranged from \$18 to \$25 per square foot.

Responding to these assertions, Battuello testified that most properties for corporate headquarters now consist of low rise campuses on larger areas of land. In his opinion, the fact that the Subject Property is a high building with less land would make the Subject Property less

¹⁰² See, E7:158. On cross examination, Mustoe admitted to an extraordinary assumption that the whole building could be leased to one individual at a set price which was derived from multi-tenant leased space. Mustoe also relied on a hypothetical condition that the use of the buildings would not change. See, E7:5 and 131.

¹⁰³ See, E8:46 (description of alleged comparable property).

¹⁰⁴ See, E8:47 (description of alleged comparable property).

¹⁰⁵ See, E8:49 (description of alleged comparable property); See also, E83 transfer deed.

¹⁰⁶ See, E8:50 (description of alleged comparable property).

¹⁰⁷ See, E8:51 (description of alleged comparable property).

¹⁰⁸ See, E8:52 (description of alleged comparable property).

¹⁰⁹ See, E8:53 (description of alleged comparable property).

¹¹⁰ See, E8:54 (description of alleged comparable property).

¹¹¹ See, E8:57 (description of alleged comparable property).

desirable than his comparable properties. Concerning the Morris Crossroads Corporate Campus, Battuello asserted that the location is not rural, within a one hour drive of Wall Street, located in the same county as 50 other Fortune 500 companies, and had no transactional issues. Concerning the K-Mart Headquarters, Battuello asserted that the sale occurred at a well-attended auction with multiple bidders, and that the 2005 sale price was reasonably comparable based on market trends. Battuello reviewed each comparable and Mustoe's concerns and asserted that his adjustments were sufficient to answer the concerns with each of the alleged comparable properties.

Battuello also asserted that the Appraisal Institute has recognized using market data from multi-tenant properties to value single tenant properties as a "common error." He asserted that it would be just as wrong to use a condominium to value a single family residence as it would be to use multi-tenant data to value a single tenant property.

C. Analysis of the County Board's Determinations

The Commission's review of the determinations of the County Board is de novo.¹¹² 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 at the protest proceeding.¹¹³ During appeals from a determination of the County Board, there is both a presumption in favor of the County Board and a burden of persuasion placed upon an appealing party.¹¹⁴ The presumption in favor of the County Board, and the burden of persuasion cannot be conflated, and require separate analysis.¹¹⁵ Both the presumption and burden of persuasion relate to the determinations of the County Board.¹¹⁶ The County Board has made determinations for

¹¹² See, *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 286, 753 N.W.2d 802, 813 (2008) (indicating that the language of Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.) affords the Commission a de novo review of the issues).

¹¹³ "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).

¹¹⁴ See generally, *JQH La Vista Conference Center Development LLC v. Sarpy Cty. Bd. Of Equal.*, 285 Neb. 120, 825 N.W.2d 447 (2013).

¹¹⁵ See, *JQH La Vista Conference Center Development LLC v. Sarpy Cty. Bd. Of Equal.*, 285 Neb. 120, 125-126, 825 N.W.2d 447, 452-453 (2013).

¹¹⁶ See generally, *JQH La Vista Conference Center Development LLC v. Sarpy Cty. Bd. Of Equal.*, 285 Neb. 120, 125-126, 825 N.W.2d 447, 452-453 (2013).

three separate parcels which have been consolidated by order of the Commission.¹¹⁷ The County Board's determinations were to adopt the assessed values as determined by Mark Kriglstein for the Assessor.¹¹⁸ While the County Board presented a new opinion of value as formulated by Christopher Mustoe, the presumption and burden of persuasion do not attach to Mustoe's opinion of value. The County Board's determinations which were appealed to the Commission are: (1) that the actual value of the parcel in Case No. 12C 187, containing the Plant, is \$2,808,300 for the land and \$13,607,400 for the improvements, for a total actual value of \$16,415,700 for tax year 2012;¹¹⁹ (2) that the actual value of the parcel in Case No. 12C 188, containing the Home Office, is \$1,885,600 for the land and \$48,727,900 for the improvements for a total actual value of \$50,613,500 for tax year 2012;¹²⁰ and (3) that the actual value of the parcel in Case No. 12C 189, containing the South Site, is \$1,880,300 for the land and \$24,799,700 for the improvements for a total actual value of \$26,680,000 for tax year 2012.¹²¹ Combined, the County Board determined that the actual value of the Subject Property was \$93,709,200.

The presumption is:

[T]hat a board of equalization has faithfully preformed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action. 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.¹²²

Competent evidence is defined as relevant and material evidence or that evidence "which the very nature of the thing to be proven requires."¹²³ The Nebraska Supreme Court has held that, "when an independent appraiser using professionally approved methods of mass appraisal

¹¹⁷ The determinations of the County Board are found in evidence at E1, E2 and E3.

¹¹⁸ The determinations of the County Board are found in evidence at E1, E2 and E3.

¹¹⁹ E1.

¹²⁰ E2.

¹²¹ E3.

¹²² See, *JQH La Vista Conference Center Development LLC v. Sarpy Cty. Bd. Of Equal.*, 285 Neb. 120, 124, 825 N.W.2d 447, 451-452 (2013) (citing *US Ecology v. Boyd Cty. Bd of Equal.*, 256 Neb. 7, 588 N.W.2d 575 (1999) and *Schmidt v. Thayer Cty. Bd. Of Equal.*, 10 Neb.App. 10, 624 N.W.2d 63 (2001)).

¹²³ *Black's Law Dictionary 6th Edition*, West Group, p. 284 (1990).

certifies that an appraisal was performed according to professional standards, the appraisal is considered competent evidence under Nebraska law.”¹²⁴

In the current case, there are two appraisals, one prepared by Christopher Mustoe and offered by the County Board,¹²⁵ and one prepared by Gary A. Battuello and offered by United.¹²⁶ Both appraisals are certified as having been prepared following professionally accepted appraisal standards and present significantly different opinions of value for the Subject Property from that determined by the County Board.¹²⁷ The County Board asserts that Battuello’s appraisal does not meet professional standards, and United purports that Mustoe’s appraisal does not meet professional standards. The Commission determines that these assertions constitute differences of opinion between subjective elements of appraisal. The Commission finds that both appraisals provide relevant evidence concerning the County Board’s determinations. The Commission, therefore, finds that the presumptions in favor of the County Board’s determinations are rebutted.

Having determined that the presumption in favor of the County Board’s determinations is rebutted, the only issue left before the Commission is a question of fact concerning the reasonableness of the County Board’s determination of value based upon the evidence in the appeals.¹²⁸ The Taxpayer has the burden to show that the valuation determination by the County Board was unreasonable or arbitrary.¹²⁹ This burden is only met by clear and convincing evidence.¹³⁰ The County Board has asserted that the burden of persuasion:

is not met by showing a mere difference of opinion unless it is established by clear and convincing evidence that the valuation placed upon his property when compared with valuations placed on similar property is grossly excessive and is the result of a systematic

¹²⁴ *JQH La Vista Conference Center Development LLC v. Sarpy Cty. Bd. Of Equal.*, 285 Neb. 120, 126, 825 N.W.2d 447, 453 (2013) (citations omitted).

¹²⁵ Mustoe’s appraisal is found in E7.

¹²⁶ Battuello’s appraisal is found in E8.

¹²⁷ Mustoe’s final opinion of value is \$20,000,000 less than the County Board’s determinations. See, E7. Battuello’s final opinion of value is approximately \$50,000,000 less than the County Board’s determinations. See, E8.

¹²⁸ See, Neb. Rev. Stat. 77-5016(9) (Cum. Supp. 2012); See also, *JQH La Vista Conference Center Development LLC v. Sarpy Cty. Bd. Of Equal.*, 285 Neb. 120, 124-125, 825 N.W.2d 447, 451-452 (2013).

¹²⁹ See, Neb. Rev. Stat. 77-5016(9) (Cum. Supp. 2012); See also, *JQH La Vista Conference Center Development LLC v. Sarpy Cty. Bd. Of Equal.*, 285 Neb. 120, 124-125, 825 N.W.2d 447, 451-452 (2013).

¹³⁰ See, *JQH La Vista Conference Center Development LLC v. Sarpy Cty. Bd. Of Equal.*, 285 Neb. 120, 124-125, 825 N.W.2d 447, 451-452 (2013).

exercise of intentional will or failure of a plain legal duty, and not mere errors of judgment.¹³¹

This standard has been pronounced by the Nebraska Supreme Court and is applicable when the appellant's position states "a mere difference of opinion[.]" In those instances where the appellant's case only presents evidence of a difference of opinion the appellant is limited to equalization relief.¹³² However, where clear and convincing evidence shows that the County Board's determination was arbitrary or unreasonable the Taxpayer is entitled to relief.¹³³

The Commission finds that there is clear and convincing evidence that the County Board's determinations which relied upon Kriglstein's valuations were arbitrary or unreasonable.

Kriglstein testified that the Plant was valued as a warehouse even after he determined that the Plant did not contain any warehouse space. Both Mustoe and Battuello asserted that they could not determine an independent value for the Plant because it was in actuality only a conductor of HVAC, mechanical, electrical, and telecommunications systems for the South Site and the Home Office. Mustoe opined that if the Plant were to be valued independently, then the value must reflect the income producing capability of the Plant to produce electricity and provide the services described to other parcels. Mustoe stated that he was unable to find such market data to quantify the value of the Plant under this approach. Kriglstein testified that he did not do any analysis of the Plant as anything other than a warehouse.

Real property is required to be taxed on its actual value.¹³⁴

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.¹³⁵

Determining the actual value of real property for ad valorem tax purposes requires an analysis of the use of the real property, and consideration of the physical characteristics of the real

¹³¹ See, *JQH La Vista Conference Center Development LLC v. Sarpy Cty. Bd. Of Equal.*, 285 Neb. 120, 124-125, 825 N.W.2d 447, 451-452 (2013).

¹³² See, *JQH La Vista Conference Center Development LLC v. Sarpy Cty. Bd. Of Equal.*, 285 Neb. 120, 124-125, 825 N.W.2d 447, 451-452 (2013).

¹³³ Neb. Rev. Stat. § 5016(8) (Reissue 2009).

¹³⁴ See, Neb. Rev. Stat. §77-201(1) (Reissue 2009).

¹³⁵ Neb. Rev. Stat. §77-112 (Reissue 2009).

property.¹³⁶ Kriglstein's testimony indicates that he did not perform this analysis for the Plant, and that contrary to his personal knowledge that the Plant did not contain warehouse space, he continued to value the Plant for a use which was not applicable to it. The Commission finds that the County Board's determination of the improvement value of the parcel in Case No.12C 187, which relied upon Kriglstein's valuation, was, therefore, arbitrary or unreasonable.

Further, Kriglstein testified that he valued the Home Office as a multi-tenant building and attempted to take into account the cost to convert the Home Office into a multi-tenant building by adding 2% to the expense ratio. However, Kriglstein also testified that he was unaware of the actual cost to convert the Home Office into multi-tenant office space. Kriglstein's determination of the cost to convert the Home Office was, therefore, arbitrary. Further, the record indicates that the uses within the Home Office include warehouse space, cafeteria space, and office space; each of which commands a different rent in the Subject Property's market.¹³⁷ Kriglstein, however, applied a single rental rate, based on multi-tenant office space rental rates, to the entire Home Office.¹³⁸ The County Board relied upon Kriglstein's income approach value of the Home Office in its determination. The Commission finds that the County Board's determination of the improvement value of the parcel in Case No. 12C 188 is therefore arbitrary or unreasonable.

Kriglstein also valued the South Site using the income approach and the same income approach factors for the South Site as were used for the Home Office; including expenses and vacancy rate. Testimony at the hearing indicated that the Home Office had unique problems with functional utility due to the structural layout of the building. These issues would require expensive and extensive renovations to permit multi-tenant occupancy. Kriglstein testified that he applied a 2% expense factor to account for any architectural issues necessary to convert the Home Office to multi-tenant space. This factor is not applicable to the South Site, but was included in Kriglstein's expense rate for the South Site.¹³⁹ The South Site is not subject to as extensive or expensive structural issues. Additionally, the evidence indicates that Kriglstein

¹³⁶ See, Neb. Rev. Stat. §77-112 (Reissue 2009).

¹³⁷ See, E7 (Mustoe's income approach indicating different rental values for the different uses).

¹³⁸ See, E5:13.

¹³⁹ See, E6:14 (income approach worksheet for the South Site indicating a 52% expense ratio). See also, E5:13 (indicating a 52% expense ratio of the Home Office).

applied an incorrect rental rate and capitalization rate to the South Site.¹⁴⁰ The Commission finds that the County Board's determination of the improvement value of the parcel in Case No. 12C 189 is arbitrary or unreasonable.

The only issue left for the Commission is the actual value of the Subject Property based upon the evidence presented to it.

D. Analysis of the Appraisal Reports

At the hearing before the Commission, the County Board presented an opinion of value determined by Christopher M. Mustoe, a certified general appraiser. Mustoe's appraisal reports for the Subject Property were received into evidence.¹⁴¹ Mustoe asserted that he appraised the Subject Property as a campus in order to derive a value in use. Value in use represents the value of income producing property to the current user.¹⁴² Value in use and market value may not be equal.¹⁴³ Under Nebraska law, actual value and market value mean the same thing.¹⁴⁴ For ad valorem tax purposes, real property in Nebraska is required to be valued at statutorily defined levels of actual value.¹⁴⁵ "Actual value of real property for purposes of taxation means the market value of real property in the ordinary course of trade."¹⁴⁶

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.¹⁴⁷

It is possible for the value of a property to its current owner (its value in use) and its actual value to differ significantly.

¹⁴⁰ Battuello and Mustoe derived fairly similar capitalization rates after extensive review and calculations. See, E7:151 and E8:94. Both Mustoe and Battuello acknowledged that parts of the South Site are not office space and should be valued by the current use at lower rental rates than office space. See, E7:133 and E8:89.

¹⁴¹ E7.

¹⁴² Fisher, Jeffery D., and Martin, Robert S., *Income Property Valuation*, Dearborn Financial Publishing Inc., (1994) at 25-26 (Definition of value in use).

¹⁴³ Fisher, Jeffery D., and Martin, Robert S., *Income Property Valuation*, Dearborn Financial Publishing Inc., (1994) at 25-26 (Definition of value in use).

¹⁴⁴ "Actual value, market value, and fair market value mean exactly the same thing." *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).

¹⁴⁵ Neb. Rev. Stat. §77-201 (Reissue 2009).

¹⁴⁶ Neb. Rev. Stat. §77-112 (Reissue 2009).

¹⁴⁷ Neb. Rev. Stat. §77-112 (Reissue 2009).

Mustoe's appraisal relied on leases of 9,000 to 125,000 square foot office spaces to determine the appropriate rental rate for the Subject Property's office space.¹⁴⁸ The floor plates for a single floor in the Home Office reach approximately 80,000 square feet, while the Home Office itself has over 1,000,000 square feet of office space. The general principle of economies of scale indicates that as the area of property increases, the value of each additional square foot decreases. Mustoe's appraisal assumes that the whole Home Office would be rented to a single tenant, but fails to derive and quantify the impact this assumption would have on rental rates derived from properties less than one third the size of the Home Office.¹⁴⁹

Additionally, Mustoe failed to consider the difference between a multi-tenant rental rate and a single tenant rental rate. All of Mustoe's comparable rents used to determine the rental rate of the Home Office were multi-tenant rents or included consideration for a lease of a small portion of an owner-occupied building. However, Mustoe's appraisal conclusions are based upon the Home Office being rented to a single tenant.¹⁵⁰ Extensive testimony and evidence at the hearing indicates that the Home Office cannot be used for multi-tenant office space without expensive renovations to meet the requirements of building codes and federal law. Mustoe indicated that he did not have a meaningful method of quantifying these factors when conducting his appraisal. The Commission finds that without appropriate adjustments to the expenses and rental rates, it is unreasonable to use multi-tenant rental rates to value the Home Office as a single-tenant office building.

Mustoe's alleged comparable properties had different sizes and uses than the Subject Property, and the adjustments do not appear to be based on tangible market data. The Commission therefore finds that Mustoe's appraisal is not the most reasonable opinion of value in evidence.

Battuello asserted that the Subject Property was a limited market property. A special-purpose property is defined as a property which is adapted for a single use.¹⁵¹ Another term for a special-purpose property is a limited market property.¹⁵² Special-purpose properties or limited

¹⁴⁸ E7:115-146.

¹⁴⁹ See, E7:5 and 131.

¹⁵⁰ See, E7:5 and 131.

¹⁵¹ See, IAAO, *Standard on Mass Appraisal of Real Property*, definition "special-purpose property" (2008).

¹⁵² Appraisal Institute, *The Appraisal of Real Estate*, at 28 (13th ed. 2008).

market properties include properties which have “layouts that restrict their functional utility to the use for which they were originally built.”¹⁵³ Limited-market properties have very few buyers at any particular time and may take extensive time to sell.¹⁵⁴ The Subject Property was built in phases to accommodate the specific needs of the Taxpayer. The Taxpayer’s decisions concerning the development of the Subject Property resulted in a layout and structural interconnectivity of the Home Office, Plant, and South Site which limit the functional utility of the Subject Property.

The Commission finds that the Subject Property is a limited market property that operates in a regional market. The Commission finds that it is reasonable to extend the review of properties outside of the Omaha market to develop relevant comparable properties and market factors for valuation.

The Commission notes that the comparable properties utilized by Battuello contained significantly different features, including size, style, age, and location, as compared to the Subject Property, and required subjective adjustments. However, the Commission finds that Battuello was able to generally explain the reasons for his adjustments, and that his adjustments were supported by professional appraisal standards.

While the County Board expressed concerns that Battuello adopted the County Assessor’s land values for the Subject Property, Battuello testified that there was limited market data available to perform an independent analysis of the land value of the Subject Property and, after review of the market data, he determined that the County Assessor’s land values were as reasonable as any calculation he could perform. Moreover, Battuello testified that he did not rely on any appraisal approach wherein individually derived land values were a contributing factor to his determination of actual value for the Subject Property.

While the Commission would prefer that Battuello’s comparable properties were more similar to the Subject Property and required fewer subjective adjustments, the Commission finds that Battuello’s appraisal conclusions constitute the best evidence of actual value for these appeals.

¹⁵³ Appraisal Institute, *The Appraisal of Real Estate*, at 28 (13th ed. 2008).

¹⁵⁴ See, Appraisal Institute, *The Appraisal of Real Estate*, at 27 (13th ed. 2008).

E. Actual Value of the Subject Property

The Commission finds that the best evidence of the actual value for the Subject Property consists of Battuello's income approach for the South Site and the sales comparison approach for the Home Office and the Plant. Both Battuello and Mustoe testified that it was appropriate under appraisal standards to value the Home Office and the Plant together, or as a campus.

However, the Commission notes that the Plant and the Home Office are not located on the same parcel as defined by Nebraska Statutes. Real property in Nebraska is required to be valued by individual parcel.¹⁵⁵

Parcel means a contiguous tract of land determined by its boundaries, under the same ownership, and in the same tax district and section. Parcel also means an improvement on leased land. If all or several lots in the same block are owned by the same person and are contained in the same tax district, they may be included in one parcel.¹⁵⁶

The County Assessor has determined not to combine the three parcels in these appeals into a single parcel for purposes of ad valorem taxation.¹⁵⁷

For the South Site, the Commission finds that Battuello's opinion of value constitutes the most reasonable opinion of value in evidence. Battuello determined that the actual value of the South Site is \$20,400,000.¹⁵⁸ Battuello's determination includes both the land component and the improvement component of the actual value. The County Board's determination of the land value was not in dispute in these appeals. The County Board determined that the land value for the South Site is \$1,880,300.¹⁵⁹ The Commission therefore determines that the improvement value for the South Site is \$18,519,700.¹⁶⁰

For the Home Office and the Plant, the Commission finds that the Battuello Appraisal's sales comparison approach is the best evidence of the combined total actual value of the two parcels. Because the Home Office and Plant are located on separate parcels, each parcel requires a separate actual value on the assessment rolls.¹⁶¹ The Commission notes that neither Mustoe nor

¹⁵⁵ Neb. Rev. Stat. §77-1311 (Reissue 2009).

¹⁵⁶ Neb. Rev. Stat. §77-132 (Reissue 2009).

¹⁵⁷ See, E4, E5 and E6.

¹⁵⁸ See, E8:100.

¹⁵⁹ See, E3.

¹⁶⁰ \$20,400,000 total actual value - \$1,880,300 land value = \$18,519,700 improvement value.

¹⁶¹ Neb. Rev. Stat. §77-1311 (Reissue 2009).

Battuello provided an allocated actual value for each parcel that they appraised in the aggregate as a campus. Battuello adjusted his January 1, 2011 opinion of value to \$30,611,000 for the Home Office and the Plant using an index.¹⁶² The undisputed actual value of the land component of the Home Office is \$1,885,600.¹⁶³ The undisputed actual value of the land component of the Plant is \$2,808,300.¹⁶⁴ Therefore, the remaining \$25,917,100 represents the aggregate value of the improvement components of the Home Office and the Plant.¹⁶⁵

The sales comparison data was available to value the Subject Property as a campus, land values were undisputed, and income data was available to allocate the portion of the aggregate value to the South Site. But similar data is not available to allocate the portion of this aggregate value attributable to the improvements on the Home Office and the Plant parcels. Nebraska law requires that this allocation be recorded in the assessment rolls.¹⁶⁶ Where legal standards require specific actions that are contrary to general appraisal practice, it is permissible to state the requirements and conform to law.¹⁶⁷ The Commission determines that in order to allocate value as required by law, it can establish a ratio of the replacement cost new of the improvement for the parcel in Case No. 12C 188 to the replacement cost new of the improvements located on the parcel in Case No. 12C 187, and apply that ratio to the aggregate opinion of value developed by Battuello's sales comparison approach to derive the allocated actual value of the improvements on the parcel in Case No. 12C 188 and the parcel in Case No. 12C 187.

During the hearing, both Battuello and Mustoe agreed that the cost approach produced in Battuello's appraisal was not a reliable indicator of the actual value of the Subject Property. Generally, the cost approach contains an inherent weakness when valuing older properties because any estimation of accrued depreciation "can involve considerable subjectivity."¹⁶⁸ However, the cost approach is generally the best way to value special-purpose property because

¹⁶² See, E8:95-100. \$31,800,000 remainder - \$1,189,000 parking lot not included in the appeals = \$30,611,000.

¹⁶³ See, E2.

¹⁶⁴ See, E1.

¹⁶⁵ \$30,611,000 aggregate value of Home Office and Plant - \$1,885,600 Home Office Land - \$2,808,300 Plant Land = \$25,917,100.

¹⁶⁶ Neb. Rev. Stat. §77-1303(2) (Reissue 2009).

¹⁶⁷ See, Appraisal Institute, *The Appraisal of Real Estate*, at 28 (13th ed. 2008) (generally indicating that appraisal principles are malleable to conform with law and acknowledging that legal requirements preclude general appraisal practices).

¹⁶⁸ IAAO, *Standard on Mass Appraisal of Real Property*, §4.2 (2008).

of the unique nature of the property and lack of sales comparison and income data.¹⁶⁹ Battuello's and Mustoe's concerns focused on the subjective nature of the derived applicable depreciation.

The Commission determines that a calculation of the ratio of the replacement cost new before depreciation of the improvement on the Home Office parcel to the replacement cost new before depreciation of improvements on the Plant parcel avoids the subjectivity inherent in depreciation determinations of older improvements. The Commission is aware that Battuello's appraisal report indicates that his cost approach valuation for 2010 would need to be positively adjusted by 5% to provide an opinion of value for the Subject Property for tax year 2011.¹⁷⁰ The Commission reiterates that its opinion of the actual value of the Home Office and Plant are derived from an allocation of Battuello's opinion of the aggregate actual value of these parcels under a sales comparison approach, and thus the determination of the ratio does not require an adjustment for time. The Commission finds that the ratio of actual value of the improvements on the Home Office parcel to the actual value of the improvements on the Plant parcel is 7:1.¹⁷¹

The Commission finds the actual value of the improvements on the parcel in Case No. 12C 187 containing the Plant and parking structure is \$3,239,640.¹⁷² The total actual value of the parcel in Case No. 12C 187 is \$6,047,940.¹⁷³ The Commission finds the actual value of the improvements on the parcel in Case No. 12C 188 containing the Home Office is \$22,677,460.¹⁷⁴ The total actual value of the parcel in Case No. 12C 188 is \$24,563,060.¹⁷⁵

V. CONCLUSION

¹⁶⁹ See, IAAO, *Standard on Mass Appraisal of Real Property*, §4.6.6 (2008).

¹⁷⁰ See, E8:97-100.

¹⁷¹ Battuello listed the itemized values of specific items of real property in his appraisal report E8:62-68. \$137,974,504 (Home Office -- Above Grade) + \$36,478,397 (Home Office & Dome – Below Grade) + \$1,897,867 (1/3 of skywalks and tunnels) = \$176,350,768 (total replacement cost new of the improvements on the Home Office parcel). \$5,592,068 (central services building) + \$16,595,808 (Ramp B) + \$1,897,867 (1/3 of skywalks and tunnels) = \$24,085,743 (total replacement cost new of improvements on the Plant parcel). \$176,350,768: \$24,085,743 (ratio of the total replacement cost new of the improvements on the Home Office parcel to the total replacement cost new of improvements on the Plant parcel) reduced and rounded to 7:1.

¹⁷² The Commission has rounded the value to the nearest tens.

¹⁷³ \$3,239,640 (improvements) + \$2,808,300 (land) = \$6,047,940.

¹⁷⁴ The Commission has rounded the value to the nearest tens.

¹⁷⁵ \$22,677,460 (improvements) + \$1,885,600 (land) = \$24,563,060.

The Commission finds that there is competent evidence to rebut the presumption that the County Board faithfully performed its duties and had sufficient competent evidence to make its determinations. The Commission also finds that there is clear and convincing evidence that the County Board's decisions were arbitrary or unreasonable.

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

VI. ORDER

IT IS ORDERED THAT:

1. The decisions of the Douglas County Board of Equalization determining the values of the Subject Property for tax year 2012 are vacated and reversed.¹⁷⁶
2. The assessed values of the Subject Property for tax year 2012 are:

12C 187

Land	\$2,808,300
<u>Improvements</u>	<u>\$3,239,640</u>
Total	\$6,047,940

12C 188

Land	\$1,885,600
<u>Improvements</u>	<u>\$22,677,460</u>
Total	\$24,563,060

12C 189

Land	\$1,880,300
<u>Improvements</u>	<u>\$18,519,700</u>
Total	\$20,400,000

¹⁷⁶ Assessed value, as determined by the County Board, was based upon the evidence at the time of the Protest proceeding. At the appeal hearing before the Commission, both parties were permitted to submit evidence that may not have been considered by the County Board of Equalization at the protest proceeding.

3. This Decision and Order, if no appeal is timely filed, shall be certified to the Douglas County Treasurer and the Douglas County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (2012 Cum. Supp.).
4. Any request for relief, by any party, which is not specifically provided for by this Decision and Order is denied.
5. Each party is to bear its own costs in this proceeding.
6. This Decision and Order shall only be applicable to tax year 2012.
7. This Decision and Order is effective for purposes of appeal on July 31, 2014.

Signed and Sealed: July 31, 2014

Robert W. Hotz, Commissioner

SEAL

Nancy J. Salmon, Commissioner

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