

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

Hy-Vee Food Stores/Neilsen Rev Liv Tr  
Eileenc,  
Appellant,

v.

Douglas County Board of Equalization,  
Appellee.

Case No: 11C 491

Decision & Order Affirming the Douglas  
County Board of Equalization

**For the Appellant:**

Brian 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 is a commercial parcel located at 14416 Grover Street in Omaha, Douglas County, Nebraska (herein referred to as the “Subject Property”). The parcel is improved with a 21,720 sq. ft. floral distribution facility. The Subject Property’s Property Record File (“PRF”) and legal description are found at Exhibit 10.

**II. PROCEDURAL HISTORY**

The Douglas County Assessor determined that the assessed value of the Subject Property was \$916,300 for tax year 2011. Hy-Vee Food Stores/Neilsen Rev Liv Tr Eileenc (herein referred to as the “Taxpayer”) protested this assessment to the Douglas County Board of Equalization (herein referred to as “County Board”). The County Board determined that the assessed value for tax year 2011 was \$916,300.<sup>1</sup>

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.

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<sup>1</sup> E1.

A majority of the Commission constitutes a quorum sufficient to transact business.<sup>2</sup> The Commission must deny relief “in any hearing or proceeding unless a majority of the Commissioners present determine that the relief should be granted.”<sup>3</sup> A majority is defined as, “The greater number. The number greater than half of any total.”<sup>4</sup> 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 determination of the County Board is affirmed.

### III. STANDARD OF REVIEW

The Commission’s review of the determination by a County Board of Equalization is de novo.<sup>5</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>6</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>7</sup>

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>8</sup> Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.<sup>9</sup>

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<sup>2</sup> See, Neb. Rev. Stat. §77-5005(2) (2014 Cum. Supp.).

<sup>3</sup> See, Neb. Rev. Stat. §77-5016(13) (2014 Cum. Supp.).

<sup>4</sup> *Black’s Law Dictionary 6th Edition*, West Group, p. 955 (1990).

<sup>5</sup> 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).

<sup>6</sup> *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted).

<sup>7</sup> *Id.*

<sup>8</sup> Neb. Rev. Stat. §77-5016(8) (2014 Cum. Supp.).

<sup>9</sup> *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

A Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued.<sup>10</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>11</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>12</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>13</sup> The Commission’s Decision and Order shall include findings of fact and conclusions of law.<sup>14</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>15</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 77-1371, (2) income approach, and (3) cost approach.”<sup>16</sup> “Actual value, market value, and fair market value mean exactly the same thing.”<sup>17</sup> Taxable value is the percentage of actual value

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<sup>10</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>11</sup> *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).

<sup>12</sup> Neb. Rev. Stat. §77-5016(8) (2014 Cum. Supp.).

<sup>13</sup> Neb. Rev. Stat. §77-5016(6) (2014 Cum. Supp.).

<sup>14</sup> Neb. Rev. Stat. §77-5018(1) (2014 Cum. Supp.).

<sup>15</sup> Neb. Rev. Stat. §77-112 (Reissue 2009).

<sup>16</sup> *Id.*

<sup>17</sup> *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).

subject to taxation as directed by section 77-201 of Nebraska Statutes and has the same meaning as assessed value.<sup>18</sup> All real property in Nebraska subject to taxation shall be assessed as of January 1.<sup>19</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>20</sup>

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

The Commission received an appraisal for the Subject Property authored by the Taxpayer's appraiser, Kenneth Riggs, who testified at the hearing in support of his \$740,000 opinion of value (\$740,000/21,720 sq. ft. = \$34 per sq. ft. vs. County's \$42 per sq. ft. assessment).<sup>21</sup> Riggs' appraisal provides that the Subject Property's owners of record for tax year 2011, O.V. Neilsen and Eileen Clair Neilsen (herein sometimes referred to as the "Neilsen Trust"), purchased the parcel in 1991 for \$435,000 when the improvement area was 18,948 sq. ft. (\$435,000/18,948 = \$22.96 per sq. ft. purchase price).<sup>22</sup> Consistent with the County's Assessment Report noted below, Riggs' appraisal states that the Subject Property's improvement component consisted of 18,948 sq. ft. when constructed in 1976, and that an additional 2,772 sq. ft. were added in 2005 (18,948 + 2,772 = 21,720 sq. ft. total area for tax year 2011).<sup>23</sup>

Riggs' appraisal states that Florist Distributing Inc. leased the Subject Property from the Neilsen Trust for tax year 2011 purposes, pursuant to a lease executed in April 1992 with contract rent in the amount of \$2.21 per square foot for the first 10-year term, which escalates to \$2.55, \$2.68 and \$2.81 per square foot for the three, five-year options to extend.<sup>24</sup> Riggs' appraisal also indicates that Hy-Vee, which owns and operates several supermarkets in the Omaha area, purchased Florist Distributing Inc. in 1992.<sup>25</sup> Riggs' testimony and his appraisal found at Exhibit 19 indicate that the Subject Property is used by Hy-Vee to engage in the business of retailing and wholesaling floral products to the general public and to accommodate the floral operations component of its supermarkets in the Omaha area.

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<sup>18</sup> Neb. Rev. Stat. §77-131 (Reissue 2009).

<sup>19</sup> See, Neb. Rev. Stat. §77-1301(1) (Reissue 2009).

<sup>20</sup> Neb. Rev. Stat. §77-201(1) (Reissue 2009).

<sup>21</sup> See, E19:3.

<sup>22</sup> See, E19:18 and E19:69; See also, 10:5 (County's PRF for the Subject Property, which indicates that the owner for tax year 2011 is the Eileen Clair Neilsen Living Trust, which the Commission notes is an entity used for lifetime estate planning purposes).

<sup>23</sup> E19:18.

<sup>24</sup> E19:69 (Riggs' appraisal states that this \$2.21 - \$2.81 per sq. ft. contract rent "is based on return considerations on an investment and is not considered indicative of current market rents").

<sup>25</sup> E19:69.

Riggs conducted the sales comparison approach, the cost approach, and the income approach for the Subject Property for tax year 2011.<sup>26</sup> Riggs' \$740,000 (\$34 per sq. ft.) opinion of value assigns the most weight to the sales comparison approach, although his appraisal indicates that the income approach estimates are "reasonable and properly supported" (\$690,000 – \$31.77 per sq. ft.).<sup>27</sup> Riggs' appraisal also indicates that he assigned the least weight to the cost approach (\$680,000 – \$31.31 per square foot).<sup>28</sup>

Riggs' \$740,000 (\$34 per sq. ft.) sales comparison approach valuation is based on four sales after adjustments.<sup>29</sup> The dates of these sales range from October 2008 to January 2011, and the transaction amounts prior to adjustment range from \$30.77 to \$53.81 per sq. ft. (\$30.77, \$34.41, \$45.33 and \$53.81 per sq. ft.).<sup>30</sup>

Riggs itemizes his adjustments to the four sales comparables 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.<sup>31</sup> He applies 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.<sup>32</sup> With respect to miscellaneous "other" adjustments, Riggs focuses on factors such as clearance capacity, loading capacity, land-to-building ratio, and percentage office.<sup>33</sup> Riggs' adjusted sales range from \$32.75 to \$35.38 per sq. ft. (\$32.75, \$34.41, \$34.98 and \$35.38 per sq. ft.).<sup>34</sup>

Riggs' income approach differed from the County Assessor's income approach as follows: (1) rental rate - \$3.50 per sq. ft. vs. County \$5; (2) vacancy and collection loss rate - 8% vs. County 10%; (3) non-recoverable expenses - 2.5% vs. County expense ratio 25%; and (4) capitalization rate - 9.67% vs. County 8%.<sup>35</sup>

Riggs' \$3.50 rental rate is derived from the triple net listings of three comparable properties in Douglas County and one in Carter Lake, Iowa, which is near Omaha's Eppley Airfield.<sup>36</sup>

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<sup>26</sup> See, E19:16-17 (Riggs' "Executive Summary," which indicates that his appraisal is dated May 1, 2013, with a retrospective effective date of January 1, 2011) and E19:82 ("Reconciliation of Value Estimates").

<sup>27</sup> E19:82.

<sup>28</sup> E19:82.

<sup>29</sup> E19:67.

<sup>30</sup> See, E19:58.

<sup>31</sup> See, E19:62-68.

<sup>32</sup> See, E19:62 and E19:68.

<sup>33</sup> See, E19:62-67.

<sup>34</sup> E19:58 and E19:67.

<sup>35</sup> See, E10:14 (County's "Income Worksheet") and E19:69 – 81 (Riggs' income approach analysis).

<sup>36</sup> See, 19:69-76.

These listings amount to \$2.95 for one comparable and \$3.50 per sq. ft. for the other three rentals.<sup>37</sup> Riggs made adjustments to the comparable rental rates to account for differences in terms of age, condition, size, height clearance, percentage office, loading capacity, and location.<sup>38</sup> He also asserted that he spoke with real estate professionals in the market to derive his \$3.50 rental rate.<sup>39</sup>

Riggs derived his 9.5% 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).<sup>40</sup> Riggs derived his 9.67% loaded capitalization rate by adding a .17% "effective tax rate" to the unloaded rate (the effective tax rate is determined by multiplying the 2.18% Nebraska property tax rate by Riggs' 8% vacancy and credit loss rate).<sup>41</sup>

An Assessment Report prepared by Keith Nielsen of the County Assessor's Office for the Subject Property was received in evidence by the Commission in support of the County Board's \$916,300 determination for tax year 2011 (\$916,300/21,720 sq. ft. = \$42 per sq. ft.).<sup>42</sup> Additionally, Linda Rowe, a commercial appraiser employed by the Douglas County Assessor's Office, testified at the hearing before the Commission.

The Assessment Report, which indicates that the County Assessor conducted an exterior inspection on July 29, 2010, contains a Property Record File ("PRF") indicating that the Subject Property parcel is improved with a 21,720 sq. ft. facility constructed in 1976 and remodeled in 2005 for "Distribution Warehouse" purposes.<sup>43</sup> Similarly, the PRF indicates that the County Assessor categorized use under Occupancy Code 407 "Distribution Warehouse" for tax year 2011.<sup>44</sup> Rowe's testimony and the Assessment Report assert that the Taxpayer's appraisal authored by Riggs is insufficient because it focuses on properties that the County designates as

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<sup>37</sup> See, E19:69-76.

<sup>38</sup> See, E19:69-76.

<sup>39</sup> See, E19:76.

<sup>40</sup> E19:79-80.

<sup>41</sup> See, E19:79-80.

<sup>42</sup> See, E10:1 and E10:18 (2011 Property Valuation History – "PVAL" - indicating that the County Assessor reappraised the Subject Property in March 2011 at a value of \$916,300, and that the County Board adopted this recommendation for tax year 2011).

<sup>43</sup> See, E10:6 (PRF, indicating Subject Property's improvement component was constructed in 1976 for "Distribution Warehouse" use purposes and remodeled in 2005 for the same use) and E10:17 (inspection reference).

<sup>44</sup> E10:5.

“Storage Warehouse” for use purposes rather than the “Distribution Warehouse” designation assigned to the Subject Property.<sup>45</sup>

The Assessment Report indicates that the County used an income approach to derive the \$916,300 (\$42 per sq. ft.) value relied upon by the County Board for its tax year 2011 determination.<sup>46</sup> The County’s income approach uses the following estimates: (1) Rental Rate - \$5 per sq. ft.; (2) Vacancy and Collection Loss Rate - 10%; (3) Total Expense - 25%; and (4) Capitalization Rate - 8%.<sup>47</sup>

Rowe testified that the County’s income approach estimates were derived from a model based on market data.<sup>48</sup> 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 County’s Assessment Report contains four alleged comparables used to derive the above-noted \$5 rent rate (rents: \$4.50, \$4.50, \$4.95 & \$5.25), together with related Loop Net information.<sup>49</sup> Three of these parcels are designated as “Distribution Warehouse” for use purposes, while the other is categorized as a “Storage Warehouse.”<sup>50</sup>

Rowe also asserted that the County’s 8% capitalization rate is derived from the Voss Study, which is included in evidence.<sup>51</sup> 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.<sup>52</sup>

The Voss Study also examined 216 industrial sales in the Douglas County area, of which 109 were used in the final analysis.<sup>53</sup> Voss indicated that the amount of sales available for

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<sup>45</sup> E10:7 – 8.

<sup>46</sup> E10:13 – E10:17, E10:18 18 (2011 Property Valuation History – “PVAL” - indicating that the County Assessor reappraised the Subject Property in March 2011 at a value of \$916,300, and that the County Board adopted this recommendation for tax year 2011).

<sup>47</sup> E10:14.

<sup>48</sup> See, E10:14 and E10:14.

<sup>49</sup> See, E10:34 – E10:42 and E10:33 – E10:41.

<sup>50</sup> E10:31.

<sup>51</sup> See, E10:15 and E10:19 – 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, E10:19 – 30 states 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”).

<sup>52</sup> See, E10:22 – 25.

<sup>53</sup> E10:26.

examination in the 2008 – 2009 period were limited, so several transactions prior to that period dating back to 2004 were used for analysis purposes.<sup>54</sup>

In further support of the County Board’s \$916,300 determination for the Subject Property for tax year 2011, the Assessment Report contains PRFs for three alleged “sales” comparables, all of which are assigned to the “Distribution Warehouse” use category.<sup>55</sup> The Assessment Report also states that the Subject Property is equalized with five “Distribution Warehouses” of similar size, age and location, although the County did not submit PRFs for these alleged “equalization” comparables.<sup>56</sup>

### C. Analysis

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’ appraisal for the Subject Property parcel (Exhibit 19) 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”).<sup>57</sup> 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.<sup>58</sup>

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.<sup>59</sup> The presumption in favor of the County Board and the burden of persuasion cannot be

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<sup>54</sup> See, E10:26 - 30.

<sup>55</sup> E10:12 (2011 sales comparison chart), E10:38-52 (PRFs for three alleged sales comparables for tax year 2011).

<sup>56</sup> E10:7-8 (County Assessor’s “Account Notes”).

<sup>57</sup> 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”).

<sup>58</sup> See, E19.

<sup>59</sup> See generally, *JQH La Vista Conference Center Development LLC v. Sarpy Cty. Bd. Of Equal.*, 285 Neb. 120, 825 N.W.2d 447 (2013).



conflated and require separate analysis.<sup>60</sup> Both the presumption and burden of persuasion relate to the determination of the County Board.<sup>61</sup>

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.<sup>62</sup>

Competent evidence is defined as relevant and material evidence or that evidence “which the very nature of the thing to be proven requires.”<sup>63</sup> 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.”<sup>64</sup>

Riggs conducted an appraisal of the Subject Property and certified that it was performed according to professional appraisal standards.<sup>65</sup> The Commission finds that the appraisal constitutes competent and relevant evidence concerning the County Board’s determination. The Commission, therefore, finds that the presumption in favor of the County Board’s determination is rebutted.

Having determined that the presumption in favor of the County Board’s determination is rebutted, the reasonableness of the County Board’s determination of value based upon the evidence in the appeal is a question of fact.<sup>66</sup> The Taxpayer has the burden to show by clear and convincing evidence that the valuation determination by the County Board is unreasonable or arbitrary.<sup>67</sup> An appraisal may constitute competent evidence but not rise to the level of clear and

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<sup>60</sup> 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).

<sup>61</sup> 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).

<sup>62</sup> 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)).

<sup>63</sup> *Black’s Law Dictionary*, 6th Edition, West Group, p. 284 (1990).

<sup>64</sup> *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).

<sup>65</sup> See, E19.

<sup>66</sup> 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).

<sup>67</sup> 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).

convincing evidence.<sup>68</sup> An examination of the appraisal and all other relevant evidence is necessary to determine if there is clear and convincing evidence that the County Board's determination is unreasonable or arbitrary. An expert's opinion of value is "no stronger than the facts upon which it is based."<sup>69</sup>

## 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.<sup>70</sup> 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. ...
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. ...<sup>71</sup>

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."<sup>72</sup>

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<sup>68</sup> 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).

<sup>69</sup> *Bottorf v. Clay County Board of Equalization*, 7 Neb.App. 162, 167, 580 N.W.2d 561, 565 (1998) (citations omitted).

<sup>70</sup> Appraisal Institute, *The Appraisal of Real Estate*, at 377-78 (14th ed. 2013).

<sup>71</sup> *Id.* at 381-382.

In order for a sales comparison approach to amount to clear and convincing evidence that the County Board's determination is 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.<sup>73</sup>

The assessment of real property is not an exact science.<sup>74</sup> It is possible for reasonable minds to come to diverse opinions of the actual value of real property.<sup>75</sup> 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 is unreasonable.<sup>76</sup> With respect to the Subject Property parcel under appeal herein, there are competing reasonable minds with competing reasonable opinions of value.

Riggs' \$740,000 (\$34 per sq. ft.) sales comparison approach valuation is based on four sales after adjustments.<sup>77</sup> The dates of these sales range from October 2008 to January 2011, and the transaction amounts prior to adjustment range from \$30.77 to \$53.81 per sq. ft. (\$30.77, \$34.41, \$45.33 and \$53.81 per sq. ft.).<sup>78</sup> Riggs' adjusted sales range from \$32.75 to \$35.38 per sq. ft. (\$32.75, \$34.41, \$34.98 and \$35.38 per sq. ft.).<sup>79</sup>

Significantly, Riggs' \$34 per sq. ft. sales comparison approach valuation, which he relies on in substantial part for tax year 2011 opinion of value purposes, and which includes one January 2011 sale, does not include the County's January 2011 sale comparable located at 9828 J Street in Omaha.<sup>80</sup> The County's Assessment Report contains a PRF for this comparable, which indicates that it is improved with a 19,129 sq. ft. facility categorized as Distribution Warehouse by the County that sold for \$930,000 (\$49 per sq. ft., rounded) on January 15, 2011.<sup>81</sup> The PRF for this comparable also indicates it was valued at \$887,700 (\$46 per sq. ft., rounded) by the

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<sup>72</sup> Neb. Rev. Stat. 77-1371 (Reissue 2009).

<sup>73</sup> Appraisal Institute, *The Appraisal of Real Estate*, at 382 (14th ed. 2013).

<sup>74</sup> *Matter of Bock's Estate*, 198 Neb. 121, 124, 251 N.W.2d 872, 874 (1977).

<sup>75</sup> *Id.*

<sup>76</sup> *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)).

<sup>77</sup> E19:67.

<sup>78</sup> See, E19:58.

<sup>79</sup> E19:58 and E19:67.

<sup>80</sup> See, E10:12 (County's sales comparison chart listing three comparables, including the 98<sup>th</sup> & J Street parcel that sold on January 15, 2011), E10:43-45 (County's PRF for 98<sup>th</sup> & J Street parcel), E19:16-17 (Riggs' "Executive Summary," which indicates that his appraisal is dated May 1, 2013, with a retrospective effective date of January 1, 2011), E19:55-68 (Riggs' Sales Comparison Approach analysis) and E19:82 ("Reconciliation of Value Estimates").

<sup>81</sup> E10:12.

County Assessor for tax year 2011 and for the same amount by the County Board for tax year 2011.<sup>82</sup>

Rowe's testimony and the Assessment Report assert that the Riggs' appraisal incorrectly uses sales comparison parcels that the County Assessor categorizes under the Storage Warehouse use designation rather than the Distribution Warehouse designation assigned to the Subject Property.<sup>83</sup> The Assessment Report, which indicates that the County Assessor conducted an exterior inspection on July 29, 2010, indicates that the Subject Property is improved with a 21,720 sq. ft. facility constructed in 1976 and remodeled in 2005 for Distribution Warehouse purposes, and that it is categorized under Occupancy Code 407 Distribution Warehouse for tax year 2011.<sup>84</sup>

The evidence submitted by both the Taxpayer and the County indicates that the Subject Property is used for Distribution Warehouse purposes.<sup>85</sup> In particular, the Commission notes as follows: (1) the County Assessor valued the Subject Property in the amount of \$42 per square foot in March 2011 based on a reappraisal of Distribution Warehouses;<sup>86</sup> (2) Riggs' cost approach valuation categorizes the Subject Property's improvement component as a Distribution Warehouse;<sup>87</sup> (3) Riggs' testimony and his appraisal indicate that the Subject Property was used for tax year 2011 purposes to distribute floral items to general public and Hy-Vee supermarket customers, and to the multiple Hy-Vee supermarkets in the Omaha area;<sup>88</sup> (4) Riggs' appraisal contains a photo of the "Florist Distributing Inc." signage affixed to the Subject Property's exterior;<sup>89</sup> and (5) Riggs' appraisal contains a photo of exterior signage on the Subject Property, which states "Florist Distributing Inc. Wholesale Distributor & Importer."<sup>90</sup>

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<sup>82</sup> See, E10:12 (County's sales comparison chart listing three comparables, including the 98<sup>th</sup> & J Street parcel), E10:43-45 (County's PRF for 98<sup>th</sup> & J Street parcel), E10:46 (County's "Commercial Income Worksheet" for the 98<sup>th</sup> & J Street parcel), E10:47 (Property Valuation History - "PVAL" - for the 98<sup>th</sup> & J Street sales comparable used by the County). The Commission notes that the chart at E10:12 indicates that the 98<sup>th</sup> & J St. parcel is 18,865 sq. ft., but the PRF at E10:44 and the County's "Commercial Income Worksheet" at E10:46 indicate that this parcel is 19,129 sq. ft. The Commission used the latter area to derive the \$46 per sq. ft. assessment by the County for tax year 2011 ( $\$887,700/19,129 \text{ sq. ft.} = \$46 \text{ per sq. ft.}$ ).

<sup>83</sup> E10:7 - 8.

<sup>84</sup> See, 10:5 (PRF, indicating tax year 2011 use designation), E10:6 (PRF, indicating Subject Property's improvement component was constructed in 1976 for "Distribution Warehouse" use purposes and remodeled in 2005 for the same use) and E10:17 (inspection reference).

<sup>85</sup> See, E10:7-8 (County's Assessment Report "Account Notes") and E19.

<sup>86</sup> E10:7-8 (County's Assessment Report "Account Notes") and E10:18 (County's PVAL).

<sup>87</sup> E19:51.

<sup>88</sup> See, E19:5 (photo of the "Florist Distributing Inc." signage affixed to the exterior of the Subject Property's improvement component), E19:8 (photo of exterior signage on the Subject Property which states "Florist Distributing Inc. Wholesale Distributor & Importer"), E19:9 (photo of Florist Distributing Inc.'s "Showroom") and E19:10 (photo of Florist Distributing Inc.'s "Design and Conference Room").

<sup>89</sup> E19:5.

<sup>90</sup> E19:8.

The evidence adduced by both the Taxpayer and the County indicate that the Subject Property is used for Distribution Warehouse purposes. Additionally, it is important to note that the only clear evidence consistent with this Distribution Warehouse use in evidence and available for review by the Commission is included in the PRFs for the County's three sales comparables.<sup>91</sup>

It is also important to note that Riggs' appraisal does not include the County's Distribution Warehouse sales comparable located at 9828 J Street. This is significant for the following reasons: (1) the parcel sold just 15 days after the assessment date of January 1, 2011; (2) the parcel appears similar to the Subject Property in terms of characteristics; and (3) both the County Assessor and the County Board valued the parcel at \$46 per sq. ft. by both for tax year 2011.<sup>92</sup> These \$46 per sq. ft. assessment actions with respect to this sale comparable support the County's \$42 assessment of the Subject Property for tax year 2011 as opposed to Riggs' \$34 per sq. ft. opinion of value.

The above analysis supports the County Board's reliance on the County Assessor's reappraisal of Distribution Warehouses to value the Subject Property for tax year 2011. The Commission also is not persuaded that the Taxpayer has adduced sufficient evidence to show that the County Board's reliance on the County Assessor's reappraisal of Distribution Warehouses to value the Subject Property for tax year 2011 is arbitrary or unreasonable.

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 determination regarding the Subject Property for tax year 2011. Therefore, the Commission finds that Riggs' sales comparison approach is not clear and convincing evidence that the County Board's determination for the Subject Property is unreasonable or arbitrary for tax year 2011.

## **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

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<sup>91</sup> See, E10:12 (County's sales comparables chart) and E10:38-52 (PRFs for County's three sales comparables)

<sup>92</sup> See, E10:12 and E10.47 (Property Valuation History for the County's 98<sup>th</sup> & J Street sales comparable).

net operating income; and (4) divide net operating income by an estimated capitalization rate to yield indicated value.<sup>93</sup> A variety of techniques may be used to quantify various components of any application of the approach.<sup>94</sup>

Both the County Assessor and Riggs utilized the income approach to determine the actual value of the improved Subject Property, although Riggs placed primary emphasis on the sales comparison approach.<sup>95</sup> Riggs' income approach valuation (\$690,000 - \$31.77 per sq. ft.) differed in comparison to the County Assessor's income valuation (\$916,300 - \$42 per sq. ft.) as follows: (1) rental rate - \$3.50 per sq. ft. vs. County \$5; (2) vacancy and collection loss rate - 8% vs. County 10%; (3) non-recoverable expenses - 2.5% vs. County expense ratio 25%; and (4) capitalization rate - 9.67% vs. County 8%.<sup>96</sup>

The Commission is not persuaded that Riggs' income approach valuation amounts to more than a difference of opinion in comparison to the County's \$916,300 determination for tax year 2011. In this regard, the Commission notes as follows: (1) the net operating income amounts derived by Riggs (\$66,376) and the County (\$73,305) are similar; and (2) the income approach factors applied by the County to the Subject Property and the 98<sup>th</sup> & J Street comparable discussed above are identical, except that the rental rate applied to the comparable is even higher than that applied to the Subject Property (\$5.50 rental rate for 98<sup>th</sup> & J vs. \$5 for the Subject Property).<sup>97</sup> The Commission also notes that Riggs' apparent focus on Storage Warehouse facilities rather than Distribution Warehouse parcels in developing his income approach valuation is an impediment for purposes of meeting the Taxpayer's clear and convincing evidence burden.

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 determination is unreasonable or arbitrary with respect to the Subject Property. Therefore, the Commission finds that there is not clear and convincing evidence that the County Board's \$916,300 determination for tax year 2011 is unreasonable or arbitrary.

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<sup>93</sup> See, The Appraisal Institute, *The Appraisal of Real Estate*, at 460-461 (14th ed. 2013).

<sup>94</sup> *Id.* at chapters 21-26.

<sup>95</sup> See, E10, E10, E19, and E19.

<sup>96</sup> See, E10:14 (County's "Income Worksheet") and E19:69 – 81 (Riggs' income approach analysis).

<sup>97</sup> See, E10:14 (County's Subject Property "Income Worksheet"), E10:46 (County's 98<sup>th</sup> & J "Income Worksheet"), and E19:69 – 81 (Riggs' income approach analysis).

### 3. Cost Approach

Riggs' appraisal for the Subject Property indicates that his \$680,000 cost approach valuation (\$680,000 - \$31.31 per sq. ft.) is not given significant weight for opinion of value purposes.<sup>98</sup> 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 determination is unreasonable or arbitrary with respect to the Subject Property for tax year 2011.

### 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 determination for tax year 2011. The Commission also finds that there is not clear and convincing evidence that the County Board's decision is arbitrary or unreasonable for tax year 2011.

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

### VI. ORDER

IT IS ORDERED THAT:

1. The decision of the Douglas County Board of Equalization determining the taxable value of the Subject Property for tax year 2011 is affirmed.<sup>99</sup>
2. The taxable value of the Subject Property for tax year 2011 is:

Land	\$ 242,800
<u>Improvements</u>	<u>\$ 673,500</u>
Total	\$ 916,300

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<sup>98</sup> See, E19:82; *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).

<sup>99</sup> 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.

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.
5. Each party is to bear its own costs in this proceeding.
6. This decision and order shall only be applicable to tax year 2011.
7. This decision and order is effective for purposes of appeal on April 20, 2015.

Signed and Sealed: April 20, 2015.

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Thomas D. Freimuth, Commissioner

SEAL

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 concur with Commissioner Freimuth that the determination 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.<sup>100</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 77-1371, (2) income approach, and (3) cost approach.”<sup>101</sup> “Actual value, market value, and fair market value mean exactly the same thing.”<sup>102</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>103</sup> All real property in Nebraska subject to taxation shall be assessed as of January 1.<sup>104</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>105</sup>

An appraisal may constitute competent evidence but not rise to the level of clear and convincing evidence.<sup>106</sup> An examination of the appraisal and all other relevant evidence is necessary to determine if there is clear and convincing evidence that the County Board’s determination was unreasonable or arbitrary. An expert’s opinion of value is “no stronger than the facts upon which it is based.”<sup>107</sup> 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.<sup>108</sup>

## **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

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<sup>100</sup> Neb. Rev. Stat. §77-112 (Reissue 2009).

<sup>101</sup> *Id.*

<sup>102</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>103</sup> Neb. Rev. Stat. §77-131 (Reissue 2009).

<sup>104</sup> See, Neb. Rev. Stat. §77-1301(1) (Reissue 2009).

<sup>105</sup> Neb. Rev. Stat. §77-201(1) (Reissue 2009).

<sup>106</sup> 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).

<sup>107</sup> *Bottorf v. Clay County Board of Equalization*, 7 Neb.App. 162, 167, 580 N.W.2d 561, 565 (1998) (citations omitted).

<sup>108</sup> See, E19:82.

evidence. Under professionally accepted appraisal techniques, the adjustments should allow the comparable property to equate to the subject property.<sup>109</sup>

Two types of adjustments to comparable sales are acceptable, quantitative adjustments and qualitative adjustments.<sup>110</sup> Quantitative adjustments are based on calculations with inputted numerical factors derived from the market.<sup>111</sup> 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.<sup>112</sup> 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.<sup>113</sup>

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.<sup>114</sup> 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.<sup>115</sup> Qualitative adjustments must also be derived from acceptable methods including: (1) trend analysis; (2) relative comparison analysis; and (3) ranking analysis.<sup>116</sup>

Riggs made adjustments to the comparable properties using percentage increases or decreases for determined relevant factors.<sup>117</sup> 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

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<sup>109</sup> Appraisal Institute, *The Appraisal of Real Estate*, at 382 (14th ed. 2013).

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

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

<sup>112</sup> See, Appraisal Institute, *The Appraisal of Real Estate*, at 389-390 (14th ed. 2013).

<sup>113</sup> See, Appraisal Institute, *The Appraisal of Real Estate*, at 389 (14th ed. 2013).

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

<sup>115</sup> See, Appraisal Institute, *The Appraisal of Real Estate*, at 431-432 (14th ed. 2013).

<sup>116</sup> See, Appraisal Institute, *The Appraisal of Real Estate*, at 389-390 (14th ed. 2013).

<sup>117</sup> See, E19:67.

adjustments.<sup>118</sup> Percentage adjustments should be quantitative in nature, and they should be precisely derived using appropriate methods.

Further, Riggs utilized the Moody indices to make time adjustments by equating percentage changes in overall industrial sales price per ft<sup>2</sup> with percentage changes in actual value.<sup>119</sup> There is no indication that the index took into account the differences between industrial properties including, but not limited to, size and location.<sup>120</sup>

All of the forgoing limits the credibility of Riggs' sales comparison approach. I find that because Riggs' appraisal contains these errors, Riggs' sales comparison approach is not clear and convincing evidence that the County Board's determination was unreasonable or arbitrary.

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Nancy J. Salmon, Commissioner

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<sup>118</sup> See, E19:62-67.

<sup>119</sup> See, E19:62.

<sup>120</sup> See, E19:62.