

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

Miracle Hills I LP, Miracle Hills III LP,  
Miracle Hills V Ltd. Limited Partnership,  
Miracle Hills VI Limited Partnership,  
Miracle Hills VII Limited Partnership,  
Appellants,

v.

Douglas County Board of Equalization,  
Appellee

Case Nos: 09C-562, 09C-563, 09C-564,  
09C-565, 09C-566, and 09C-567

Order Reversing the Determinations of the  
Douglas County Board of Equalization

**For the Appellant:**

William E. Peters, Esq.,  
Peters & Chunka, P.C., L.L.O. &  
Thomas R. Wilhelmy, Esq.,  
Fredrikson & Byron, P.A.

**For the Appellee:**

Thomas Barrett,  
Deputy Douglas County Attorney.

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

**I. THE SUBJECT PROPERTY**

The Subject Properties are six commercial parcels located in the Miracle Hills Office Park in Omaha, Douglas County, Nebraska. The parcels are improved with six commercial office buildings referred to as Miracle Hills I, III, V, VI South, VI North, and VII. The legal description for each Subject Property is found in each respective appeal at Exhibit 2, page 5 or 6. The Property Record File for each Subject Property is found in each appeal at Exhibit 2.

**II. PROCEDURAL HISTORY**

Assessed value of the Subject Properties placed on the assessment role as of January 1, 2009 by the Douglas County Assessor, requested value proposed in timely protests by Miracle Hills I LP (09C-562), Miracle Hills III LP (09C-563), Miracle Hills V Ltd. Limited Partnership (09C-564), Miracle Hills VI Limited Partnership (09C-565 & 09C-566), and Miracle Hills VII Limited Partnership (09C-567) (collectively referred to herein as the “Taxpayer”), and the assessed value as determined by the Douglas County Board of Equalization (referred to herein as the “County Board” or “County”) are shown in the following table:

**Case Nos. 09C-562 – 09C-567**

Parcel & Appeal Number	Assessor Notice Value	Taxpayer Protest Value	County Board Determined Value
Miracle Hills I: 09C-562	\$2,859,400	\$2,198,000	\$2,859,400
Miracle Hills III: 09C-563	\$1,789,400	\$1,419,000	\$1,789,400
Miracle Hills V: 09C-564	\$3,411,200	\$3,000,000	\$3,411,200
Miracle Hills VI South: 09C-565	\$1,357,700	\$910,600	\$1,357,700
Miracle Hills VI North: 09C-566	\$1,357,700	\$970,000	\$1,357,700
Miracle Hills VII: 09C-567	\$3,960,000	\$2,874,800	\$3,960,000

The Taxpayer appealed the decisions of the County Board to the Tax Equalization and Review Commission (Commission). Prior to the hearing, the parties exchanged exhibits and submitted Pre-Hearing Conference Reports for each appeal, as ordered by the Commission. The Commission held a hearing on November 22, 2011.

The parties stipulated to the consolidation of the appeals herein. The parties also stipulated to the receipt of exchanged Exhibits 1 through 8 with respect to each consolidated appeal. Exhibits 10, 13, 14, 15, and 16 were received by the Commission during the hearing for each consolidated appeal.

Prior to the hearing, in response to the Motions of William E. Peters, Attorney at Law, the Commission allowed the appearance of Thomas R. Wilhelmy, of Minneapolis, Minnesota, for purposes of participating in the representation of the Taxpayer before the Commission with respect to each consolidated appeal. During the hearing, Mr. Wilhelmy took the oath required by Neb. Rev. Stat. § 7-103 (Reissue of 2012) to participate in the representation of the Taxpayer before the Commission.

**III. STANDARD OF REVIEW**

The Commission's review of the determination by a County Board of Equalization is de novo.<sup>1</sup> When the Commission considers an appeal of a decision of a County Board of

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<sup>1</sup> See, Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.), *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 286, 753 N.W.2d 802, 813 (2008). "When an appeal is conducted as a 'trial de novo,' as opposed to a 'trial de novo on the record,' it means literally a new hearing and not merely new findings of fact based upon a previous record. A trial de novo is conducted as though the

Equalization, a presumption exists that the Board “has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action.”<sup>2</sup>

That presumption remains until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence adduced on appeal to the contrary. From that point forward, the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon all the evidence presented. The burden of showing such valuation to be unreasonable rests upon the taxpayer on appeal from the action of the board.<sup>3</sup>

The order, decision, determination or action appealed from shall be affirmed unless evidence is adduced establishing that the order, decision, determination, or action was unreasonable or arbitrary.<sup>4</sup> Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.<sup>5</sup>

A taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued.<sup>6</sup> The County Board need not put on any evidence to support its valuation of the property at issue unless the taxpayer establishes the Board's valuation was unreasonable or arbitrary.<sup>7</sup>

In an appeal, the Commission “may determine any question raised in the proceeding upon which an order, decision, determination, or action appealed from is based. The Commission may consider all questions necessary to determine taxable value of property as it hears an appeal or cross appeal.”<sup>8</sup> The Commission may also “take notice of judicially cognizable facts and in addition may take notice of general, technical, or scientific facts within its specialized knowledge...,” and may “utilize its experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to it.”<sup>9</sup>

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earlier trial had not been held in the first place, and evidence is taken anew as such evidence is available at the time of the trial on appeal.” *Koch v. Cedar Cty. Freeholder Bd.*, 276 Neb. 1009, 1019 (2009).

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

<sup>3</sup> *Id.*

<sup>4</sup> Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.).

<sup>5</sup> *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

<sup>6</sup> Cf. *Josten-Wilbert Vault Co. v. Board of Equalization for Buffalo County*, 179 Neb. 415, 138 N.W.2d 641 (1965) (determination of actual value); *Lincoln Tel. and Tel. Co. v. County Bd. Of Equalization of York County*, 209 Neb. 465, 308 N.W.2d 515 (1981) (determination of equalized taxable value).

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

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

<sup>9</sup> Neb. Rev. Stat. §77-5016(6) (2012 Cum. Supp.).

#### IV. VALUATION LAW

Under Nebraska law,

[a]ctual value is the most probable price expressed in terms of money that a property will bring if exposed for sale in the open market, or in an arm's length transaction, between a willing buyer and a willing seller, both of whom are knowledgeable concerning all the uses to which the real property is adapted and for which the real property is capable of being used. In analyzing the uses and restrictions applicable to real property the analysis shall include a full description of the physical characteristics of the real property and an identification of the property rights valued.<sup>10</sup>

"Actual value may be determined using professionally accepted mass appraisal methods, including, but not limited to, the (1) sales comparison approach using the guidelines in section 77-1371, (2) income approach, and (3) cost approach."<sup>11</sup> "Actual value, market value, and fair market value mean exactly the same thing."<sup>12</sup> Taxable value is the percentage of actual value subject to taxation as directed by section 77-201 of Nebraska Statutes and has the same meaning as assessed value.<sup>13</sup> All real property in Nebraska subject to taxation shall be assessed as of January 1.<sup>14</sup> All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.<sup>15</sup>

#### V. STATEMENT OF ISSUES

The Taxpayer asserts that actual values of the Subject Properties as of January 1, 2009 are less than actual values as determined by the County Board. The issues on appeal related to those assertions are:

- A. Whether the Taxpayer adduced competent evidence to rebut the presumption of correctness afforded to the County Board regarding its determinations of the actual values of the Subject Properties on January 1, 2009.
- B. Whether the Taxpayer adduced sufficient evidence to show that the decisions of the County Board regarding its determinations of the actual values of the Subject Properties on January 1, 2009 are unreasonable or arbitrary; and
- C. The actual values of the Subject Properties on January 1, 2009.

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<sup>10</sup> Neb. Rev. Stat. §77-112 (Reissue 2009).

<sup>11</sup> Neb. Rev. Stat. §77-112 (Reissue 2009).

<sup>12</sup> *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb. App. 171, 180, 645 N.W.2d 821, 829 (2002).

<sup>13</sup> Neb. Rev. Stat. §77-131 (Reissue 2009).

<sup>14</sup> See, Neb. Rev. Stat. §77-1301(1) (Reissue 2009).

<sup>15</sup> Neb. Rev. Stat. §77-201(1) (Reissue 2009).

## VI. VALUATION EVIDENCE

### A. Overview of Taxpayer's Appraisal Evidence

The Taxpayer offered testimony by George Tesar (referred to herein sometimes as the "Taxpayer's Appraiser"), a Certified General Appraiser, who inspected the Subject Properties on October 11, 2011. The Commission also received an appraisal report prepared by Mr. Tesar for each of the Subject Properties for tax year 2009.<sup>16</sup> Mr. Tesar arrived at opinions of value by reconciling the income and sales comparison approaches.<sup>17</sup>

Mr. Tesar testified that the economic crisis that began in 2007 adversely impacted the valuation of the Subject Properties as of the January 1, 2009 assessment date. In support of this assertion, Mr. Tesar relies on information contained in his appraisals and Exhibit 8 received in evidence.

### B. Overview of County's Appraisal Evidence

Mark Kriglstein (referred to herein as the "County's Appraiser"), a commercial appraiser employed by the Douglas County Assessor's Office, testified on behalf of the County Board. The Commission also received an "Assessment Report" prepared by the County's Appraiser for each of the Subject Properties for tax year 2009.<sup>18</sup>

The County's Appraiser testified that he inspected the Subject Properties on July 31, 2007. He also testified that Linda Rowe, an employee of the Douglas County Assessor's Office, inspected the Subject Properties on July 19, 2011, in preparation for hearing before the Commission.

The County's Appraiser testified that the County utilized the income approach to value the Subject Properties for tax year 2009. He also testified that he examined sales of comparable properties to support his income approach opinions of value. The County's Appraiser further testified that the County's income approach quantifications were derived from a model used for mass appraisal purposes, and that this model was developed during reappraisals of the Subject Properties in the first quarter of 2007 and the first quarter of 2008.<sup>19</sup>

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<sup>16</sup> Exhibit 5 (Case Nos. 09C-562 – 09C-567), dated October 18, 2011.

<sup>17</sup> Exhibit 5:78 (09C-562 & 09C-565); 5:79 (09C-563 & 09C-564); 5:81 (09C-566); 5:83 (09C-567).

<sup>18</sup> Exhibit 2 (Case Nos. 09C-562 – 09C-567), dated September 22, 2011.

<sup>19</sup> The Commission notes that the one-page "PVAL" document contained in the County's Assessment Reports found at Exhibit 2 for each Subject Property reflects a similar pattern of valuation during the period 2007 through 2009. For example, the PVAL document at page 17 of Exhibit 2 for Miracle Hills I (Case No. 09C-562) indicates that the Subject Property's valuation was increased from \$2,091,800 to \$3,530,200 on March 13, 2007, pursuant to a reappraisal by the County Assessor. Page 17 of Exhibit 2 for Miracle Hills I also indicates that the valuation of Miracle Hills I was decreased from \$3,120,000 to \$2,859,400 on March 10, 2008, pursuant to a reappraisal by the County Assessor. The Commission notes that the County Board accepted the

**C. Comparison of Taxpayer’s Reconciled Valuation & County’s Valuation**

A comparison of the Taxpayer’s reconciled valuation and the County’s income approach valuation follows:

Parcel & Appeal Number	Tesar Income Value	Tesar Sales Comparison Value	Tesar Reconciled Value	County Income Value
Miracle Hills I: 09C-562	\$2,300,000	\$2,600,000	\$2,450,000	\$2,859,400
Miracle Hills III: 09C-563	\$1,300,000	\$1,650,000	\$1,400,000	\$1,789,400
Miracle Hills V: 09C-564	\$2,935,000	\$3,200,000	\$3,000,000	\$3,411,200
Miracle Hills VI South: 09C-565	\$1,060,000	\$1,390,000	\$1,200,000	\$1,357,700
Miracle Hills VI North: 09C-566	\$1,070,000	\$1,390,000	\$1,200,000	\$1,357,700
Miracle Hills VII: 09C-567	\$3,200,000	\$3,575,000	\$3,400,000	\$3,960,000

**D. Table A: Comparison Chart - Income Approach Valuation Evidence**

A side-by-side comparison of the income approach calculations by the Taxpayer and County for each Subject Property is attached to this Order as Table A. Generally, the differences between the income approaches utilized by the Taxpayer and the County that are summarized on Table A are categorized as follows: (1) net leasable area; (2) market rent; (3) market vacancy and collection loss; (4) total expenses; (5) net operating income (“NOI”); and (6) capitalization rate. Following is a summary of the evidence based on these income approach categories.

**1. Taxpayer Income Approach Evidence: Net Leasable Area Calculations**

The Taxpayer’s Appraiser, Mr. Tesar, testified that he derived net leasable area for the Subject Properties from schematics provided by the Taxpayers and from rent rolls dated January 2, 2009 included in each of his appraisals. The Commission notes that the net leasable area amounts used by Mr. Tesar in his appraisals match the sum of the amounts contained in the “Rentable” area column of the rent roll for each Subject Property.<sup>20</sup>

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County Assessor’s first quarter 2008 reappraisal valuation in the amount of \$2,859,400 for Miracle Hills I for tax year 2008 and for tax year 2009. Similarly, the PVAL documents found at Exhibit 2 for Miracle Hills III, Miracle Hills V, Miracle Hills VI South, Miracle Hills VI North, and Miracle Hills VII reflect the following valuation treatment by the County: increase in 2007; decrease in 2008; and static in 2009.

<sup>20</sup> Exhibit 5:85 (09C-562); 5:88-89 (09C-563 & 09C-564); 5:87-88 (09C-565); 5:91-92 (09C-566); 5:92-93 (09C-567).

## **2. County Income Approach Evidence: Net Leasable Area Calculations**

The County's Appraiser testified that he did not use the rent rolls in his file for the Subject Properties to calculate net leasable area. Rather, he stated that he used the County's mass appraisal model and the Property Record File contained in the County's Assessment Reports found at Exhibit 2 for each appeal.

The County's Appraiser testified that a prospective buyer of a Subject Property would use information provided by owners such as rent rolls for purposes of calculating net leasable area. He stated that he did not use the rent rolls in the County's possession because it is his experience that the net leasable area of a commercial property often changes due to shrinkage or expansion of common areas stemming from lease negotiations.

Table A attached to this Order indicates that the Taxpayer's net leasable area exceeds the County's quantity with respect to four of six consolidated appeals. With respect to the two appeals wherein the Taxpayer's net leasable area is less than the County's, the difference is minimal.

## **3. Taxpayer Income Approach Evidence: Market Rent**

The Taxpayer's income approach rent values for the six Subject Properties, which are set forth on Table A attached to this Order, range from \$16.50 to \$18 per square foot.<sup>21</sup> The Taxpayer's appraisals for each appeal disclose that these \$16.50 - \$18 per square foot "market rent"<sup>22</sup> values are based upon "contract rent"<sup>23</sup> for each respective Subject Property, together with an analysis of comparable market data derived from a survey of five commercial properties in the neighborhood occupied by the Subject Properties.<sup>24</sup>

The Taxpayer's appraisals state that the Subject Properties occupy a neighborhood with borders defined as follows: (1) North - Blondo Street; (2) East - 90<sup>th</sup> Street; (3) South - West Center Road; and (4) West - 144th Street.<sup>25</sup> The five commercial properties reviewed for comparable market data survey purposes include three nearby Subject Properties in the Miracle

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<sup>21</sup> Exhibit 5:61 (09C-562); 5:63 (09C-563 & 09C-564); 5:62 (09C-565); 5:65 (09C-566); 5:67 (09C-567).

<sup>22</sup> The definition of "market rent" is as follows: "The rent currently prevailing in the market for properties comparable to the subject property. Market rent is capitalized into an estimate of value in the income approach." *Glossary for Property Appraisal and Assessment*, International Association of Assessing Officers, 1997, at 84.

<sup>23</sup> The definition of "contract rent," in contrast to "market rent," is as follows: "The actual amount of rent, per unit of time, that is specified in the contract (lease)." *Glossary for Property Appraisal and Assessment*, International Association of Assessing Officers, 1997, at 31.

<sup>24</sup> Exhibit 5:61 (09C-562); 5:63 (09C-563 & 09C-564); 5:62 (09C-565); 5:65 (09C-566); 5:67 (09C-567). They way I'm

<sup>25</sup> Exhibit 5:19 (09C-562 - 567).

Hills Office Park; a property located at 1010 North 96 Street; and a property located at 10665 Bedford Avenue, which is near 108th & Maple Street.<sup>26</sup>

The Taxpayer's appraisals disclose that the average "contract rent" relating to each respective Subject Property is less than the \$16.50 - \$18 "market rent" values used by Mr. Tesar in his income approach valuations, with the exception of Miracle Hills V (\$18.56 average contract rent vs. \$18 market rent) and Miracle Hills VII (\$18.08 average contract rent vs. \$18 market rent).<sup>27</sup> The Commission notes, however, that the \$18.08 average contract rent value for Miracle Hills VII found at page 67 of Exhibit 5 for Case No. 09C-567 could be as low as \$14.72, which is the mean of the "Contract Rent Per SF" column.<sup>28</sup> The Commission also notes that the average contract rent value for other Subject Properties could be lower than the amount reflected in each respective appraisal, based on averaging the respective "Contract Rent Per SF" column.<sup>29</sup>

The Commission received Exhibit 8 offered by the Taxpayer for all six consolidated appeals, which is a chart prepared by Mr. Tesar to compare his income approach market rent values with the County's, including perspective on values at the beginning of 2006 **prior** to the onset of the economic crisis in 2007 through January 1, 2011. With respect to Exhibit 8, Mr. Tesar testified that: (1) the value depicted as "Gross Rents" for each year 2006 through 2011 is the average of all Miracle Hills' leases executed in the previous 12-month period; (2) "Tesar Estimated Rents" in the amount of \$17.42 is depicted by a red diamond and is the mean of his market rent ranging from \$16.50 - \$18 for the six Subject Properties for tax year 2009;<sup>30</sup> (3) "Kriglstein Estimate Rents" in the amount of \$18.38 is depicted by a green triangle and is the mean of the County's rent values for the six Subject Properties ranging from \$18 - \$18.75;<sup>31</sup> and (4) "Linear (Gross Rents)" is a line that depicts the "mid-point" of the "Gross Rents" values from 2006 through 2011.

Mr. Tesar testified that Exhibit 8 depicts increasing "Gross Rents" from the period January 1, 2006 (\$18.11 per square foot) to January 1, 2007 (\$18.25). Thereafter, he testified that Exhibit 8

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<sup>26</sup> The Commission notes that the 108<sup>th</sup> & Maple Street property is north of Blondo Street and therefore approximately one mile outside of the "neighborhood" defined by Mr. Tesar, the Taxpayer's appraiser.

<sup>27</sup> Exhibit 5:61 (09C-562); 5:63 (09C-563 & 09C-564); 5:62 (09C-565); 5:65 (09C-566); 5:67 (09C-567).

<sup>28</sup> Exhibit 5:67 (09C-567). The Commission notes that average contract rent value for Miracle Hills VII disclosed on the rent roll found at page 93 of Exhibit 5 for Case No. 09C-567 is \$18.30. It is unclear how the \$18.08 average contract value reflected on page 67 of Exhibit 5 for Miracle Hills VII was determined, although it is possible that this is a typographical error in light of the \$14.72 value derived by averaging the "Contract Rent Per SF" column.

<sup>29</sup> Exhibit 5:63 (Miracle Hills III - 09C-563) (\$14.57 vs. \$14.69); 5:62 (Miracle Hills VI South - 09C-565) (\$14.04 vs. \$17.93); 5:65 (Miracle Hills VI North - 09C-566) (\$13.15 vs. \$14.69); 5:67 (09C-567) (Miracle Hills VII - \$14.72 vs. \$18.08).

<sup>30</sup>  $\$17.42 = (18 + 16.50 + 18 + 17 + 17 + 18)/6$ .

<sup>31</sup>  $\$18.38 = (18.75 + 18 + 18.75 + 18 + 18 + 18.75)/6$ .

depicts declining “Gross Rents” as compared to the \$18.25 value on January 1, 2007, with “Gross Rents” amounting to \$16.66 as of January 1, 2008 and less than “Tesar Estimated Rents” in the amount of \$17.42 as of January 1, 2009.<sup>32</sup>

Mr. Tesar stated that the red diamond on Exhibit 8 depicting his \$17.42 “Estimated Rents” value as of January 1, 2009 is above both the average “Gross Rents” value and the linear line of “Gross Rents” as illustrated on that document. In contrast, he testified that the County’s \$18.38 mean rent value for tax year 2009 is significantly above both the 2009 “Gross Rents” value and the linear line of “Gross Rents” for the entire period January 1, 2006 through January 1, 2011.<sup>33</sup>

#### **4. County Income Approach Evidence: Rent**

Table A attached hereto and the County’s Assessment Reports found at Exhibit 2 for each appeal indicate that the County uses \$18 as the rental rate for Miracle Hills III, VI South, and VI North, and \$18.75 as the rate for Miracle Hills I, V, and VII. Based on the County Appraiser’s testimony and a review of the County’s Assessment Reports, the Commission concludes that the \$18 rental rate is applied to buildings deemed “Average” in terms of construction quality, while the \$18.75 rate is used for buildings deemed “Good” in terms of quality.

Beyond the “Average” versus “Good” quality distinction, the evidence is not clear regarding the County’s method for determining rent ranging from \$18 to \$18.75 for the six Subject Properties. In general, the County’s Assessment Report for each appeal states that “[r]esearch has been done by the Assessor to determine the typical rent by location, type of structure and the property use.”<sup>34</sup> The County’s Appraiser also testified that the County assembled a mass appraisal income model utilizing information specifically for Miracle Hills, and that Miracle Hills is a “separate submarket.” In response to questioning in terms of whether the County’s mass appraisal model for rental rate purposes averaged the actual “contract rents” of the Subject Properties without extending the analysis to additional properties in the market area outside of the Miracle Hills submarket, the County’s Appraiser testified that this practice could have caused

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<sup>32</sup> Mr. Tesar testified that the Exhibit 8 “Gross Rents” value as of January 1, 2006 is \$18.11 per square foot, \$18.25 as of January 1, 2007, and \$16.66 as of January 1, 2008. While Mr. Tesar’s testimony and his appraisals do not clearly disclose an exact “Gross Rents” value as of January 1, 2009, Exhibit 8 and his testimony indicate that this value is less than “Tesar Estimated Rents” in the amount of \$17.42 as of January 1, 2009. Exhibit 8 indicates that “Gross Rents” as of January 1, 2009 is somewhere between \$17 and \$17.42.

<sup>33</sup> The Commission notes that the linear line of “Gross Rents” on Exhibit 8 would adjust upward slightly if the average “Gross Rents” values were not used beyond January 1, 2009, which is the relevant valuation date at issue in this case.

<sup>34</sup> Exhibit 2:11 (09C-562 & 09C-567); 2:12 (09C-563 & 09C-564); 2:13 (09C-565); 2:14 (09C-566).

the market rental rates for the Subject Properties to be higher or lower than the County's \$18 - \$18.75 rent rates.

In contrast to his testimony referenced above indicating that the County did not consider competitive market data outside of the Miracle Hills "separate submarket," the County's Appraiser testified that commercial rents in West and Northwest Omaha were considered in connection with the County's reappraisals of the Subject Properties in March of 2007 and March of 2008 that focused on actual value as of January 1, 2007 and January 1, 2008, respectively.<sup>35</sup> The County's Appraiser stated, however, that he could not identify specific leases included in the County's mass appraisal model built specifically for Miracle Hills pursuant to the reappraisals in March of 2007 and March of 2008, although he did state that leases from 2008 and some from 2007 were considered. He further testified that he could not identify specific leases included in the County's mass appraisal model that generated its rent values for the Subject Properties ranging from \$18 - \$18.75 for purposes of the January 1, 2009 valuation date.

The County's Appraiser testified that the County did not conduct a study for each Subject Property in the form of a reappraisal focused on the January 1, 2009 assessment date. The County's Appraiser stated, rather, that the January 1, 2009 valuation date was not focused upon until preparation of the County's Assessment Reports dated September 22, 2011 for each Subject Property. These Assessment Reports dated September 22, 2011 were submitted by the County to the Commission in advance of the November 22, 2011 hearing and are found at Exhibit 2 for each appeal.

The County's Appraiser testified that the commercial rental market was softening from 2007 through 2008, as reflected by the approximate 8% drop in the assessed value from January 1, 2007 to January 1, 2008 that stemmed from the County's reappraisal in March of 2008. The County's Appraiser further testified that a prospective buyer of the Subject Properties would consider this rental market softening as of the January 1, 2009 valuation date.

Referencing Exhibit 8, the County's Appraiser was asked whether the County conducted a study of competitive market rents from 2006 -- prior to the onset of the economic crisis --

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<sup>35</sup> Similar to the Taxpayer's appraiser, the County's Appraiser testified that the competitive market occupied by the Subject Properties includes West and Northwest Omaha. The County's Appraiser further testified that the County's "market" information used for purposes of constructing its model is based on a review of reports (rent rolls, operating statements), appraisals, and interactions with owners, managers and brokers. The County's Appraiser stated, however, that he did not interview the managers of the Subject Properties.

through the January 1, 2009 assessment date. The County's Appraiser stated that the County did not perform such a study.

Further referencing Exhibit 8, the County's Appraiser was questioned regarding the approximate \$17.50 average of all Miracle Hills' leases executed in the 12-month period previous to tax year 2009. In response, the County's Appraiser stated that he examined rent roll data for the Subject Properties submitted in connection with the protest process in the summer of 2009. It is unclear, however, whether the County's Appraiser reviewed this information in 2009 or in 2011 in preparation for hearing before the Commission.

#### **5. Taxpayer Income Approach Evidence: Market Vacancy & Collection Loss**

The Taxpayer's appraisals for each Subject Property utilize a vacancy and collection loss rate amounting to 15% of potential gross income.<sup>36</sup> Mr. Tesar's testimony and his appraisals for each of the six Subject Properties indicate he derived this 15% rate from the market and from information sources such as brokers and the Building Owners and Managers Association's ("BOMA") leasing guide.<sup>37</sup> Mr. Tesar's appraisals for each of the Subject Properties state as follows in support of the Taxpayer's 15% vacancy and collection loss rate:

Based on statistics reported in the 2008 BOMA leasing guide, vacancy rates along the West Dodge Road Corridor are averaging 18.20%. Office vacancy for the entire metropolitan area was 15.30% in 2008. The comparable rentals surveyed indicated vacancy rates of 0% up to 71%. However, many other office buildings located in the subject's immediate market are experiencing relatively high vacancy rates with notable decreases in occupancy occurring during the past year.<sup>38</sup>

#### **6. County Income Approach Evidence: Vacancy & Collection Loss**

The County's Appraiser testified that the County's 12% vacancy and collection loss rate was not based upon information from the market area, but rather was based upon the average of the actual vacancy and collection loss rates experienced by the Subject Properties. The County's Appraiser also testified that the 15% rate used by Tesar was a "little strong" for Class B office buildings in West Central Omaha, and he further stated that the applicable rate could be plus or minus 15%. The County's Appraiser further testified that the recession that began in 2007 that had not yet found its bottom by January 1, 2009 would cause a prospective buyer of the Subject Properties on the assessment date to expect increased vacancy and collection losses.

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<sup>36</sup> Exhibit 5:72 (09C-562 & 09C-565); 5:73 (09C-563 & 09C-564); 5:75 (09C-566); 5:77 (09C-567).

<sup>37</sup> Exhibit 5:71-72 (09C-562 & 09C-565); 5:72-73 (09C-563 & 09C-564); 5:74-75 (09C-566); 5:76-77 (09C-567).

<sup>38</sup> Exhibit 5:72 (09C-562 & 09C-565); 5:73 (09C-563 & 09C-564); 5:75 (09C-566); 5:77 (09C-567).

## **7. Taxpayer Income Approach Evidence: Expenses**

The Taxpayer's appraisals for the Subject Properties estimate stabilized expenses based on "historical operating expenses from the subject as well as other comparable office buildings."<sup>39</sup> Mr. Tesar's testimony and his appraisals also indicate that all of the Subject Properties' leases are full service requiring the Taxpayer to pay all costs of occupancy, including real estate taxes, building insurance, management fees, leasing commissions, utilities, maintenance, repairs and remodeling, janitorial services, and reserves for replacement, structural, and remodeling reserves.<sup>40</sup>

The Taxpayer's appraisals exclude real estate taxes from the total itemized operating expense calculation for each Subject Property; rather, real estate taxes are added (loaded) to the capitalization rate.<sup>41</sup> With the exception of real estate taxes, the Taxpayer's appraisals itemize each of the cost categories referenced in the preceding paragraph, and the total itemized operating expense for each Subject Property is referenced on Table A attached hereto.<sup>42</sup>

## **8. County Income Approach Evidence: Expenses**

The County uses 40% of effective gross income as the expense ratio for Miracle Hills VI South, VI North, and VII, and 44% of effective gross income as the expense ratio for Miracle Hills I, III, and V.<sup>43</sup> Based on the County Appraiser's testimony and a review of the County's Assessment Reports, the Commission concludes that the 40% expense ratio is applied to buildings older than 20 years, while the 44% expense ratio is used for buildings 20 years of age or less.

The County's Appraiser testified that the County's 40% and 44% non-itemized expense ratios include real estate taxes and are derived from an internal model. He also testified that the model includes a 4% management fee, but he could not quantify any other component of the County's ratios, and his testimony was otherwise unclear regarding the basis of the model in terms of the source and age of data.

The County's Appraiser further testified that the County categorizes the Subject Properties as Class B commercial properties. He also testified that he included Class A, B and C commercial

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<sup>39</sup> Exhibit 5:72 (09C-562 & 09C-565); 5:73 (09C-563 & 09C-564); 5:75 (09C-566); 5:77 (09C-567).

<sup>40</sup> Exhibit 5:72 (09C-562 & 09C-565); 5:73 (09C-563 & 09C-564); 5:75 (09C-566); 5:77 (09C-567).

<sup>41</sup> Exhibit 5:72 (09C-562 & 09C-565); 5:73 (09C-563 & 09C-564); 5:75 (09C-566); 5:77 (09C-567).

<sup>42</sup> Exhibit 5:72-73(09C-562 & 09C-565); 5:73-74 (09C-563 & 09C-564); 5:75-76 (09C-566); 5:77-78 (09C-567).

<sup>43</sup> Exhibit 2:12 (09C-562 & 09C-567); 2:13 (09C-563 & 09C-564); 2:14 (09C-565); 2:15 (09C-566).

properties in the County's model for purposes of determining its 40% and 44% non-itemized expense ratios.

### **9. Income Approach: Net Operating Income ("NOI") Calculations**

The Commission notes that the unadjusted NOI quantities used by the Taxpayer in its appraisals and by the County in its Assessment Reports for each of the Subject Properties indicate that the values are essentially the same. For example, Table A attached to this Order shows that the Taxpayer's NOI is \$250,255 for Case No. 09C-562 (Miracle Hills I), while the County's **unadjusted** NOI amounts to \$243,049. As Table A indicates, however, the County's NOI after adjustment for real estate taxes is \$301,667, which is significantly higher than the Taxpayer's \$250,255 NOI. Table A illustrates a similar pattern with respect to Case Nos. 09C-563 – 567.

The NOI comparison issue outlined above is further illustrated in Exhibit 3 received by the Commission for each consolidated appeal, which include recommendations by a Referee and a Referee Coordinator hired by the County Board to review the protests filed by the Taxpayer for each Subject Property in June of 2009. For example, Page 2 of Exhibit 3 for Case No. 09C-562 states the following in the Referee "Comments" section: "[p]rotest indicates actual 2008 NOI of \$250,060 versus assessor NOI \$243,049." Referee comments similar to the preceding example are found at page 2 of Exhibit 3 for Case Nos. 09C-563 – 09C-567.

The source of the Taxpayer and County NOI amounts included in these Referee comments is not included in evidence. Nonetheless, based on the similarity of these amounts as compared to the NOI amounts contained in the Taxpayer's appraisals found at Exhibit 5 and the County's Assessment Reports found at Exhibit 2 for each appeal, the Commission notes that the above-referenced Referee comments generated in connection with the County Board's determination process for tax year 2009 do not adjust for real estate taxes and therefore do not provide a clear comparison.

### **10. Taxpayer Income Approach Evidence: Capitalization Rate**

The Taxpayer's appraisals for each Subject Property utilize a 10.80% loaded capitalization rate, consisting of an 8.75% unloaded base capitalization rate and a 2.05% real estate tax rate.<sup>44</sup> Mr. Tesar's testimony and his appraisals for each of the six Subject Properties indicate he derived this 10.80% by reconciling the band of investment and direct capitalization techniques,

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<sup>44</sup> Exhibit 5:74-77(09C-562 & 09C-565); 5:75-78 (09C-563 & 09C-564); 5:77-80 (09C-566); 5:79-82 (09C-567).

thereby considering (1) the yield requirements of both lenders and investors; and (2) the actions of buyers and sellers in the market.<sup>45</sup>

### **11. County Income Approach Evidence: Capitalization Rate**

The County uses 8.75% as the capitalization rate for Miracle Hills III, VI South and VI North, and 8.5% for Miracle Hills I, V and VII. Based on the County Appraiser's testimony and a review of the County's Assessment Reports for each appeal, the Commission concludes that the 8.75% rate is applied to Subject Properties deemed "Average" in terms of construction quality, while the 8.5% rate is used for Subject Properties deemed "Good" in terms of construction quality.

The County's Appraiser testified that the County's capitalization rate for each Subject Property does not include real estate taxes and is therefore unloaded. Additionally, the County's Assessment Report found at Exhibit 2 for each appeal states the following for capitalization rate purposes:

Some classes of property may not include a component for the effective tax rate because they are rented on a full service basis with the landlord being responsible for the property taxes. The tax expense in our analysis is included in the total expenses of the property. Therefore, the tax expenses are not added back into the overall effective capitalization rate.<sup>46</sup>

The County's Appraiser testified that the County's capitalization rate for each of the Subject Properties was supported by a study conducted by Kenneth Voss & Associates, LLC, of Atlanta, Georgia. The County's Assessment Report for each appeal states that Mr. Voss utilized sales between January 1, 2003 and December 31, 2009 for capitalization rate calculation purposes, with a focus on "2007-2009 data."<sup>47</sup> The County's Appraiser could not explain the basis of Mr. Voss' use of sales during the 12-month period subsequent to the valuation date of January 1, 2009. He also testified that he did not review the Voss report in its entirety.

The County's Assessment Report authored by the County's Appraiser for each appeal further states as follows with respect to the use of sales prior to 2008 in calculating the County's capitalization rates:

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<sup>45</sup> Exhibit 5:74-76(09C-562 & 09C-565); 5:75-77 (09C-563 & 09C-564); 5:77-79 (09C-566); 5:79-81 (09C-567).

<sup>46</sup> Exhibit 2:13 (09C-562 & 09C-567); 2:14 (09C-563 & 09C-564); 2:15 (09C-565); 2:16 (09C-566).

<sup>47</sup> Exhibit 2:13 (09C-562 & 09C-567); 2:14 (09C-563 & 09C-564); 2:15 (09C-565); 2:16 (09C-566).

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.<sup>48</sup>

## VII. ANALYSIS & FINDINGS

### A. Income Approach: Market Data Requirement

The Taxpayer asserts that the County's mass appraisal income approach model erroneously focuses on Miracle Hills submarket data and therefore does not sufficiently consider competitive local market data. The Commission analyzes this assertion in terms of whether the County's income model is: (1) unreasonable or arbitrary; and (2) the best evidence of value as compared to the Taxpayer's opinions of value for the Subject Properties that reconcile the sales and income approaches to value.

The income capitalization approach used by the Taxpayer and the County requires the analysis and use of competitive market information.<sup>49</sup> *The Appraisal of Real Estate* published by The Appraisal Institute states: "To derive pertinent income and expense data, an appraiser investigates comparable sales and rentals or competitive income-producing properties of the same type in the same market. . . . Appraisers try to obtain all income and expense data from the income-producing properties used as comparables."<sup>50</sup> "Vacancy and collection loss is commonly expressed as a percentage of potential annual gross income, and it should be based on market research, not the actual rental history of a property."<sup>51</sup> "Published studies are useful, but the appraiser must still develop operating expense ratios from comparable properties in the subject property's market or verify the applicability of the published ratios to this market."<sup>52</sup> The direct capitalization method used by the Taxpayer produces an indication of value based on a single year's estimated income, and this method "employs capitalization rates and multipliers extracted from market data."<sup>53</sup>

The Taxpayer's appraisals and the testimony of Mr. Tesar, which are summarized above, are persuasive in terms of the use of competitive market information to value the Subject Properties. Therefore, the Commission finds that the Taxpayer used sufficient market information under the

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<sup>48</sup> Exhibit 2:13 (09C-562 & 09C-567); 2:14 (09C-563 & 09C-564); 2:15 (09C-565); 2:16 (09C-566).

<sup>49</sup> Fisher and Martin, *Income Property Valuation*, Dearborn Financial Publishing, Inc., 2004, at 43.

<sup>50</sup> *The Appraisal of Real Estate*, 13th Edition, The Appraisal Institute, 2008, 473.

<sup>51</sup> *Mass Appraisal of Real Property*, International Association of Assessing Officers, 1999, at 404.

<sup>52</sup> *Id.* at 494.

<sup>53</sup> *The Appraisal of Real Estate*, 13th Edition, The Appraisal Institute, 2008, at 499.

income approach authorities referenced above to calculate rent, vacancy and collection losses, operating expenses, and capitalization rates.

The Commission is not persuaded that the County used sufficient market information to construct its mass appraisal model that was used to value the Subject Properties for the 2009 tax year. In this regard, the County Appraiser's testimony is in conflict in terms of the use of sufficient competitive market information for mass appraisal purposes. Nonetheless, the Commission finds probative value in the following testimony by the County's Appraiser for purposes of determining whether the County's income model utilized sufficient competitive local market information outside of Miracle Hills as required for mass appraisal purposes:

1. The County assembled its income model utilizing information specifically for Miracle Hills, and that Miracle Hills is a "separate submarket."
2. The extension of the rental rate analysis to additional properties in the market area outside of the Miracle Hills submarket could have caused the market rental rates for the Subject Properties to be higher or lower than the County's \$18 - \$18.75 rates.
3. The County's 12% vacancy and collection loss rate was not based upon information from the market area, but rather was based upon the average of the actual vacancy and collection loss rates experienced by the Subject Properties.
4. The County's Appraiser was unable to produce or discuss examples of leases outside of Miracle Hills used in the County's mass appraisal model.

Based on the above testimony, the Commission finds that the County's income model relies on data from the Miracle Hills submarket and therefore does not sufficiently consider competitive market information outside of that submarket for purposes of satisfying mass appraisal requirements. Therefore, the Commission finds clear and convincing evidence that the County's income model used to value the Subject Properties for tax year 2009 is unreasonable or arbitrary. Based on this finding, the Commission further finds that the Taxpayer's appraisals for the Subject Properties constitute the best evidence of value.

#### **B. Consideration of Declining Local Market Trends**

The Taxpayer asserts that the County's income model failed to sufficiently consider the economic crisis that began in 2007 and the associated declining market trends that adversely impacted the value of the Subject Properties as of the January 1, 2009 valuation date. In support

of this assertion, the Taxpayer relies on Mr. Tesar's testimony, together with his appraisals and Exhibit 8 that he prepared.

The Taxpayer's appraisals for each of the Subject Properties reference a chart published by LoopNet for Omaha office rentals entitled "Office Property Asking Price Index Trends," which indicates that asking rent peaked at approximately \$14.40 per square foot in late 2007 and declined through early 2010 to approximately \$13.50 per square foot.<sup>54</sup> Additionally, following are excerpts that appear in each of the Taxpayer's appraisals for the Subject Properties:

1. The economic downturn has forced many businesses to downsize or close altogether. Maintaining current tenants seems to be a priority for most building owners.<sup>55</sup>
2. Brokers that were interviewed in conjunction with the rental analysis indicated that the office buildings [in Omaha] are particularly experiencing weak demand.<sup>56</sup>
3. An analysis of market data in Omaha reveals that values for office buildings have declined from 2007 through 2009 based on LoopNet market trends analysis. In addition the building located at 11825 Q Street sold in October of 2006 for \$2,600,000 and was sold again in September of 2009 for \$2,350,000. This property showed an average decline of 3.46% annually or 0.288% per month. After considering the overall trends within the Omaha area, I have estimated an annual appreciation rate of -3.50% per year for sales that occurred prior to July of 2008.<sup>57</sup>

The Taxpayer also relies on Exhibit 8 prepared by Mr. Tesar to support its assertion that the County failed to sufficiently consider the economic crisis and associated declining local competitive market trends. As discussed previously, Exhibit 8 depicts increasing gross rents from the period January 1, 2006 (\$18.11 per square foot) to January 1, 2007 (\$18.25). Thereafter, Exhibit 8 depicts declining gross rents as compared to the \$18.25 average on January 1, 2007, with gross rents amounting to \$16.66 as of January 1, 2008 and less than \$17.42 as of January 1, 2009.

With regard to analyzing the Taxpayer's economic crisis assertion, Neb. Rev. Stat. § 77-1301 (2012 Cum. Supp.) requires the assessment of all real property at actual market value as of January 1 of each tax year. Additionally, Neb. Rev. Stat. § 77-1311.03 (2012 Cum. Supp.) requires a reappraisal of each parcel of real property in the form of a systematic review and inspection at least once every six years. Finally, Neb. Rev. Stat. § 77-112 (Reissue 2009)

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<sup>54</sup> Exhibit 5:71 (09C-562 & 09C-565); 5:72 (09C-563 & 09C-564); 5:74 (09C-566); 5:76 (09C-567).

<sup>55</sup> Exhibit 5:21 (09C-562 - 09C-566); 5:22 (09C-567).

<sup>56</sup> Exhibit 5:71 (09C-562 & 09C-565); 5:72 (09C-563 & 09C-564); 5:74 (09C-566); 5:76 (09C-567).

<sup>57</sup> Exhibit 5:56 (09C-562) 5:57 (09C-565); 5:58 (09C-563 & 09C-564); 5:60 (09C-566); 5:62 (09C-567).

provides in pertinent part that actual value for property tax assessment purposes 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.”

The Nebraska Supreme Court has found that the assessed value for real property may differ on a year-to-year basis, dependent upon the circumstances.<sup>58</sup> For this reason, the Court held in *DeVore v. Board of Equalization* that a prior year’s assessment is not relevant to the subsequent year’s valuation.<sup>59</sup> In other words, the *DeVore* Court contemplated year-to-year valuation changes and examination thereof annually.<sup>60</sup>

Additionally, in *Leech, Inc. v. Board of Equalization*, the Nebraska Supreme Court held that “[w]here a county assessor has not acted on his own information, and where it is arbitrarily determined without explanation of the methods used or the elements considered, there is no presumption that the valuation is correct, and such a valuation is not supported by competent evidence and is legally erroneous.”<sup>61</sup> In reaching this conclusion, the *Leech* Court found that the assessed valuations at issue in the case were “automatically accepted through the years by the taxing authorities without any consideration of the relevant and applicable statutory factors.”<sup>62</sup>

Further guidance for purposes of analyzing the Taxpayer’s economic crisis argument in the mass appraisal context is contained in *Property Assessment Valuation*, which is published by the International Association of Assessing Officers. Addressing mass appraisal income approach models used in the commercial context, *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 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.<sup>63</sup>

Under the statutory, case law, and mass appraisal authority framework above, the County Assessor is required to perform a full reappraisal of each parcel in the County via inspection and review at least once every six years. This framework, however, also requires the County Assessor and the County Board to determine the impact of known market condition changes on a

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<sup>58</sup>*Affiliated Foods Coop. v. Madison Co. Bd. Of Equal.*, 229 Neb. 605, 613, 428 N.W.2d 201, 206 (1988).

<sup>59</sup>*DeVore v. Bd. of Equal.*, 144 Neb. 351, 13 N.W.2d 451 (1944); *Affiliated Foods*, 229 Neb. at 613, 428 N.W.2d at 206 (1988).

<sup>60</sup>*DeVore v. Bd. of Equal.*, 144 Neb. 351, 354, 13 N.W.2d 451, 453

<sup>61</sup>*Leech, Inc. v. Bd. Of Equal.*, 176 Neb. 841, 846, 127 N.W.2d 917, 921 (1964). See also *Baum Realty Co. v. Board of Equalization*, 169 Neb. 682, 100 N.W.2d 730 (1960); *Matzke v. Board of Equalization*, 167 Neb. 875, 95 N.W.2d 61 (1959); *Adams v. Board of Equalization*, 168 Neb. 286, 95 N.W.2d 627 (1959).

<sup>62</sup>*Id.* at 852.

<sup>63</sup>*Property Assessment Valuation, 3rd Ed.*, International Association of Assessing Officers, 2010, 417-18. [Emphasis added.]

previously constructed mass appraisal model for a class or subclass of property on an annual basis.

The County Appraiser's testimony and the County's Assessment Reports indicate that the County's income approach quantifications were derived from a model used for mass appraisal purposes, and that this model was developed during reappraisals of the Subject Properties in the first quarter of 2007 and the first quarter of 2008.<sup>64</sup> The County's Appraiser also acknowledged that the local commercial rental market was softening in the 2007 – 2009 period due to the economic crisis, and that a buyer on the January 1, 2009 assessment would consider this factor.

The County Appraiser's testimony and the County's Assessment Reports indicate that the County's mass appraisal income approach model used to value the Subject Properties was not reviewed or supplemented with data after the reappraisal on March 10, 2008 to account for the impact of the ongoing economic crisis on commercial properties in the competitive local market.<sup>65</sup> Moreover, the assessed valuation of each Subject Property established by this 2008 reappraisal was accepted by the County Board for the 2008 and 2009 tax years, even though (1) the County Assessor's mass appraisal model was not reviewed or supplemented after March 10, 2008,<sup>66</sup> and (2) the County Appraiser testified that a prospective buyer of the Subject Properties within the meaning of Neb. Rev. Stat. § 77-112 (Reissue 2009) would consider localized competitive market softening associated with the economic crisis as of the January 1, 2009 assessment date. Therefore, under the authorities outlined above, the Commission finds that the County's valuation for each Subject Property is not the best evidence of value as compared to the Taxpayer's appraisals because the County Board accepted the 2008 valuations for purposes of the 2009 tax year without considering known economic crisis impact on the local market occupied by the Subject Properties.

The County Assessor is not required to supplement its models every year in the case where examination of the market for the class or subclass of real property indicates with acceptable confidence a reasonable degree of reliability in the model. The Commission finds, however, that the Taxpayer adduced sufficient evidence regarding the declining local market to necessitate examination and possible supplementation of the mass appraisal model by the County Assessor to ensure that the Subject Properties were assessed at actual market value as of January 1, 2009.

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<sup>64</sup> Exhibit 2:17 (09C-562 & 09C-567); 2:18 (09C-563 & 09C-564); 2:19 (09C-565); 2:20 (09C-566).

<sup>65</sup> Exhibit 2:17 (09C-562 & 09C-567); 2:18 (09C-563 & 09C-564); 2:19 (09C-565); 2:20 (09C-566).

<sup>66</sup> Exhibit 2:17 (09C-562 & 09C-567); 2:18 (09C-563 & 09C-564); 2:19 (09C-565); 2:20 (09C-566).

Finally, the Commission notes that at least one jurisdiction outside of Nebraska has considered the impact of the economic crisis for property tax valuation purposes in the commercial context. For example, the Washington Board of Tax Appeal's stated as follows in addressing the County Assessor's four comparable sales used in valuing a commercial office building:

The four sales used in the Assessor's arguments have less than ideal "market condition" characteristics: one closed in mid-year 2006, one in mid-year 2007, one in the first-quarter of 2008, and one in mid-year 2008. Relying on the bracketing effect of the derived range of values (\$181 to \$306 per square foot of net rentable area), the Assessor makes no attempt to adjust for characteristics or for market conditions. The bracketing approach would be given more weight if at least some of the sale closings happened after the onset of the Great Recession. Since that is not the situation in this appeal, the Assessor's sales data are given less weight than would normally be the case.<sup>67</sup>

### **C. Income Approach: Expense Calculations**

The Commission determined in section VII (A) above that the County's income approach model, which includes 40% to 44% non-itemized expense ratios, does not satisfy mass appraisal requirements because the model erroneously focuses on Miracle Hills submarket data and therefore fails to sufficiently consider competitive local market data. The Taxpayer also asserts that the County's income model is insufficient because its expense ratios: (1) are based in part on non-comparable Class A and Class C properties; and (2) failed to consider the declining local rental market as of January 1, 2009. The Commission analyzes these assertions in terms of whether the County's income model is the best evidence of value as compared to the Taxpayer's opinions of value for the Subject Properties.

The Taxpayer's appraisals for the Subject Properties estimate stabilized expenses based on "historical operating expenses from the subject as well as other comparable office buildings."<sup>68</sup> Mr. Tesar's testimony and his appraisals also indicate that all of the Subject Properties' leases are full service requiring the Taxpayer to pay all costs of occupancy, including real estate taxes, building insurance, management fees, leasing commissions, utilities, maintenance, repairs and

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<sup>67</sup> *Thomas Northlake, LLC v. Lloyd Hara, King County Assessor*, Docket No. 75238, at 5 (Washington Board of Tax Appeals 2012).

<sup>68</sup> Exhibit 5:72 (09C-562 & 09C-565); 5:73 (09C-563 & 09C-564); 5:75 (09C-566); 5:77 (09C-567).

remodeling, janitorial services, and reserves for replacement, structural, and remodeling reserves.<sup>69</sup>

The Taxpayer's appraisals exclude real estate taxes from the total itemized operating expense calculation for each Subject Property; rather, real estate taxes are added (loaded) to the capitalization rate.<sup>70</sup> With the exception of real estate taxes, the Taxpayer's appraisals itemize each of the cost categories referenced in the preceding paragraph, and the total itemized operating expense for each Subject Property is referenced on Table A attached hereto.<sup>71</sup> The Commission finds the Taxpayer's evidence credible in terms of expenses for income approach valuation purposes.

The County's Appraiser testified that the County categorizes the Subject Properties as Class B commercial properties. He also testified that he included Class A, B and C commercial properties in the County's model for purposes of determining its 40% and 44% expense ratios for the Subject Properties. *Property Assessment Valuation* published by the International Association of Assessing Officers states that expense calculations for income approach purposes requires the examination of "operating statements from comparable properties" in the competitive market.<sup>72</sup> Thus, the Commission finds that the evidence is not persuasive for best evidence purposes in terms of whether the County sufficiently used comparable Class B commercial properties in its mass appraisal model for purposes of its 40% and 44% expense ratios.

The Taxpayer also asserts that the County's 40% and 44% expense ratios are based in part on information derived prior to the economic crisis and therefore required adjustment to address the declining local market on January 1, 2009, for the reason that rents were decreasing and costs were fixed or increasing at that time. Other than the 4% management fee component, the County Appraiser's testimony is not clear regarding the expense ratios for each Subject Property in terms of (1) percentages for model components such as deferred maintenance, building insurance, and replacement reserves; (2) source of model data; and (3) age of model data. Therefore, for best evidence purposes, the Commission is not persuaded that the County's expense ratios sufficiently considered the declining rental market as of January 1, 2009.

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<sup>69</sup> Exhibit 5:72 (09C-562 & 09C-565); 5:73 (09C-563 & 09C-564); 5:75 (09C-566); 5:77 (09C-567).

<sup>70</sup> Exhibit 5:72 (09C-562 & 09C-565); 5:73 (09C-563 & 09C-564); 5:75 (09C-566); 5:77 (09C-567).

<sup>71</sup> Exhibit 5:72-73(09C-562 & 09C-565); 5:73-74 (09C-563 & 09C-564); 5:75-76 (09C-566); 5:77-78 (09C-567).

<sup>72</sup> *Property Assessment Valuation, 3rd Ed.*, International Association of Assessing Officers, 2010, 327.

#### **D. Income Approach: Capitalization Rate Calculations**

The Taxpayer asserts that the income approach capitalization rates used by the County are insufficient for the following reasons: (1) the County's capitalization rates are derived from a study and analysis that are not clear; and (2) the County's rates are based in part on sales prior to the onset of the economic crisis in 2007. The Commission analyzes these assertions in terms of whether the County's income model is the best evidence of value as compared to the Taxpayer's opinions of value for the Subject Properties.

Mr. Tesar's appraisals for each Subject Property utilize a 10.80% loaded capitalization rate, consisting of an 8.75% unloaded base capitalization rate and a 2.05% real estate tax rate.<sup>73</sup> Mr. Tesar's testimony and his appraisals for each of the six Subject Properties indicate he derived this 10.80% by reconciling the band of investment and direct capitalization techniques, thereby considering (1) the yield requirements of both lenders and investors; and (2) the actions of buyers and sellers in the market.<sup>74</sup> The Commission finds that the Taxpayer's use of a 10.80% loaded capitalization rate credible for each Subject Property.

The County's Appraiser testified that the County's capitalization rate for each of the Subject Properties was supported by a study conducted by Kenneth Voss & Associates, LLC, of Atlanta, Georgia. The County's Assessment Report for each appeal states that Mr. Voss utilized sales between January 1, 2003 and December 31, 2009 for capitalization rate calculation purposes, with a focus on "2007-2009 data."<sup>75</sup> The County's Appraiser was unable to explain the basis of Mr. Voss' use of sales during the 12-month period subsequent to the valuation date of January 1, 2009. He also testified that he did not review the Voss report in its entirety.

In addition to the Voss study, the County's Assessment Report authored by the County's Appraiser for each appeal further states as follows with respect to the use of sales prior to the onset of the economic crisis in calculating the County's capitalization rates:

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.<sup>76</sup> **[Emphasis added.]**

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<sup>73</sup> Exhibit 5:74-77(09C-562 & 09C-565); 5:75-78 (09C-563 & 09C-564); 5:77-80 (09C-566); 5:79-82 (09C-567).

<sup>74</sup> Exhibit 5:74-76(09C-562 & 09C-565); 5:75-77 (09C-563 & 09C-564); 5:77-79 (09C-566); 5:79-81 (09C-567).

<sup>75</sup> Exhibit 2:13 (09C-562 & 09C-567); 2:14 (09C-563 & 09C-564); 2:15 (09C-565); 2:16 (09C-566).

<sup>76</sup> Exhibit 2:13 (09C-562 & 09C-567); 2:14 (09C-563 & 09C-564); 2:15 (09C-565); 2:16 (09C-566).

Based on the County Appraiser's testimony and the evidence contained in the County's Assessment Reports outlined in the preceding two paragraphs, the Commission finds that the County did not sufficiently consider market activity most relevant to the tax year at issue for capitalization rate calculation purposes. The Commission acknowledges that the County's Assessment Report for each appeal authored by the County's Appraiser 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 County Appraiser's testimony regarding incomplete review of the Voss study, together with the language that he authored in the County's Assessment Reports noted above regarding the use "older" sales due to insufficient sales during the economic crisis period from "late 2008 through 2009," the Commission finds 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. Therefore, while the Commission is mindful that the County's base unloaded capitalization rates are similar to the Taxpayer's base unloaded rates, the Commission is persuaded that the Taxpayer's rates are preferable for best evidence purposes.

#### **E. Valuation Opinions**

The Taxpayer's Appraiser certifies that his appraisals were prepared using professionally approved methods at Page 2 of Exhibit 5 for each appeal. Therefore, under *JQH La Vista Conference Center Development LLC v. Sarpy Cty. Bd. of Equal.*, 285 Neb.120, 825 N.W.2d 447 (2013), the Commission finds that the Taxpayer's appraisal for each Subject Property constitutes sufficient competent evidence to rebut the presumption in favor of the County.

Based on the findings in section VII (A) above, the Commission finds that the County's determinations that the Subject Properties were assessed at actual market value for tax year 2009 are unreasonable or arbitrary. Based on the findings in sections VII (A) and VII (D) above, the Commission further finds that the Taxpayer's appraisal for each Subject Property constitutes the best evidence of value for tax year 2009.

The Commission finds 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 decisions, and that the Taxpayer has shown by clear and convincing evidence that the decisions of the County Board of Equalization were arbitrary or unreasonable. Therefore, the Commission finds that the actual value of the Subject Properties for 2009 is \$2,450,000 for Miracle Hills I,

\$1,400,000 for Miracle Hills III, \$3,000,000 for Miracle Hills V, \$1,200,000 for Miracle Hills VI South, \$1,200,000 for Miracle Hills VI North, and \$3,400,000 for Miracle Hills VII.

### **VIII. CONCLUSION**

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

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

### **IX. ORDER**

IT IS ORDERED THAT:

1. The decisions of the Douglas County Board of Equalization determining the value of the Subject Properties for tax year 2009 are vacated and reversed.<sup>77</sup>
2. The assessed values of the Subject Properties for tax year 2009 are: \$2,450,000 for Miracle Hills I (09C-562), \$1,400,000 for Miracle Hills III (09C-563), \$3,000,000 for Miracle Hills V (09C-564), \$1,200,000 for Miracle Hills South VI (09C-565), \$1,200,000 for Miracle Hills North VI (09C-566), and \$3,400,000 for Miracle Hills VII (09C-567).
3. This decision and order, if no appeal is timely filed, shall be certified to the Douglas County Treasurer and the Douglas County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (2012 Cum. Supp.)
4. Any request for relief, by any party, which is not specifically provided for by this order is denied.
5. Each party is to bear its own costs in this proceeding.
6. This decision shall only be applicable to tax year 2009.

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<sup>77</sup> Assessed value, as determined by the County Board, was based upon the evidence at the time of the Protest proceeding. At the appeal hearing before the Commission, both parties were permitted to submit evidence that may not have been considered by the county board of equalization at the protest proceeding.

7. This order is effective for purposes of appeal on May 16, 2013

Signed and Sealed: May 16, 2013.

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Thomas D. Freimuth, Commissioner

SEAL

**Nancy J. Salmon, concurring in part, dissenting in part.**

I concur with section VII (A) and VII (C), dissent with section VII (D), and concur in part and dissent in part with sections VII (B) and VII (E) of Commissioner Freimuth's decision. I concur with the result of the decision.

**A. Market Data**

The income approach requires an appropriate use and examination of market data to determine factors used to calculate an opinion of actual value based upon the approach.<sup>78</sup> I concur with section VII (A) that the conflicting nature of Kriglstein's testimony, his testimony that the rental rate and vacancy and collection loss were determined by a limited examination of the Subject Property, and evidence contained within Tesar's appraisal reports that the rental rate and vacancy and collection loss were different after consideration of appropriate market data, are clear and convincing evidence that the County Board's decision, which relied upon the County Assessor's opinion of value, is arbitrary or unreasonable.

Similarly, I concur with VII (C) which determines that evidence that the County Assessor examined non-comparable properties when determining the appropriate expense ratio is persuasive evidence that the County Assessor's opinion of value was not the best evidence of value.

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<sup>78</sup> *Mass Appraisal of Real Property*, International Association of Assessing Officers (1999) at 156.

## B. Market Trends

I concur that a County Assessor is required by Nebraska Statute to set the assessed values of real property at its actual value as of January 1 of the tax year,<sup>79</sup> and that a County Assessor should be aware of unique circumstances affecting the local market. I further concur that the failure of a County Assessor to act upon known information that indicates changing market conditions impacting the actual value of real property results in an opinion of value that is legally erroneous.<sup>80</sup>

However, to the extent that the Commission's Opinion would impose a new duty, or imposes a duty that the County Assessor do more than act on known information, I disagree. I do not find a statutory requirement that County Assessors reappraise each market every year, but recognize that the County Assessor may systematically review a sample of properties within a market, comparing the properties' sale prices to model determined value, to ensure that the model is producing values which fall within the statutorily permissible ranges.

Changes in the local market are depicted within the local market data. In the assessment of real property any changes in the global or national economic environments are only relevant to the extent there is a measurable impact within the local market; it is possible for values in a local market to be decreasing during a global boom or increasing during a global depression. It is the impact on the local market factors which contribute to the actual value of a property, as depicted by local market factors, which is relevant. Information that explains why the local market factors are changing may be important for policy reasons, but it is the quantified impact on the local market that matters in appropriately determining the actual value of real property.

Thus while Commissioner Freimuth's opinion cites to a Washington case wherein the Washington Tax Board referenced a "Great Recession" and relied upon the macro economic climate to determine the appropriate weight to be given to sales data for use in the determination of actual value,<sup>81</sup> I find that the macro economic climate is irrelevant to the determination of the

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<sup>79</sup> Neb. Rev. Stat. § 77-1301 (2012 Cum. Supp.)

<sup>80</sup> See. *DeVore v. Board of Equalization*, 144 Neb. 351, 13 N.W.2d 451 (1944).

<sup>81</sup> *Thomas Northlake, LLC v Lloyd Hara, King County Assessor*, Docket No. 75238, at 5 (Washington Tax Board Appeals 2012).

actual impacts on the local market unless that impact on the local market conditions can be quantified.

### **C. Capitalization Rate Calculations**

I note the difference between Tesar's capitalization rate and the County Assessor's capitalization rate can be almost entirely explained by differences in method; Tesar included real estate taxes as a component of the capitalization rate, and the County Assessor included real estate taxes in the expense ratio. This Commissioner finds that the inclusion or exclusion of the real estate taxes from the capitalization rates or expenses is irrelevant to the issues in the case.

### **D. Conclusion**

I concur that at the hearing, Tesar, a licensed appraiser, testified concerning the actual value of the Subject Properties captioned above. The Taxpayer supplied the Commission with the appraisal report for the real property as prepared by Tesar.<sup>82</sup> The Taxpayer has, therefore, through competent evidence, rebutted the presumption that the County Board faithfully performed its duties and had sufficient competent evidence to make its determination.<sup>83</sup>

I concur that there is clear and convincing evidence that the County Board's decision was arbitrary or unreasonable. I would find that Tesar's appraisal is the best evidence of value based on Tesar's appropriate examination of market factors when determining the actual value of the Subject Property. I concur in the result of the Commission's Order and Decision, but do so based on the reasoning presented in this concurrence.

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Nancy J. Salmon, Commissioner

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

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<sup>82</sup> Exhibits 5 in all of the above captioned appeals.

<sup>83</sup> See, *JQH La Vista Conf. Ctr. v. Sarpy Cty. Bd. Of Equal.*, 285 Neb. 120, 127, --- N.W.2d --- (2013).

**TABLE A**  
**COMPARISON OF INCOME APPROACH DATA**

	<b>09C-562 County</b>	<b>09C-562 Taxpayer</b>	<b>09C-563 County</b>	<b>09C-563 Taxpayer</b>	<b>09C-564 County</b>	<b>09C-564 Taxpayer</b>
<b>Leasable Area</b>	26,304	26,377	17,651	17,476	31,380	33,364
<b>Year Built</b>	1985	1985	1986	1986	1986	1986
<b>Condition</b>	Average	Average	Average	Average	Good	Average
<b>Quality</b>	Good	Average	Average	Average	Good	Average
<b>Rent</b>	\$18.75	\$18.00	\$18.00	\$16.50	\$18.75	\$18.00
<b>PGI</b>	\$493,200	\$474,785	\$317,718	\$288,355	\$588,375	\$600,550
<b>Vacancy</b>	12% of PGI	15% of PGI	12% of PGI	15% of PGI	12% of PGI	15% of PGI
<b>Total Expenses</b>	44% of EGI including tax	Itemized w/o tax	44% of EGI including tax	Itemized w/o tax	44% of EGI including tax	Itemized w/o tax
<b>Total Expenses</b>	\$190,967	\$153,315	\$123,020	\$104,190	\$227,819	\$193,455
<b>Total Expenses Less 2.05% Tax</b>	\$132,349	N/A	\$ 86,337	N/A	\$157,889	N/A
<b>NOI (With 2.05% Tax Expense)</b>	\$243,049	N/A	\$156,572	N/A	\$289,951	N/A
<b>NOI (Without 2.05% Tax Expense)</b>	\$301,667	\$250,255	\$193,255	\$140,910	\$359,881	\$317,015
<b>Base Cap Rate</b>	8.50%	8.75%	8.75%	8.75%	8.5%	8.75%
<b>Tax Rate</b>	0	2.05%	0	2.05%	0	2.05%
<b>Loaded Cap Rate</b>	N/A	10.80%	N/A	10.80%	N/A	10.80%
<b>Income Value</b>	\$2,859,400	\$2,300,000	\$1,789,400	\$1,300,000	\$3,411,200	\$2,935,000
	<b>09C-565 County</b>	<b>09C-565 Taxpayer</b>	<b>09C-566 County</b>	<b>09C-566 Taxpayer</b>	<b>09C-567 County</b>	<b>09C-567 Taxpayer</b>
<b>Leasable Area</b>	12,500	13,870	12,500	14,108	34,000	37,857
<b>Year Built</b>	1990	1990	1989	1989	1990	1990
<b>Condition</b>	Average	Average	Average	Average	Average	Average
<b>Quality</b>	Average	Average	Average	Average	Good	Average
<b>Market Rent</b>	\$18.00	\$17.00	\$18.00	\$17.00	\$18.75	\$18.00
<b>PGI</b>	\$225,000	\$235,790	\$225,000	\$239,835	\$637,500	\$681,425
<b>Market Vacancy</b>	12% of PGI	15% of PGI	12% of PGI	15% of PGI	12% of PGI	15% of PGI
<b>Total Expenses</b>	40% of EGI including tax	Itemized w/o tax	40% of EGI including tax	Itemized w/o tax	40% of EGI including tax	Itemized w/o tax
<b>Total Expenses</b>	\$79,200	\$86,460	79,200	\$88,440	\$224,400	\$234,685
<b>Total Expenses Less 2.05% Tax</b>	\$51,367	N/A	\$51,367	N/A	\$143,220	N/A
<b>NOI (With 2.05% Tax Expense)</b>	\$118,800	N/A	\$118,800	N/A	\$336,600	N/A
<b>NOI (Without 2.05% Tax Expense)</b>	\$146,633	\$113,960	\$146,633	\$115,420	\$417,780	\$344,525
<b>Base Cap Rate</b>	8.75%	8.75%	8.75%	8.75%	8.5%	8.75%
<b>Tax Rate</b>	0	2.05%	0	2.05%	0	2.05%
<b>Loaded Cap Rate</b>	N/A	10.80%	N/A	10.80%	N/A	10.80%
<b>Income Value</b>	\$1,357,700	\$1,060,00	\$1,357,700	\$1,070,000	\$3,960,000	\$3,200,000