

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

HY-Vee Food Stores/D&D Foods, Inc.,

And

HY-Vee Food Stores/D & D Distributing,

And

D & D Distributing, Inc, c/o HYVEE,

And

D AND D Foods, Inc, c/o HYVEE,
Appellants,

v.

Douglas County Board of Equalization,
Appellee.

Case Nos: 11C 489, 11C 490 & 12C 358,
12C 359

Decision & Order Affirming the Douglas
County Board of Equalization

For the Appellant:

Brian S. Kruse,
Rembolt Ludtke LLP.

For the Appellee:

Malina Dobson & Jimmie Pinkham III,
Deputy Douglas County Attorneys.

Heard before Commissioners Thomas D. Freimuth and Nancy J. Salmon.

I. THE SUBJECT PROPERTY

The Subject Property consists of two adjacent commercial parcels located in Omaha, Douglas County, Nebraska. The 4.67-acre parcel located at 9425 North 48th Street that is the subject of appeal in Case Nos. 11C 490 & 12C 358 is improved with an 85,414 sq. ft. industrial facility, and its legal description and Property Record File (“PRF”) for tax years 2011 and 2012 are found at Exhibits 16 and 17, respectively. The parcel located at 9401 North 48th Street that is the subject of appeal in Case Nos. 11C 489 & 12C 359 is a 2.04-acre parking lot adjacent to the industrial facility, and its legal description and PRF for tax years 2011 and 2012 are found at Exhibits 14 and 15, respectively.

II. PROCEDURAL HISTORY

The parcels that constitute the Subject Property in connection with these appeals are owned by entities that have some form of common business relationship with Hy-Vee. These entities will be referred to throughout this Order as the “Taxpayer.”

The Douglas County Assessor (herein referred to as the “Assessor”) determined that the assessed value of the Subject Property parcel that is the subject of appeal in Case Nos. 11C 490 & 12C 358 was \$2,894,000 for tax years 2011 and 2012. The Taxpayer protested this assessment to the Douglas County Board of Equalization (herein referred to as the “County Board”). The County Board determined that the assessed value for tax years 2011 and 2012 was \$2,894,000.¹

The Assessor determined that the assessed value of the Subject Property parcel that is the subject of appeal in Case Nos. 11C 489 & 12C 359 was \$39,000 for tax years 2011 and 2012. The Taxpayer protested this assessment to the County Board. The County Board determined that the assessed value for tax years 2011 and 2012 was \$39,000.²

The Taxpayer appealed the decisions of the County Board to the Tax Equalization and Review Commission (herein referred to as the “Commission”). The Commission opened a hearing on the merits of the above captioned appeal on July 21, 2014, and recessed the hearing later that day. The hearing on the merits was resumed and concluded on December 15, 2014.

A majority of the Commission constitutes a quorum sufficient to transact business.³ The Commission must deny relief “in any hearing or proceeding unless a majority of the Commissioners present determine that the relief should be granted.”⁴ A majority is defined as, “The greater number. The number greater than half of any total.”⁵ Commissioner Freimuth and Commissioner Salmon were present at the hearing and constituted a majority of the Commission, and, therefore, a quorum sufficient to transact business. A majority of the Commission has determined that relief should not be granted. The determinations of the County Board are affirmed.

¹ E7 and E8.

² E5 and E6.

³ See, Neb. Rev. Stat. §77-5005(2) (2014 Cum. Supp.).

⁴ See, Neb. Rev. Stat. §77-5016(13) (2014 Cum. Supp.).

⁵ *Black's Law Dictionary 6th Edition*, West Group, p. 955 (1990).

III. STANDARD OF REVIEW

The Commission's review of the determination by a County Board of Equalization is de novo.⁶ 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."⁷

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.⁸

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.⁹ Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.¹⁰

A Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued.¹¹ 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.¹²

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

⁶ See, Neb. Rev. Stat. §77-5016(8) (2014 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).

⁷ *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted).

⁸ *Id.*

⁹ Neb. Rev. Stat. §77-5016(8) (2014 Cum. Supp.).

¹⁰ *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

¹¹ 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).

¹² *Botdorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).

consider all questions necessary to determine taxable value of property as it hears an appeal or cross appeal.”¹³ 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.”¹⁴ The Commission’s Decision and Order shall include findings of fact and conclusions of law.¹⁵

IV. VALUATION

A. Law

Under Nebraska law,

[a]ctual value is the most probable price expressed in terms of money that a property will bring if exposed for sale in the open market, or in an arm’s length transaction, between a willing buyer and a willing seller, both of whom are knowledgeable concerning all the uses to which the real property is adapted and for which the real property is capable of being used. In analyzing the uses and restrictions applicable to real property the analysis shall include a full description of the physical characteristics of the real property and an identification of the property rights valued.¹⁶

“Actual value may be determined using professionally accepted mass appraisal methods, including, but not limited to, the (1) sales comparison approach using the guidelines in section 77-1371, (2) income approach, and (3) cost approach.”¹⁷ “Actual value, market value, and fair market value mean exactly the same thing.”¹⁸ Taxable value is the percentage of actual value subject to taxation as directed by section 77-201 of Nebraska Statutes and has the same meaning as assessed value.¹⁹ All real property in Nebraska subject to taxation shall be assessed as of January 1.²⁰ All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.²¹

¹³ Neb. Rev. Stat. §77-5016(8) (2014 Cum. Supp.).

¹⁴ Neb. Rev. Stat. §77-5016(6) (2014 Cum. Supp.).

¹⁵ Neb. Rev. Stat. §77-5018(1) (2014 Cum. Supp.).

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

¹⁷ *Id.*

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

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

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

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

B. Summary of the Evidence

Linda Rowe, a commercial appraiser employed by the Douglas County Assessor's Office, testified at the hearing before the Commission. Assessment Reports for tax years 2011 and 2012 prepared by Keith Nielsen of the County Assessor's Office for both Subject Property parcels were received in evidence by the Commission, which indicate that Rowe and Nielsen conducted an exterior inspection on August 30, 2010.²²

The County's Assessment Reports for the 4.67-acre Subject Property parcel improved with the industrial facility each contain a Property Record File ("PRF") indicating that the improvement is an 85,414 sq. ft. facility constructed in 1986 and remodeled in 2000 for "Industrial Light Manufacturing" purposes.²³ The PRFs indicate that the County Assessor categorized use under Occupancy Code 334 "Industrial Light Manufacturing" for tax years 2011 and 2012.²⁴ Despite this use designation, language in each Assessment Report states that the facility should be categorized as a "Distribution Warehouse" rather than "Light Industrial Manufacturing" based on the exterior inspection performed by Rowe and Nielsen on August 30, 2010.²⁵

The Assessment Reports for the industrial facility parcel indicate that the County used an income approach to derive the \$2,894,000 value relied upon by the County Board for its tax year 2011 and 2012 determinations.²⁶ The County's income approach uses the following estimates: (1) Rental Rate - \$4 per sq. ft.; (2) Vacancy and Collection Loss Rate - 10%; (3) Total Expense - 20%; and (4) Capitalization Rate - 8.5%.²⁷ The County Board's \$2,894,000 determination for tax years 2011 and 2012 amounts to \$33.88 per sq. ft. ($\$2,894,000/85,414 \text{ sq. ft.} = \33.88).

Rowe testified that the County's income approach estimates were derived from a model based on market data.²⁸ Specifically, she testified that the rental rates, vacancy and collection loss rates, and expenses were derived from Loop Net and owner surveys in the market area. Rowe asserted that all of the data used to derive the County Assessor's income approach factors was maintained in the County Assessor's work files. In support of Rowe's testimony, the

²² E14:1, E15:1, E16:1, E16:17 (inspection reference), E17:1, and E17:17 (inspection reference).

²³ E16:6 and E17:6.

²⁴ E16:5 and E17:5.

²⁵ E16:17 and E17:17.

²⁶ E16:14 – E16:18, E16:19 (2011 Property Valuation History, indicating that the County Assessor reappraised the improved Subject Property parcel in March 2011), E17:14 – E17:17, and E17:18 (2012 Property Valuation History).

²⁷ E16:14 and E17:14.

²⁸ See, E16:14 and E17:14.

County's Assessment Reports contain four alleged comparables used to derive the above-noted \$4 rent rate (rents: \$3.50, \$3.95, \$5.50 & \$5.50), together with related Loop Net information.²⁹

Rowe also asserted that the County's 8.50% capitalization rate is derived from the Voss Study, which is included in evidence.³⁰ The Voss Study indicates that industrial capitalization rates were derived from an examination of published sources including the Korpacz Report, the Real Estate Research Corporation ("RERC") Report, and the Realty Rates.com Investor Survey.³¹

The Voss Study also examined 216 industrial sales in the Douglas County area, of which 109 were used in the final analysis.³² Voss indicated that the amount of sales available for examination in the 2008 – 2009 period were limited, so several transactions prior to that period dating back to 2004 were used for analysis purposes.³³

In further support of the County Board's \$2,894,000 determination for the Subject Property parcel improved with the industrial facility for tax years 2011 and 2012, the Assessment Reports contain PRFs for three alleged "sales" comparables.³⁴ The Assessment Reports also contain PRFs for three alleged "equalization" comparables.³⁵

Keith Nielsen of the County Assessor's Office also prepared Assessment Reports for the 2.04-acre Subject Property parcel used by the Taxpayer as a parking lot, which were received in evidence by the Commission and are found at Exhibits 14 and 15 for tax years 2011 and 2012, respectively. The PRFs contained in these Assessment Reports indicate that the Taxpayer purchased this 2.04-acre parcel from Hy-Vee Inc. for \$39,000 in February 2008.³⁶ In support of the County Board's \$39,000 assessment determination for the 2.04-acre Subject Property parcel

²⁹ See, E16:34 – E16:42 and E17:33 – E17:41.

³⁰ See, E16:20 – 31 and E17:19 – 30. According to the County Board's Assessment Reports, the County Assessor's Office hired Kenneth Voss & Associates, LLC, of Atlanta, Georgia, to determine capitalization rates in the Omaha market in the aftermath of the economic crisis. While Kenneth Voss did not appear at the hearing before the Commission, E16:20 – 31 and E17:19 – 30 state that his study produced for the County Assessor relied in part on nationally-recognized capitalization rate analysis produced by the Taxpayer's appraiser, Kenneth Riggs, who testified that he is the Chairman and President of Real Estate Research Corporation (sometimes referred to herein as "RERC").

³¹ See, E16:23 – 26 and E17: 22 – 25.

³² 16:27 and 17:26.

³³ See, 16:27 – 31 and 17:26 - 30.

³⁴ E16:12 (2011 sales comparison chart), E16:43 -16:64 (PRFs for three alleged sales comparables for tax year 2011), E17:12 (2012 sales comparison chart), E17:42 -17:56 (PRFs for three alleged sales comparables for tax year 2012).

³⁵ E16:33 (2011 equalization comparison chart), E16:65 -16:79 (PRFs for three alleged equalization comparables for tax year 2011), E17:32 (2012 equalization comparison chart), and E17:57 - 17:70 (PRFs for three alleged equalization comparables for tax year 2012).

³⁶ E14:3 and E15:3.

for tax years 2011 and 2012, the Assessment Reports contain PRFs for three alleged “sales” comparables.³⁷

The Taxpayer asserted that its appraiser, Kenneth Riggs, is a nationally respected expert regarding the valuation of commercial properties. The evidence in the form of testimony and the Riggs’ appraisals for each Subject Property parcel (Exhibits 22 & 23) provides that he is a Nebraska certified general appraiser, with decades of experience valuing commercial real estate across the country and with significant experience in the Omaha market in particular. Riggs received the Member of the Appraisal Institute (“MAI”) designation from the Appraisal Institute in 1987, and he currently serves as Chairman and President of Real Estate Research Corporation (sometimes referred to herein as “RERC”).³⁸ Riggs has served as publisher of the RERC Real Estate Report since 1992, and he has authored several nationally published works in the areas of real estate investment and valuation.³⁹

The Commission received identical appraisals authored by Riggs for both Subject Property parcels, which are found at Exhibit 22 (2.04-acre parcel subject to appeal in Case Nos. 11C-489 and 12C-359) and Exhibit 23 (4.67-acre parcel improved with the industrial facility subject to appeal in Case Nos. 11C-490 and 12C-358).⁴⁰ Riggs’ appraisals state that the 2.04-acre Subject Property parcel is improved with “some asphalt and minimal landscaping” and is used by the Taxpayer for “additional semi-truck turning radius and employee parking.”⁴¹ Based on these physical characteristics and use determination, Riggs’ appraisals designate the 2.04-acre parcel as surplus land.⁴² Consequently, Riggs’ \$2,220,000 opinion of value (\$26 per sq. ft.) includes both Subject Property parcels.⁴³

Riggs conducted the sales comparison approach, the cost approach, and the income approach for the Subject Property.⁴⁴ The Taxpayer appealed the assessed value of each Subject Property

³⁷ E14:7 (2011 sales comparison chart), E14:10 -14:23 (PRFs for three alleged sales comparables for tax year 2011), E15:7 (2012 sales comparison chart), E15:8 -15:19 (PRFs for three alleged sales comparables for tax year 2012).

³⁸ See, *Wortmann v. Commissioner of Internal Revenue*, T.C. Memo. 2005-227 (2005) (citing *Estate of Aufer v. Commissioner*, T.C. Memo. 1998-185, the United States Tax Court stated that “MAI is a designation awarded to qualifying members of the American Institute of Real Estate Appraisers and within the appraisal community is viewed as the most highly regarded appraisal designation”).

³⁹ See, E22 & E23.

⁴⁰ See, E22 (Parking Lot parcel) and E23 (Industrial Facility parcel).

⁴¹ E22:2 and E23:2.

⁴² E22:2 and E23:2.

⁴³ See, E22 (Parking Lot parcel) and E23 (Industrial Facility parcel).

⁴⁴ See, E22 and E23.

parcel for tax years 2011 and 2012.⁴⁵ Riggs testified that although his appraisal report does not mention a determination of actual value for tax year 2012, his opinion of value would be the same for tax years 2011 and 2012.

Riggs relied upon the sales comparison approach to determine his \$2,220,000 (\$26 per sq. ft.) opinion of the actual value of the Subject Property.⁴⁶ Riggs' sales comparison approach is based on five sales after adjustments, which he itemized under the following categories: (1) financing terms; (2) conditions of sale; (3) market conditions; (4) size; (5) location; (6) age and condition; and (7) miscellaneous "other" adjustments.⁴⁷

The dates of the sales used by Riggs range from January 2008 to November 2010.⁴⁸ Riggs applied percentage time adjustments for market conditions to the sales based on a chart produced as part of Moody's/RCA Commercial Property Price Indices (CPPI) for Industrial properties.⁴⁹

Riggs' income approach differed from the County Assessor's income approach as follows: (1) rental rate - \$3 per sq. ft. vs. County \$4; (2) vacancy and collection loss rate - 8% vs. County 10%; (3) total expenses - 2.9% vs. County 10%; and (4) capitalization rate - 10.17% vs. County 8.5%.⁵⁰

Riggs' \$3 rental rate is derived from the listings of five comparable properties in Douglas County, which range from \$2.50 to \$3.50 per sq. ft. on a triple net basis.⁵¹ Riggs asserted that he made adjustments to the comparable rental rates to account for differences in age, condition, size, height clearance, percentage office, loading capacity, and location.⁵² He also asserted that he spoke with real estate professionals in the market to derive his \$3 rental rate.⁵³

Riggs derived his 10% unloaded capitalization rate by examining RERC's investor surveys (9.5% - 10.5% range) and five single tenant industrial property sales in the Midwest region of the United States in the 2009 - 2010 time period (9% - 10% range).⁵⁴ Riggs derived his 10.17% loaded capitalization rate by adding a .17% "effective tax rate" to the unloaded rate (the effective

⁴⁵ See, E5, E6, E7 and E8 (indicating the Taxpayer appealed the assessed value of the each Subject Property parcel for both tax years.)

⁴⁶ See, E23:85.

⁴⁷ See, E23:56-68.

⁴⁸ See, E23:68.

⁴⁹ See, E23:62 and E23:68.

⁵⁰ See, E23:70 - 81.

⁵¹ See, E23:70 - 81.

⁵² See, E23:70-78.

⁵³ See, E23:70-78.

⁵⁴ E23:83.

tax rate is determined by multiplying the 2.17% Nebraska property tax rate by Riggs' 8% vacancy and credit loss rate).⁵⁵

C. Analysis

With respect to appeals arising from County Board determinations, there is both a presumption in favor of the County Board and a burden of persuasion placed upon an appealing party.⁵⁶ The presumption in favor of the County Board and the burden of persuasion cannot be conflated and require separate analysis.⁵⁷ Both the presumption and burden of persuasion relate to the determinations of the County Board.⁵⁸

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.⁵⁹

Competent evidence is defined as relevant and material evidence or that evidence “which the very nature of the thing to be proven requires.”⁶⁰ The Nebraska Supreme Court has held that, “when an independent appraiser using professionally approved methods of mass appraisal certifies that an appraisal was performed according to professional standards, the appraisal is considered competent evidence under Nebraska law.”⁶¹

Riggs conducted appraisals of the Subject Property and certified that they were performed according to professional appraisal standards.⁶² The Commission finds that the appraisals constitute competent and relevant evidence concerning the County Board's determinations. The

⁵⁵ See, E23:83-84.

⁵⁶ See generally, *JQH La Vista Conference Center Development LLC v. Sarpy Cty. Bd. Of Equal.*, 285 Neb. 120, 825 N.W.2d 447 (2013).

⁵⁷ 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).

⁵⁸ 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).

⁵⁹ 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)).

⁶⁰ *Black's Law Dictionary*, 6th Edition, West Group, p. 284 (1990).

⁶¹ *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).

⁶² See, E22 and E23.

Commission, therefore, finds that the presumptions in favor of the County Board's determinations are rebutted.

Having determined that the presumptions in favor of the County Board's determinations are rebutted, the reasonableness of the County Board's determinations of value based upon the evidence in the appeals is a question of fact.⁶³ The Taxpayer has the burden to show by clear and convincing evidence that the valuation determinations by the County Board were unreasonable or arbitrary.⁶⁴ An appraisal may constitute competent evidence but not rise to the level of clear and convincing evidence.⁶⁵ An examination of the appraisals and all other relevant evidence is necessary to determine if there is clear and convincing evidence that the County Board's determinations were unreasonable or arbitrary. An expert's opinion of value is "no stronger than the facts upon which it is based."⁶⁶

1. Sales Comparison Approaches

An opinion of value under the sales comparison approach is developed by analyzing closed sales, listings, or pending sales of properties that are similar to the subject property.⁶⁷ An opinion of value based on use of the sales comparison approach requires use of a systematic procedure:

1. Research the competitive market for information on properties that are similar to the subject property and that have recently sold, are listed for sale, or are under contract. ... The characteristics of the properties such as property type, date of sale, size, physical condition, location, and land use constraints should be considered. The goal is to find a set of comparable sales or other evidence such as property listings or contracts as similar as possible to the subject property to ensure they reflect the actions of similar buyers. ...
2. Verify the information by confirming that the data obtained is factually accurate and that the transactions reflect arm's-length market considerations. ...
3. Select the most relevant units of comparison used by participants in the market (e.g., price per acre, price per square foot, price per front foot, price per dwelling unit) and develop a comparative analysis for each unit. ...

⁶³ See, Neb. Rev. Stat. 77-5016(9) (2014 Cum. Supp.); 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).

⁶⁴ See, Neb. Rev. Stat. 77-5016(9) (2014 Cum. Supp.); 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).

⁶⁵ See, *JQH La Vista Conference Center Development LLC v. Sarpy Cty. Bd. Of Equal.*, 285 Neb. 120, 825 N.W.2d 447 (2013) (determining that an appraisal was competent evidence, but upholding the Commission's finding that the appraisal did not constitute clear and convincing evidence).

⁶⁶ *Bottorf v. Clay County Board of Equalization*, 7 Neb.App. 162, 167, 580 N.W.2d 561, 565 (1998) (citations omitted).

⁶⁷ Appraisal Institute, *The Appraisal of Real Estate*, at 377-78 (14th ed. 2013).

4. Look for differences between the comparable sale properties and the subject property using all appropriate elements of comparison. Then adjust the price of each sale property, reflecting how it differs, to equate it to the subject property or eliminate that property as a comparable. This step typically involves using the most similar sale properties and then adjusting for any remaining differences. ...

5. Reconcile the various value indications produced from the analysis of comparables into a value conclusion. ...⁶⁸

Additionally, Nebraska law defines comparable sales as “recent sales of properties that are similar to the property being assessed in significant physical, functional, and location characteristics and in their contribution to value.”⁶⁹

In order for a sales comparison approach to amount to clear and convincing evidence that the County Board was unreasonable or arbitrary, the adjustments made to comparable properties must be made to truly comparable sales and in a manner that is supported by market evidence. Under professionally accepted appraisal techniques, the adjustments should allow the comparable property to equate to the subject property.⁷⁰

The assessment of real property is not an exact science.⁷¹ It is possible for reasonable minds to come to diverse opinions of the actual value of real property.⁷² The burden placed on the Taxpayer is not to show that there are reasonable alternative opinions of value for the Subject Property, but to show by clear and convincing evidence that the County Board’s determination was unreasonable.⁷³ With respect to the Subject Property parcels under appeal herein, there are competing reasonable minds with competing reasonable opinions of value.

Riggs’ sales comparison approach includes two comparables that are also contained in the County’s Assessment Report for tax years 2011 and 2012, including the parcels located at 505 Crown Point Avenue and 4343 South 96th Street in Omaha. The 505 Crown Point comparable is an 82,586 sq. ft. facility categorized as an “Industrial Light Manufacturing” facility by the County that sold for \$2,992,545 (\$36.24 per sq. ft.) in July 2009.⁷⁴ The County’s Assessment Reports indicate that this comparable was assessed at \$2,991,836 (\$36.23 per sq. ft.) for tax years

⁶⁸ *Id.* at 381-382.

⁶⁹ Neb. Rev. Stat. 77-1371 (Reissue 2009).

⁷⁰ Appraisal Institute, *The Appraisal of Real Estate*, at 382 (14th ed. 2013).

⁷¹ *Matter of Bock’s Estate*, 198 Neb. 121, 124, 251 N.W.2d 872, 874 (1977).

⁷² *Id.*

⁷³ *JQH La Vista Conference Center Development LLC v. Sarpy County Board of Equalization*, 285 Neb. 120, 124-25, 825 N.W.2d 447, 452 (2013) (quoting *Brenner v. Banner County Bd. Of Equal.*, 276 Neb. 275, 284, 276 N.W.2d 802, 812 (2008)).

⁷⁴ E16:12, E17:12, E23:58.

2011 and 2012.⁷⁵ In contrast, the Riggs' appraisal adjusts the \$36.24 per sq. ft. sale price to \$30.88 per sq. ft.⁷⁶

The other common sale parcel, which is located at 4343 South 96th Street in Omaha, is an 88,178 sq. ft. facility categorized as a "Distribution Warehouse" by the County that sold for \$3,025,000 (\$34.31 per sq. ft.) in January 2010.⁷⁷ The County's Assessment Reports indicate that this comparable was assessed at \$2,790,000 (\$31.64 per sq. ft.) for tax years 2011 and 2012.⁷⁸ In contrast, Riggs' appraisal adjusts the \$34.31 per sq. ft. sale price of this parcel to \$27.44.⁷⁹

Significantly, Riggs' sales comparison approach does not include the County's sale comparable located at 4433 South 94th Street in Omaha. This parcel is an 88,079 sq. ft. facility categorized as "Industrial Light Manufacturing" by the County, which sold for \$2,987,945 (\$33.92 per sq. ft.) in August 2011.⁸⁰ The County's Assessment Report for the 4.67-acre Subject Property parcel for tax year 2012 indicates that this comparable was valued at \$2,818,500 (\$32 per sq. ft.) by the County Assessor for tax year 2011 and for the same amount by the County Board for tax year 2012.⁸¹

The evidence submitted by both the Taxpayer and the County indicates that the 4.67-acre Subject Property parcel is used for manufacturing (salad processing) and distribution warehouse purposes.⁸² Consistent with this use, the PRFs for the sales comparables used by both the Taxpayer and the County that are in evidence and available for review by the Commission indicate that both parties considered parcels categorized as "Industrial Light Manufacturing" (505 Crown Point Avenue) and "Distribution Warehouse" (4343 South 96th Street). While the Taxpayer adjusted the comparable located at 4343 South 96th Street from its \$34.31 per sq. ft. sale price to \$27.44 per sq. ft., Riggs adjusted the 505 Crown Point comparable from its \$36.33 per sq. ft. sale price to \$30.88 per sq. ft. The latter amount is closer to the County's \$33.88 determination of value as compared to Taxpayer's \$26 per sq. ft. opinion of value.

⁷⁵ E16:12 and E17:12.

⁷⁶ E23:68.

⁷⁷ E16:12, E17:12, and E23:58.

⁷⁸ E16:12 and E17:12.

⁷⁹ E23:68.

⁸⁰ E17:12.

⁸¹ See, E17:12, E17.51 (Property Valuation History for the 4433 South 94th Street sales comparable used by the County).

⁸² E16:3 & E17:3 (County's sketch of industrial facility), E16:7 & E17:7 (County's reference to salad processing), E23:5-7 (Taxpayer's photos of loading docks), E23:9 (Taxpayer's photo of salad processing area), and E23:9 & E23:11 (Taxpayer's photos of dry storage and potato storage areas).

It is also important to note that Riggs' appraisal did not include the County's sales comparable located at 4433 South 94th Street, which appears similar to the 4.67-acre Subject Property parcel in terms of characteristics and which was valued at \$32 per sq. ft. by the County Assessor for tax year 2011 and for the same amount by the County Board for tax year 2012.⁸³ These \$32 per sq. ft. assessment actions with respect to this sale comparable support the County's \$33.88 assessment of the 4.67-acre Subject Property parcel for tax years 2011 and 2012 as opposed to Riggs' \$26 per sq. ft. opinion of value.

With respect to the 2.04-acre Subject Property parcel used by the Taxpayer as a parking lot and for additional semi-truck turning radius, Riggs' surplus land designation is problematic. Based on this designation, Riggs asserted that the industrial facility and the adjacent parking lot should be valued together, so his \$2,220,000 opinion of value includes both parcels.⁸⁴

Surplus land is defined as land that is not necessary to support the existing use on a parcel, but which is incapable of separation from the rest of the parcel for a different use.⁸⁵ Surplus land is generally considered to have no influence on parcel value.⁸⁶ In contrast, land that is not necessary to support the existing use on a parcel, but which is capable of separation from the rest of the parcel for a different use, is called "excess land".⁸⁷ Unlike surplus land, excess land may have a different highest and best use as compared to the associated parcel, thereby requiring separate analysis to determine appropriate market value.⁸⁸

Riggs' appraisals indicate that the 4.67-acre Subject Property parcel was improved with the industrial facility in 1986, and that a "large" addition was added in 2000 together with "small" additions added in 2005 and 2006.⁸⁹ In light of this increased size and associated activity, it is plausible that the Taxpayer purchased the 2.04-acre Subject Property parcel to support the existing use on the adjacent 4.67-acre parcel. While admittedly the evidence is not clear whether the 2.04-acre parcel is necessary to support the existing use on the adjacent industrial facility parcel, the Taxpayer's \$39,000 purchase in 2008 and Riggs' appraisals indicate that the parking lot at a minimum is useful and therefore does not fully satisfy the requirements of either surplus land or excess land designation. If anything, in light of the Taxpayer's \$39,000 purchase and the

⁸³ See, E17:12 and E17.51 (Property Valuation History for the 4433 South 94th Street sales comparable used by the County).

⁸⁴ See, E22:2 and E23:2.

⁸⁵ See, Appraisal Institute, *The Appraisal of Real Estate*, at 200 (14th ed. 2013).

⁸⁶ See, Appraisal Institute, *The Appraisal of Real Estate*, at 200 (14th ed. 2013).

⁸⁷ See, Appraisal Institute, *The Appraisal of Real Estate*, at 200 (14th ed. 2013).

⁸⁸ See, Appraisal Institute, *The Appraisal of Real Estate*, at 200 (14th ed. 2013).

⁸⁹ E22:2 and E23:2.

continuing separate and distinct parcel designation, the parking lot in some manner meets the definition of excess land rather than surplus land, thereby requiring separate valuation.

The following evidence is clear: (1) the Taxpayer paid \$39,000 in 2008 to purchase the parking lot separately from the adjacent parcel improved with the industrial facility; (2) the Taxpayer used the 2.04-acre parcel for employee parking and additional semi-truck turning radius, thereby benefitting the adjacent industrial facility parcel;⁹⁰ (3) the parking lot is a distinct and separate parcel with a separate address (9401 North 48th Street) as compared to the industrial facility parcel (9425 North 48th Street); (4) the County Board assessed the parking in the amount of \$39,000 for tax years 2011 and 2012; and (5) Riggs' \$180,000 cost approach land valuation effectively attributes \$54,725 in value to the parking lot.⁹¹ Based on this evidence, the Commission is not persuaded that the Taxpayer has adduced sufficient evidence to show that the 2.04-acre Subject Property parcel used as a parking lot is surplus land with little or no value.

All of the forgoing limits the credibility of Riggs' sales comparison approach. Consequently, while the evidence generally supports the Taxpayer's assertions, it also does not sufficiently contradict the County Board's determinations regarding the improved 4.67-acre Subject Property parcel for tax years 2011 and 2012. Similarly, the Commission is not persuaded that the County Board's determination to assess the 2.04-acre Subject Property parcel at the Taxpayer's \$39,000 purchase price in 2008 for tax years 2011 and 2012 is unreasonable or arbitrary. Therefore, the Commission finds that Riggs' sales comparison approach is not clear and convincing evidence that the County Board's determinations for each Subject Property parcel are unreasonable or arbitrary for tax years 2011 and 2012.

2. Income Approaches

The steps required for use of the income approach with direct capitalization may be summarized as follows: (1) estimate potential gross income; (2) deduct estimated vacancy and collection loss to determine effective gross income; (3) deduct estimated expenses to determine net operating income; and (4) divide net operating income by an estimated capitalization rate to

⁹⁰ E14:3, E15:3, E22:18, and E23:18.

⁹¹ See, E14, E15, E16, E17, E22:49 & E23:49 (the latter two Exhibit references set forth Riggs' \$180,000 land valuation under the cost approach). The Commission notes that the \$54,725 attributable to the 2.04-acre parking lot parcel is calculated as follows using Riggs' \$180,000 cost approach land valuation: $2.04 \text{ acres} \div (2.04 \text{ acres} + 4.67 \text{ acres}) \times \$180,000 = \$54,725$.

yield indicated value.⁹² A variety of techniques may be used to quantify various components of any application of the approach.⁹³

Both the County Assessor and Riggs utilized the income approach to determine the actual value of the improved Subject Property parcel, although Riggs placed primary emphasis on the sales comparison approach.⁹⁴ Riggs' income approach valuation (\$2,180,000 - \$25.52 per sq. ft.) differed from the County Assessor's income valuation (\$2,894,000 - \$33.88 per sq. ft.) with respect to rental rate, vacancy and collection loss rate, total expenses, and capitalization rate.⁹⁵ The Taxpayer also asserted that the County's income approach inappropriately imposed an upward adjustment to the improved Subject Property parcel based on its hot and cold storage features.

The Commission is not persuaded that Riggs' income approach valuation amounts to more than a difference of opinion in comparison to the County's \$2,894,000 determinations for tax years 2011 and 2012. In this regard, the Commission notes that the net operating income derived by Riggs (\$221,735) and the County (\$245,992) are similar. The Commission also notes that Courts have indicated that food processing and warehouse facilities with temperature control systems can derive increased marketability under the sales comparison approach because such systems can enhance flexibility and adaptability for alternative industrial use purposes.⁹⁶

Based on a review of the relevant factors used in the respective income approaches, and in light of the analysis above regarding the sales comparison approach, the Commission is not persuaded that the County Board's determinations were unreasonable or arbitrary with respect to the 4.67-acre Subject Property parcel improved with the industrial facility. Similarly, the Commission is not persuaded that the County Board's determination to value the 2.04-acre Subject Property parcel at the Taxpayer's \$39,000 purchase price in 2008 for tax years 2011 and 2012 is unreasonable or arbitrary. Therefore, the Commission finds that there is not clear and

⁹² See, The Appraisal Institute, *The Appraisal of Real Estate*, at 460-461 (14th ed. 2013).

⁹³ *Id.* at chapters 21-26.

⁹⁴ See, E16, E17, E22, and E23.

⁹⁵ See, E22 and E23.

⁹⁶ See, *Great Atlantic & Pac. Tea Co., Inc. v. Kiernan*, 42 N.Y.2d 236, ___, 397 N.Y.S.2d 718, 722 (New York Court of Appeals 1977) (1973 valuation at issue); *Great Atlantic & Pac. Tea Co., Inc. v. Kiernan*, 79 A.D.2d 371, ___, 437 N.Y.S.2d 851, 852 – 853 (Supreme Court of New York, Appellate Division 1981) (in addition to adopting the reasoning of the New York Court of Appeals in the 1973 valuation case regarding the possible enhanced value stemming from "special" features such as temperature control systems, the Supreme Court of New York stated in this 1974 – 1978 valuation case that the highest and best use of the food processing plant under review "is as a general manufacturing and warehousing structure" similar to the improved Subject Property parcel in Omaha).

convincing evidence that the County Board's determinations were unreasonable or arbitrary with respect to both Subject Property parcels for tax years 2011 and 2012.

3. Cost Approach

Riggs' appraisals for the Subject Property parcels indicate that his \$2,150,000 cost approach valuation (\$2,150,000 - \$25.17 per sq. ft.) is not given significant weight for opinion of value purposes, which is consistent with the determinations of other Courts in the context of food processing/storage facility valuation for property tax purposes.⁹⁷ For this reason, together with the analysis above, the Commission finds that Riggs' cost approach valuation does not constitute clear and convincing evidence that the County Board's determinations were unreasonable or arbitrary with respect to both Subject Property parcels for tax years 2011 and 2012.

V. CONCLUSION

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 not clear and convincing evidence that the County Board's decisions were arbitrary or unreasonable.

For all of the reasons set forth above, the appeals of the Taxpayer are denied.

VI. ORDER

IT IS ORDERED THAT:

1. The decisions of the Douglas County Board of Equalization determining the taxable value of the Subject Property located at 9401 North 48th Street, Omaha, Nebraska for tax years 2011 and 2012, and the decisions of the Douglas County Board of Equalization

⁹⁷ See, E23:85; *Great Atlantic & Pac. Tea Co., Inc. v. Kiernan*, 42 N.Y.2d 236, ___, 397 N.Y.S.2d 718, 723 (New York Court of Appeals 1977) (the Court, in a tax year 1973 valuation of a large food processing/storage facility, stated that the cost approach often should be used only to "establish the upper limit of value" and that the method "may result in serious overvaluation of the property due to rising construction costs and its failure to adequately account for factors such as functional obsolescence and physical deterioration"); *Great Atlantic & Pac. Tea Co., Inc. v. Kiernan*, 79 A.D.2d 371, ___, 437 N.Y.S.2d 851, 852 – 853 (Supreme Court of New York, Appellate Division 1981) (tax year 1974 – 1978 valuation of a large food processing/storage facility).

determining the value of the Subject Property located at 9425 North 48th Street, Omaha, Nebraska for tax years 2011 and 2012 are affirmed.⁹⁸

2. The taxable values of the Subject Property are:

Case No. 11C 489

Land	\$ 39,000
<u>Improvements</u>	<u>\$ 0</u>
Total	\$ 39,000

Case No. 11C 490

Land	\$ 100,000
<u>Improvements</u>	<u>\$2,794,000</u>
Total	\$2,894,000

Case No. 12C 358

Land	\$ 100,000
<u>Improvements</u>	<u>\$2,794,000</u>
Total	\$2,894,000

Case No. 12C 359

Land	\$ 39,000
<u>Improvements</u>	<u>\$ 0</u>
Total	\$ 39,000

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 (2014 Cum. Supp.).
4. Any request for relief, by any party, which is not specifically provided for by this decision and order is denied.

⁹⁸ Taxable 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.

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 April 10, 2015.

Signed and Sealed: April 10, 2015.

SEAL

Thomas D. Freimuth, Commissioner

Appeals from any decision of the Commission must satisfy the requirements of Neb. Rev. Stat. §77-5019 (2014 Cum. Supp.) and other provisions of Nebraska Statutes and Court Rules.

Nancy J. Salmon, concurring,

I agree with Commissioner Freimuth that the Taxpayer has rebutted the presumption in favor of the County Board under *JQH La Vista Conference Center Development LLC v. Sarpy County Board of Equalization*, 285 Neb. 120, 124-25, 825 N.W.2d 447, 452 (2013). I also concur with Commissioner Freimuth’s reasoning that, contrary to Riggs’ assertions the adjacent parcel does not constitute surplus land. I also agree with Commissioner Freimuth that the determinations of the County Board should be affirmed, but on additional reasoning.

I. 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.⁹⁹

“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

⁹⁹ Neb. Rev. Stat. §77-112 (Reissue 2009).

77-1371, (2) income approach, and (3) cost approach.”¹⁰⁰ “Actual value, market value, and fair market value mean exactly the same thing.”¹⁰¹ 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.¹⁰² All real property in Nebraska subject to taxation shall be assessed as of January 1.¹⁰³ All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.¹⁰⁴

An appraisal may constitute competent evidence but not rise to the level of clear and convincing evidence.¹⁰⁵ An examination of the appraisals and all other relevant evidence is necessary to determine if there is clear and convincing evidence that the County Board’s determinations were unreasonable or arbitrary. An expert’s opinion of value is “no stronger than the facts upon which it is based.”¹⁰⁶ I note that Riggs’ opinion of value was based upon the sales comparison approach, or that while Riggs’ conducted all three approaches he gave the most weight to the sales comparison approach. I, therefore, limited my analysis to his sales comparison approach.¹⁰⁷

B. Sales Comparison Approach

Riggs’ relied upon his sales comparison approach to determine the actual value of the Subject Property. In order for a sales comparison approach to amount to clear and convincing evidence that the County Board was unreasonable or arbitrary, the adjustments made to comparable properties must be made to truly comparable sales and in a manner that is supported by market evidence. Under professionally accepted appraisal techniques, the adjustments should allow the comparable property to equate to the subject property.¹⁰⁸

¹⁰⁰ *Id.*

¹⁰¹ *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).

¹⁰² Neb. Rev. Stat. §77-131 (Reissue 2009).

¹⁰³ See, Neb. Rev. Stat. §77-1301(1) (Reissue 2009).

¹⁰⁴ Neb. Rev. Stat. §77-201(1) (Reissue 2009).

¹⁰⁵ See, *JQH La Vista Conference Center Development LLC v. Sarpy Cty. Bd. Of Equal.*, 285 Neb. 120, 825 N.W.2d 447 (2013) (determining that an appraisal was competent evidence, but upholding the Commission’s finding that the appraisal did not constitute clear and convincing evidence).

¹⁰⁶ *Bottorf v. Clay County Board of Equalization*, 7 Neb.App. 162, 167, 580 N.W.2d 561, 565 (1998) (citations omitted).

¹⁰⁷ See, E22:85 and E23:85.

¹⁰⁸ Appraisal Institute, *The Appraisal of Real Estate*, at 382 (14th ed. 2013).

Two types of adjustments to comparable sales are acceptable, quantitative adjustments and qualitative adjustments.¹⁰⁹ Quantitative adjustments are based on calculations with inputted numerical factors derived from the market.¹¹⁰ Several methods exist for determining quantitative adjustments: (1) paired data analysis; (2) grouped data analysis; (3) secondary data analysis; (4) statistical analysis; (5) cost related adjustments; and (6) capitalization of income differences.¹¹¹ The appraiser uses some subjectivity to select data to use in these approaches when there is an abundance of data available, but the processes are formalistic and derive a specific numerical adjustment to price or specific percentage adjustment.¹¹²

Conversely, qualitative adjustments, which are applied after application of quantitative adjustments, assign a designation of inferior or superior to comparable properties as compared to the subject property.¹¹³ The comparable properties can then be stratified according to the qualitative designations in order to aid in the reconciliation of derived per unit indications of value obtained after quantitative adjustments.¹¹⁴ Qualitative adjustments must also be derived from acceptable methods including: (1) trend analysis; (2) relative comparison analysis; and (3) ranking analysis.¹¹⁵

Riggs made adjustments to the comparable properties using percentage increases or decreases for determined relevant factors.¹¹⁶ However, Riggs did not indicate how he calculated the appropriate percentage adjustments. When questioned in the hearing he testified that the percentage adjustments were subjective. Further review of Riggs' adjustments indicates that all adjustments were made in 5% increments, and that no evidence was included to explain why the 5% increment was acceptable or how it was derived; with the possible exception of time adjustments.¹¹⁷ Percentage adjustments should be quantitative in nature, and they should be precisely derived using appropriate methods.

¹⁰⁹ See, Appraisal Institute, *The Appraisal of Real Estate*, at 389-390 (14th ed. 2013).

¹¹⁰ See, Appraisal Institute, *The Appraisal of Real Estate*, at 389-390 (14th ed. 2013).

¹¹¹ See, Appraisal Institute, *The Appraisal of Real Estate*, at 389-390 (14th ed. 2013).

¹¹² See, Appraisal Institute, *The Appraisal of Real Estate*, at 389 (14th ed. 2013).

¹¹³ See, Appraisal Institute, *The Appraisal of Real Estate*, at 431-432 (14th ed. 2013).

¹¹⁴ See, Appraisal Institute, *The Appraisal of Real Estate*, at 431-432 (14th ed. 2013).

¹¹⁵ See, Appraisal Institute, *The Appraisal of Real Estate*, at 389-390 (14th ed. 2013).

¹¹⁶ See, E22:68 and E23:68.

¹¹⁷ See, E22:62-68 and E23:62-68.

Further, Riggs utilized the Moody indices to make time adjustments by equating percentage changes in overall industrial sales price per ft² with percentage changes in actual value.¹¹⁸ There is no indication that the index took into account the differences between industrial properties including, but not limited to, size and location.¹¹⁹ The index does not extend past January 1, 2011, even though Riggs asserted that his opinion of the value would be the same as of January 1, 2011, and January 1, 2012.¹²⁰ Without the information extending out until January 1, 2012, Riggs could not make appropriate adjustments to his comparable sales. Even if the information was available to Riggs, it was not available to the Commission.

All of the forgoing limits the credibility of Riggs' sales comparison approaches. I find that because Riggs' appraisals contain these errors, Riggs' sales comparison approaches are not clear and convincing evidence that the County Board's determinations are unreasonable or arbitrary.

Nancy J. Salmon, Commissioner

¹¹⁸ See, E22:62 and E23:62.

¹¹⁹ See, E22:62 and E23:62.

¹²⁰ See, E22:62 and E23:62.