

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

HY-Vee Food Stores/10808 Fort St Omaha
LLC,

And

8809 West Center Omaha, c/o HYVEE,

And

HY-Vee Food Stores/Applewood Station
LLC,
Appellants,

v.

Douglas County Board of Equalization,
Appellee.

Case Nos: 11C 492, 11C 493, 12C 360, &
12C 361

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

For the Appellant:

Brian S. Kruse,
Rembolt Ludtke, LLP.

For the Appellee:

Malina M. Dobson,
Deputy Douglas County Attorney,
and
Jimmie L. Pinkham, III,
Deputy Douglas County Attorney.

The appeals were heard before Commissioners Nancy J. Salmon and Thomas D. Freimuth; Commissioner Salmon affirming the determinations of the Douglas County Board of Equalization and Commissioner Freimuth dissenting.

I. THE SUBJECT PROPERTY

The Subject Property consists of three commercial parcels located in Douglas County and improved with Hy-Vee Supermarket stores. The legal description of and property record card for the Subject Property located at 10808 Fort Street, Omaha, Nebraska is found at Exhibit 11 for tax year 2011 and Exhibit 12 for tax year 2012. The legal description of and property record card for the Subject Property located at 8801 West Center, Omaha, Nebraska is found at Exhibit 18 for tax year 2012. The legal description of and property record card for the Subject Property located at 9707 Q Street, Omaha, Nebraska is found at Exhibit 13 for tax year 2011.

II. PROCEDURAL HISTORY

The parcels that constitute the Subject Property of these appeals are owned by limited liability companies (LLCs) as indicated in the caption, and have some form of common business relationship with Hy-Vee. The LLCs will be referred to throughout the order as “the Taxpayer.”

The Douglas County Assessor (County Assessor) determined that the assessed value of the Subject Property in Case No. 11C 492 located at 10808 Fort Street, Omaha, Nebraska was \$4,924,700 for tax year 2011.¹ The Taxpayer protested this assessment to the Douglas County Board of Equalization (the County Board).² The County Board determined that the assessed value for tax year 2011 was \$4,924,700.³

The County Assessor determined that the assessed value of the Subject Property in Case No. 12C 360 located at 10808 Fort Street, Omaha, Nebraska was \$4,754,300 for tax year 2012.⁴ The Taxpayer protested this assessment to the County Board.⁵ The County Board determined that the taxable value for tax year 2012 was \$4,754,300.⁶

The County Assessor determined that the assessed value of the Subject Property in Case No. 12C 361 located at 8801 West Center Road, Omaha, Nebraska was \$4,239,500 for tax year 2012.⁷ The Taxpayer protested this assessment to the County Board.⁸ The County Board determined that the taxable value for tax year 2012 was \$4,239,500.⁹

The County Assessor determined that the assessed value of the Subject Property in Case No. 11C 493 located at 9707 Q Street, Omaha, Nebraska was \$4,332,400 for tax year 2011.¹⁰ The Taxpayer protested this assessment to the County Board.¹¹ The County Board determined that the assessed value for tax year 2011 was \$4,332,400.¹²

¹ See, E2.

² See, *id.*

³ See, *id.*

⁴ See, E3.

⁵ See, *id.*

⁶ See, *id.*

⁷ See, E9.

⁸ See, *id.*

⁹ See, *id.*

¹⁰ See, E4.

¹¹ See, *id.*

¹² See, *id.*

The Taxpayer appealed the decisions of the County Board to the Tax Equalization and Review Commission (Commission). The Commission opened a hearing on the merits of the above captioned appeals 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.¹³ The Commission must deny relief “in any hearing or proceeding unless a majority of the Commissioners present determine that the relief should be granted.”¹⁴ A majority is defined as, “The greater number. The number greater than half of any total.”¹⁵ 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. Commissioner Salmon has determined that relief should not be granted, and Commissioner Freimuth has determined that relief should be granted. A majority of the Commission has not determined that relief should be granted. The determinations of the County Board are affirmed.

III. STANDARD OF REVIEW

The Commission’s review of the determination by a County Board of Equalization is de novo.¹⁶ 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.”¹⁷

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.¹⁸

¹³ See, Neb. Rev. Stat. §77-5005(2) (2014 Cum. Supp.).

¹⁴ See, Neb. Rev. Stat. §77-5016(13) (2014 Cum. Supp.).

¹⁵ *Black’s Law Dictionary 6th Edition*, West Group, p. 955 (1990).

¹⁶ 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).

¹⁷ *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted).

¹⁸ *Id.*

The order, decision, determination or action appealed from shall be affirmed unless evidence is adduced establishing that the order, decision, determination, or action was unreasonable or arbitrary.¹⁹ Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.²⁰

A Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued.²¹ 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.²²

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.”²³ 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.”²⁴ The Commission’s Decision and Order shall include findings of fact and conclusions of law.²⁵

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

¹⁹ Neb. Rev. Stat. §77-5016(8) (2014 Cum. Supp.).

²⁰ *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

²¹ 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).

²² *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).

²³ Neb. Rev. Stat. §77-5016(8) (2014 Cum. Supp.).

²⁴ Neb. Rev. Stat. §77-5016(6) (2014 Cum. Supp.).

²⁵ Neb. Rev. Stat. §77-5018(1) (2014 Cum. Supp.).

full description of the physical characteristics of the real property and an identification of the property rights valued.²⁶

“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.”²⁷ “Actual value, market value, and fair market value mean exactly the same thing.”²⁸ 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.²⁹ All real property in Nebraska subject to taxation shall be assessed as of January 1.³⁰ All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.³¹

B. Summary of the Evidence

Linda Rowe, supervisor of the commercial appraisal department of the County Assessor’s Office, testified at the hearing. She asserted that the County Assessor conducted a sales comparison approach, a cost approach, and an income approach for the Subject Property, but that the Assessment Reports only include the income approach because it is the only approach that the County Assessor relied upon.³² She testified that the income approach factors listed on the Income Worksheets were derived from market data.³³ Specifically, she testified that the rental rates, vacancy and collection loss rates, and expenses were derived from Loop Net and owner surveys from 40 to 50 properties in the market area. Only a portion of the data collected in this process was submitted as evidence in the above captioned appeals. Rowe testified that the alleged rental comparable located near 144th and Center, which was a listing for a vacant Hy-Vee as of the dates of assessment, was not given any more weight than other comparable properties when determining the County Assessor’s income approach rental rates.³⁴ Rowe asserted that all

²⁶ Neb. Rev. Stat. §77-112 (Reissue 2009).

²⁷ *Id.*

²⁸ *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).

²⁹ Neb. Rev. Stat. §77-131 (Reissue 2009).

³⁰ See, Neb. Rev. Stat. §77-1301(1) (Reissue 2009).

³¹ Neb. Rev. Stat. §77-201(1) (Reissue 2009).

³² See, E11, E12, E13, and E18.

³³ See, E11:16, E12:13, E13:12, and E18:13.

³⁴ See, E25:2.

of the data used to derive the County Assessor's income approach factors was maintained in the County Assessor's work files.

Rowe also asserted that the capitalization rate had been derived from the Voss Study, which is included in evidence.³⁵ The Voss Study indicates that the capitalization rates were derived from an examination of published sources including the Korpacz Report, the RERC Report, and the Realty Rates.com report.³⁶ Additionally, the Voss Study examined several sales from the Omaha Market.³⁷ Voss indicated that the amount of sales available for examination was limited and so he went back in time and used older sales. Some of the sales used in the Voss study were up to ten years old.³⁸

Rowe testified that the income approach factors for the Subject Property had been derived by multiple employees of the County Assessor's Office. She asserted that she was unable to answer all questions concerning specific assignments given to other employees. Instead, Rowe was able to testify to the extent of her personal knowledge concerning methods used by the County Assessor's Office to derive the income approach factors and any portion of the assessment in which she was personally involved to the extent of her personal involvement. Rowe did not testify that any of the derived income approach factors were unexplainable, but instead limited her testimony to her own personal knowledge as previously described.

Kenneth P. Riggs, a Nebraska State Certified General Appraiser, conducted appraisals for the Subject Property.³⁹ Riggs conducted the sales comparison approach, the cost approach, and the income approach for the Subject Property.⁴⁰ The Taxpayer appealed the assessed value of the Subject Property located at 10808 Fort Street, Omaha, Nebraska for both tax years 2011 and 2012.⁴¹ 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.

³⁵ See, E25:4-15; E26:4-15; E27:4-15; and E28:4-15.

³⁶ See, E25:4-15; E26:4-15; E27:4-15; and E28:4-15.

³⁷ See, *id.*

³⁸ See, *id.*

³⁹ See, E20, E21, and E24.

⁴⁰ See, E20, E21, and E24.

⁴¹ See, E2 and E3 (indicating the Taxpayer appealed the assessed value of the Subject Property located at 10808 Fort Street, Omaha, Nebraska for both tax years.)

Riggs relied upon sales comparison approaches to determine the actual value of the Subject Property.⁴² Riggs' sales comparison approaches for 10808 Fort Street and 9707 Q Street were based on six sales after adjustments.⁴³ The dates of the sales ranged from June 2008 to November 2011.⁴⁴ Riggs made 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 Retail properties.⁴⁵ The index appears to equate the retail sales per ft² to the actual value per ft² of retail property.⁴⁶ There is no indication that data was limited to any individual market or that any adjustments were made for the size or location of the real property.⁴⁷ Riggs determined the time adjustments by calculating the percentage change in the index's value per ft² between the time of sale and January 1, 2011, and made a straight percentage adjustment to the sale price per ft² of the comparable.⁴⁸ The index indicates that between January 1, 2011, and January 1, 2012, retail sales per ft² dramatically increased.⁴⁹ However, Riggs asserted that his opinion of value would be the same for 10808 Fort Street as of January 1, 2011, and January 1, 2012. Riggs' sales comparison approach for 8801 W Center Road was based on seven sales after adjustments.⁵⁰

In all of his sales comparison approaches, Riggs made adjustments to the comparable properties using percentage increases or decreases for determined relevant factors.⁵¹ 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.

Riggs' income approach differed from the County Assessor's income approach in rental rates, vacancy and collection loss rates, total expenses, and capitalization rates.⁵² Riggs determined his capitalization rates by examining the RERC Report that he helped construct, by talking with unnamed professionals in the Omaha area, and by examining sales that were not

⁴² See, E20:85, E21:84, and E24:83.

⁴³ See, E20:69 and E21:68.

⁴⁴ See, *id.*

⁴⁵ See, E20:62, E21:61, and E24:62.

⁴⁶ See, *id.*

⁴⁷ See, E20:62, E21:61, and E24:62.

⁴⁸ See, E20:63-69, E21:62-68, and E24:63-69.

⁴⁹ See, E20:62, E21:61, and E24:62.

⁵⁰ See, E24:67.

⁵¹ See, E20:69, E21:68, and E24:69.

⁵² See, E20:80-81, E21:70-83, and E24:69-82.

disclosed to the Commission.⁵³ Riggs' rental rates were derived from the lease or listing of five comparable properties.⁵⁴ Riggs asserted that he made adjustments to the rental rates to account for differences in size, location, and whether the rental rate was a listing or an actual rental rate.⁵⁵ He also asserted that he spoke with real estate professionals in the market to obtain further information.⁵⁶

C. Analysis

During appeals from a determination of the County Board, there is both a presumption in favor of the County Board and a burden of persuasion placed upon an appealing party.⁵⁷ The presumption in favor of the County Board, and the burden of persuasion cannot be conflated, and require separate analysis.⁵⁸ Both the presumption and burden of persuasion relate to the determinations of the County Board.⁵⁹

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.⁶⁰

Competent evidence is defined as relevant and material evidence or that evidence “which the very nature of the thing to be proven requires.”⁶¹ The Nebraska Supreme Court has held that, “when an independent appraiser using professionally approved methods of mass appraisal

⁵³ See, E20:80-81, E21:81-82, and E24:80-81.

⁵⁴ See, E20:75-78, E21:73-78, and E24:72-77.

⁵⁵ See, E20:76-79, E21:75-78, and E24:76-79.

⁵⁶ See, *id.*

⁵⁷ See generally, *JQH La Vista Conference Center Development LLC v. Sarpy Cty. Bd. Of Equal.*, 285 Neb. 120, 825 N.W.2d 447 (2013).

⁵⁸ 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).

⁵⁹ 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).

⁶⁰ 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)).

⁶¹ *Black's Law Dictionary 6th Edition*, West Group, p. 284 (1990).

certifies that an appraisal was performed according to professional standards, the appraisal is considered competent evidence under Nebraska law.”⁶²

Riggs conducted appraisals of the Subject Property and certified that they were performed according to professional appraisal standards.⁶³ The Commission finds that the appraisals constitute competent and relevant evidence concerning the County Board’s determinations. The Commission, therefore, finds that the presumptions in favor of the County Board’s determinations are rebutted.

Having determined that the 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.⁶⁴ The Taxpayer has the burden to show by clear and convincing evidence that the valuation determinations by the County Board were unreasonable or arbitrary.⁶⁵ An appraisal may constitute competent evidence but not rise to the level of clear and convincing evidence.⁶⁶ 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.”⁶⁷

1. Riggs’ Sales Comparison Approaches

In the sales comparison approach an opinion of value is developed by analyzing closed sales, listings, or pending sales of properties that are similar to the subject property.⁶⁸ 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

⁶² *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).

⁶³ See, E20, E21, and E24.

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, 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).

⁶⁶ 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).

⁶⁷ *Bottorf v. Clay County Board of Equalization*, 7 Neb.App. 162, 167, 580 N.W.2d 561, 565 (1998) (citations omitted).

⁶⁸ Appraisal Institute, *The Appraisal of Real Estate*, at 377-78 (14th ed. 2013).

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. ...⁶⁹

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.”⁷⁰

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.⁷¹

Two types of adjustments to comparable sales are acceptable, quantitative adjustments and qualitative adjustments.⁷² Quantitative adjustments are based on calculations with inputted numerical factors derived from the market.⁷³ 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.⁷⁴

The appraiser uses some subjectivity to select data to use in these approaches when there is an

⁶⁹ *Id.* at 381-382.

⁷⁰ Neb. Rev. Stat. 77-1371 (Reissue 2009).

⁷¹ Appraisal Institute, *The Appraisal of Real Estate*, at 382 (14th ed. 2013).

⁷² See, Appraisal Institute, *The Appraisal of Real Estate*, at 389-390 (14th ed. 2013).

⁷³ See, Appraisal Institute, *The Appraisal of Real Estate*, at 389-390 (14th ed. 2013).

⁷⁴ See, Appraisal Institute, *The Appraisal of Real Estate*, at 389-390 (14th ed. 2013).

abundance of data available, but the processes are formalistic and derive a specific numerical adjustment to price or specific percentage adjustment.⁷⁵

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.⁷⁶ 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.⁷⁷ Qualitative adjustments must also be derived from acceptable methods including: (1) trend analysis; (2) relative comparison analysis; and (3) ranking analysis.⁷⁸

Riggs made adjustments to the comparable properties using percentage increases or decreases for determined relevant factors.⁷⁹ 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.⁸⁰ 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 retail sales per ft² with percentage changes in actual value.⁸¹ There is no indication that the index took into account the differences between retail properties including, but not limited to, size and location.⁸² Even though the index indicated different rates for January 1, 2011, and January 1, 2012, Riggs asserted that the value of the Subject Property would be the same.

All of the forgoing limits the credibility of Riggs' sales comparison approaches. The Commission finds that Riggs' sales comparison approaches are not clear and convincing evidence that the County Board's determinations are unreasonable or arbitrary.

⁷⁵ See, Appraisal Institute, *The Appraisal of Real Estate*, at 389 (14th ed. 2013).

⁷⁶ See, Appraisal Institute, *The Appraisal of Real Estate*, at 431-432 (14th ed. 2013).

⁷⁷ See, Appraisal Institute, *The Appraisal of Real Estate*, at 431-432 (14th ed. 2013).

⁷⁸ See, Appraisal Institute, *The Appraisal of Real Estate*, at 389-390 (14th ed. 2013).

⁷⁹ See, E20:69, E21:68, and E24:69.

⁸⁰ See, E20:62-69, E21:61-68, and E24:62-69.

⁸¹ See, E20:62, E21:61; and E24:62.

⁸² See, E20:62, E21:61; and E24:62.

2. Riggs' Cost Approaches

The cost approach includes six steps:

(1) Estimate the land (site) value as if vacant and available for development to its highest and best use; (2) Estimate the total cost new of the improvements as of the appraisal date, including direct costs, indirect costs, and entrepreneurial profit from market analysis; (3) Estimate the total amount of accrued depreciation attributable to physical deterioration, functional obsolescence, and external (economic) obsolescence; (4) Subtract the total amount of accrued depreciation from the total cost new of the primary improvements to arrive at the depreciated cost of improvements; (5) Estimate the total cost new of any accessory improvements and site improvements, then estimate and deduct all accrued depreciation from the total cost new of these improvements; (6) Add site value to the depreciated cost of the primary improvements, accessory improvements, and site improvements, to arrive at a value indication by the cost approach.⁸³

Riggs admitted that the cost approach was not the best approach to value the Subject Property because of the age of the Subject Property and the market conditions as of the dates of assessment. Riggs calculated the economic depreciation of the Subject Property by capitalizing the income loss due to externalities associated with the recession.⁸⁴ However, because the recession was not permanent, the income loss would not be stabilized for the life of the improvements.⁸⁵ Instead of running a direct capitalization of the income loss due to the externalities, Riggs should have run a discounted cash flow analysis of the income loss due to the externalities in order to account for the expected improvement in market conditions.⁸⁶ Because the external obsolescence was not derived using accepted appraisal techniques, the cost approach is not clear and convincing evidence that that County Board's determinations were arbitrary or unreasonable.

3. Riggs' and County Assessor's Income Approaches

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

⁸³ International Association of Assessing Officers, *Property Assessment Valuation*, at 230 (3rd ed. 2010).

⁸⁴ See, E20:51-52, E21:50-51, and E24:49-50.

⁸⁵ See, Appraisal Institute, *The Appraisal of Real Estate*, at 635-637 (14th ed. 2013).

⁸⁶ See, *id.*

indicated value.⁸⁷ A variety of techniques may be used to quantify various components of any application of the approach.⁸⁸

Both the County Assessor and Riggs utilized the income approach to determine the actual value of the Subject Property.⁸⁹ Riggs' income approaches differed from the County Assessor's income approaches in rental rates, vacancy and collection loss rates, total expenses, and capitalization rates.⁹⁰ After a review of the relevant factors used in the income approaches the Commission finds that there is not clear and convincing evidence that the County Board's determinations were unreasonable or arbitrary.

In order to compare the County Assessor's income approach conclusions and Riggs' income approach conclusions the approaches must be reduced to common factors. While both Riggs and the County Assessor completed income approaches, each expressed their conclusions in significantly different ways. The Commission has reviewed the assessment reports and appraisals and will discuss the credibility of the evidence based upon the common income approach factors as generally expressed in direct capitalization income approaches.

i. Net Leasable Area

The income approach relies upon the application of income and expense factors to the Subject Property based upon the net leasable area of the Subject Property.⁹¹ Riggs and the County Assessor disagreed on the applicable net leasable area of the Subject Property located at 10808 Fort Street, Omaha, Nebraska, and the Subject Property located at 8801 West Center Road, Omaha, Nebraska.

The County Assessor determined that the net leaseable area for the Subject Property located at 10808 Fort Street, Omaha, Nebraska was 70,434 ft² and the gross area was 75,414 ft² for both tax years 2011 and 2012.⁹² The County Assessor determined that the mezzine and office space located on the second floor of the Subject Property located 10808 Fort Street, Omaha, Nebraska, would not contribute to the net leasable area of the supermarket.⁹³ Similarly, the County

⁸⁷ See, The Appraisal Institute, *The Appraisal of Real Estate*, at 460-461 (14th ed. 2013).

⁸⁸ *Id.* at chs 21-26.

⁸⁹ See, E11, E12, E13, and E18 (County Assessor's Assessment Reports); See also, E20, E21, and E24.

⁹⁰ See, E20:71-84; E21:70-83 and E24:69-82.

⁹¹ See, International Association of Assessing Officers, *Property Assessment Valuation*, at 323 (3rd ed. 2010).

⁹² See, E11:2 and 16; See also, E12:2 and 13.

⁹³ See E11:18; See also, E11:3 and E12:3 (building sketches for the Subject Property located 10808 Fort Street, Omaha, Nebraska, which indicate that the County Assessor's net leaseable area is equal to the area of the first floor).

Assessor determined that the net leaseable area for the Subject Property located at 8801 West Center Road, Omaha, Nebraska, was 62,808 ft² and the gross area was 72,219 ft².⁹⁴ The County Assessor determined that the mezzine and office space located on the second floor of the Subject Property located 8801 West Center Road, Omaha, Nebraska, would not contribute to the net leaseable area of the supermarket.⁹⁵ Conversely, Riggs determined that the net leaseable area in both the Subject Property located at 10808 Fort Street, Omaha, Nebraska, and the Subject Property located at 8801 West Center Road, Omaha, Nebraska, were equal to the gross area.⁹⁶

Other than what can be discerned from the information in the preceding paragraph, niether party presented testimony concerning the correct net leaseable area of the Subject Property. The Commission determines that it was reasonable for the County Assessor to exclude the mezzine and office areas from the net leaseable areas of the Subject Property located at 10808 Fort Street, Omaha, Nebraska, and 8801 West Center Road, Omaha, Nebraska. These areas have significantly different finishes and uses than the remainder of the area of the corresponding structures. The mezzine and office space support the general purpose of a supermarket, but based on the evidence before the Commission it is as reasonable as not that these areas would be excluded in an income approach calculation.

ii. Rental Rates

Rowe asserted that the rental rates used by the County Assessor were derived from the market by examining listing services and through surveys completed by local market participants. Only a portion of the data is in evidence, but Rowe testified that the remainder of the data is maintained in the County Assessor's work files. The dissent asserts that the County Assessor relied substantially or completely on a single rental listing of the alleged comparable property located at 144th and Center. However, this assertion is not consistent with the evidence. Rowe clearly testified that the alleged comparable property located at 144th and Center did not receive any more weight than other sources of information, and that the County Assessor established the rental rate after reviewing data from 40 to 50 sources. The County Assessor determined that the rental rate for the Subject Properties was between \$7 and \$8 per square foot.

⁹⁴ See, E18:2 and 13.

⁹⁵ See, E18:3 (building sketch for the Subject Property located 8801 West Center Road, Omaha, Nebraska, which indicates that the County Assessor's net leaseable area is equal to the area of the first floor).

⁹⁶ See, E20:81; See also, E24:79.

The listing for 144th and Center is for \$9.75. If the County Assessor had relied substantially or completely on this listing than the rental rate would have been significantly higher. Other than assertions, there is no evidence that the County Assessor placed more weight on the 144th and Center listing than any other piece of relevant data considered in the assessment of the Subject Property. Also, other than assertion, there is no evidence that the County Assessor did not examine multiple sources of relevant market data to derive the rental rates.

Additionally, the Taxpayer asserted that the County Assessor had used a higher than market rental rate because the Taxpayer is a well-known lucrative business. The Commission finds that this assertion is not supported by the evidence. Aside from the listing for 144th and Center, the Taxpayer's appraisal indicates the actual rental rates for the Subject Property. The rental rates are as high as \$13.24 per ft².⁹⁷ Based on the forgoing, if the County Assessor had valued the Subject Property at the value-in-use, or the specific value to Hy-Vee, then the assessed values would likely have been much higher. The fact that the County Assessor's rental rates are substantially below the actual rental rents of the Subject Property and the listing for 144th and Center support the position that the County Assessor derived the value-in-exchange for the Subject Property, and did not inappropriately value the business. All Commissioners agree that the Subject Property should be valued at its market value or value-in-exchange. However, the controlling opinion and the dissent disagree with whether the evidence supports an assertion that the County Assessor used a value-in-use instead of value-in-exchange.

Riggs established his supermarket rental rates by reviewing listings and leases of five comparable properties.⁹⁸ Riggs' comparable properties ranged drastically in size and location.⁹⁹ He asserted that he made applicable adjustments but there is no explanation of how he quantified those adjustments.¹⁰⁰ Riggs also testified that he spoke with market participants and took their opinions into account. Adjustments made to comparable rents appear to be based on a comparison of the gross area of the Subject Property to the leased area of the comparable properties. Riggs made adjustments due to the size differences between the Subject Property and the comparable properties. As previously mentioned the net leasable area is disputed for the

⁹⁷ See, E20:71 (indicating actual rental rate of \$9.17 per ft²); See also, E21:70 (indicating an actual rental rate of \$6.08 per ft² plus 1% of gross sales exceeding \$36,617,152); See also, E24:69 (indicating an actual rental rate of \$13.24 per ft²).

⁹⁸ See, E20:75-78, E21:73-78, and E24:72-77.

⁹⁹ See, E20:75-78, E21:73-78, and E24:72-77.

¹⁰⁰ See, E20:78, E21:78, and E24:77.

Subject Property located at 10808 Fort Street, Omaha, Nebraska, and 8801 West Center Road, Omaha, Nebraska. This may affect the reasonableness of any adjustments made to the rental rates.

Both the County Assessor's assertions and Riggs' assertions of the rental rates have limited support based on the record. Without the specific data that the County Assessor relied upon the Commission's ability to analyze the assessed value is limited. Similarly, without further evidence of Riggs' methods for adjusting rental rates, and further information on how those adjustments lead to his quantified opinions, the Commission's ability to analyze his income approaches are limited as well. The Commission finds that Riggs' rental rates are not clear and convincing evidence that the County Board's determinations were unreasonable or arbitrary.

iii. Vacancy and Collection Loss Rates

Riggs derived an 8% vacancy and collection loss rate.¹⁰¹ The County Assessor utilized a 5% to 10% vacancy and collection loss rate for 2011¹⁰² and a 10% vacancy and collection loss rate for 2012.¹⁰³ Riggs' vacancy and collection loss rate and the County Assessor's vacancy and collection loss rates are similar. Given the evidence in the record the Commission determines that the varying opinions carry the same amount of weight.

iv. Expenses

The County Assessor expressed his opinion of the expenses for the Subject Property as an expense ratio.¹⁰⁴ The County Assessor's ratio was 8% for 2011 and 10% for 2012.¹⁰⁵ Rowe testified that the expense ratios were derived from the market as gathered from property owners in the County. Rowe asserted that the data was maintained at the County Assessor's Office in a work file, but was not in evidence in the hearing.

Riggs' derived his expense ratio by examining the Institute of Real Estate Management's Income/Expense Analysis for Shopping Centers 2011 (IREM), and by market research and

¹⁰¹ See, E20:79, E21:80, and E24:79.

¹⁰² See, E11:16 and E13:12.

¹⁰³ See, E12:13 and E18:13.

¹⁰⁴ See, E11:16, E12:13, and E18:13.

¹⁰⁵ See, E11:16, E12:13, E13:12, and E18:13.

conversations with real estate professionals in the area.¹⁰⁶ The IREM data was gathered from a large portion of the United States including the Western Midwest, Rocky Mountain, and Pacific Northwest regions, and provided a range of expenses.¹⁰⁷

When deriving the applicable expense ratio Riggs included line items for expenses which would be paid by the tenant under a triple net lease.¹⁰⁸ During his calculation of the potential gross income (PGI), Riggs then included the reimbursement payments as an alternative form of income before applying his vacancy and collection loss rate.¹⁰⁹ The result is equivalent to an additional expense for alleged unrecovered costs typically paid by the tenant, but passed on to the lessor when the Subject Property is vacant or when the tenant fails to pay expenses as contracted. It is logical that the lessor's expense would increase during periods of vacancy and when the tenant fails to make payment for insurance, however, Riggs' calculation does not adjust the amount of expenses to account for a decrease in cost to maintain a vacant building.

Similarly, Riggs applied his collection loss rate to all tenant paid expenses, even though a failure to pay for services such as cleaning, general management while occupied, utilities, and trash removal would not result in an additional expense to the lessor as these services are generally contracted between the lessee and a service provider.¹¹⁰ The lessor would have no contractual obligation to pay these expenses in the event that the lessee failed to do so. However, the Commission notes that the insurance payments are significantly different than the expenses previously discussed. If the lessee were to fail to pay for insurance the lessor would have a logical incentive and potential contractual obligation to make payment in order to protect against risks of loss.

Based on the foregoing, the Commission finds that Riggs' expense ratio is inappropriate, and not clear and convincing evidence that the County Board's determinations were unreasonable or arbitrary. The Commission notes that even without adjusting Riggs' expenses as required, Riggs' expenses expressed as a ratio would only be 4.7%, lower than the County Assessor's 8%.

¹⁰⁶ See, E20:80, E21:80, and E24:78.

¹⁰⁷ See, E20:80, E21:80, and E24:78.

¹⁰⁸ See, E20:80-81, E21:80-81, and E24:78-79.

¹⁰⁹ See, E20:81, E21:81, and E24:79.

¹¹⁰ See, E20:80-81, E21:80-81, and E24:78-79.

v. Capitalization Rates

The County Assessor and Riggs disagreed on the applicable capitalization rate. The County Assessor utilized the Voss Study. The Voss Study indicates that the capitalization rates were derived from an examination of published sources including the Korpacz Report, the RERC Report, and the Realty Rates.com report.¹¹¹ Additionally the Voss Study examined several sales from the Omaha Market.¹¹² The Voss Study indicates that the amount of sales available for examination was limited. In order to adjust for this problem the study used older sales than typical. Some of the sales used in the Voss study were up to ten years old.¹¹³ Rowe did not have personal knowledge regarding adjustments, if any, made to the sales to account for their age.¹¹⁴ Riggs derived capitalization rates from the RERC Report and sales.¹¹⁵ However, Riggs did not disclose the sales that he used. Riggs did include the RERC Report from the 4th Q of 2010.¹¹⁶

The RERC Report lists a range of applicable capitalization rates for both the 4th Q of 2010 as examined by Riggs,¹¹⁷ and the Summer 2009 as examined by the Voss study.¹¹⁸ For example, the reported range is 8.5 to 16.0 for the 4th Q of 2010 for retail neighborhood/community centers,¹¹⁹ and 9.0 to 15.0 for Summer 2009 Warehouses.¹²⁰ Both Voss and Riggs required sales to narrow down the range to a specific capitalization rate, however, only the Voss study's sales are in the record. Riggs agreed that due to a credit crunch the number of commercial transactions decreased significantly over the most relevant time periods. Therefore, Riggs would have encountered the same problems finding sales that the Voss study encountered. Voss' solution was to use older sales. Riggs did not explain how he overcame this problem. Without evidence of how Riggs overcame the shortage of relevant sales, his opinion is not clear and convincing evidence that the County Board was unreasonable or arbitrary.

¹¹¹ See, E25:4-15; E26:4-15; E27:4-15; and E28:4-15.

¹¹² See, E25:4-15; E26:4-15; E27:4-15; and E28:4-15.

¹¹³ See, E25:4-15; E26:4-15; E27:4-15; and E28:4-15.

¹¹⁴ See, E25:4-15; E26:4-15; E27:4-15; and E28:4-15.

¹¹⁵ See, E20:82-83, E21:81-82, and E24:80-81.

¹¹⁶ See, E20:82-83, E21:81-82, and E24:80-81.

¹¹⁷ See, E20:82, E21:81, and E24:80.

¹¹⁸ See, E10:22.

¹¹⁹ See, E20:82, E21:81, and E24:80.

¹²⁰ See, E10:22.

4. County's Comparable Sales

The dissent asserts that the assessed values of the County Assessor's comparable property located at 3505 L. St. for tax years 2011 and 2012 support Riggs' opinion of the assessed value of the Subject Property for tax year 2011. The dissent does not raise an equalization concern, but instead asserts that the assessed value of the comparable property is further support of Riggs' value. The dissent cites to cases from the United States Tax Courts, wherein the courts determined that the assessed value of the subject property could properly be used to corroborate more reliable methods,¹²¹ including expert opinions and actual sales, of determining the actual value of the subject property.¹²² The Commission does not question the admissibility of the assessed value of the Subject Property for use in determining the actual value of the Subject Property. In fact, it would be impossible to ignore the assessed value of the Subject Property in this hearing. However, the Commission disagrees with the use of the assessed value of other properties to support the assessed value of the Subject Property except in context of an equalization argument,¹²³ or in a preliminary state of finding comparable properties,¹²⁴ or as secondary evidence of historical market trends.¹²⁵

A determination of actual value may be made for mass appraisal and assessment purposes by using approaches identified in Nebraska Statutes.¹²⁶ The approaches identified are the sales comparison approach, the income approach, the cost approach and other professionally accepted mass appraisal methods.¹²⁷ The comparison of assessed values of dissimilar parcels is not recognized as an appropriate approach.¹²⁸ The Subject Property and 3505 L St. are located

¹²¹ See, *Northern Trust Co. v. Commr. Of Internal Revenue*, 87 T.C. 349, 382 (1986) ("We have recently held that assessed value may be considered when the relationship between assessed value and fair market value is demonstrated, but basically as a corroboration of fair market value determined by a more reliable method.").

¹²² See, *Wortmann v. Commissioner of Internal Revenue*, T.C. Memo. 2005-227 (2005).

¹²³ The Commission notes that all equalization arguments inherently require the comparison of assessed values for the purposes of determining whether properties have been uniformly valued. The use of the assessed values of alleged comparable properties in these instances is necessary and admissible.

¹²⁴ See, Appraisal Institute, *The Appraisal of Real Estate*, at 64-65 (14th ed. 2013)

¹²⁵ See, Appraisal Institute, *The Appraisal of Real Estate*, at 64-65 (14th ed. 2013)

¹²⁶ Neb. Rev. Stat. §77-112 (Reissue 2009).

¹²⁷ *Id.*

¹²⁸ See, Appraisal Institute, *The Appraisal of Real Estate*, at 197 (14th ed. 2013) ("Assessed values may not be good indicators of the market value of the individual properties because mass appraisals based on statistical methodology tend to equalize the application of taxes to achieve parity among assessment level in a given district... The reliability of local assessments as indicators of market value varies from district to district."); See generally, *Lienemann v. City of Omaha*, 191 Neb. 442, 215 N.W.2d 893 (1974) (holding that the assessed value of real property was not admissible evidence of actual value in a condemnation case citing other jurisdiction which state that while assessed

approximately 60 blocks apart.¹²⁹ It is reasonable for the County Assessor to apply different income approach factors based on location. There is no evidence in the record that this determination was not based on market data.

The dissent asserts that the sale of the property located at 144th and Center supports Riggs' opinion of value.¹³⁰ Concerning the sale at 144th and Center, limited testimony was received at the hearing. The testimony asserted that the property sold some time in either 2011 or 2012 for somewhere around \$3,000,000. Rowe testified that the purchaser intends to demolish the improvements located on 144th and Center. Because the purchaser intends to demolish the improvements, significant adjustments and detailed analysis is necessary prior to the 144th and Center property being appropriately used to support an opinion of value for the Subject Property.¹³¹ Further, the exact time and sale price are unknown making necessary adjustments impossible based on the limited evidence. In other words, it is impossible to appropriately use the sale at 144th and Center to support any opinion of value, because the facts of this sale are not known.

Concerning all of the Subject Properties, the dissent asserts that evidence that the County Board lowered the assessed values for subsequent years indicates that the Subject Properties were overassessed for the tax years in question. The assessed value for real property may be different from year to year, dependent upon the circumstances.¹³² For this reason, a prior year's assessment is not relevant to the subsequent year's valuation.¹³³ For this same reason, the Commission finds that a subsequent year's assessment is not relevant to the prior year's valuation. This is especially true in the current case where all witnesses agree that the market was moving during the relevant time periods. Further, the assessed values for the subsequent years were not at question in this hearing, and no evidence was presented concerning the data used to derive the subsequent County Board values.

The dissent asserts that the change in assessed values in subsequent years indicates that the County Assessor's valuations were not appropriately responsive to market conditions at the time of assessment. There is no evidence in the record to factually establish why the assessed values

values are required to be set at actual value, errors may occur resulting in an assessed value that is not at actual value).

¹²⁹ See, E13.

¹³⁰ See, E25.2 (listing for 144th and Center).

¹³¹ See, Appraisal Institute, *The Appraisal of Real Estate*, at 412-14 (14th ed. 2013).

¹³² See, *Affiliated Foods Coop. v. Madison Co. Bd. Of Equal.*, 229 Neb. 605, 613, 428 N.W.2d 201, 206 (1988).

¹³³ *Id.*

were changed in subsequent years. Many potential explanations are equally possible, including, but not limited to, changes in real property markets effecting the Subject Properties, new data previously unavailable to the County Board, and new recommendations by the County Assessor. In fact, it is just as likely that the changes in valuations over the history of the Subject Property indicate that the County Board and the County Assessor's Office have been appropriately and consistently following the local market trends by changing assessed values as dictated by the market.

The dissent asserts that the sales of Bag N Save supermarkets at 76th and Dodge and near 114th and Dodge, as well as the assessed value of these locations after the sales, support Riggs' conclusions. Rowe testified, as elicited by the Taxpayer, that the properties were sold after the dates of assessment and that the sales were part of a buyout with sale prices supported by individual appraisals. Neither the appraisals nor testimony from anyone with personal knowledge of the sales are in evidence. Moreover, the sales occurred after the date of assessment and were not available for review or consideration as of January 1, 2011, or January 1, 2012. The Commission determines that it is not unreasonable or arbitrary that an assessed value on January 1, 2011, and January 1, 2012, would not have considered sales which were non-existent as of the dates of assessment. Sometime markets change quickly and drastically over a relatively short period of time.

The testimony in this hearing indicated that the real estate market moved significantly from tax year 2011 to 2012. A time adjustment is necessary in order for these sales to be indicative of the value of the Subject Property in tax years 2011 and 2012, as well as further testimony concerning the conditions of the sale.¹³⁴ The comparison of assessed values for subsequent years of alleged comparable properties based on limited evidence, and the sales prices of alleged comparable properties that occurred after the dates of assessment and without appropriate adjustments are not clear and convincing evidence that the County Board's determinations were unreasonable or arbitrary.

¹³⁴ See, Appraisal Institute, *The Appraisal of Real Estate*, at 388-95 (14th ed. 2013).

5. Explainability

The dissent asserts that the County Assessor's determinations, County Board's actions, or statements in Assessment Reports are "unexplainable" and cites to the mass appraisal principle that models should be explainable to determine that the credibility of the County Board's determinations, County Assessor's opinions, and statements found in the Assessment Reports is severely limited. Opinions, assertions, or statements are unexplainable when they are incapable of explanation or impossible to explain. This is not the situation in any of the dissents asserted "unexplainable" opinions, determinations, or statements. Instead the dissent classifies differences of opinion and unexplained positions as unexplainable. Multiple explanations can be derived for the opinions, determinations, and statements. It is true that the parties did not elicit testimony concerning most of the items that the dissent finds most important, however, that does not mean that a ready and reasonable explanation would not have been produced if the appropriate questions had been asked or the appropriate witnesses and documents subpoenaed.

Some assertions have been made that the County Board's determinations have limited credibility because Rowe's testimony was limited to her personal knowledge, and because there are inconsistencies in the record as to whether the County Assessor performed all three appraisal approaches. The County Assessor is only required to use one of the approved appraisal approaches.¹³⁵ The burden is on the Taxpayer to show by clear and convincing evidence that the County Board's determinations were unreasonable or arbitrary. "[T]he 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."¹³⁶ The Taxpayer called Rowe as a witness, but Rowe was under no compulsion from the Commission to attend the hearing. The Commission notes that the Taxpayer did not subpoena any witnesses from the County Assessor's Office to testify, nor did the Taxpayer formally request through the Commission the production of any documents at any point.

None of the "unexplainable" determinations, opinions, or statements of the County Board are actually incapable of explanation. The only potentially inexplicable opinion solicited in the

¹³⁵ See, *Schmidt v. Thayer County Bd. of Equalization*, 10 Neb.App. 10, 18, 624 N.W.2d 63, 69 - 70 (2001).

¹³⁶ *Bottorf v. Clay County Board of Equalization*, 7 Neb.App. 162, 167, 580 N.W.2d 561, 565 (1998) (citations omitted).

entire proceedings was that of Riggs who was incapable of providing a logical rationale for the quantification of many of his adjustments, but instead relied upon his own subjective opinions.

V. CONCLUSION

The Commission rejects Riggs' opinions of value because of the inherent problems described in the previous sections. 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 10808 Fort Street, Omaha, Nebraska for tax years 2011 and 2012, the decision of the Douglas County Board of Equalization determining the value of the Subject Property located at 8801 West Center, Omaha, Nebraska for tax year 2012, and the decision of the Douglas County Board of Equalization determining the value of the Subject Property located at 9707 Q Street, Omaha, Nebraska for tax year 2011 are affirmed.¹³⁷
2. The taxable values of the Subject Property are:

Case No. 11C 492

Land	\$800,400
<u>Improvements</u>	<u>\$4,124,300</u>
Total	\$4,924,700

¹³⁷ 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.

Case No. 11C 493

Land	\$1,085,900
<u>Improvements</u>	<u>\$3,246,500</u>
Total	\$4,332,400

Case No. 12C 360

Land	\$800,400
<u>Improvements</u>	<u>\$3,953,900</u>
Total	\$4,754,300

Case No. 12C 361

Land	\$2,496,900
<u>Improvements</u>	<u>\$1,742,600</u>
Total	\$4,239,500

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 for the Subject Property located at 9707 Q Street, Omaha, Nebraska, tax year 2012 for the Subject Property located at 8801 West Center, Omaha, Nebraska, and for both tax years 2011 and 2012 for the Subject Property located at 10808 Fort Street, Omaha, Nebraska.

7. This decision and order is effective for purposes of appeal on April 1, 2015.

Signed and Sealed: April 1, 2015

Nancy J. Salmon, 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.

Commissioner Freimuth, concurring in part, and dissenting in part,

I. OVERVIEW

The three Subject Property parcels under appeal are improved with Hy-Vee supermarkets located in Omaha at the following addresses: (1) 10808 Fort Street (“108th & Fort” – tax year 2011 & 2012 appeals); (2) 9707 Q Street (“97th & Q” – tax year 2011 appeal); and (3) 8809 West Center Road (“88 & Center” - tax year 2012 appeal). The Taxpayer’s appraiser, Kenneth Riggs, certifies that his appraisals for these Subject Property parcels were prepared using professionally approved methods for each appeal.¹³⁸ Therefore, I concur with the majority opinion that under *JQH La Vista Conference Center Development LLC v. Sarpy Cty. Bd. of Equal.*, 285 Neb.120, 825 N.W.2d 447 (2013), the Taxpayer’s appraisal for each Subject Property parcel constitutes sufficient competent evidence to rebut the presumption in favor of the County Board for tax years 2011 and 2012.

As stated in the “Standard of Review” portion of the majority’s opinion, in the case where this presumption has been rebutted, “the reasonableness of the valuation fixed by the [County Board] becomes one of fact based upon all the evidence presented.”¹³⁹ Unlike the majority opinion, I am persuaded that the evidence demonstrates clearly and convincingly that the decisions of the County Board were arbitrary or unreasonable with respect to the Subject

¹³⁸ E20 (108th & Fort Hy-Vee Supermarket - the Commission notes that the Taxpayer's appraiser testified that his Appraisal found at Exhibit 20 with an effective date of January 1, 2011 also reflects his opinion for this Subject Property parcel as of January 1, 2012); E21 (97th & Q Hy-Vee Supermarket); E24 (88 & Center Hy-Vee Supermarket).

¹³⁹ *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted).

Property parcels located at 108th & Fort (tax years 2011 and 2012), 97th & Q (tax year 2011) and 88th & Center (tax year 2012), and that the Taxpayer's appraisal for each of these parcels constitutes the best evidence of value for each respective tax year under appeal herein.

II. SUMMARY OF THE EVIDENCE

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 Taxpayer's appraisals for each Subject Property parcel (Exhibits 20, 21 & 24) provides that Mr. Riggs 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. Mr. 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").¹⁴⁰ Mr. 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.¹⁴¹

The County's Assessment Reports contain valuation/assessment histories for the three parcels under appeal herein and other parcels that the County references for alleged comparability and/or equalization purposes (these County charts for the Subject Property parcels and other parcels are sometimes referred to herein as "PVAL" or "PVALs"). The chart below sets forth the County's PVAL for the Subject Property parcel located at 108th & Fort, which indicates a significant increase by the County Assessor and the County Board from \$4,203,500 in tax years 2009 and 2010 to \$4,924,700 in tax year 2011 and to \$4,754,300 in 2012 in the aftermath of the 2007 – 2008 economic crisis, and which also indicates an attempt to reset the 2011/2012 value to approximate the \$4,853,000 pre-crisis assessment imposed for tax years 2005 through 2008.¹⁴²

¹⁴⁰ See, *Wortmann v. Commissioner of Internal Revenue*, T.C. Memo. 2005-227 (2005) (citing *Estate of Auker 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").

¹⁴¹ See, E20, E21 & E24.

¹⁴² E12:16.

108th & FORT Hy-Vee VALUATION/ASSESSMENT HISTORY

YEAR EFFECTIVE	DATE OF CHANGE	LAND VALUE	IMPROVE VALUE	TOTAL VALUE	REASON
2012	3/9/2012	\$800,400	\$3,953,900	\$4,754,300	County Assessor Reappraisal
2011	8/9/2011	\$800,400	\$4,124,300	\$4,924,700	County Board
2011	3/13/2011	\$800,400	\$4,124,300	\$4,924,700	Building Permit
2010	8/11/2010	\$800,400	\$3,403,100	\$4,203,500	County Board
2009	8/12/2009	\$800,400	\$3,403,100	\$4,203,500	County Board
2005	7/23/2005	\$800,400	\$4,052,600	\$4,853,000	County Board
2002	10/15/2002	\$800,400	\$4,931,000	\$5,731,400	S/C (Acronym Unknown)

The County's Assessment Report sets forth the following assessment history regarding the Subject Property located at 97th & Q, which indicates a significant increase by the County Assessor and the County Board from \$3,606,200 in tax years 2008 – 2010 to \$4,332,400 in tax year 2011 in the aftermath of the 2007 – 2008 economic crisis (I note that the significant decrease by the County Assessor and the County Board for the 97th & Q Hy-Vee to \$3,440,000 in tax year 2013 from the \$4,332,400 assessment in tax year 2011 quite possibly stems from 2011/2012 market area sales of parcels similarly improved for supermarket use in the range of \$3 million to \$3.6 million while assessed in the range of \$4 million to \$4.5 million – these sales are discussed in detail below):¹⁴³

97th & Q Hy-Vee VALUATION/ASSESSMENT HISTORY

YEAR EFFECTIVE	DATE OF CHANGE	LAND VALUE	IMPROVE VALUE	TOTAL VALUE	REASON
2013	8/7/2013	\$1,085,900	\$2,354,600	\$3,440,500	County Board
2013	3/9/2013	\$1,085,900	\$2,354,600	\$3,440,500	County Assessor Reappraisal
2012	8/7/2012	\$1,085,900	\$3,246,500	\$4,332,400	County Board
2011	8/9/2011	\$1,085,900	\$3,246,500	\$4,332,400	County Board
2011	3/13/2011	\$1,085,900	\$3,246,500	\$4,332,400	County Assessor Reappraisal
2010	8/11/2010	\$1,085,900	\$2,520,300	\$3,606,200	County Board
2009	5/20/2010	\$1,085,900	\$2,520,300	\$3,606,200	TERC
2009	8/12/2009	\$1,085,900	\$2,520,300	\$3,606,200	County Board
2008	5/20/2010	\$1,085,900	\$2,520,300	\$3,606,200	TERC
2008	8/7/2008	\$1,085,900	\$2,520,300	\$3,606,200	County Board

¹⁴³ E13:14 (County's PVAL for 97 & Q contained in its Assessment Report for the 97 & Q appeal); E11:25 (County's PVAL for 97 & Q contained in its Assessment Report for the 108th & Fort appeal. As indicated at E11:12, the County uses nine Omaha Hy-Vees as equalization comparables, including the 97 & Q Hy-Vee, to justify its assessment actions regarding the 108th & Fort Hy-Vee, so the 97 & Q PVAL is included in the County's Assessment Report for tax year 2011).

The County’s Assessment Report sets forth the following assessment history regarding the Subject Property located at 88th & Center, which indicates a slight decrease to \$4,239,500 by the County Assessor and the County Board in tax year 2012 in comparison to the County Board’s \$4,380,900 assessment for tax years 2009 – 2011 (similar to the assessment history noted above regarding 97th & Q, this slight decrease is quite possibly in response to 2011/2012 market area sales of parcels similarly improved for supermarket use in the range of \$3 million to \$3.6 million while assessed in the range of \$4 million to \$4.5 million):¹⁴⁴

88th & CENTER Hy-Vee VALUATION/ASSESSMENT HISTORY

YEAR EFFECTIVE	DATE OF CHANGE	LAND VALUE	IMPROVE VALUE	TOTAL VALUE	REASON
2013	8/7/2013	\$2,496,900	\$1,785,900	\$4,282,800	County Board
2013	3/9/2013	\$2,496,900	\$1,785,900	\$4,282,800	County Assessor Reappraisal
2012	8/7/2012	\$2,496,900	\$1,742,600	\$4,239,500	County Board
2012	3/9/2012	\$2,496,900	\$1,742,600	\$4,239,500	County Assessor Reappraisal
2010	8/11/2010	\$2,496,900	\$1,884,000	\$4,380,900	County Board
2009	8/12/2009	\$2,496,900	\$1,884,000	\$4,380,900	County Board
2005	7/23/2005	\$2,496,900	\$2,171,100	\$4,668,000	County Board
2005	3/19/2005	\$2,496,900	\$3,305,800	\$5,802,700	County Assessor Reappraisal
2004	7/27/2004	\$2,321,500	\$3,178,500	\$5,500,000	County Board
2004	6/27/2004	\$2,321,500	\$4,578,500	\$6,900,000	County Board
2003	11/3/2015	\$2,321,500	\$4,578,500	\$6,900,000	S/C (Acronym Unknown)

The County’s Assessment Reports and the Taxpayer’s Appraisals for the three Hy-Vee supermarkets at issue herein are summarized as follows in terms of characteristics and valuation approaches (I note that the majority references the distinction between total improvement area and leasable area – in order to address this distinction, the chart and discussion/analysis below provides per square foot comparisons based on total improvement area):

¹⁴⁴ E18:15 (County’s PVAL for 88th & Center contained in its Assessment Report for the 88th & Center appeal).

TAXPAYER vs. COUNTY VALUATIONS OF SUBJECT PROPERTY PARCELS

	108 & FORT COUNTY 2011 (E11)	108 & FORT COUNTY 2012 (E12)	108 FORT TAXPAYER 2011/2012 (E20)	97 & Q COUNTY 2011 (E13)	97 & Q TAXPAYER 2011 (E21)	88 & CENTER COUNTY 2012 (E18)	88 & CENTER TAXPAYER 2012 (E24)
Land Area: Acre - Sq. Ft.	7.35 AC - 320,148 SF	7.35 AC - 320,148 SF	7.35 AC - 320,148 SF	7.12 AC - 310,147 SF	7.12 AC - 310,147 SF	5.79 AC - 252,212	5.79 AC - 252,212
Total Improvement Sq. Ft.	75,414	75,414	75,414	60,173	60,173	72,219	72,219
Year Built	1998/partial remodel 2010	1998/partial remodel 2010	1998/partial remodel 2010	1989	1989	1999	1999
Condition	Average	Average	Good	Average	Good	Average	Good
Quality	Average	Average	None	Average	None	Average	None
Leasable Area (Sq. Ft.)	70,434	70,434	75,414	60,173	60,173	62,808	72,219
Market Rent	\$7.00	\$7.50	\$5.50	\$8.00	\$5.25	\$7.50	\$6.00
Potential Gross Income	\$493,038	\$475,430	\$414,777	\$481,384	\$315,908	\$471,060	\$433,314
Vacancy/Collection Loss	5% of PGI	10% of PGI	8% of PGI	10% of PGI	8% of PGI	10% of PGI	8% of PGI
Effective Gross Income	\$468,386	\$475,430	\$373,148	\$433,246	\$283,896	\$423,954	\$390,561
Total Expenses	8% of EGI	10% of EGI	6% of EGI	10% of EGI	6% of EGI	10% of EGI	5% of EGI
Total Expenses	\$37,471	\$47,543	\$22,624	\$43,324	\$18,052	\$42,395	\$21,666
Net Operating Income	\$430,915	\$427,887	\$350,524	\$389,921	\$265,844	\$381,559	\$368,895
Loaded Cap Rate	8.75%	9.00%	9.67%	9.00%	9.68%	9.00%	9.68%
Income Value	\$4,924,700	\$4,754,300	\$3,620,000	\$4,332,500	\$2,750,000	\$4,239,500	\$3,810,000
Sales Comp. Value	None	None	\$3,770,000	None	\$2,890,000	None	\$3,900,000
Cost Value	None	None	\$3,620,000	None	\$2,740,000	None	\$3,810,000
Land Value	\$800,400	\$800,400	\$960,000	\$1,085,900	\$1,090,000	\$2,496,900	\$1,010,000
Land Value Per Sq. Ft.	\$2.50	\$2.50	\$3.00	\$3.50	\$3.50	\$9.90	\$4.00
Improvement Value	\$4,124,300	\$3,953,900	\$2,810,000	\$3,246,500	\$1,800,000	\$1,742,600	\$2,890,000
Value Opinion (Land + Imp)	\$4,924,700	\$4,754,300	\$3,770,000	\$4,332,400	\$2,890,000	\$4,239,500	\$3,900,000
Value Opinion Per Total Improvement Sq. Ft.	\$65	\$63	\$49	\$72	\$48	\$59	\$54

As indicated, the Taxpayer's appraiser performed a sales comparison, cost and income valuation for the three Subject Property parcels. The Taxpayer's appraisals state that while the estimates used in the income approach are reasonable and properly supported, the valuation opinions rely in substantial part on the sales comparison approach for the tax years at issue as follows: (1) 108th & Fort - \$3,770,000 for tax years 2011 and 2012 (\$49 per sq. ft. vs. \$65/\$63 County); (2) 97th & Q - \$2,890,000 for tax year 2011 (\$48 per sq. ft. vs. \$72 County); (3) 88th & Center - \$3,900,000 for tax year 2012 (\$54 per sq. ft. vs. \$59 County).¹⁴⁵ As the above chart also indicates, the Taxpayer's income approach rental rates range from \$5.25 - \$6 per sq. ft. for the three Subject Property parcels versus the County's range of \$7 - \$8 per sq. ft. (108th & Fort - \$5.50 for tax years 2011 & 2012 vs. the County's \$7 and \$7.50 rates for those same years, respectively; 97th & Q - \$5.25 for tax year 2011 vs. the County's \$8 rate; and 88th & Center - \$6 for tax year 2012 vs. the County's \$7.50 rate).

¹⁴⁵ E20:85, E21:84, E24:83.

The evidence indicates that the County Board's determinations for 108th & Fort (\$4,924,700 for tax year 2011 and \$4,754,300 for tax year 2012), 97th & Q (\$4,332,500 for tax year 2011), and 88th & Center (\$4,239,500) rely on the County Assessor's income approach.¹⁴⁶ The County Board's documentary evidence indicates that the County Assessor did not perform cost or sales comparison approach valuations, in part due to an alleged lack of "comparable" "supermarket" sales.¹⁴⁷

III. VALUATION ANALYSIS

A. THE TAXPAYER'S APPRAISALS

The Taxpayer's appraisals for the three Subject Property parcels, found at Exhibits 20, 21 and 24, reference a variety of tasks completed for valuation purposes and contain detailed analysis regarding the sales, income and cost approaches to valuation. For example, the Taxpayer's appraiser interviewed "several sales brokers across the state of Nebraska as well as the head of disposition of vacated stores for Walmart" to assist with the determination of his opinion of value for each Subject Property parcel.¹⁴⁸

The Taxpayer's appraisals include detailed information for each comparable used for sales comparison approach and income approach rent rate purposes, including comparison in terms of population and median income factors and explanation regarding adjustments for financing terms, conditions of sale, market conditions, size, location, age and condition.¹⁴⁹ Contrary to the assertion contained in the majority opinion, the written appraisals and the testimony of the Taxpayer's appraiser contain credible support for the adjustments to the comparables used for sales comparison approach and income approach rent rate purposes.

As further discussed and charted in detail below, the testimony of the Taxpayer's appraiser and his tax year 2012 written appraisal for 88th & Center reference the sales of three similar-sized former or current supermarkets in Douglas County in the 2011/2012 timeframe that support

¹⁴⁶ E20, E21, E24.

¹⁴⁷ See, E11, E12, E13:13 (alleged lack of comparable supermarket sales) & E18.

¹⁴⁸ E20:22, E21:22, E24:20.

¹⁴⁹ See, E20, E21, E24. The sales comparison charts found at E20:57, E21:56 & E24:54 set forth population and median income figures within a five-mile radius for each respective Subject Property parcel and the Taxpayer's sales comparables, while the charts at E20:69, E21:68 & E24:67 set forth adjustments to each comparable. The Taxpayer's charts of comparable rent rates and listings found at E20:72, E21:71 & E24:70 set forth population and median income figures within a five-mile radius for each respective Subject Property parcel and the Taxpayer's comparables. Exhibits 20, 21 and 24 also contain detailed written analysis regarding the Taxpayer's sales comparables and rent rate comparables, including the basis for adjustments.

his opinions of value for all Subject Property parcels.¹⁵⁰ These sales, which include a former Hy-Vee and two Bag N Save supermarkets on or near Dodge Street in Omaha, ranged from \$47 to \$54 per sq. ft. and support the \$48 to \$54 per sq. ft. range contained in the Taxpayer's appraisals of the three Subject Property parcels.¹⁵¹ These three sales also support the Taxpayer's \$5.25 - \$6 per sq. ft. income approach rental rates charted above for the three Subject Property parcels and show that the County's \$7 - \$8 per sq. ft. rates do not reflect market conditions.

Particularly in light of the importance of "value-in-exchange" for purposes of valuing real property under Nebraska Statutes section 77-112 discussed in detail below, the Taxpayer's use of the vacant parcel at 306 North Saddle Creek (former Target store, which vacated in 2006 - \$4 per sq. ft. rental listing supports Taxpayer's \$5.25 - \$6 rental rates) for sales comparison and income approach purposes is useful and significant because it demonstrates that vacated retail "big-box" improvements often sit idle for years and that making money via the improvement of land for retail use is not automatic. The sales comparable located at 129th & Center (former Super Target, which included a supermarket grocery) also illustrates the difficulty in selling vacated "big-box" locations and the significant risk associated with improvement of land for retail use.

The Taxpayer's use of Bellevue (Sarpy County, Nebraska), Hastings (Adams County, Nebraska), North Platte (Lincoln County, Nebraska), Missouri and Iowa comparables for sales comparison and income approach purposes is well-explained and reasonable.¹⁵² Contrary to the assertions of the County, these comparables are useful in terms of supporting the Taxpayer's valuation opinions for each of the three Subject Property parcels, especially considering the following: (1) the County's testimony and documentary evidence indicating that comparable

¹⁵⁰ See, E24 (Taxpayer's 88th & Center appraisal for tax year 2012, which references the April 2012 sales of Bag N Save supermarkets on 76th & Dodge and near 114th & Dodge). With respect to the sale of the former Oakview Mall Hy-Vee located near 144th & Center in Omaha in the 2011/2012 timeframe, the testimony of the Taxpayer's appraiser indicates that this transaction supported his opinions of value for all three Subject Property parcels for tax year 2011 (108th & Fort and 97th & Q) and for tax year 2012 (108th & Fort and 88th & Center). I note that the reference to the two April 2012 Bag N Save sales are only referenced in the Taxpayer's appraisal for 88th & Center because that appeal is focused on tax year 2012 only, while the Taxpayer's appraisals for 108th & Fort and 97th & Q have a retrospective effective date of January 1, 2011, prior to the Bag N Save transactions (as discussed elsewhere, the Taxpayer's appraiser testified that his \$3,770,000 written opinion of value for 108th & Fort for tax year 2011 is also his opinion of value for tax year 2012). I also note that the Taxpayer's 88th & Center appraisal for tax year 2012 includes the sales of two other Omaha supermarkets in 2012, including a Bag N Save at 2011 North 156th Street and a No Frills supermarket at 3548 Q Street – while these two sales support the Taxpayer's opinions of value for all three Subject Property parcels, this analysis will focus on the sale of the former Oakview Hy-Vee and the two Bag N Save supermarkets located on or near Dodge Street because Douglas County Assessor's Office Property Record Files ("PRFs") are included in evidence for those parcels.

¹⁵¹ See, E20, 21, 24 (Taxpayer's appraisals for the three Subject Property parcels); E11:41 – E11:45 (County's PRF for the former Oakview Hy-Vee); E12:22 – 12:26 (76th & Dodge Bag N Save PRF); E12:27 – 12:31 (114th & Dodge Bag N Save PRF).

¹⁵² See, E20, 21, 24 (Taxpayer's appraisals for the three Subject Property parcels, which include detailed information for each comparable used for sales comparison approach and income approach rent rate purposes, including explanation regarding adjustments for financing terms, conditions of sale, market conditions, size, location, age and condition).

supermarket sales in the Subject Property’s market area were sparse in the aftermath of the 2007 – 2008 economic crisis; (2) the insufficiency of documentary evidence offered by the County to support its \$7 - \$8 per sq. ft. income approach rent rates, which is discussed in further detail below; and (3) the difficulty in acquiring rental rate information from competitors in the “very competitive” Omaha market.¹⁵³

I note that the Nebraska Supreme Court has joined several other states in accepting the use of sales comparables outside of the taxing jurisdiction at issue, thereby recognizing that economic markets are not always limited to areas within city, county or state lines.¹⁵⁴ In *Y Motel, Inc. v. State Dept. of Roads*, the Nebraska Supreme Court accepted the use of comparable sale properties located in Kansas, Missouri, Arkansas, Oklahoma, and Texas for purposes of valuing the real property component of a Nebraska parcel improved with a motel, noting that the appraiser confined his market area to the plains states west of the Mississippi River and east of the Rockies similar to the Taxpayer’s Hy-Vee appraisals.¹⁵⁵

The Taxpayer’s capitalization rate analysis is credible in the aftermath of the economic crisis. I also note that the analysis of the County’s Atlanta-based capitalization rate expert, Kenneth Voss of Kenneth Voss & Associates, LLC, relies significantly on nationally-recognized studies performed by the Taxpayer’s expert, Mr. Riggs, who is the Chairman and President of Real Estate Research Corporation.¹⁵⁶ Moreover, Mr. Riggs focuses his capitalization rate analysis on

¹⁵³ See, E13:13 (County’s Assessment Report for the 97 & Q Hy-Vee, stating that a “lack” of supermarket sales existed in the aftermath of the economic crisis).

¹⁵⁴ *Y Motel, Inc. v. State Dept. of Roads*, 227 N.W.2d 869, 193 Neb. 526 (Neb. 1975) (Nebraska Supreme Court) (Court accepted use of sales comparables located in Nebraska, Kansas, Missouri, Arkansas, Oklahoma, and Texas for purposes of valuing a Nebraska parcel improved with a motel); *Bartlett & Co. Grain v. Board of Review*, 253 N.W.2d 86, 94 (Iowa 1977) (Iowa Supreme Court held that sales of grain terminals in other states were comparable to the taxpayer’s terminal in Sioux City Iowa for market value purposes, stating that the economic market included Omaha, Kansas City and Minneapolis and that “[w]hen from the nature of the property the market for the purchase and sale encompasses a wider area, the wider area becomes the field for investigation. . . . This is necessary in order to give meaning to the sales prices approach”); *Great Atlantic & Pacific Tea Co. v. Kiernan*, 366 N.E.2d 808, 812 - 813 (N.Y. 1977) (New York Court of Appeals held that “economic realism” justified the taxpayer’s use of sales of comparable food processing properties in other states where the evidence showed that the market for properties of that type was regional); *State v. Therrien*, 461 A.2d 106 (N.H. 1983) (trial court erred in excluding evidence of sale of Maine property as matter of law for purposes of determining whether property in Maine was comparable to property in New Hampshire); *City of Springfield v. Love*, 721 S.W.2d 208, 217 (Mo. App. 1986) (“the test of admissibility of evidence of comparable sales is not whether it lies one side or the other of a political dividing line . . . but is whether the land sold is comparable in character and locality to the land taken”); *Hays v. State*, 342 S.W.2d 167, 172 (Tex. Civ. App. 1960); *Knollman v. United States*, 214 F.2d 106, 108 (6th Cir. 1954) (“the law of supply and demand so important on the question of market value . . . does not cease operating at the boundary of a township”). I note that while some of the cases referenced in this footnote involve valuation for eminent domain purposes rather than property taxation purposes, in both contexts market value of real property is at issue.

¹⁵⁵ *Y Motel, Inc. v. State Dept. of Roads*, 227 N.W.2d 869, 873, 875, 193 Neb. 526, 530, 534 (Neb. 1975)

¹⁵⁶ E25:5 – 6, E26:5 – 6, E27:5 - 6, E28:5 - 6.

tax years 2011 and 2012, while the County's study conducted by Mr. Voss is intended for 2010 tax year purposes and thus does not contain analysis of information beyond 2009.¹⁵⁷

B. CURRENT MARKET CONDITIONS REQUIREMENT

The Taxpayer asserts that the onset of the economic crisis in 2007 created an environment wherein extremely tight credit conditions and distressed or otherwise depressed transactions were a significant factor in the Subject Property's market area for tax year 2011 and 2012 purposes. The Taxpayer also asserts that the County's income approach valuations of the three parcels at issue herein unjustifiably relied in substantial part on a single \$9.75 per sq. ft. listing dated in 2010 pertaining to a former Hy-Vee supermarket parcel that the evidence indicates sold for significantly less than its assessed value in the 2011/2012 timeframe.

The testimony of the County Board's witness, Linda Rowe, an employee of the Douglas County Assessor's Office, indicates that the economic crisis and its aftermath depressed commercial values in the Omaha market. Additionally, the County Board's own documentation received in evidence by the Commission, authored by Kenneth Voss & Associates, LLC, states as follows:

The current weakness weighting down retail properties is the pullback in consumer spending and low level of consumer confidence. With continuing uncertainty in both stock of wealth and flow of future income, there appears to be little basis for optimism required to maintain or increase spending and therefore keep retail businesses afloat. With tenants downsizing in terms of their space or going out of business, **the near-term future of retail space remains daunting.**¹⁵⁸

General guidance regarding consideration of the economic crisis by the County in the mass appraisal context is contained in *Property Assessment Valuation*, which is published by the

¹⁵⁷ E20 (108th & Fort Hy-Vee Supermarket - the Commission notes that the Taxpayer's appraiser testified that his Appraisal found at Exhibit 20 with an effective date of January 1, 2011 also reflects his opinion for this Subject Property parcel as of January 1, 2012); E21 (97th & Q Hy-Vee Supermarket - tax year 2011 analysis); E24 (88 & Center Hy-Vee Supermarket - tax year 2012 analysis); . E25:1 - 2 (108 & Fort County Rebuttal Packet 2011); E26:4 - 26:16 (108 & Fort County Rebuttal Packet 2012); E27:4 - 27:16 (97 & Q County Rebuttal Packet); E28:4 - E28:16 (88 & Center County Rebuttal Packet).

¹⁵⁸ E28:11; See, E25 - E28 (County Board's Rebuttal packet) (emphasis added). According to the County Board's Rebuttal packet, 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, pages five and six of Exhibit 25 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" - page 3 of Exhibit 20 confirms this testimony).

International Association of Assessing Officers.¹⁵⁹ For example, *Property Assessment Valuation* states that assessment officials are required to review factors such as vacancy factors and distressed sale rates as a part of developing and maintaining market area databases.¹⁶⁰ Additionally, in addressing mass appraisal techniques such as the model used by the County to value the Subject Property, *Property Assessment Valuation* states as follows:

Although the structure of a mass appraisal model may be valid for many years, **the model is usually recalibrated or updated every year.** To update for short periods, trending factors may suffice. Over longer periods, as the relationships among the variables in market value change, complete market analyses are required. **The goal is for mass appraisal equations and schedules to reflect current market conditions.**¹⁶¹

The New Jersey Tax Court stated as follows regarding consideration of “current market conditions” in a 2013 opinion that reduced the assessed value of the Borgata casino from \$2.26 billion to \$880 million in tax year 2009 and to \$870 million in tax year 2010 due to the adverse impact of the national economic crisis and increased gaming competition (the \$2.26 billion assessment stemmed from a reappraisal for tax year 2008, similar to the experience of the Taxpayer herein):

The national economy began to soften in late 2007, primarily due to the subprime housing crisis. By October 1, 2008, the economy suffered a significant downturn triggered by the collapse of the mortgage markets and the failure of Bear Stearns and Lehman Brothers. The government-sanctioned bailout of Bear Stearns as a banking institution “too big to fail” set off alarms concerning the stability of the American banking system. The mid-September 2008 collapse of Lehman Brothers led to a sharp drop-off in the stock market and the beginning of the worst recession since the Great Depression. . . .

By October 1, 2009, the national economic condition had further deteriorated. According to one expert who testified at trial “as of October 1, 2009, the macro economy had entered into what many commentators termed a ‘New Normal,’ meaning that the developed nations would enter into a prolonged period of low growth, high unemployment and a need for de-leveraging. This would add to the uncertainty surrounding the gaming industry in general and in Atlantic City specifically, as of the valuation date.” Unemployment rates started to increase significantly in 2008 and were still rising as of September 2009. This fact is significant because low unemployment rates are indicative of increased consumer spending on such discretionary items as gaming and entertainment. The

¹⁵⁹ *Property Assessment Valuation*, 3rd Ed., International Association of Assessing Officers, 2010, at pgs. 73 - 83.

¹⁶⁰ *Property Assessment Valuation*, 3rd Ed., International Association of Assessing Officers, 2010, at pgs. 77 - 83.

¹⁶¹ *Property Assessment Valuation*, 3rd Ed., International Association of Assessing Officers, 2010, at p. 417-18 (emphasis added).

perception that the nation's economic trouble was not a transitory downturn, but a long-term recalibration of the economy, was hardening among the public and participants in the financial markets as of the second valuation date.¹⁶²

The Illinois Court of Appeal stated as follows regarding consideration of “current market conditions” in a 2012 opinion affirming a lower court’s approval of a \$300,000 judicial foreclosure sale of commercial real estate secured by a note with a principal balance in the amount of \$824,540:

Our courts today face a similar situation as that faced by the court in [1937] *Levy* during the Great Depression, in that many properties were purchased during a time when real estate values greatly increased (referred to as “the real estate bubble”) **and those same properties plummeted in value after 2006 [and] continuing to the present.** Consequently, many property owners owe much more to the lenders than what the property is worth. While this fact is unquestionably tragic, the value of a given piece of property must be determined by considering all of the pertinent factors as they exist at the time of the sale, whether such sale is made in the open market or through a judicial sale as a result of a foreclosure action.¹⁶³

The Nebraska Supreme Court has also recently considered “current market conditions” in the aftermath of the economic crisis. In *County of Lancaster v. Union Bank & Trust Co. (In re Estate of Craven)*, the Court upheld a ruling issued by the Lancaster County Court that the \$113,000 purchase price of property sold at an estate auction in a weak real estate market after the decedent’s death in 2008 stemmed from an arm’s length transaction and was the best evidence of value for inheritance tax purposes.¹⁶⁴

The County Board’s witness, Ms. Rowe, testified that the income approach valuations of the Subject Property parcels are based on a review of the approximate 40 to 50 supermarkets in Douglas County. She also testified that the details regarding this review were contained in her file that was not submitted in evidence before the Commission. Rather, other than Ms. Rowe’s testimony, the County’s \$7 - \$8 per square foot income approach rental rates for the three Subject Property parcels rely in substantial part on a single \$9.75 per square foot rental listing

¹⁶² *Marina District Development Co., LLC v. City of Atlantic City*, DOCKET NOS. 008116-2009, 008117-2009, 003188-2010, 003194-2010, at pgs. 1 – 2, 8 – 9 (New Jersey Tax Court 2013).

¹⁶³ *Sewickley, LLC v. Chicago Title and Trust Company*, 974 N.E.2d 397, 406 (Court of Appeal of Illinois, First District, Second Division 2012) (emphasis added).

¹⁶⁴ *County of Lancaster v. Union Bank & Trust Co. (In re Estate of Craven)*, 281 Neb. 122, 794 N.W.2d 406 (Neb. 2011).

pertaining to the Hy-Vee location adjacent to Oakview Mall near 144th & Center (this former Hy-Vee location is sometimes referred to herein as the “Oakview Hy-Vee”).¹⁶⁵

The supermarket business in Douglas County is “very competitive” according to the Taxpayer’s appraisals, which provide that Hy-Vee’s 16.8% market share in 2011 generated by its 13 area stores ranked second behind Walmart (20.4% - 9 stores) and ahead of Kroger (a/k/a Baker’s – 13.3% - 11 stores), Nash Finch Foods (a/k/a No Frills - 11.6% - 16 stores), Bag N Save (10.8% - 11 stores), Target (5.1% - 5 stores) and Sam’s Club (4.8% - 2 stores).¹⁶⁶ Consequently, the County’s reliance on the 2010 \$9.75 rental rate listing of the former Oakview Hy-Vee to the apparent exclusion of all other supermarkets in the competitive Omaha market is unjustified and diminishes the credibility of its valuation actions regarding the three Subject Property parcels for tax years 2011 and 2012 in the aftermath of the economic crisis.

The Taxpayer’s appraiser testified at the hearing before the Commission that the former Oakview Hy-Vee near 144th & Center sold for approximately \$3,000,000 (\$47 per sq. ft., assuming a sale price of \$3,064,500 equaling the County Board’s 2012 assessment charted below) in the 2011/2012 timeframe when the County Assessor and the County Board both assessed the parcel in excess of \$4,000,000, and the testimony of the County’s witness, Ms. Rowe, corroborates this testimony. This testimony is consistent with the County’s Assessment Reports, which include the following assessment history regarding the former Oakview Hy-Vee sale parcel (according to a listing agreement found at page 2 of Exhibits 25, 26, 27 & 28, Hy-Vee vacated this location in the summer of 2010):¹⁶⁷

¹⁶⁵ E25:1 - 2 (108 & Fort Rebuttal Packet 2011); E26:1 - 2 (108 & Fort Rebuttal Packet 2012); E27:1 - 2 (97 & Q Rebuttal Packet); E28:1 - 2 (88 & Center Rebuttal Packet); E11:14 (108 & Fort County Assessment Report for 2011), E12:32(108 & Fort County Assessment Report for 2011), E13:65 (97 & Q County Assessment Report); E18:30 (88 & Center County Assessment Report).

¹⁶⁶ E20:38, E21, E24. The Commission notes that the market share information contained in the Taxpayer’s appraisal references the publication known as *Chain Store Guides* (2011), which analyzes the Omaha – Council Bluffs, IA metro area. Thus, the 67 total supermarkets analyzed include some Council Bluffs operations – consequently, the testimony by the County’s witness, Ms. Rowe, which indicated that Douglas County had 40 to 50 supermarket operations in the 2011/2012 tax year timeframe, is plausible.

¹⁶⁷ E13:24. I note that the County’s PRF for the former Oakview Hy-Vee sale parcel inexplicably does not contain any sales history as required by Nebraska law. I also note that I do not give weight to the County’s assertion referenced in the majority opinion regarding an alleged plan to demolish the Oakview supermarket improvement after Hy-Vee vacated in 2010, for the reason that the original building remained for at least several years after the sale thereof in the 2011/2012 timeframe.

FORMER OAKVIEW Hy-Vee VALUATION/ASSESSMENT HISTORY

YEAR EFFECTIVE	DATE OF CHANGE	LAND VALUE	IMPROVE VALUE	TOTAL VALUE	REASON
2013	3/9/2013	\$2,155,000	\$818,800	\$2,973,800	County Assessor Reappraisal
2012	8/7/2012	\$2,155,000	\$909,500	\$3,064,500	County Board
2012	3/9/2012	\$2,155,000	\$2,026,900	\$4,181,900	County Assessor Reappraisal
2011	8/9/2011	\$2,155,000	\$1,855,000	\$4,010,000	County Board
2010	8/11/2010	\$2,155,000	\$1,855,000	\$4,010,000	County Board
2005	7/23/2005	\$2,155,000	\$1,855,000	\$4,010,000	County Board
2002	7/3/2002	\$2,155,000	\$2,745,000	\$4,900,000	County Board
2000	7/5/2000	\$2,155,000	\$3,258,500	\$5,413,500	County Board
2000	5/17/2000	\$2,155,000	\$3,665,800	\$5,820,800	TERC
2000	3/15/2000	\$2,014,000	\$3,426,000	\$5,440,000	County Assessor Reappraisal

Significantly, as the above County PVAL indicates, after its sale the assessment of the former Oakview Hy-Vee dropped to \$3.06 million in tax year 2012 and \$2.97 million in 2013. As also indicated in the related discussion/chart in the next section hereof that compares the County/Taxpayer valuations of each of the three Subject Property parcels with the pre-sale and post-sale assessments by the County relating to the former Oakview Hy-Vee and two Bag N Save supermarkets, an approximate \$3 million sale/assessment supports only a \$5.37 rental rate for the former Oakview Hy-Vee, rather than the \$7 amount used by the County in its \$4.01 million income valuation of that parcel for tax year 2011 (this \$5.37 amount is derived by using the County Board’s \$3,064,500 valuation/assessment for tax year 2012 and the following County income approach variables used in its \$4,010,000 assessment for 2011: vacancy rate – 5% of potential gross income; expense ratio – 8% of effective gross income; and capitalization rate – 9.50%).¹⁶⁸

Additionally, the County’s substantial if not total reliance on the single \$9.75 per square foot rental listing pertaining to the Oakview Hy-Vee is illustrated in the County’s own Assessment Reports for each of the three Subject Property parcels. Significantly in this regard, the County’s Assessment Reports for each of the three Subject Property do **NOT** reference or include **ANY** rental rates for **ANY** of the approximate 40 to 50 Omaha area supermarkets that the County’s witness testified were used to construct the County’s \$7 - \$8 per sq. ft. income models for tax

¹⁶⁸E11:41 – E11:45 (former Oakview Hy-Vee PRF, including the County’s income approach documentation).

years 2011 and 2012.¹⁶⁹ Thus, while the County's witness testified that rent rates of other supermarkets in the competitive Omaha market were considered, the absence of documentation to support this assertion other than the former Oakview Hy-Vee listing from 2010 diminishes the credibility of the use of \$7 - \$8 per sq. ft. rent rates for tax years 2011 and 2012.¹⁷⁰

C. SUPERMARKET SALES IN DOUGLAS COUNTY REFLECT CURRENT MARKET CONDITIONS IN THE AFTERMATH OF THE ECONOMIC CRISIS & SUPPORT TAXPAYER'S APPRAISALS

At least three Omaha supermarket sales in the 2011 – 2012 timeframe support the Taxpayer's opinion of value for the three Subject Property parcels, including the sale of a former Hy-Vee supermarket parcel adjacent to Oakview Mall near 144th & Center discussed in the previous section and the sales of Bag N Save supermarkets at 76th & Dodge and near 114th & Dodge. These transactions demonstrate that parcels improved for supermarket operations that either had ceased (Oakview Hy-Vee, referenced in testimony by Mr. Riggs & Ms. Rowe) or were continuing (Dodge Street Bag N Save stores, referenced in testimony and the Taxpayer's appraisal found at Exhibit 24 for the 88th & Center Hy-Vee for tax year 2012) generated sale prices ranging from \$3 million to \$3.6 million while assessed in the range of \$4.01 million (Oakview Hy-Vee) to \$4.5 million (Dodge Street Bag N Save stores). I am persuaded that these sales for amounts significantly less than assessed value show that the County's assessment actions regarding the three Subject Property parcels failed to sufficiently consider current market conditions in the aftermath of the economic crisis.

The significance of the above-referenced Douglas County supermarket sales is illustrated by Nebraska Statutes section 77-112, which as indicated in the majority opinion governs the determination of actual/market value for real property tax purposes:

¹⁶⁹ E25:1 - 2 (108 & Fort Rebuttal Packet 2011); E26:1 - 2 (108 & Fort Rebuttal Packet 2012); E27:1 - 2 (97 & Q Rebuttal Packet); E28:1 - 2 (88 & Center Rebuttal Packet); E11:14 (108 & Fort County Assessment Report for 2011), E12:32(108 & Fort County Assessment Report for 2011), E13:65 (97 & Q County Assessment Report); E18:30 (88 & Center County Assessment Report).

¹⁷⁰ The County's inappropriate focus on the Hy-Vee operation to the exclusion of other supermarket properties in the "very competitive" Omaha market is further illustrated by its "Equalization Comparables" charts found at Exhibit 11, page 12 and Exhibit 13, page 9. These charts reference nine Hy-Vee supermarkets either in prime Omaha locations or subject to the benefits of tax increment financing (51 & Center Hy-Vee) -- the charts, however, do **NOT** reference **ANY** of the many supermarkets that compete with Hy-Vee in the Omaha market.

Actual value of real property for purposes of taxation means the market value of real property in the ordinary course of trade. Actual value may be determined using professionally accepted mass appraisal methods, including, but not limited to, the (1) sales comparison approach using the guidelines in section 77-1371, (2) income approach, and (3) cost approach. **Actual value is the most probable price expressed in terms of money that a property will bring if exposed for sale in the open market, or in an arm's length transaction, between a willing buyer and willing seller, both of whom are knowledgeable concerning all the uses to which the real property is adapted and for which the real property is capable of being used.** In analyzing the uses and restrictions applicable to real property, the analysis shall include a consideration of the full description of the physical characteristics of the real property and an identification of the property rights being valued.¹⁷¹

The Nebraska Supreme Court has consistently held that the “value-in-exchange” language of Nebraska Statutes section 77-112 highlighted above is a critical component of the real property tax assessment system (this system of taxation is sometimes referred to herein as “ad valorem taxation”).¹⁷² The Nebraska Supreme Court recently illustrated the importance of the “value-in-exchange” concept under Nebraska Statutes section 77-112 in *County of Lancaster v. Union Bank & Trust Co. (In re Estate of Craven)* by affirming a ruling issued by the Lancaster County Court that the \$113,000 purchase price of property sold at an estate auction in a weak real estate market after the decedent’s death in 2008 stemmed from an arm’s length transaction and was the best evidence of value for inheritance tax purposes.¹⁷³ Significantly, in support of this decision, the *In re Estate of Craven* Court set forth the following excerpt from a 1937 Great Depression-era ruling by the Nebraska Supreme Court where the sale price of a parcel subject to \$20,000 opinion evidence did not exceed \$12,000 on three separate occasions:

While opinion evidence is almost always necessary in fixing the market value of land, it is not always controlling. The trial court apparently gave it little weight in the case at bar when the results of three public auctions of the land were presented to it. In this we believe the trial court was justified. Opinion evidence must give way to facts, and, after three sales, none of which brought over \$12,000, it would

¹⁷¹ Neb. Rev. Stat. §77-112 (Reissue 2009) (emphasis added).

¹⁷² See, *County of Lancaster v. Union Bank & Trust Co. (In re Estate of Craven)*, 281 Neb. 122, 794 N.W.2d 406 (Neb. 2011) (Real property sold at auction is sold in the ordinary course of trade within the meaning of §77-112); *Firethorn Invest. v. Lancaster Cty. Bd. of Equal.*, 261 Neb. 231, 622 N.W.2d 605 (2001) (Actual value of real property for purposes of taxation under §77-112 shall mean the market value of real property in the ordinary course of trade); *US Ecology, Inc. v. Boyd Cty. Bd. of Equal.*, 256 Neb. 7, 588 N.W.2d 575 (1999) (The statutory measure of actual value is not what an individual buyer may be willing to pay for property, but, rather, its market value in the ordinary course of trade). See also, *The Dictionary of Real Estate Appraisal*, Fourth Edition, Appraisal Institute, p. 104 (2002) [Defining "exchange value" for economics purposes as “the attribution of value to goods or services based on how much can be obtained for them in exchange for other goods and services. ... Market value as an appraisal concept is a type of exchange value.”].

¹⁷³ *County of Lancaster v. Union Bank & Trust Co. (In re Estate of Craven)*, 281 Neb. 122, 794 N.W.2d 406 (Neb. 2011).

seem that the trial court was amply justified in finding that the market value did not exceed that amount.¹⁷⁴

The Taxpayer asserted that the County Assessor and the County Board overvalued the three Subject Property parcels in part because Hy-Vee has a superior reputation in terms of management and generation of profit in the “very competitive” Omaha market. In other words, the Taxpayer argues that the County inappropriately imposed a premium “use” tax valuation on the three Subject Property parcels based on Hy-Vee’s strong management skill.

In contrast to the “value-in-exchange” language of Nebraska Statutes section 77-112 highlighted above, the “value-in-use” of a particular parcel is “[t]he value a specific property has to a specific person or specific firm **as opposed to the value to persons or the market in general.**”¹⁷⁵ In a useful analysis of this contrast, the Michigan Court of Appeals stated as follows in holding that real property must be valued based on its “usual” or ordinary course of trade sale price rather than the value-in-use to the owner or user, even in the case where the value to the owner/user is significantly more than its value-in-exchange: “[A]ttributing value to the property or what it could command in the marketplace due to its use by the owner imposes a ‘use tax’, not an ad valorem property tax.”¹⁷⁶

Moreover, *Mass Appraisal of Real Property*, which is published by the International Association of Assessing Officers, states the basic concept that only the value of the real property and not that value of the business which is attributable to individual management style or experience is subject to ad valorem taxation.¹⁷⁷ Similarly, while not controlling in this case, the Michigan Supreme Court stated as follows in holding that the value of real property to the owner is irrelevant: “The Constitution and the General Property Tax require that property tax assessments be based on **market** value, **not value to the owner.**”¹⁷⁸

In light of the importance of “value-in-exchange” under Nebraska Statutes section 77-112, the sale of the former Hy-Vee supermarket parcel adjacent to Oakview Mall discussed previously and the sales of Bag N Save supermarkets at 76th & Dodge and near 114th & Dodge are instructive for purposes of assessing current market conditions and avoiding the inappropriate

¹⁷⁴ *County of Lancaster v. Union Bank & Trust Co. (In re Estate of Craven)*, 281 Neb. 122, 128, 794 N.W.2d 406, 410 - 411 (Neb. 2011), quoting *Lincoln Joint Stock Land Bank v. Fuller*, 132 Neb. 677, 273 N.W. 14 (1937).

¹⁷⁵ *The Dictionary of Real Estate Appraisal*, Fourth Edition, Appraisal Institute, p. 306 (2002) (emphasis added).

¹⁷⁶ *Safran Printing Co. v. City of Detroit, Wayne County*, 276 N.W.2d 602, 88 Mich.App. 376 (Mich.App. 1979)

¹⁷⁷ *Mass Appraisal of Real Property*, International Association of Assessing Officers, p. 158 (1999).

¹⁷⁸ *First Federal Savings & Loan Association v. City of Flint*, 415 Mich. 702, 703, 329 N.W.2d 755 (1982) (emphasis added).

taxation of Hy-Vee management.¹⁷⁹ In other words, use of these sales as indicators of value facilitates the accurate assessment of the real property components of the three Subject Property parcels and avoids the imposition of a business or use tax based on Hy-Vee's strong management reputation.

The County's Assessment Reports include the following assessment history regarding the Bag N Save sale parcel located at 76th & Dodge, which sold for \$3,657,000 (\$54.60 per sq. ft.) on April 5, 2012, and for \$3,300,000 (\$49 per sq. ft.) in 2004 -- this PVAL illustrates the County's over-assessment of supermarkets pre-crisis and post-crisis because the April 2012 sale for \$3,657,000 occurred after the County Assessor's \$4,518,200 reappraisal the previous month, and because the 2004 sale for \$3,300,000 occurred while assessed by the County at \$6,365,600 (see 2002 - 2005 assessment rows on chart):¹⁸⁰

¹⁷⁹ The majority addresses the value-in-exchange language in this dissent by referencing the actual lease amounts for each Subject Property parcel found at E20:71 (108th & Fort actual rental rate of \$9.17 per sq. ft., pursuant to a lease with an initial 20-year term that commenced on March 1, 2000, prior to the economic crisis), E21:70 (97th & Q actual rental rate of \$6.08 per sq. ft., pursuant to a lease with an initial 20-year term that commenced on November 7, 1989), and E24:69 (88th & Center actual rental rate of \$13.24 per sq. ft., pursuant to a lease with an initial 20-year term that commenced on March 1, 2000, prior to the economic crisis; I also note that the PVAL charts set forth previously indicate that the land component of this parcel is valued by the County at \$2,496,900 for tax year 2012, while the land components of 108th & Fort & 97th & Q are valued at \$800,400 & \$1,085,900, respectively). Not only does the majority's language add to the County's focus on Hy-Vee to the exclusion of the many other supermarkets in the "very competitive" Omaha market, it is important to note that the Taxpayer's appraiser states at E20:71, E21:70 and E24:69 that these actual rent rates are "not considered indicative of current market rents" due to return on investment considerations. Not only is the standard market rent rather than actual rent, it is more than plausible for a variety of reasons that these lease amounts for the Subject Property parcels have no relation at all to market rent rates, especially in the aftermath of the economic crisis. Some of these reasons include the following: (1) in a "tenant market" landlords often grant concessions in lieu of reducing contract rent in order to remain competitive in a market that is not as favorable for tenants; (2) landlords often grant concessions in lieu of reducing contract rent in order to retain the ability to sell leased property based on contract rent in the future to purchasers interested in properties with tax shelter benefits as opposed to purchasers interested in market rent properties; and (3) contract rent in excess of market rent offset by landlord concessions can enhance borrowing capacity. As discussed in detail below, it is also important to note that the County Assessment Reports for each Subject Property parcel (E11:18, E12:15 & E18:14) indicate that the Taxpayer submitted actual rental rate information for Hy-Vees located at 132nd & Dodge (747 North 132nd St.), 97th & Q and 35th & L to the County for consideration during the protest period in tax years 2011 and 2012. Thus, especially because the Taxpayer disclosed actual rent information to the County Assessor and County Board concerning the 132nd & Dodge Hy-Vee that is located in a prime area of Omaha, the language contained in the Taxpayer's appraisals stating that the actual lease rates for the Subject Property parcels are not indicative of market rent is credible.

¹⁸⁰ E24 (Taxpayer's appraisal for 88th & Center, which uses the 114th & Dodge Bag N Save as a sales comparable); E12:22 (76th & Dodge Bag N Save PRF – Sales Summary); E12:26 (76th & Dodge Bag N Save PVAL). See, E12:10 for the County's per square foot ("psf") calculations regarding the 108th & Fort parcel's 2012 assessment and for the 76th & Dodge and 114th & Dodge Bag N Save sales. I note that the Taxpayer's appraisal for 88th & Center indicates that the two Dodge Street Bag N Save sales were arms' length transactions whereby the sale price was based on an appraisal. The County's witness, Ms. Rowe, also indicated that an appraisal set the price of these two 2012 Bag N Save sales.

76TH & DODGE BAG N SAVE VALUATION/ASSESSMENT HISTORY

YEAR EFFECTIVE	DATE OF CHANGE	LAND VALUE	IMPROVE VALUE	TOTAL VALUE	REASON
2012	8/7/2012	\$2,293,400	\$1,321,200	\$3,614,600	County Board
2012	3/9/2012	\$2,293,400	\$2,224,800	\$4,518,200	County Assessor Reappraisal
2006	7/23/2006	\$2,293,400	\$1,093,600	\$3,387,000	County Board
2005	9/25/2006	\$2,293,400	\$1,093,600	\$3,387,000	TERC
2005	7/23/2005	\$3,440,100	\$2,925,500	\$6,365,600	County Board
2002	3/24/2002	\$3,440,100	\$2,925,500	\$6,365,600	County Assessor Reappraisal
2001	10/24/2001	\$2,175,300	\$2,443,900	\$4,619,200	S/C (Acronym Unknown)

The County's Assessment Reports include the following assessment history regarding the Bag N Save sale parcel located near 114th & Dodge, which sold for \$3,163,589 (\$47 per sq. ft.) on April 5, 2012, and for \$2,300,000 (\$34 per sq. ft.) in 2002 – similar to the pattern regarding the 76th & Dodge Bag N Save noted above, this PVAL for the 114th & Dodge location illustrates the County's over-assessment of supermarkets pre-crisis and post-crisis because the April 2012 sale for \$3,163,59 occurred after the County Assessor's \$4,527,700 reappraisal the previous month, and because the 2003 sale for \$2,300,000 occurred while assessed by the County at \$3,308,600 (see 2002 assessment on chart):¹⁸¹

114TH & DODGE BAG N SAVE VALUATION/ASSESSMENT HISTORY

YEAR EFFECTIVE	DATE OF CHANGE	LAND VALUE	IMPROVE VALUE	TOTAL VALUE	REASON
2012	8/7/2012	\$1,497,200	\$1,722,500	\$3,219,700	County Board
2012	3/9/2012	\$1,497,200	\$3,030,500	\$4,527,700	County Assessor Reappraisal
2009	3/9/2009	\$1,497,200	\$1,432,600	\$2,929,800	Inspection by County Assessor
2008	10/13/2009	\$1,497,200	\$1,432,600	\$2,929,800	TERC
2008	8/7/2008	\$1,497,200	\$2,271,600	\$3,768,800	County Board
2007	1/5/2009	\$1,497,200	\$1,432,600	\$2,929,800	TERC
2007	7/30/2007	\$1,497,200	\$2,271,600	\$3,768,800	County Board
2007	3/13/2007	\$1,497,200	\$2,271,600	\$3,768,800	County Assessor Reappraisal
2003	7/8/2003	\$1,497,200	\$802,800	\$2,300,000	County Board
2002	3/24/2002	\$1,497,200	\$1,811,400	\$3,308,600	Inspection by County Assessor

¹⁸¹ E24 (Taxpayer's appraisal for 88th & Center, which uses the 114th & Dodge Bag N Save as a sales comparable); E12:27 (114th & Dodge Bag N Save PRF – Sales Summary); E12:31 (114th & Dodge Bag N Save PVAL). See, E11:12 & E12:10 for the County's per square foot ("psf") calculations regarding the 108th & Fort parcel's 2011/2012 assessments and for the 114th & Dodge Bag N Save sale. See, E12:10 for the County's per square foot ("psf") calculations regarding the 108th & Fort parcel's 2012 assessment and for the 76th & Dodge and 114th & Dodge Bag N Save sales. I note that the Taxpayer's appraisal for 88th & Center indicates that the two Dodge Street Bag N Save sales were arms' length transactions whereby the sale price was based on an appraisal. The County's witness, Ms. Rowe, also indicated that an appraisal set the price of these two 2012 Bag N Save sales.

I am persuaded that the \$3 million to \$3.6 million range of sales of the former Oakview Hy-Vee and the two Bag N Save supermarkets while assessed in the range of \$4.01 million to \$4.5 million reflect current market conditions for tax year 2011 and 2012 purposes and show that the County’s assessment of the Subject Property parcels in a range of \$4.2 million to \$4.9 million during that period is arbitrary or unreasonable. The charts below that compare the County/Taxpayer valuations of each of the three Subject Property parcels with the County’s pre-sale and post-sale assessments of the former Oakview Hy-Vee and the two Bag N Save supermarkets are instructive in this regard (I note that the post-sale income approach rent rates ranging from \$5.33 to \$6 for the three sale parcels are derived using the County Board’s 2012 assessed value together with the County Assessor’s pre-sale income approach factors for vacancy rate, expense ratio and capitalization rate):¹⁸²

108th & FORT Hy-Vee vs. OAKVIEW Hy-Vee & BAG N SAVE SALES

	108 & FORT Hy-Vee COUNTY 2011 (E11)	108 & FORT Hy-Vee COUNTY 2012 (E12)	108 FORT Hy-Vee TAXPAYER 2011 & 2012 (E20)	OAKVIEW Hy-Vee PRE-SALE 2011 ASSESSMENT (E11:41 - 45)	OAKVIEW Hy-Vee POST-SALE 2012 ASSESSMENT (E11:41 - 45)	76TH & DODGE BAG N SAVE PRE-SALE 2012 ASSESSMENT (E12:22 - 26)	76TH & DODGE BAG N SAVE POST-SALE 2012 ASSESSMENT (E12:22 - 26)	114TH & DODGE BAG N SAVE PRE-SALE 2012 ASSESSMENT (E12:27 - 31)	114TH & DODGE BAG N SAVE POST-SALE 2012 ASSESSMENT (E12:27 - 31)
Total Improvement Sq. Ft.	75,414	75,414	75,414	65,078	65,078	66,937	66,937	67,077	67,077
Year Built	1998/partial remodel 2010	1998/partial remodel 2010	1998/partial remodel 2010	1993	1993	1984	1984	1986	1986
Condition	Average	Average	Good	Average	Average	Average	Average	Average	Average
Quality	Average	Average	None	Average	Average	Average	Average	Average	Average
Leasable Area (Sq. Ft.)	70,434	70,434	75,414	61,943	61,943	66,937	66,937	67,077	67,077
Market Rent	\$7.00	\$7.50	\$5.50	\$7.00	\$5.37	\$7.50	\$6.00	\$7.50	\$5.33
PGI	\$493,038	\$475,430	\$520,357	\$433,601	\$333,098	\$502,028	\$401,622	\$503,078.00	\$357,744
Vacancy/Collection Loss	5% of PGI	10% of PGI	8% of PGI	5% of PGI	5% of PGI	10% of PGI	10% of PGI	10% of PGI	10% of PGI
EGI	\$468,386	\$475,430	\$478,728	\$411,921	\$316,443	\$451,825	\$361,460	\$452,770	\$321,970
Total Expenses	8% of EGI	10% of EGI	6% of EGI	7.5% of EGI	8% of EGI	10% of EGI	10% of EGI	10% of EGI	10% of EGI
Total Expenses	\$37,471	\$47,543	\$128,204	\$30,971	\$25,316	\$45,182	\$36,146	\$45,277	\$32,970
NOI (No Tax Expense)	\$430,915	\$427,887	\$350,524	\$380,950	\$291,127	\$406,643	\$325,314	\$407,493	\$289,773
Loaded Cap Rate	8.75%	9.00%	9.67%	9.50%	9.50%	9.00%	9.00%	9.00%	9.00%
Income Value	\$4,924,700	\$4,754,300	\$3,620,000	\$4,010,000	\$3,064,500	\$4,518,300	\$3,614,600	\$4,527,700	\$3,219,700
Sales Comp. Value	None	None	\$3,770,000	None	None	None	None	None	None
Cost Value	None	None	\$3,620,000	None	None	None	None	None	None
Land Value	\$800,400	\$800,400	\$960,000	\$2,155,000	\$2,155,000	\$2,293,400	\$2,293,400	\$1,497,200	\$1,497,200
Improvement Value	\$4,124,300	\$3,953,900	\$2,810,000	\$1,855,000	\$909,500	\$2,224,800	\$1,321,200	\$3,030,500	\$1,722,500
Value Opinion (Land + Improvement)	\$4,924,700	\$4,754,300	\$3,770,000	\$4,010,000	\$3,064,500	\$4,518,200	\$3,614,600	\$4,527,700	\$3,219,700
Value Opinion Per Total Improvement Sq. Ft.	\$65	\$63	\$49	\$61	\$47	\$67	\$54	\$67	\$48

¹⁸² See, E11:41 – E1145 (former Oakview Hy-Vee PRF, including the County’s income approach documentation). For example, as charted, an approximate \$3 million sale/assessment supports only a \$5.37 rental rate for the former Oakview Hy-Vee, rather than the \$7 amount used by the County in its income valuation of that parcel for tax year 2011. This \$5.37 amount is derived by using the County Board’s \$3,064,500 valuation/assessment for tax year 2012 and the following County income approach variables used in its \$4,010,000 assessment for 2011: vacancy rate – 5% of potential gross income; expense ratio – 8% of effective gross income; and capitalization rate – 9.50%).

97TH & Q Hy-Vee vs. OAKVIEW Hy-Vee & BAG N SAVE SALES

	97 & Q Hy-Vee COUNTY 2011 (E13)	97 & Q Hy-Vee TAXPAYER 2011 (E21)	OAKVIEW Hy-Vee PRE-SALE 2011 ASSESSMENT (E11:41 - 45)	OAKVIEW Hy-Vee POST-SALE 2012 ASSESSMENT (E11:41 - 45)	76TH & DODGE BAG N SAVE PRE-SALE 2012 ASSESSMENT (E12:22 - 26)	76TH & DODGE BAG N SAVE POST-SALE 2012 ASSESSMENT (E12:22 - 26)	114TH & DODGE BAG N SAVE PRE-SALE 2012 ASSESSMENT (E12:27 - 31)	114TH & DODGE BAG N SAVE POST-SALE 2012 ASSESSMENT (E12:27 - 31)
Total Improvement Sq. Ft.	60,173	60,173	65,078	65,078	66,937	66,937	67,077	67,077
Year Built	1989	1989	1993	1993	1984	1984	1986	1986
Condition	Average	Good	Average	Average	Average	Average	Average	Average
Quality	Average	None	Average	Average	Average	Average	Average	Average
Leasable Area (Sq. Ft.)	60,173	60,173	61,943	61,943	66,937	66,937	67,077	67,077
Market Rent	\$8.00	\$5.25	\$7.00	\$5.37	\$7.50	\$6.00	\$7.50	\$5.33
PGI	\$481,384	\$400,150	\$433,601	\$333,098	\$502,028	\$401,622	\$503,078.00	\$357,744
Vacancy/Collection Loss	10% of PGI	8% of PGI	5% of PGI	5% of PGI	10% of PGI	10% of PGI	10% of PGI	10% of PGI
EGI	\$433,246	\$368,138	\$411,921	\$316,443	\$451,825	\$361,460	\$452,770	\$321,970
Total Expenses	10% of EGI	6% of EGI	7.5% of EGI	8% of EGI	10% of EGI	10% of EGI	10% of EGI	10% of EGI
Total Expenses	\$43,324	\$102,294	\$30,971	\$25,316	\$45,182	\$36,146	\$45,277	\$32,970
NOI (No Tax Expense)	\$389,921	\$265,844	\$380,950	\$291,127	\$406,643	\$325,314	\$407,493	\$289,773
Loaded Cap Rate	9.00%	9.68%	9.50%	9.50%	9.00%	9.00%	9.00%	9.00%
Income Value	\$4,332,500	\$2,750,000	\$4,010,000	\$3,064,500	\$4,518,300	\$3,614,600	\$4,527,700	\$3,219,700
Sales Comp. Value	None	\$2,890,000	None	None	None	None	None	None
Cost Value	None	\$2,740,000	None	None	None	None	None	None
Land Value	\$1,085,900	\$1,090,000	\$2,155,000	\$2,155,000	\$2,293,400	\$2,293,400	\$1,497,200	\$1,497,200
Improvement Value	\$3,246,500	\$1,800,000	\$1,855,000	\$909,500	\$2,224,800	\$1,321,200	\$3,030,500	\$1,722,500
Value Opinion (Land + Improvement)	\$4,332,400	\$2,890,000	\$4,010,000	\$3,064,500	\$4,518,200	\$3,614,600	\$4,527,700	\$3,219,700
Value Opinion Per Total Improvement Sq. Ft.	\$72	\$48	\$61	\$47	\$67	\$54	\$67	\$48

88th & CENTER Hy-Vee vs. OAKVIEW Hy-Vee & BAG N SAVE SALES

	88 & CENTER Hy-Vee COUNTY 2012 (E18)	88 & CENTER Hy-Vee TAXPAYER 2012 (E24)	OAKVIEW Hy-Vee PRE-SALE 2011 ASSESSMENT (E11:41 - 45)	OAKVIEW Hy-Vee POST-SALE 2012 ASSESSMENT (E11:41 - 45)	76TH & DODGE BAG N SAVE PRE-SALE 2012 ASSESSMENT (E12:22 - 26)	76TH & DODGE BAG N SAVE POST-SALE 2012 ASSESSMENT (E12:22 - 26)	114TH & DODGE BAG N SAVE PRE-SALE 2012 ASSESSMENT (E12:27 - 31)	114TH & DODGE BAG N SAVE POST-SALE 2012 ASSESSMENT (E12:27 - 31)
Total Improvement Sq. Ft.	72,219	72,219	65,078	65,078	66,937	66,937	67,077	67,077
Year Built	1999	1999	1993	1993	1984	1984	1986	1986
Condition	Average	Good	Average	Average	Average	Average	Average	Average
Quality	Average	None	Average	Average	Average	Average	Average	Average
Leasable Area (Sq. Ft.)	62,808	72,219	61,943	61,943	66,937	66,937	67,077	67,077
Market Rent	\$7.50	\$6.00	\$7.00	\$5.37	\$7.50	\$6.00	\$7.50	\$5.33
PGI	\$471,060	\$433,314	\$433,601	\$333,098	\$502,028	\$401,622	\$503,078.00	\$357,744
Vacancy/Collection Loss	10% of PGI	8% of PGI	5% of PGI	5% of PGI	10% of PGI	10% of PGI	10% of PGI	10% of PGI
EGI	\$423,954	\$390,561	\$411,921	\$316,443	\$451,825	\$361,460	\$452,770	\$321,970
Total Expenses	10% of EGI	5% of EGI	7.5% of EGI	8% of EGI	10% of EGI	10% of EGI	10% of EGI	10% of EGI
Total Expenses	\$42,395	\$21,666	\$30,971	\$25,316	\$45,182	\$36,146	\$45,277	\$32,970
NOI (No Tax Expense)	\$381,559	\$368,895	\$380,950	\$291,127	\$406,643	\$325,314	\$407,493	\$289,773
Loaded Cap Rate	9.00%	9.68%	9.50%	9.50%	9.00%	9.00%	9.00%	9.00%
Income Value	\$4,239,500	\$3,810,000	\$4,010,000	\$3,064,500	\$4,518,300	\$3,614,600	\$4,527,700	\$3,219,700
Sales Comp. Value	None	\$3,900,000	None	None	None	None	None	None
Cost Value	None	\$3,810,000	None	None	None	None	None	None
Land Value (5.79 A, \$4 psf)	\$2,496,900	\$1,010,000	\$2,155,000	\$2,155,000	\$2,293,400	\$2,293,400	\$1,497,200	\$1,497,200
Improvement Value	\$1,742,645	\$2,890,000	\$1,855,000	\$909,500	\$2,224,800	\$1,321,200	\$3,030,500	\$1,722,500
Value Opinion (Land + Improvement)	\$4,239,500	\$3,900,000	\$4,010,000	\$3,064,500	\$4,518,200	\$3,614,600	\$4,527,700	\$3,219,700
Value Opinion Per Total Improvement Sq. Ft.	\$59	\$54	\$61	\$47	\$67	\$54	\$67	\$48

As indicated in the comparison charts above, the \$47 to \$54 per sq. ft. sale/assessment range of the former Oakview Hy-Vee (\$47) and the two Bag N Save supermarkets (\$48 & \$54) support the opinions of value ranging from \$48 to \$54 per square foot contained in the Taxpayer's

appraisals. The \$5.33 to \$6 per sq. ft. income approach rental rates derived from these sales/assessments also support the Taxpayer's \$5.25 to \$6 per sq. ft. income approach rent rates for the three Subject Property parcels.

Therefore, based on the Taxpayer's written appraisals and the testimony of its appraiser, I am persuaded that the Taxpayer has met its burden by showing clearly and convincingly that the County's \$59 to \$72 per sq. ft. opinion of value range and its \$7 - \$8 rental rates for the Subject Property parcels are unreasonable and arbitrary in the aftermath of the economic crisis. For these same reasons, I would also find that the County Assessor and the County Board did not sufficiently consider the impact of the 2007 - 2008 national economic crisis and its aftermath for purposes of valuing the Subject Property parcels for tax years 2011 and 2012.

D. 108th & FORT - THE COUNTY'S INCOME APPROACH VALUATIONS

The County Board submitted its Assessment Reports received in evidence at Exhibits 11 and 12 for the 108th & Fort parcel. These Assessment Reports indicate that the County Board's determinations for tax years 2011 (\$4,924,700) and 2012 (\$4,754,300) are based on the County Assessor's income approach.¹⁸³

The County's Assessment Reports for the 108th & Fort parcel both state as follows, referencing information submitted to the County Board by the Taxpayer during the 2011/2012 protest periods:

The taxpayer's evidence was reviewed. The taxpayer submitted a list of properties currently being leased with lease rates by Hy-Vee Stores. The rent comparables that were used in Omaha, 9707 Q St., 3505 L St and 747 N 132 Street are in a less desirable area, are attached to Neighborhood Strips and are older than the subject. The subject is a standalone Super Market built in 1999.¹⁸⁴

Contrary to the excerpt above, the County's Property Record File ("PRF") for the Hy-Vee at 3505 & L (\$3,200,000 assessment for tax year 2012 – \$53 per sq. ft. & \$5.36 rent rate), which includes a photograph, indicates that it is a "stand alone" parcel like the 108th & Fort Hy-Vee.¹⁸⁵

¹⁸³ E11:19 & E12:15. I note that pages 19 and 20 of Exhibit 11 and pages 15 and 16 of Exhibit 12 indicate that both the County Assessor's and County Board's determination was based only on the income approach and did not consider the cost or market approaches for valuation purposes, unlike the Taxpayer's appraisals. Page 19 of Exhibit 11 and page 15 of Exhibit 12 set forth the County Assessor's "Commercial Income Worksheet" relied upon by the County Board for tax years 2011 and 2012, respectively.

¹⁸⁴ E11:18 & E12:15 (108th & Fort – 2011 & 2012 appeals); E18:14 (88th & Center – 2012 appeal).

¹⁸⁵ E13:4 (97 & Q strip mall photograph); E13:6 (reference to "Strip" in "Nbhd" field of PRF). See, E11:26 & E11:27 (PRF for the "Strip" adjacent to the 97 & Q Hy-Vee, which assigns the "Neighborhood Shopping Center" designation).

This mischaracterization not only diminishes the credibility of the County's Assessment Report, because these are similar "stand alone" parcels, the County's \$53 per sq. ft. assessment and \$5.36 rent rate for the 35th & L Hy-Vee supports the Taxpayer's \$49 per sq. ft. opinion of value and \$5.50 rent rate for 108th & Fort.

Significantly, and consistent with the above excerpt, the County's PRF for the Hy-Vee at 97th & Q indicates that it is not a "stand alone" store and is part of a "Neighborhood Shopping Center" or "Strip" ("Strip" is a term used in the County's PRF for 97th & Q, unlike the Hy-Vees located at 108th & Fort, 88th & Center and 35th & L).¹⁸⁶ This categorization is important as discussed elsewhere in terms of the County's misguided reliance on the 2010 sale of the 97th & Q Hy-Vee parcel together with the adjoining Neighborhood Shopping Center parcel because the sale price does not allocate separate transaction amounts to each distinct parcel, thereby significantly diminishing the reliability of the transaction for purposes of valuing the three Subject Property parcels for tax years 2011 and 2012.

The credibility of the County's Assessment Report is also diminished because one of the "less desirable" areas referenced in the above excerpt is the Hy-Vee that operates at "747 N 132 Street" with high visibility along the West Dodge Road and 132nd Street corridors. I am not persuaded that the 132nd & West Dodge Road Hy-Vee is inferior to the 108th & Fort Hy-Vee location.

Mass Appraisal of Real Property, which is published by the International Association of Assessing Officers, states that mass appraisal models should generate valuations that are "understandable and explainable," and assessors "should understand the components of the model and how it works."¹⁸⁷ In light of this "understandable and explainable" standard, the County's assessment actions regarding the Subject Property parcel located at 108th & Fort are problematic.

The County's Assessment Reports include a document entitled "Income Worksheet" that attempts to support the Subject Property's valuations for tax years 2011 and 2012.¹⁸⁸ The County Board's expert offered only a limited explanation regarding the basis of the variables used in the "Income Worksheets" for tax years 2011 and 2012. The County relies in substantial part on the former Oakview Hy-Vee's \$9.75 rental listing in 2010 to support its \$7.00 and \$7.50

¹⁸⁶ E11:31 – E11:33.

¹⁸⁷ *Mass Appraisal of Real Property*, International Association of Assessing Officers, 1999, p. 207.

¹⁸⁸ E11:19, E12:15.

per sq. ft. income approach rental rates for tax years 2011 and 2012, respectively.¹⁸⁹ As illustrated elsewhere herein, Hy-Vee vacated the Oakview location in the summer of 2010, and the evidence indicates that the County lowered its assessment in excess of \$4 million for tax years 2010 and 2011 to \$3,064,000 in 2012 and \$2,973,800 in 2013 due to the sale of the parcel in the approximate amount of \$3 million prior to the 2012 County Board protest period.

The County's assessment actions regarding 108th & Fort for tax years 2011 and 2012 also rely on the following transactions: (1) the 2010 sale of the 97th & Q Subject Property parcel together with an adjoining neighborhood shopping center;¹⁹⁰ and (2) the sale of the Baker's supermarket located at 888 South Saddle Creek in Omaha on November 1, 2011.¹⁹¹

It is important to note that the documents submitted for consideration at the hearing before the Commission do not allocate the purchase price between the 97th & Q Hy-Vee Subject Property parcel and the adjoining neighborhood shopping center.¹⁹² Significantly, as discussed further below, the County Assessor and the County Board lowered the valuation of the 97th & Q Hy-Vee from \$4,332,400 in tax year 2011 to \$3,440,500 in tax year 2013,¹⁹³ which is essentially identical to the \$3,407,900 valuation/assessment of the 35th & L Hy-Vee by the County Assessor and the County Board for tax year 2013.¹⁹⁴ In part because this is a fresh-look "de novo" proceeding where the Commission is able to consider evidence that was possibly not available to the County Board for tax years 2011 and 2012, this \$3,440,500 assessment in 2013 significantly diminishes the credibility of the County's reliance on the 2010 sale of the 97th & Q Hy-Vee together with the adjacent neighborhood shopping center in support of its valuation of the 108th & Fort Hy-Vee for tax years 2011 and 2012.

With respect to the County's reliance on the 2011 Baker's sale, it is important to note that this transaction involved purchase by the lessee of the supermarket parcel, which was improved in 1989 and remodeled in 2006.¹⁹⁵ I also note that the Taxpayer's appraiser adjusted the \$70 per sq. ft. Baker's sale price to \$55 per sq. ft.¹⁹⁶ Therefore, I am not persuaded that the Baker's sale

¹⁸⁹ See, E25:2 (108 & Fort Rebuttal Packet); E11:14, E12:32.

¹⁹⁰ See, E11:11.

¹⁹¹ See, E12:10.

¹⁹² See, E13:5 (97 & Q Hy-Vee PRF Sales Summary); E13:72 – 78 (521 Real Estate Transfer Statement & PRF for 9717 Q Street parcel, which is the neighborhood shopping center adjacent to the 97 & Center Hy-Vee parcel located at 9707 Q Street).

¹⁹³ E13:14 (97 & Q Hy-Vee PVAL).

¹⁹⁴ E13:19 (35 & L Hy-Vee PVAL).

¹⁹⁵ E12:17 – 18; E20:57 & E20:65 (\$70 psf sale price adjusted to \$55 psf by Taxpayer's appraiser).

¹⁹⁶ E20:57 & E20:65

supports the County Board's assessment of the 108th & Fort Hy-Vee for tax years 2011 and 2012.

Based in substantial part on the Taxpayer's appraisals together with the sale/assessment history of the former Oakview Hy-Vee, the analysis above regarding the assessment histories of the 97th & Center and 35th & L Hy-Vees, and the 2011 lessee purchase of the alleged Baker's sale comparable, I place little weight on the 2010 and 2011 transactions involving the 97th & Q Hy-Vee and the Saddle Creek Baker's supermarket as well as the \$9.75 Oakview listing used in substantial part to support the County's income valuation. Together with a review of the Taxpayer's appraisals, I am also persuaded that the three supermarket sales in Douglas County in the 2011 – 2012 timeframe discussed above (Oakview Hy-Vee and Dodge Street Bag N Save locations) provide a clear indication of current market conditions in the aftermath of the economic crisis, and I would find that the County's largely unexplained and unsubstantiated income approach documentation for the 108th & Fort Hy-Vee is not persuasive.

E. 97th & Q - THE COUNTY'S 2011 INCOME APPROACH VALUATION

The County Board submitted its Assessment Report received in evidence at Exhibit 13 for the 97th & Q parcel. This Assessment Report indicates that the County Board's determinations for tax year 2011 (\$4,332,400) is based on the County Assessor's income approach.¹⁹⁷

The County's Assessment Report for the 108th & Fort parcel states as follows in response to information submitted by the Taxpayer to the County Board during the 2011 protest period (the County's Assessment Report for the 88th & Center parcel contains identical language at page 14 of Exhibit 18):

The taxpayer's evidence was reviewed. The taxpayer submitted a list of properties currently being leased with lease rates by Hy-Vee Stores. The rent comparables that were used in Omaha, **9707 Q St., 3505 L St** and 747 N 132 Street **are in a less desirable area**].¹⁹⁸

¹⁹⁷ E13:14 (Property Valuation History Chart – "PVAL"). I note that page 13 of Exhibit 13 indicates that both the County Assessor's and County Board's determination was based only on the income approach and did not consider the cost or market approaches for valuation purposes, unlike the Taxpayer's appraisals. Page 12 of Exhibit 13 sets forth the County Assessor's "Commercial Income Worksheet" relied upon by the County Board.

¹⁹⁸ E11:18 & E12:15 (108th & Fort – 2011 & 2012 appeals) (emphasis added); E18:14 (88th & Center – 2012 appeal) (emphasis added). I note that this identical language for the 108th & Fort and 88th & Center Hy-Vee's indicates that both stores were built in 1999. The PRFs for the 108th & Fort parcel found at page 6 of Exhibits 11 and 12 indicate that the store was built in 1998, not 1999. The PRF for the 88th & Center parcel found at page 6 of Exhibit 18 indicates that the store was built in 1999.

As indicated, the 97th & Q Hy-Vee is deemed by the County to be in an area that is less desirable in comparison to the Hy-Vee supermarkets located at 108th & Fort and 88th & Center. This determination by the County is consistent with the Taxpayer's valuation ranges for tax years 2011 and 2012 (97th & Q - \$2,890,000 tax year 2011; 108th & Fort - \$3,770,000 tax years 2011 and 2012; and 88th & Center - \$3,810,000 tax year 2012). On the other hand, this determination is not consistent with the County Assessor's use of an \$8 per sq. ft. rent rate for the 97th & Q Hy-Vee for tax year 2011 in comparison to 108th & Fort (\$7 & 7.50 per sq. ft. for tax years 2011 and 2012, respectively) and 88th & Center (\$7.50 per sq. ft. for tax year 2012), thereby diminishing the credibility of the County Board's determinations of value for the Subject Property parcels.

The above excerpt groups the 97th & Q parcel with the 35th & L Hy-Vee in terms of location desirability. Additionally, the County's Assessment report for 97th & Q (\$72 per sq. ft. assessment for tax year 2011) includes the 35th & L Hy-Vee (\$53 per sq. ft. assessment for tax year 2011) as an equalization comparable at page 9 of Exhibit 13 for tax year 2011.

The County's Assessment Reports include the following assessment history regarding the 35th & L Hy-Vee (\$53 per sq. ft. assessment vs. \$72 per sq. ft. assessment for the 97th & Q Hy-Vee for tax year 2011), which is instructive as discussed in further detail below because it illustrates that the County assessed the two parcels in a similar manner after tax year 2011, consistent with the sales of the former Oakview Hy-Vee and the two Dodge Street Bag N Save supermarkets for amounts significantly less than the \$4 million to \$4.5 million assessments for those respective parcels:¹⁹⁹

¹⁹⁹ E13:9 (County's per square foot - "psf" - calculations regarding the 97th & Q Hy-Vee assessment for tax year 2011 compared to the 35 & L Hy-Vee); E13:19 (35th & L Hy-Vee PVAL).

35TH & L Hy-Vee VALUATION/ASSESSMENT HISTORY

YEAR EFFECTIVE	DATE OF CHANGE	LAND VALUE	IMPROVE VALUE	TOTAL VALUE	REASON
2013	8/7/2013	\$1,188,100	\$2,219,800	\$3,407,900	County Board
2013	3/9/2013	\$1,188,100	\$2,219,800	\$3,407,900	County Assessor Reappraisal
2012	8/7/2012	\$1,188,140	\$2,011,860	\$3,200,000	County Board
2012	3/9/2012	\$1,188,100	\$2,835,100	\$4,023,200	County Assessor Reappraisal
2010	8/11/2010	\$1,188,100	\$2,003,000	\$3,191,100	County Board
2009	8/12/2009	\$1,188,100	\$2,003,000	\$3,191,100	County Board
2009	3/9/2009	\$1,188,100	\$2,003,000	\$3,191,100	County Assessor Reappraisal
2007	7/30/2007	\$891,100	\$2,300,000	\$3,191,100	County Board
2007	3/13/2007	\$891,100	\$2,532,200	\$3,423,300	Building Permit
2005	7/23/2005	\$308,900	\$2,445,100	\$2,754,000	County Board

The chart below compares the County’s and Taxpayer’s opinions of value of the 97th & Q Hy-Vee with the County’ assessment history of the 35th & L Hy-Vee in tax years 2011 and 2012. As the chart indicates, the County’s Assessment Reports indicate that the 35th & L Hy-Vee is similar to the 97th & Q Hy-Vee in terms of size (59,604 sq. ft. vs 60,173 sq. ft.), age (1988 vs. 1989), quality (Average) and condition (Average), and I note that both parcels are situated in fairly close proximity along the L & Q Street corridors consistent with the excerpt above regarding location desirability.²⁰⁰ As the chart also indicates, the County’s income approach documentation assigns a \$5.36 rental rate to the 35 & L Hy-Vee.²⁰¹ This \$5.36 rental rate supports the \$5.25 rental rate used in the Taxpayer’s \$2,750,000 income approach valuation for the 97th & Q Hy-Vee – it also supports the \$5.50 rate used for the 108th & Fort Hy-Vee and the \$6 per sq. ft. rate used for the 88th & Center Hy-Vee (the County Board is referred to in the chart below as the “BOE” – this is a shorthand reference for the County Board of Equalization):

²⁰⁰ E13:6 (97th & Q Hy-Vee PRF – Average condition and quality); E13:9 (size and age comparison); E13:16 (35 & L Hy-Vee PRF – Average condition and quality).

²⁰¹ E11:34 (County's Income Worksheet for the 35th & L Hy-Vee).

97TH & Q Hy-Vee vs. 35TH & L Hy-Vee ASSESSMENT HISTORY

	97 & Q COUNTY (2011 - E13)	97 & Q TAXPAYER (2011 - E21)	35 & L HY-VEE 2011 ASSESSMENT (E13:15 - 19)	35 & L HY-VEE 2012 COUNTY APPRAISAL (E13:15 - 19)	35 & L HY-VEE 2012 BOE ASSESSMENT (E13:15 - 19)
Total Improvement Sq. Ft.	60,173	60,173	59,604	59,604	59,604
Year Built	1989	1989	1988	1988	1988
Condition	Average	Good	Average	Average	Average
Quality	Average	None	Average	Average	Average
Leasable Area (Sq. Ft.)	60,173	60,173	59,604	59,604	59,604
Market Rent	\$8.00	\$5.25	\$5.36	\$6.75	\$5.37
PGI	\$481,384	\$400,150	\$319,477	\$402,780	320366
Vacancy/Collection Loss	10% of PGI	8% of PGI	5% of PGI	5% of PGI	5% of PGI
EGI	\$433,246	\$368,138	303,504	\$382,641	\$304,348
Total Expenses	10% of EGI	6% of EGI	8% of EGI	8% of EGI	8% of EGI
Total Expenses	\$43,324	\$102,294	\$24,280	30611	\$24,348
NOI (No Tax Expense)	\$389,921	\$265,844	\$279,234	\$352,030	\$280,000
Loaded Cap Rate	9.00%	9.68%	8.75%	8.75%	8.75%
Income Value	\$4,332,500	\$2,750,000	\$3,191,100	\$4,023,200	\$3,200,000
Sales Comp. Value	None	\$2,890,000	None	None	None
Cost Value	None	\$2,740,000	None	None	None
Land Value	\$1,085,900	\$1,090,000	\$1,188,100	\$1,188,100	\$1,188,140
Improvement Value	\$3,246,500	\$1,800,000	\$2,003,000	\$2,835,100	\$2,011,860
Value Opinion (Land + Improvement)	\$4,332,400	\$2,890,000	\$3,191,100	\$4,023,200	\$3,200,000
Value Opinion Per Total Improvement Sq. Ft.	\$72	\$48	\$53	\$67	\$53

The similarity of the Subject Property parcel at 97th & Q and the 35th & L Hy-Vee is further illustrated by the actions of the County Assessor and the County Board in tax year 2013. In this regard, the County Assessor and the County Board lowered the valuation of the 97th & Q Hy-Vee from \$4,332,400 in tax year 2011 to \$3,440,500 in tax year 2013,²⁰² which is essentially identical to the \$3,407,900 valuation/assessment of the 35th & L Hy-Vee by the County Assessor and the County Board for tax year 2013 (see above assessment history chart for 35th & L, together with the next chart set forth below).²⁰³

It is also important to note that the actions of the County Assessor and the County Board in lowering the valuation of the 97th & Q Hy-Vee from \$4,332,400 (\$72 per sq. ft.) in tax year 2011 to \$3,440,500 (\$57 per sq. ft.) in tax year 2013 is consistent with the sale/assessment histories regarding the former Oakview Hy-Vee and the Bag N Save supermarkets located at 76th &

²⁰² E13:14 (97 & Q Hy-Vee PVAL).

²⁰³ E13:19 (35 & L Hy-Vee PVAL).

Dodge and near 114 & Dodge. Following is a chart depicting the relationship of the 2013 assessments of the 97th & Q and 35th & L Hy-Vees with the 2012 post-sale assessments of the former Oakview Hy-Vee and the Bag N Save supermarkets. Significantly for purposes of the Commission’s fresh-look “de novo” review, this chart indicates that the County Board significantly lowered the assessment of all of these parcels to better reflect current market conditions and to satisfy the requirement to value all real property at actual or market value under Nebraska Statutes sections 77-201 and 77-112 (the County Board is referred to in the chart below as the “BOE” – this is a shorthand reference for the County Board of Equalization):²⁰⁴

97TH & Q and 35TH & L Hy-Vees vs. OAKVIEW Hy-Vee & BAG N SAVE SALES

	97 & Q HY-VEE 2013 COUNTY REAPPRAISAL = BOE ASSESSMENT (E13:12 - 14)	35 & L HY-VEE 2013 COUNTY REAPPRAISAL = BOE ASSESSMENT (E13:15 - 19)	OAKVIEW HY-VEE POST-SALE 2012 ASSESSMENT (E11:41 - 45)	76TH & DODGE BAG N SAVE POST-SALE 2012 ASSESSMENT (E12:22 - 26)	114TH & DODGE BAG N SAVE POST-SALE 2012 ASSESSMENT (E12:27 - 31)
Total Improvement Sq. Ft.	60,173	59,604	65,078	66,937	67,077
Year Built	1989	1988	1993	1984	1986
Condition	Average	Average	Average	Average	Average
Quality	Average	Average	Average	Average	Average
Leasable Area (Sq. Ft.)	60,173	59,604	61,943	66,937	67,077
Market Rent	\$6.35	\$5.72	\$5.37	\$6.00	\$5.33
PGI	\$382,278	\$341,184	\$333,098	\$401,622	\$357,744
Vacancy/Collection Loss	10% of PGI	5% of PGI	5% of PGI	10% of PGI	10% of PGI
EGI	\$344,050	\$324,125	\$316,443	\$361,460	\$321,970
Total Expenses	10% of EGI	8% of EGI	8% of EGI	10% of EGI	10% of EGI
Total Expenses	\$34,405	\$25,930	\$25,316	\$36,146	\$32,970
NOI (No Tax Expense)	\$309,645	\$298,195	\$291,127	\$325,314	\$289,773
Loaded Cap Rate	9.00%	8.75%	9.50%	9.00%	9.00%
Income Value	\$3,440,500	\$3,407,900	\$3,064,500	\$3,614,600	\$3,219,700
Sales Comp. Value	None	None	None	None	None
Cost Value	None	None	None	None	None
Land Value	\$1,085,900	\$1,188,100	\$2,155,000	\$2,293,400	\$1,497,200
Improvement Value	\$2,354,600	\$2,219,800	\$909,500	\$1,321,200	\$1,722,500
Value Opinion (Land + Improvement)	\$3,440,500	\$3,407,900	\$3,064,500	\$3,614,600	\$3,219,700
Value Opinion Per Sq. Ft.	\$57	\$57	\$47	\$54	\$48

²⁰⁴ The sales/assessment histories above regarding the 144th & Center Hy-Vee (65,078 sq. ft. – approximate \$3.064 million, \$47 psf sale price in the 2011/2012 timeframe prior to 2012 BOE action, necessitating the lowering of the County Assessor’s March 2012 \$4,181,900 - \$64.25 psf reappraisal value to \$3,064,500 by the County Board - \$47 psf) and the Bag N Save supermarkets located at 76th & Dodge (66,937 sq. ft. - \$54.64 psf sale price in April 2012, necessitating the lowering of the County Assessor’s March 2012 \$4,518,200 - \$67 psf - reappraisal value to \$3,614,600 by the County Board - \$54 psf) and 114 & Dodge (67,077 sq. ft. - \$47.16 psf sale price in April 2012, necessitating the lowering of the County Assessor’s March 2012 \$4,527,700 - \$67 psf - reappraisal value to \$3,219,700 by the County Board - \$48 psf).

Mass Appraisal of Real Property, which is published by the International Association of Assessing Officers, states that mass appraisal models should generate valuations that are “understandable and explainable,” and assessors “should understand the components of the model and how it works.”²⁰⁵ In light of this “understandable and explainable” standard, the County’s assessment actions regarding the Subject Property parcel located at 97th & Q are problematic, especially in the aftermath of the economic crisis.

The County’s Assessment Report includes a document entitled “Income Worksheet” that attempts to support the 97th & Q valuation for tax year 2011.²⁰⁶ The County Board’s documentation and its expert’s testimony offered only a limited explanation regarding the basis of the variables used in the “Income Worksheet” for tax year 2011.

The County relies in substantial part on the former Oakview Hy-Vee’s \$9.75 rental listing in 2010 to support its \$8.00 per sq. ft. income approach rental rate for tax year 2011.²⁰⁷ As illustrated elsewhere herein, Hy-Vee vacated the Oakview location in the summer of 2010, and the evidence indicates that the County lowered its assessment in excess of \$4 million for tax years 2010 and 2011 to \$3,064,000 in 2012 and \$2,973,800 in 2013 due to the sale of the parcel in the approximate amount of \$3 million prior to the 2012 County Board protest period.

The County’s valuation of the 97th & Q Hy-Vee for tax year 2011 also appears to be based on the 2010 purchase of that parcel together with an adjoining neighborhood shopping center.²⁰⁸ The documents submitted for consideration at the hearing before the Commission, however, do not allocate the purchase price between the 97th & Q Hy-Vee Subject Property parcel and the adjoining neighborhood shopping center.²⁰⁹ Significantly, as discussed previously, the County Assessor and the County Board lowered the valuation of the 97th & Q Hy-Vee from \$4,332,400 in tax year 2011 to \$3,440,500 in tax year 2013,²¹⁰ which is essentially identical to the \$3,407,900 valuation/assessment of the 35th & L Hy-Vee by the County Assessor and the County Board for tax year 2013.²¹¹ In part because this is a fresh-look “de novo” proceeding where the Commission is able to consider evidence that was possibly not available to the County Board for

²⁰⁵ *Mass Appraisal of Real Property*, International Association of Assessing Officers, 1999, p. 207.

²⁰⁶ E13:12.

²⁰⁷ See, E13:12, E13:65, E26:2.

²⁰⁸ See, E13:13.

²⁰⁹ See, E13:5 (97 & Q Hy-Vee PRF Sales Summary); E13:72 – 78 (521 Real Estate Transfer Statement & PRF for 9717 Q Street parcel, which is the neighborhood shopping center adjacent to the 97 & Center Hy-Vee parcel located at 9707 Q Street).

²¹⁰ E13:14 (97 & Q Hy-Vee PVAL).

²¹¹ E13:19 (35 & L Hy-Vee PVAL).

tax year 2011, this \$3,440,500 assessment in 2013 significantly diminishes the credibility of the County's reliance on the 2010 sale of the 97th & Q Hy-Vee together with the adjacent neighborhood shopping center in support of its valuation of the separate and distinct supermarket parcel for tax year 2011.

Based in substantial part on the Taxpayer's appraisals together with the sale/assessment history of the former Oakview Hy-Vee and the analysis above regarding the assessment histories of the 97th & Center and 35th & L Hy-Vees, I place little weight on the 2010 transaction involving the 97th & Q Hy-Vee as well as the \$9.75 Oakview listing used to support the County's income valuation. Together with a review of the Taxpayer's appraisals, I am also persuaded that the three supermarket sales in Douglas County in the 2011 – 2012 timeframe discussed above (Oakview Hy-Vee and Dodge Street Bag N Save locations) provide a clear indication of current market conditions in the aftermath of the economic crisis, and I would find that the County's largely unexplained and unsubstantiated income approach documentation for the 97th & Q Hy-Vee is not persuasive.

F. 88th & CENTER - THE COUNTY'S INCOME APPROACH VALUATION

The County Board submitted its Assessment Report received in evidence at Exhibit 18 for the 88th & Center parcel. This Assessment Report indicates that the County Board's determinations for tax year 2012 (\$4,239,500) is based on the County Assessor's income approach.²¹²

The County's Assessment Report for the 88th & Center parcel states as follows, referencing information submitted to the County Board by the Taxpayer during the 2012 protest period:

The taxpayer's evidence was reviewed. The taxpayer submitted a list of properties currently being leased with lease rates by Hy-Vee Stores. The rent comparables that were used in Omaha, 9707 Q St., 3505 L St and 747 N 132 Street are in a less desirable area, are attached to Neighborhood Strips and are older than the subject. The subject is a standalone Super Market built in 1999.²¹³

Contrary to the excerpt above, the County's Property Record File ("PRF") for the Hy-Vee at 3505 & L (\$3,200,000 assessment for tax year 2012 – \$53 per sq. ft. & \$5.36 rent rate), which

²¹² E18:15 (Property Valuation History Chart – "PVAL"). I note that page 14 of Exhibit 18 indicates that both the County Assessor's and County Board's determination was based only on the income approach and did not consider the cost or market approaches for valuation purposes, unlike the Taxpayer's appraisals. Page 12 of Exhibit 18 sets forth the County Assessor's "Commercial Income Worksheet" relied upon by the County Board.

²¹³ E18:14 (88th & Center 2012 appeal).

includes a photograph, indicates that it is a “stand alone” parcel like the 88th & Center Hy-Vee.²¹⁴ This mischaracterization not only diminishes the credibility of the County’s Assessment Report, because these are similar “stand alone” parcels, the County’s \$53 per sq. ft. assessment and \$5.36 rent rate for the 35th & L Hy-Vee supports the Taxpayer’s \$54 per sq. ft. opinion of value and \$6 rent rate for 88th & Center.

Significantly, and consistent with the above excerpt, the County’s PRF for the Hy-Vee at 97th & Q indicates that it is not a “stand alone” store and is part of a “Neighborhood Shopping Center” or “Strip” (“Strip” is a term used in the County’s PRF for 97th & Q, unlike the Hy-Vees located at 108th & Fort, 88th & Center and 35th & L).²¹⁵ This categorization is important as discussed elsewhere in terms of the County’s misguided reliance on the 2010 sale of the 97th & Q Hy-Vee parcel together with the adjoining Neighborhood Shopping Center parcel because the sale price does not allocate separate transaction amounts to each distinct parcel, thereby significantly diminishing the reliability of the transaction for purposes of valuing the three Subject Property parcels for tax years 2011 and 2012.

The credibility of the County’s Assessment Report is also diminished because one of the “less desirable” areas referenced in the above excerpt is the Hy-Vee that operates at “747 N 132 Street” with high visibility along the West Dodge Road and 132nd Street corridors. I am not persuaded that the 132nd & West Dodge Road Hy-Vee is inferior to the 88th & Center location.

Mass Appraisal of Real Property, which is published by the International Association of Assessing Officers, states that mass appraisal models should generate valuations that are “understandable and explainable,” and assessors “should understand the components of the model and how it works.”²¹⁶ In light of this “understandable and explainable” standard, the County’s assessment actions regarding the Subject Property parcel located at 108th & Fort are problematic.

The County’s Assessment Report includes a document entitled “Income Worksheet” that attempts to support the 88th & Center Hy-Vee’s valuation for tax year 2012.²¹⁷ The County Board’s expert offered only a limited explanation regarding the basis of the variables used in the “Income Worksheets” for tax year 2012. The County relies in substantial part on the former

²¹⁴ E13:4 (97 & Q strip mall photograph); E13:6 (reference to “Strip” in “Nbhd” field of PRF). See, E11:26 & E11:27 (PRF for the “Strip” adjacent to the 97 & Q Hy-Vee, which assigns the “Neighborhood Shopping Center” designation).

²¹⁵ E11:31 – E11:33.

²¹⁶ *Mass Appraisal of Real Property*, International Association of Assessing Officers, 1999, p. 207.

²¹⁷ E11:19, E12:15.

Oakview Hy-Vee's \$9.75 rental listing in 2010 to support its \$7.50 per sq. ft. income approach rental rates for tax year 2012.²¹⁸ As illustrated elsewhere herein, Hy-Vee vacated the Oakview location in the summer of 2010, and the evidence indicates that the County lowered its assessment in excess of \$4 million for tax years 2010 and 2011 to \$3,064,000 in 2012 and \$2,973,800 in 2013 due to the sale of the parcel in the approximate amount of \$3 million prior to the 2012 County Board protest period.

The County's assessment actions regarding 88th & Center for tax year 2012 also relies on the following transactions: (1) the 2010 sale of the 97th & Q Subject Property parcel together with an adjoining neighborhood shopping center;²¹⁹ and (2) the sale of the Baker's supermarket located at 888 South Saddle Creek in Omaha on November 1, 2011.²²⁰

It is important to note that the documents submitted for consideration at the hearing before the Commission do not allocate the purchase price between the 97th & Q Hy-Vee Subject Property parcel and the adjoining neighborhood shopping center.²²¹ Significantly, as discussed previously, the County Assessor and the County Board lowered the valuation of the 97th & Q Hy-Vee from \$4,332,400 in tax year 2011 to \$3,440,500 in tax year 2013,²²² which is essentially identical to the \$3,407,900 valuation/assessment of the 35th & L Hy-Vee by the County Assessor and the County Board for tax year 2013.²²³ As also discussed previously, in part because this is a fresh-look "de novo" proceeding where the Commission is able to consider evidence that was possibly not available to the County Board for tax years 2011 and 2012, this \$3,440,500 assessment in 2013 significantly diminishes the credibility of the County's reliance on the 2010 sale of the 97th & Q Hy-Vee together with the adjacent neighborhood shopping center in support of its valuation of the 88th & Center Hy-Vee for tax year 2012.

With respect to the County's reliance on the 2011 Baker's sale, it is important to note that this transaction involved purchase by the lessee of the supermarket parcel, which was improved in 1989 and remodeled in 2006.²²⁴ I also note that the Taxpayer's appraiser adjusted the \$70 per

²¹⁸See, E28:2 (88th & Center Rebuttal Packet); E18:31.

²¹⁹ See, E11:11.

²²⁰ See, E18:9 – E18:10.

²²¹ See, E13:5 (97 & Q Hy-Vee PRF Sales Summary); E13:72 – 78 (521 Real Estate Transfer Statement & PRF for 9717 Q Street parcel, which is the neighborhood shopping center adjacent to the 97 & Center Hy-Vee parcel located at 9707 Q Street).

²²² E13:14 (97 & Q Hy-Vee PVAL).

²²³ E13:19 (35 & L Hy-Vee PVAL).

²²⁴ E12:17 – 18; E20:57 & E20:65 (\$70 psf sale price adjusted to \$55 psf by Taxpayer's appraiser).

sq. ft. Baker's sale price to \$55 per sq. ft.²²⁵ Therefore, I am not persuaded that the Baker's sale supports the County Board's assessment of the 88th & Center Hy-Vee for tax year 2012.

Based in substantial part on the Taxpayer's appraisals together with the sale/assessment history of the former Oakview Hy-Vee, the analysis above regarding the assessment histories of the 97th & Center and 35th & L Hy-Vees, and the 2011 lessee purchase of the alleged Baker's sale comparable, I place little weight on the 2010 and 2011 transactions involving the 97th & Q Hy-Vee and the Saddle Creek Baker's supermarket as well as the \$9.75 Oakview listing used to support the County's income valuation. Together with a review of the Taxpayer's appraisals, I am also persuaded that the three supermarket sales in Douglas County in the 2011 – 2012 timeframe discussed above (Oakview Hy-Vee and Dodge Street Bag N Save locations) provide a clear indication of current market conditions in the aftermath of the economic crisis, and I would find that the County's largely unexplained and unsubstantiated income approach documentation for the 88th & Center Hy-Vee is not persuasive.

G. THE COUNTY'S "OVERALL" CAPITALIZATION RATE

The County's Assessment Reports and its rebuttal packet for tax years 2011 and 2012 contain documentation that attempts to support its capitalization rates for those years for each respective appeal.²²⁶ These documents, which only contain very limited explanation concerning the basis of using these rates to value the Subject Property specifically, indicate that various County rates for Class A, B, C, and D retail properties were supported by a study conducted by Kenneth Voss & Associates, LLC, of Atlanta, Georgia.²²⁷ Mr. Voss was not available to testify at the hearing before the Commission.

The County's capitalization rate evidence is problematic because it provides insufficient information regarding the impact of the economic crisis on the local market. The County's "Overall Capitalization Rate" documents state that the Voss study utilized sales "between January 1, 2003 and December 31, 2009" to derive his capitalization rates, with a focus on "2007-2009 data."²²⁸ In addition to referencing the Voss study, however, the documents contain

²²⁵ E20:57 & E20:65

²²⁶ See, E11:14, E12:12, E25, E13:11, E26, E18:12, E27.

²²⁷ E25, E26, E27.

²²⁸ E25, E26, E27.

language that states as follows with respect to the use of sales prior to the onset of the economic crisis to derive capitalization rates for tax years 2011 and 2012:

Please note that the number of market transactions decreased in late 2008 and through 2009. I decided to analyze **older** sales because of the data obtained during the verification process. I adjusted the final rates based on my knowledge of the current real estate market.²²⁹

Based on the County's Assessment Reports outlined in the preceding two paragraphs, I would find that the County did not sufficiently consider market activity most relevant to the 2011 and 2012 tax years at issue to determine its capitalization rates. I acknowledge that the County's Assessment Report for each appeal authored by the County's witness, Ms. Rowe, states that the Voss study focused on "2007-2009 data" as a part of his capitalization rate study of sales between January 1, 2003, and December 31, 2009. Nonetheless, based on the language noted above in the County's Assessment Reports regarding the use of "older" sales due to insufficient sales during the economic crisis period from "late 2008 through 2009," I am persuaded that the County analyzed older sales in lieu of sales more recent and relevant to the date of assessment for purposes of determining its capitalization rates.

H. USE OF COUNTY'S ASSESSMENT ACTIONS REGARDING THE FORMER OAKVIEW HY-VEE SALE PARCEL, THE BAG N SAVE SALE PARCELS & THE 35TH & L HY-VEE

The majority indicates that the use of the County's post-sale assessments of the former Oakview Hy-Vee and the two Bag N Save supermarkets, which are charted above, is inappropriate for purposes of supporting the Taxpayer's opinions of value for each of the three Subject Property parcels.²³⁰ Similarly, the majority indicates that it is inappropriate to use the

²²⁹ E25, E26, E27 (emphasis added).

²³⁰ As discussed previously, I am persuaded that the Taxpayer's appraisals together with the \$3 million to \$3.6 million range of sales of the former Oakview Hy-Vee (\$47 per sq. ft. based on \$3,064,500 million sale price, which equals the County Board's assessment) and the two Bag N Save supermarkets (\$47 & \$54.60 per sq. ft. sale prices) while assessed in the range of \$4.01 million to \$4.5 million reflect current market conditions for tax year 2011 and 2012 purposes and show that the County's assessment of the Subject Property parcels in a range of \$4.2 million to \$4.9 million during that period is arbitrary or unreasonable. In other words, I am persuaded that these three supermarket sales are significant indicators of value in the Omaha market for the tax years at issue and provide clear support for the Taxpayer's opinions of value as charted above, **without** regard to the subsequent assessment actions by the County Assessor and the County Board. The charts above, however, that compare the County/Taxpayer valuations of each of the three Subject Property parcels with the County's pre-sale and post-sale assessment actions regarding the former Oakview Hy-Vee and the two Bag N Save supermarkets illustrate the County's (1) pattern of overvaluation in the aftermath of the economic crisis; and (2) post-sale assessment reduction of the three sale parcels in recognition of current market conditions. Both of these factors support the Taxpayer's assertions and opinions of value, and I find that it is reasonable to use the County's post-sale assessments of the former Oakview Hy-Vee and the two Bag N Save

County's assessment of the 35th & L Hy-Vee for tax years 2011 - 2013 to support the Taxpayer's opinions of value.²³¹ I disagree.

Nebraska Statutes section 77-201 provides that all taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.²³² "Actual value, market value, and fair market value mean exactly the same thing."²³³ Taxable value is the percentage of actual value subject to taxation as directed by Nebraska Statutes section 77-201 and has the same meaning as assessed value.²³⁴

The majority relies on the following excerpt from Nebraska Statutes section 77-112 in asserting that the above-referenced assessed values are inappropriate for purposes of supporting the Taxpayer's opinions of value: "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."²³⁵ Notwithstanding the requirement under Nebraska Statutes section 77-201 to assess the three supermarket sale parcels and the 35th & Q Hy-Vee at actual value, the majority apparently does not attribute weight thereto for purposes of valuing the Subject Property parcels for the reason that use of these assessments is not a professionally accepted mass appraisal method.

The Nebraska Supreme Court recently held that the Nebraska Statutes section 77-112 language referenced above that is relied upon by the majority is permissive and does not require an indicator of value to meet the strict definition of a professionally accepted mass appraisal

supermarkets as indicators of value regarding the Subject Property parcels because Nebraska Statutes section 77-201 & 77-112 require assessment at actual or market value as discussed in this "Valuation Analysis" section.

²³⁰ Neb. Rev. Stat. §77-201(1) (Reissue 2009).

²³¹ The analysis in this dissent is focused on valuation rather than equalization. Equalization analysis in part involves a determination whether similar properties were assessed at materially different values under *Scribante v. Douglas County Board of Equalization*, 8 Neb.App. 25, 39, 588 N.W.2d 190, 199 (1999). I note that the charts and discussion above indicate that all three Subject Property parcels are similar to the 35th & L Hy-Vee in terms of characteristics, especially the 97th & Q Subject Property parcel, and that the County's assessment of the 35th & L Hy-Vee for tax years 2011 – 2013 supports the Taxpayer's opinions of value for all three Subject Property parcels from a valuation standpoint. The charts and discussion above also illustrate the similarity of all three Subject Property parcels in comparison to the former Oakview Hy-Vee sale parcel and the two Dodge Street Bag N Save sale parcels, and that the County's post-sale assessments of these parcels support the Taxpayer's opinions of value for all three Subject Property parcels from a valuation standpoint.

²³² Neb. Rev. Stat. §77-201(1) (Reissue 2009).

²³³ *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).

²³⁴ Neb. Rev. Stat. §77-131 (Reissue 2009).

²³⁵ Neb. Rev. Stat. § 77-112 (Reissue 2009). I note that the majority relies in part on *Lienemann v. City of Omaha*, 191 Neb. 442, 215 N.W.2d 893 (1974) in support of its position that it is improper to use assessments of parcels other than the Subject Property as indicators of value. I also note, however, that the *Lienemann* case involved a condemnation proceeding wherein the Nebraska Supreme Court stated that its holding does not extend to tax cases.

method.²³⁶ In *County of Lancaster v. Union Bank & Trust Co. (In re Estate of Craven)*, the Nebraska Supreme Court stated as follows in determining that the sale price of auctioned real property constituted a valid indicator of value within the meaning of Nebraska Statutes section 77-112:

The county argues that the appraisals were better indicators of the actual value of the property and notes that those appraisals utilized the methods expressly approved by § 77-112. However, though the county court may consider a professionally accepted mass appraisal method in determining the actual value of property under § 77-112, it is not required to adopt those values. The court is free to weigh other competent evidence, such as the auction sale price, and determine the actual value of the property.²³⁷

The Appraisal of Real Estate, published by the Appraisal Institute, supports the use of the County's assessment actions concerning the 35 & L Hy-Vee as well as the post-sale assessments of the former Oakview Hy-Vee and the two Bag N Save supermarkets to support the Taxpayer's opinions of value regarding the Subject property parcels.²³⁸ In this regard, *The Appraisal of Real Estate* states as follows regarding the use of assessed values:

[D]ata on assessed values can be useful as supporting data in analyses for assignments involving other types of value. For example, a comparison of assessed values can aid in selection of comparable properties, or research into trends in assessed values can be used as secondary evidence of changing market conditions.²³⁹

I also note that the United States Tax Court recognizes the use of assessed value of real property at issue in federal tax cases as an indicator of value in the case where state law provides for assessment at market value.²⁴⁰ While these cases involve the use of assessed value of subject

²³⁶ See, *County of Lancaster v. Union Bank & Trust Co. (In re Estate of Craven)*, 281 Neb. 122, 794 N.W.2d 406 (Neb. 2011).

²³⁷ *County of Lancaster v. Union Bank & Trust Co. (In re Estate of Craven)*, 281 Neb. 122, 128 – 129, 794 N.W.2d 406, 411 (Neb. 2011).

²³⁸ *The Appraisal of Real Estate*, Appraisal Institute, at 64 – 65 (14th Ed. 2013).

²³⁸ *County of Lancaster v. Union Bank & Trust Co. (In re Estate of Craven)*,

²³⁹ *The Appraisal of Real Estate*, Appraisal Institute, at 64 – 65, 196 - 197 (14th Ed. 2013).

²⁴⁰ See, *Wortmann v. Commissioner of Internal Revenue*, T.C. Memo. 2005-227 (United States Tax Court 2005) (with respect to Nebraska improved real property, the Tax Court stated that Nebraska Statutes sections 77-201 and 77-112 require assessment at market value and therefore determined that assessed value corroborated value of property as determined by actual sale and the Internal Revenue Service's expert); *Estate of Silvester v. C.I.R.*, 36 T.C.M. (CCH) 1815, 3314-75, T.C. Memo 1977-439 (United States Tax Court 1977) (the Tax Court determined that the taxpayer did not rebut the Internal Revenue Service's determination of fair market value of real property based on assessed value for local tax purposes); *Estate of Kaplin v. C.I.R.*, 815 F.2d 32, 33 - 34 (United States Court of Appeals, Sixth Circuit 1987) (based on Ohio law requiring assessment of real property at fair market value, the Court of Appeals determined that evidence of assessed value should be considered for valuation purposes); *Frieders' Estate v. C. I. R.*, 687 F.2d 224, 227 (United States Court of Appeals, Seventh Circuit 1982) (the Court of Appeals determined that the United States Tax Court did not err in considering assessment records because an Illinois statute required that real property be assessed at its "fair cash value"); *N. Trust Co. v. Commissioner*, 87 T.C. 349, 382 (United States Tax Court 1986) (citing *Estate of Kaplin v. Commissioner*, T.C. Memo. 1986-167, the Tax Court determined that "assessed value may be

property under appeal rather than comparable properties, they demonstrate that the United States Tax Court recognizes market-based assessment actions as valid indicators of value. Similarly, in light of the requirement to assess real property at market value under Nebraska statutes sections 77-201 and 77-112 and the permissive nature of Nebraska Statutes section 77-112 as illustrated by the Nebraska Supreme Court in *County of Lancaster v. Union Bank & Trust Co. (In re Estate of Craven)*, I would find that it is reasonable to use the County's assessment actions concerning the 35 & L Hy-Vee as well as the post-sale assessments of the former Oakview Hy-Vee and the two Bag N Save supermarkets as valid indicators of value in support the Taxpayer's opinions of value regarding the Subject Property parcels.²⁴¹

I. VALUATION ANALYSIS CONCLUSION

The Taxpayer's appraiser has substantial commercial real estate experience, including work throughout the Omaha area. Based on the Taxpayer's written appraisals and the testimony of its appraiser, I would find that the Taxpayer has met its burden by showing clearly and convincingly that the County's \$59 to \$72 per sq. ft. opinion of value range and its \$7 - \$8 rental rates for the Subject Property parcels are unreasonable and arbitrary in the aftermath of the economic crisis. For these same reasons, I would also find that the County Assessor and the County Board did not sufficiently consider the impact of the 2007 - 2008 national economic crisis and its aftermath for purposes of valuing the Subject Property parcels for tax years 2011 and 2012.

In the case where it is determined that the County Board's determination is unreasonable or arbitrary, the Commission must review the evidence and adopt the most reasonable estimate of actual value presented.²⁴² As indicated in the comparison charts above, the \$47 to \$54 per sq. ft. sale/assessment range of the former Oakview Hy-Vee (\$47) and the two Bag N Save supermarkets (\$54 & \$48) support the opinions of value ranging from \$48 to \$54 per square foot contained in the Taxpayer's appraisals. The \$5.33 to \$6 per sq. ft. income approach rental rates derived from these sales/assessments also support the Taxpayer's \$5.25 to \$6 per sq. ft. income

considered when the relationship between assessed value and fair market value is demonstrated, but basically as a corroboration of fair market value determined by a more reliable method").

²⁴¹ As indicated in the majority opinion, this is a de novo review by the Commission. Under this fresh-look standard, assessed values as determined by the County Board were based upon the evidence at the time of the protest proceedings before that body in 2011 and 2012. At the appeal hearing before the Commission, both parties were permitted to submit evidence that may not have been considered by the County Board at these protest proceedings.

²⁴² See, *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted); *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002); *Garvey Elevators, Inc. v. Adams County Bd. of Equalization*, 261 Neb. 130, 621 N.W.2d 518 (2001).

approach rent rates for the three Subject Property parcels and show that the County's use of \$7 - \$8 rates is unreasonable or arbitrary. Therefore, I would find that the opinions of value submitted by the Taxpayer's appraiser constitute the best evidence of value for the Subject Property parcels for tax years 2011 and 2012.

IV. CONCLUSION

Based on the above analysis, I would find that the Taxpayer has rebutted the presumption that the County Board faithfully performed its duties with sufficient and competent evidence on which to base its decision for tax years 2011 and 2012, and that the Taxpayer has shown by clear and convincing evidence that the decisions of the County Board were arbitrary or unreasonable with respect to the three Subject Property parcels under appeal herein. I would further find that the Taxpayer's opinion of value constitutes the best evidence of value for these three Subject Property parcels. Therefore, I would find that the actual value of the Subject Property parcel at 108th & Fort for tax years 2011 and 2012 is \$3,770,000, and that the decisions of the County Board should be vacated and reversed. I would further find that the actual value of the Subject Property parcel at 97th & Q for tax years 2011 is \$2,890,000, and that the decision of the County Board should be vacated and reversed. Finally, I would find that the actual value of the Subject Property parcel at 88th & Center for tax year 2012 is \$3,900,000, and that the decision of the County Board should be vacated and reversed.

Thomas D. Freimuth, Commissioner