

**BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION**

Cole Mt Papillion NE, LLC,  
Appellant,

v.

Sarpy County Board of Equalization,  
Appellee.

Case No: 11C 193 & 12C 015

Decision and Order Affirming the  
Determination of the Sarpy County  
Board of Equalization

**For the Appellant:**

William E. Peters,  
Peters & Chunka, PC LLO,  
&  
Thomas R. Wilhelmy,  
Fredrikson & Byron, P.A.

**For the Appellee:**

Michael A. Smith,  
Bonnie Moore,  
Deputy Sarpy County Attorneys.

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

**I. THE SUBJECT PROPERTY**

The Subject Property is a 12.3 acre commercial parcel located at 8909 S. 71<sup>st</sup> Plaza, Papillion, Sarpy County, Nebraska.<sup>1</sup> The parcel is improved with an 88,974 square foot discount department store.<sup>2</sup> The legal description of the parcel and the property record card for the Subject Property are found at Exhibit 3 and Exhibit 4 respectively.

**II. PROCEDURAL HISTORY**

The Sarpy County Assessor (the Assessor) determined that the assessed value of the Subject Property was \$6,360,000 for tax year 2011.<sup>3</sup> Cole Mt Papillion NE, LLC (Kohl's) protested this assessment to the Sarpy County Board of Equalization (the County Board) and requested an

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<sup>1</sup> E3:5.

<sup>2</sup> E3:6.

<sup>3</sup> E1.

assessed valuation of \$5,700,000.<sup>4</sup> The Sarpy County Board determined that the taxable value for tax year 2011 was \$6,360,000.<sup>5</sup>

The Assessor determined that the assessed value of the Subject Property was \$6,360,000 for tax year 2012.<sup>6</sup> Kohl's protested this assessment to the County Board and requested an assessed valuation of \$5,700,000.<sup>7</sup> The County Board determined that the taxable value for tax year 2012 was \$6,360,000.<sup>8</sup>

Kohl's appealed these decisions of the County Board to the Tax Equalization and Review Commission (the Commission). Prior to the hearing, the parties exchanged exhibits and submitted a Pre-Hearing Conference Report, as ordered by the Commission. The Commission held a hearing on October 31, 2013.

### III. STANDARD OF REVIEW

The Commission's review of the determination by a County Board of Equalization is de novo.<sup>9</sup> 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."<sup>10</sup>

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.<sup>11</sup>

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<sup>4</sup> E3:1.

<sup>5</sup> E1.

<sup>6</sup> E2.

<sup>7</sup> E4:1.

<sup>8</sup> E2.

<sup>9</sup> 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).

<sup>10</sup> *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted).

<sup>11</sup> *Id.*

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.<sup>12</sup> Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.<sup>13</sup>

A Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued.<sup>14</sup> 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.<sup>15</sup>

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.”<sup>16</sup> 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.”<sup>17</sup>

## 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.<sup>18</sup>

“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

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<sup>12</sup> Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.).

<sup>13</sup> *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

<sup>14</sup> 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).

<sup>15</sup> *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).

<sup>16</sup> Neb. Rev. Stat. §77-5016(8) (2011 Supp.).

<sup>17</sup> Neb. Rev. Stat. §77-5016(6) (2011 Supp.).

<sup>18</sup> Neb. Rev. Stat. §77-112 (Reissue 2009).

77-1371, (2) income approach, and (3) cost approach.”<sup>19</sup> “Actual value, market value, and fair market value mean exactly the same thing.”<sup>20</sup> 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.<sup>21</sup> All real property in Nebraska subject to taxation shall be assessed as of January 1.<sup>22</sup> All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.<sup>23</sup>

## **B. Summary of the Evidence**

D. Kendall Lees, the Senior Manager of Real Estate for Kohl’s, testified that the County Board’s determination was unreasonable or arbitrary because it relied upon the County Assessor’s opinion of value derived from an income approach that utilized an inappropriate rental rate, vacancy rate, and capitalization rate.<sup>24</sup> Lees asserted that due to a general downturn in economic factors, the Subject Property was hindered from obtaining the expected amount of retail sales per square foot originally contemplated by Kohl’s. Lees testified that the Subject Property was built upon the expectation that the surrounding area would have substantial residential growth, but that the recent economic recession had delayed development and restrained residential growth in the area. Lees testified that sluggish residential growth resulted in lower than expected retail sales.

Lees posited that appropriate rental rates for purposes of the income approach could be derived through an examination of the ratio of retail sales per square foot of the Subject Property to rental rates per square foot derived from the market. Lees referred to published data concerning the average level of retail sales per square foot between 2004 and 2008, and corresponding rental rates per square foot.<sup>25</sup> Lees posited that the Subject Property was only as valuable as its amount of retail sales, and that as the amount of retail sales per square foot of the

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<sup>19</sup> *Id.*

<sup>20</sup> *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).

<sup>21</sup> Neb. Rev. Stat. §77-131 (Reissue 2009).

<sup>22</sup> See, Neb. Rev. Stat. §77-1301(1) (Reissue 2009).

<sup>23</sup> Neb. Rev. Stat. §77-201(1) (Reissue 2009).

<sup>24</sup> See, E15.

<sup>25</sup> See, E15:72-73.

Kohl's merchandise within the Subject Property ebbed and flowed, so did the actual value of the Subject Property.<sup>26</sup>

Lees asserted market data indicated that the appropriate rental rate for the Subject Property was \$4.70 for both tax years.<sup>27</sup> Lees' calculated rental rate relied upon known rental rates in active leases and adjusted listings.<sup>28</sup> Lees ran a regression analysis of the data to derive an indicated rental rate for the Subject Property.<sup>29</sup> He additionally posited that the vacancy rate should be 14.3% for tax year 2011 and 12.4% for tax year 2012.<sup>30</sup> Lees testified that he relied upon the Lerner Reports found in Exhibit 15 to derive these numbers.<sup>31</sup>

Finally, Lees asserted that the capitalization rates should be 10.30% for 2011 and 9.88% for 2012. Lees derived the capitalization rates based upon his determination that the Subject Property was a non-institutionalized grade power center under the Korpacz and PWC definitions. Lees asserted that although the Korpacz reports did not provide capitalization rates for non-institutionalized grade power centers for the tax years in question, that he could nonetheless derive the appropriate capitalization rates by first determining the difference between institutional and non-institutional grade strip center capitalization rates and then applying the same difference to the Korpacz reported institutional grade power centers to derive the capitalization rate for a non-institutional grade power center.<sup>32</sup> Lees made no adjustments for any differences between power centers and strip centers.<sup>33</sup>

Lees testified that his final opinion of value for the Subject Property was \$3,102,883 for tax year 2011 and \$3,320,669 for tax year 2012.<sup>34</sup>

Richard John, a Commercial Real Estate Appraiser employed by the Assessor, and a Certified General Real Estate Appraiser in Nebraska, testified that he valued the Subject Property

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<sup>26</sup> Lees supported these assertions by citing to The Appraisal Institute, *The Appraisal of Real Estate*, (14th ed. 2013) (exerts provided in E15:74-76).

<sup>27</sup> See, E15:10.

<sup>28</sup> See, E15:8 and E25.

<sup>29</sup> See, E25.

<sup>30</sup> See, E15:10.

<sup>31</sup> See also, E15:10.

<sup>32</sup> See, E15:10-11.

<sup>33</sup> See, E15:10-11.

<sup>34</sup> See, E26.

based upon the income approach for both years.<sup>35</sup> He testified that he obtained the rental rate from LoopNet, speaking with other appraisers, and reviewing surveys and information from appeals to the County Board. He obtained his vacancy rates by discussions with appraisers in the area. John testified that no adjustments to vacancy rates, capitalization rates, or expense rates had been made by the Assessor since 2008. John testified that while a cost approach was performed for the Subject Property for both years, he did not rely upon the cost approach when determining the assessed value of the Subject Property, and had, therefore, not derived an economic obsolescence factor for the Subject Property. John asserted that there was very little impact from the economic recession on the Sarpy County real estate markets. He asserted that the Assessor reviews sales each year to determine if the model is still providing reliable opinions of value and that, in his opinion, it was.

### **C. Analysis**

Kohl's asserted that the County Board's determination was unreasonable or arbitrary because it relied upon the Assessor's opinion of value derived from an income approach that utilized an inappropriate rental rate, vacancy rate, and capitalization rate. Lees' testimony and appraisal report indicate that, in his opinion, the rental rate should be \$4.70, the vacancy rate should be 14.3% for tax year 2011 and 12.4% for tax year 2012, and a capitalization rate of 10.30% for 2011 and 9.88% for 2012 would be appropriate. The Commission finds that the Taxpayer has not produced clear and convincing evidence that the County Board's determination of actual value was arbitrary or unreasonable for the following reasons.

Lees' calculated rental rate relied upon known rental rates of active leases and adjusted listings.<sup>36</sup> Lees ran a regression analysis of the data to derive an indicated rental rate for the Subject Property.<sup>37</sup> However, the Commission finds that the data used to develop the rental rate limits the reliability of the regression. The Subject Property consists of approximately 89,000 square feet of gross leasable area (GLA).<sup>38</sup> Lees' regression analysis does not include any data

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<sup>35</sup> See, E3 and E4.

<sup>36</sup> See, E15:8 and E25.

<sup>37</sup> See, E25.

<sup>38</sup> The Commission notes that the property record cards for the Subject Property indicate a GLA of 88,974 square feet. E3:7 and E4:6. The Commission also notes that Lees' report indicates a GLA of 89,025 square feet in Exhibit 15, page 16-17, and approximately 90,000 square feet in Exhibit 15, pages 8-9.

for actual rental rates for properties with GLA above 69,272 square feet.<sup>39</sup> The only data included in the analysis for properties consisting of more than 69,272 square feet are two listings, not actual rental rates, for properties with 100,000 square feet and 114,513 square feet.<sup>40</sup> Of these two properties, the largest is located at 84<sup>th</sup> Street and Giles Road.<sup>41</sup> The Lerner Report indicates that pockets of retail developments in Sarpy County were experiencing higher vacancies than the rest of the Submarket.<sup>42</sup> The specific area designated as experiencing these unique economic circumstances includes “the 84<sup>th</sup> Street corridor from Giles Road to just south of Harrison Street[.]”<sup>43</sup>

Lees made a negative 10% adjustment to the listing price to control for the estimated actual rent based on his observed ratio of listing rate to actual rate, and a positive 12% adjustment to account for the Subject Property’s superior economic factors.<sup>44</sup> Lees testified that the positive 12% adjustment was derived by giving a positive 1% adjustment for each block of distance between the Subject Property and the alleged comparable. Lees did not explain how he derived the 1% distance adjustment. The actual rental rate of the Subject Property was not included in Lees’ data set.<sup>45</sup> Finally, Lees adjusted all rental rates from leases signed prior to 2009 by a negative 10% factor.<sup>46</sup> The Commission notes that the dates of the leases utilized in the regression analysis range from 2002 to 2008, with no actual signed leases within two years of the date of assessment. Despite Lees’ testimony that the market took a drastic downward turn in 2007 and 2008, the same adjustment was applied to all leases signed prior to 2009.<sup>47</sup> The Commission finds that Lees’ opinion of the market rental rate for the Subject Property is not clear and convincing evidence because it was derived from a regression analysis of limited data affected by unsupported or unexplained adjustments.

Lees asserted that a historical ratio of retail sales per square foot to rental rate per square foot support his asserted rental rate. Lees supported this examination by reviewing: (1) the historical

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<sup>39</sup> See, E15:8 and E25. By utilizing properties for comparison that are less than 80% the size of the Subject Property, Lees’ analysis appears to have ignored economies of scale, where typically the larger the property the lower the value per unit.

<sup>40</sup> See, E15:8 and E25.

<sup>41</sup> E8.

<sup>42</sup> E15:41 and 46.

<sup>43</sup> E15:41. See also, E15:46.

<sup>44</sup> E15:8-9.

<sup>45</sup> See, E15:8.

<sup>46</sup> See, E9.

<sup>47</sup> See, E15:9.

sales per square feet of the Subject Property; (2) the historical sales per square foot of other Kohl's stores; and (3) median sales per square foot of department stores in U.S. Super Regional Shopping Centers as published in *Dollars and Cents of Shopping Centers*. The Commission finds that Kohl's department stores do not operate within an exclusive market, but instead compete with similar retail establishments. The dollar amount of sales per square foot of a retail establishment is affected by many factors, including the brand appeal of merchandise, public perception of the chain or owning establishment, proximity to other retail establishments of the same or similar character or chain, and the individual management of the specific retail establishment or chain of establishments. These factors must be examined and controlled in order to provide a reliable rental rate factor based on a ratio of sales per square foot to rental rate. The Commission notes that in order to derive an effective rent-to-revenue ratio, an appraisal would need to obtain and review the sales per square foot and rental of properties other than the Subject Property or other properties within the same chain.<sup>48</sup> The Commission also finds that a rental rate derived from a ratio of sales per square foot to rental rate per square foot which fails to consider the sales per square foot of similar retail establishments outside of the Subject Property's chain is not clear and convincing evidence. While Lees also relied upon publications to support his ratio, the Commission notes that these sources are based on data from 4 to 5 years prior to the dates of assessment, and, therefore, are not clear and convincing evidence.<sup>49</sup>

Lees asserted that the appropriate vacancy rates for the Subject Property were 14.3% for tax year 2011 and 12.4% for tax year 2012. Lees relied upon the Lerner Reports to derive these vacancy rates.<sup>50</sup> The Commission notes that the Lerner Reports categorize retail properties by type and size.<sup>51</sup> Lees' 14.3% and 12.4% vacancy rates are the Lerner Reports' derived average vacancy rates for all retail categories of property in the Sarpy Submarket.<sup>52</sup> The Lerner Reports further indicate the vacancy rates within each category of retail property.<sup>53</sup> The Commission finds that the Subject Property is best classified as a Category 2 (Cat. 2) property within the

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<sup>48</sup> See, E15:76 (a photocopy of Appraisal Institute, *The Appraisal of Real Estate*, at 714 (14th ed. 2013)).

<sup>49</sup> See, E15:72-73 (a photocopy of Urban Land Institute, *Dollars and Cents of Shopping Centers/ The Score 2008*, at 124-125 (2008)).

<sup>50</sup> E15:9.

<sup>51</sup> See, E15:34 and 39.

<sup>52</sup> See, E15:36 and 41.

<sup>53</sup> See, E15:36 and 41.



Lerner Reports.<sup>54</sup> The stated vacancy rates for Cat. 2 properties are 3.69% for year-end 2010, and 4.66% for year-end 2011.<sup>55</sup> After its review of the Lerner Reports, the Commission finds that Lees' vacancy rates are not clear and convincing evidence.

Lees additionally asserted that the appropriate capitalization rates for the Subject Property were 10.30% for 2011 and 9.88% for 2012.<sup>56</sup> Lees concluded that under the Korpacz and PWC definitions the Subject Property is part of a non-institutional grade power center.<sup>57</sup> The PWC definitions of "institutional grade real estate" and "power center" were provided in evidence.<sup>58</sup> Institutional grade real estate is defined as, "Real property investments that are sought out by institutional buyers and have the capacity to meet generally prevalent instructional investment criteria."<sup>59</sup> A power center is defined as, "An open center dominated by at least 75.0% large big-box stores, including discount stores, warehouse clubs, and value-oriented category stores, and a minimal amount of inline store space."<sup>60</sup> The Commission finds that under these definitions the Subject Property is an institutional power center. The average capitalization rate for institutional power centers for the first quarter of 2011 was 7.8%, and 7.32 % for the first quarter of 2012.<sup>61</sup> The Commission finds that Lees' asserted capitalization rates are not clear and convincing evidence of the appropriate capitalization rate for the Subject Property.

Additionally, The Commission notes that the published reports determine that strip centers and power centers are separate and distinct types of properties.<sup>62</sup> Even if the Subject Property is a non-institutional grade power center, the Taxpayer did not provide sufficient evidence that the difference in capitalization rates between an institutionalized strip center and a non-institutionalized strip center is the same as the difference in capitalization rates between an institutionalized grade power center and a non-institutionalized grade power center to support its

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<sup>54</sup> The Lerner Reports define a Category 2 (Cat. 2) property as, "Region properties containing from 250,000 to 800,000 square feet." E15:34 and 39. The Commission notes that the Exhibit 15, page 5 produced by the Taxpayer indicates that the Subject Property is part of a larger regional shopping center known as The Shoppes at Market Pointe. While the Subject Property itself has only 89,025 of GLA, the regional shopping center also includes a Wal-Mart, Lowes, and other inline stores. See, E15:5.

<sup>55</sup> See, E15:41 and 46.

<sup>56</sup> See, E15:10-11.

<sup>57</sup> See, E15:10.

<sup>58</sup> See, E18 and E17.

<sup>59</sup> E18: and E17: .

<sup>60</sup> E18: and E17: .

<sup>61</sup> E15:10-11.

<sup>62</sup> See, E17 and E18.

use in Lees' calculation.<sup>63</sup> The Commission finds that without evidence that the differences are the same, Lee's derived capitalization rates are not clear and convincing evidence.

The Commission further notes that for tax years 2010 and 2011 the Assessor assigned a higher vacancy rate and capitalization rate than indicated by Kohl's published reports.<sup>64</sup> Additionally, the Commission finds that the Assessor valued the Subject Property using a statutorily permitted technique.<sup>65</sup>

## 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."<sup>66</sup> Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value.<sup>67</sup> 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.<sup>68</sup> 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.<sup>69</sup> 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.<sup>70</sup> Taxpayers are entitled to have their property assessed uniformly and proportionately, even though the result may be that it is assessed at less than the actual value.<sup>71</sup> The constitutional requirement of

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<sup>63</sup> See, Lees' calculation in Section B. Summary of Evidence in this order.

<sup>64</sup> E3:9 indicates that the County Assessor assigned a vacancy rate of 5.00% and a capitalization rate of 8.75% to the Subject Property for tax year 2011, while the reports submitted by the Taxpayer indicate an applicable vacancy rate of 3.69% for tax year 2011 and a capitalization rate of 7.8%. See, E15:36; See also, E15:10. E4:8 indicates that the County Assessor assigned a vacancy rate of 5.00% and a capitalization rate of 8.75% to the Subject Property for tax year 2012, while the reports submitted by the Taxpayer indicate an applicable vacancy rate of 4.66% for tax year 2012 and a capitalization rate of 7.32%. See, E15:46; See also E15:11.

<sup>65</sup> Neb. Rev. Stat. §77-112 (Reissue 2009).

<sup>66</sup> *Neb. Const.*, Art. VIII, §1.

<sup>67</sup> *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).

<sup>68</sup> *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).

<sup>69</sup> *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).

<sup>70</sup> *Banner County v. State Board of Equalization*, 226 Neb. 236, 411 N.W.2d 35 (1987).

<sup>71</sup> *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).

uniformity in taxation extends to both rate and valuation.<sup>72</sup> If taxable values are to be equalized it is necessary for a Taxpayer to establish by “clear and convincing evidence that valuation placed on his or her property when compared with valuations placed on similar property is grossly excessive and is the result of systematic will or failure of a plain legal duty, and not mere error of judgment [sic].”<sup>73</sup> There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity.<sup>74</sup>

## **B. Summary of the Evidence**

Lees asserted that the Subject Property was not equalized with other Kohl’s stores located in Douglas and Lancaster Counties. He provided charts comparing the assessed values, and pertinent characteristics of the Subject Property and the alleged comparable properties.<sup>75</sup> Lees asserted that Kohl’s stores in other counties had higher retail sales per square foot but were assessed at a lower per square foot rate. Of the listed Kohl’s stores, the Subject Property had the lowest retail sales per square foot, and the highest assessed value per square foot.<sup>76</sup> The Taxpayer asserted that the principles of equalization and uniformity required that the Subject Property’s per square foot assessed value be decreased.

## **C. Analysis**

The Commission finds that the Taxpayer’s assertions and evidence that Kohl’s stores were valued at different levels does not violate the Constitutional requirements of uniformity and equalization for the following reasons.<sup>77</sup> Kohl’s assertions consisted of Lees’ testimony that the Subject Property, although recording lower sales per square foot than other Kohl’s stores in Nebraska, nevertheless was assessed at a higher amount per square foot. The Commission notes that Kohl’s did not provide any property record cards for the alleged comparable properties as ordered by the Commission’s Order and Notice of Hearing.

Equalization concerning the valuation of a single property has a defined purpose under Nebraska law. The Nebraska Court of Appeals has held that, “[T]he purpose of equalization of

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<sup>72</sup> *First Nat. Bank & Trust Co. v. County of Lancaster*, 177 Neb. 390, 128 N.W.2d 820 (1964).

<sup>73</sup> *Newman v. County of Dawson*, 167 Neb. 666, 670, 94 N.W.2d 47, 49-50 (1959) (Citations omitted).

<sup>74</sup> *Id.* at 673, 94 N.W.2d at 50.

<sup>75</sup> E15:12.

<sup>76</sup> E15:12.

<sup>77</sup> *Neb. Const.*, Art. VIII, §1.

assessments is to bring assessments from different parts of the taxing district to the same relative standard, so that no one part is compelled to pay a disproportionate share of the tax.”<sup>78</sup> This kind of individual analysis is limited to comparisons of properties within the same taxing district. A lack of uniformity within a taxing district may be shown by either: (1) a comparison of the ratio of assessed value to actual value for the Subject Property and other properties indicating a disproportionate burden upon the Subject Property;<sup>79</sup> or (2) evidence that comparable properties have been valued at materially different levels.<sup>80</sup> Under the applicable standards, the Subject Property must be compared with properties within the same taxing district.<sup>81</sup>

The Commission finds that Lees’ assertions and Kohl’s evidence concerning the equalization of similar properties does not constitute clear and convincing evidence that that valuation placed on the Subject Property is grossly excessive and is the result of systematic will or failure of a plain legal duty. Lees compared the assessed value of the Subject Property to other Kohl’s stores in different taxing districts (other Nebraska counties). The Taxpayer did not present any evidence of the level of value of any comparable properties in the same taxing district, or evidence of the assessed to sales ratio of other properties within the same taxing district.

## **VI. CONCLUSION**

The Commission finds that there is not competent evidence to rebut the presumption that the County Board faithfully performed its duties and had sufficient competent evidence to make its determination. The Commission also finds that there is not clear and convincing evidence that the County Board’s decision was arbitrary or unreasonable. The Commission finds that there is not clear and convincing evidence that the valuation placed on the Subject Property when compared with valuations placed on similar property is grossly excessive and is the result of systematic will or failure of a plain legal duty, and not mere error of judgment.

For all of the reasons set forth above, the determinations made by the Sarpy County Board of Equalization are affirmed.

## **VII. ORDER**

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<sup>78</sup> *Cabela’s Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597, 597 N.W.2d 623, 635 (1999).

<sup>79</sup> *Kearney Convention Center v. Buffalo County Board of Equalization*, 216 Neb. 292, 304, 344 N.W.2d 620, 626 (1984).

<sup>80</sup> *Scribante v. Douglas County Board of Equalization*, 8 Neb.App. 25, 39, 588 N.W.2d 190, 199 (1999).

<sup>81</sup> See generally, *Cabela’s Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597, 597 N.W.2d 623, 635 (1999).

IT IS ORDERED THAT:

1. The decisions of the Sarpy County Board of Equalization determining the taxable value of the Subject Property for tax years 2011 and 2012 are affirmed.<sup>82</sup>
2. The taxable value of the Subject Property for both tax years 2011 and 2012 is \$6,360,000.
3. This Decision and Order, if no appeal is timely filed, shall be certified to the Sarpy County Treasurer and the Sarpy County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (2012 Cum. Supp.).
4. Any request for relief, by any party, which is not specifically provided for by this Decision and Order is denied.
5. Each party is to bear its own costs in this proceeding.
6. This Decision and Order shall only be applicable to tax years 2011 and 2012.
7. This Decision and Order is effective for purposes of appeal on March 25, 2014.

Signed and Sealed: March 25, 2014

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Robert W. Hotz, Commissioner

SEAL

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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.

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<sup>82</sup> 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.