

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Landmark Group, Chops Holdings, Inc,
Appellant,

v.

Douglas County Board of Equalization,
Appellee.

Case No: 11R-635

Decision Affirming
County Board of Equalization

BACKGROUND & PROCEDURAL HISTORY

1. The Subject Property is a residential rental parcel located at 2523 Jones Street, Omaha, Nebraska, with a legal description of: JOHNSON ADD REPLAT LOT 9 BLOCK 0 W 50 FT SUB LT 1 OF 50 X 66.5.
2. The Douglas County Assessor assessed the Subject Property at \$38,300 for tax year 2011.
3. Landmark Group, Chops Holdings (herein referred to as the “Taxpayer”) protested this value to the Douglas County Board of Equalization (herein referred to as the “County Board”) and requested an assessed value of \$34,433 for tax year 2011.
4. The County Board determined that the assessed value of the Subject Property was \$38,300 for tax year 2011.
5. The Taxpayer appealed the determination of the County Board to the Tax Equalization and Review Commission (herein referred to as the “Commission”).
6. A Single Commissioner hearing was held at the Omaha State Office Building, 1313 Farnam St., Omaha, Nebraska, before Commissioner Thomas D. Freimuth.
7. David J. Paladino and Alexander Karimi-Asl were present at the hearing for the Taxpayer, Landmark Group, Chops Holdings.
8. Larry Thomsen, an employee of the Douglas County Assessor’s Office, was present for the County Board.

STANDARD OF REVIEW & GENERAL VALUATION LAW

9. The Commission’s review of the determination of the County Board of Equalization is de novo.¹ “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.”²
10. When considering an appeal 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.”³ That presumption “remains until

¹ 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).

² *Koch v. Cedar Cty. Freeholder Bd.*, 276 Neb. 1009, 1019 (2009).

³ *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted).

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.”⁴

11. 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.⁵
12. Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.⁶
13. A Taxpayer must introduce competent evidence of actual value of the Subject Property in order to successfully claim that the subject property is overvalued.⁷
14. Nebraska Statutes section 77-112 defines actual value as follows:

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 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.⁸

GENERAL VALUATION ANALYSIS

15. The Property Record Profile contained in the Assessment Report submitted by the County Board at the hearing indicates that the Subject Property sold for \$3,500 in 1999.
16. The Property Record Profile for the Subject Property indicates that the County Board’s \$38,300 determination for tax year 2011 includes \$4,600 for land and \$33,700 for improvements.
17. The County’s Assessment Report indicates that the County Board’s \$33,700 determination attributable to improvements for tax year 2011 is based on a sales comparison approach mass appraisal model derived from market area arm’s-length sales and multiple regression analysis. Multiple regression analysis assigns value to physical and locational characteristics of real property based on correlation of such characteristics

⁴ *Id.*

⁵ Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.).

⁶ *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

⁷ 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).

⁸ Neb. Rev. Stat. § 77-112 (Reissue 2009).

with market area sales.⁹ The Assessment Report contains a document entitled “Market Calculation Detail” that sets forth the value assigned to each of the various mass appraisal model characteristics relating to the Subject Property’s improvements.

18. The Property Record Profile and the Market Calculation Detail document indicate that the Subject Property is located in Neighborhood 16 and Subdivision 19120. The Property Record Profile indicates that the Subject Property is included on County map number 16-0207.
19. The Taxpayer asserted that the condition rating of the Subject Property should be lowered from fair to poor. Based on the evidence presented at the hearing, the Commission finds that the Taxpayer did not present clear and convincing evidence that the condition of the Subject Property should be lowered from fair to poor.
20. The Taxpayer presented Multiple Listing Service (“MLS”) documents for five area comparable properties subject to recent sales in support of its assertion that the actual value of the Subject Property was \$26,300 for tax year 2011. The Taxpayer averaged the sale price of these alleged comparable properties for purposes of arriving at its \$26,300 opinion of value for the Subject Property. The Taxpayer’s approach can best be described as an attempt to value the Subject Property using the sales comparison approach.
21. Averaging is not an acceptable part of the sales comparison approach. “Simply averaging the results of the adjustment process to develop an averaged value fails to recognize the relative comparability of the individual transactions as indicated by the size of the total adjustments and the reliability of the data and methods used to support the adjustments.”¹⁰
22. Further, the sales comparison approach has a defined systematic procedure that requires, among other things, that the individual appraising the Subject Property “[l]ook for differences between the comparable sale properties and the Subject Property using the elements of comparison. Then adjust the price of each sale to reflect how it differs from the Subject Property or eliminate that property as a comparable. This step typically involves using the most comparable sale properties and then adjusting for any remaining differences.”¹¹
23. The elements of comparison include real property rights conveyed in the sales, any financing terms, condition of the sale, expenditures made immediately after purchase, market conditions, location, physical characteristics, economic characteristics, use and zoning, and any non-realty components of value.¹² Consideration of many of these characteristics is required under Nebraska Statutes section 77-1371.¹³
24. The Taxpayer did not provide analysis regarding adjustments based on the elements of comparison referenced above to determine whether the alleged comparable properties were truly comparable. Therefore, the Commission finds that the Taxpayer has not provided clear and convincing evidence that the County Board’s determination for tax year 2011 is unreasonable or arbitrary.
25. The Commission notes that guidance for purposes of applying the sales comparison approach is widely available. For example, the Commission is allowed by statute and by

⁹ *Property Assessment Valuation*, 3rd Ed., International Association of Assessing Officers, 2010, at pgs. 416, 427.

¹⁰ *The Appraisal of Real Estate*, 13th Edition, Appraisal Institute (2008) at 308.

¹¹ *Id.* at 301-302.

¹² *Id.* at 141.

¹³ Neb. Rev. Stat. §77-1371 (Reissue 2009).

its rules and regulations to consider many publications that provide guidance regarding the sales comparison approach and other valuation techniques. These publications, which are listed at the Commission's "Rules/Regulations" website link (Chapter 5, section 031), can be found at area public libraries and law school libraries. Guidance regarding valuation techniques can also be found at the Commission's "Decisions" website link.

26. The Commission also notes that section 8 of the Order for Single Commissioner Hearing issued to the parties in this matter at least 30 days prior to the hearing provides as follows:

NOTE: *Copies of the County's Property Record File for any parcel you will present as a comparable parcel should be provided so that your claim can be properly analyzed. The information provided on the County's web page is not a property record file. A property Record File is only maintained in the office of the County Assessor and should be obtained from that office prior to the hearing.*

DISTRESSED SALES AS INDICATOR OF VALUE ANALYSIS

27. Mr. Thomsen of the County Assessor's Office noted that some if not all of the Taxpayer's alleged comparable sales were foreclosures or otherwise not arm's-length transactions such as "short sales," and that the County does not consider such distressed transactions valid under the sales comparison valuation approach. Mr. Thomsen also indicated that the County Assessor's sales comparison approach mass appraisal model used to value properties in the Subject Property's market area excludes foreclosure sales and other distressed sales that are deemed not arm's-length.
28. *The Dictionary of Real Estate Appraisal* defines an arm's-length transaction as follows: "A transaction between unrelated parties under no duress."¹⁴
29. In connection with the sales comparison approach to valuation, *The Appraisal of Real Estate* states as follows: "[s]ales that are not arm's-length...should be identified and rarely if ever used."¹⁵
30. As indicated above in the Standard of Review & General Valuation Law section, Nebraska Statutes section 77-112 references arm's-length transactions in defining actual (i.e., market) value, stating as follows:

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 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.¹⁶

¹⁴ *The Dictionary of Real Estate Appraisal*, 4th Ed., Appraisal Institute, 2002, at p. 18.

¹⁵ *The Appraisal of Real Estate*, 13th Edition, Appraisal Institute, 2008, at p. 304.

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

31. In addition to the factors referenced above in Nebraska Statutes section 77-112, *Property Assessment Valuation* states that actual or market value is derived from transactions involving “reasonable time for exposure to the market.”¹⁷
32. The Taxpayer asserted that the economic crisis that began in 2007 created an environment where distressed transactions dominated the Subject Property’s market area for tax year 2011 assessment purposes. Consequently, the Taxpayer asserted that distressed transactions such as foreclosures, bank sales and short sales are valid indicators of value under the sales comparison approach and should be considered by the County in its mass appraisal model.
33. General guidance regarding consideration of the economic crisis by the County in the residential mass appraisal context is contained in *Property Assessment Valuation*, which is published by the International Association of Assessing Officers.¹⁸ For example, *Property Assessment Valuation* states that assessment officials are required to review factors such as foreclosure rates and vacancy rates as a part of developing and maintaining market area databases.¹⁹ Additionally, in addressing mass appraisal techniques such as the sales comparison approach 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.²⁰

34. Generally, jurisdictions outside of Nebraska have considered the impact of the economic crisis in terms of the use of sales comparison approach for property tax valuation purposes.²¹ For example, the Washington Board of Tax Appeals stated as follows in addressing the County Assessor’s four comparable sales used to value 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

¹⁷ *Property Assessment Valuation*, 3rd Ed., International Association of Assessing Officers, 2010, at p. 15; *See, The Appraisal of Real Estate*, 13 ed., Appraisal Institute, 2008, at pgs. 54-77

¹⁸ *Property Assessment Valuation*, 3rd Ed., International Association of Assessing Officers, 2010, at pgs. 73 - 83.

¹⁹ *Property Assessment Valuation*, 3rd Ed., International Association of Assessing Officers, 2010, at pgs. 77 - 83.

²⁰ *Property Assessment Valuation*, 3rd Ed., International Association of Assessing Officers, 2010, at p. 417-18.

²¹ *Thomas Northlake, LLC v. Lloyd Hara, King County Assessor*, Docket No. 75238, at p. 5 (Washington Board of Tax Appeals 2012).

situation in this appeal, the Assessor's sales data are given less weight than would normally be the case.²²

35. With respect to whether distressed sales can be considered reliable indicators of market value, several courts have issued opinions in the aftermath of the economic crisis.²³ For instance, in a case that involved consideration of the economic crisis for valuation purposes outside of the property tax context, the Illinois Appellate Court commented as follows regarding the validity of a distressed transaction as an indicator of value in affirming a lower court's approval of a \$300,000 judicial foreclosure sale of 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.²⁴

36. In terms of the use of distressed sales in the property tax context, in 2012 the Oregon Tax Court considered whether “foreclosures and short sales characterize the market for the subject property” in *Greene v. Benton County Assessor*.²⁵ In summarizing the Taxpayer's argument, the Court stated as follows:

The Taxpayer testified that, although he is not a licensed broker or appraiser, he owns 11 properties and is experienced in real estate. As support that the subject property sale is representative of its real market value, Greene provided an article by Alan Smith (Smith), Deputy Assessor, Ada County Assessor's Office, Boise, Idaho, entitled “Distressed Sales: Anomaly or Market Value?” Smith states that “bank-owned resales, if they are marketed by a realtor, or through a multiple listing service for a time period considered to be an average exposure to

²² *Thomas Northlake, LLC v. Lloyd Hara, King County Assessor*, Docket No. 75238, at 5 (Washington Board of Tax Appeals 2012).

²³ *Sewickley, LLC v. Chicago Title and Trust Company*, 974 N.E.2d 397 (Illinois Court of Appeals 2012); *Greene v. Benton County Assessor*, TC-MD 110687N (Oregon Tax Court 2012); *Voronaeff v. Crook County Assessor*, TC-MD No 110361C (Oregon Tax Court 2012); *Brashnyk v. Lane County Assessor*, TC-MD No 110308 (Oregon Tax Court 2011); *Witkin v. Lane County Assessor*, TC-MD No 110460C (Oregon Tax Court 2012); *Umpqua Bank v. Lane County Assessor*, TC-MD No 110594N (Oregon Tax Court 2012); *Columbus City School Dist. Bd. of Education v. Franklin County*, 983 N.E.2d 1285, 134 Ohio St.3d 529 (Ohio Supreme Court 2012) (bank sale deemed arm's-length because bank acted like a typically motivated seller); *Cattell v. Lake Cty. Bd. of Revision*, 2010-Ohio-4426, 2009-L-161 (Ohio Court of Appeals, Eleventh District 2010) (bank sales deemed arm's-length where properties were listed with a realtor on the open market).

²⁴ *Sewickley, LLC v. Chicago Title and Trust Company*, 974 N.E.2d 397, 406 (Illinois Court of Appeals 2012).

²⁵ *Greene v. Benton County Assessor*, TC-MD 110687N, at p. 8 (Oregon Tax Court 2012).

the market, will likely be very close to fair market value in this type of market.²⁶

37. In holding that the Taxpayer failed to prove that foreclosures or short sales characterized the market under the sales comparison approach, the Oregon Tax Court in *Greene* indicated that proof that the “majority” of market area sales were distressed is required:

[P]roperty purchased through foreclosure may be “a voluntary *bona fide* arm’s-length transaction between a knowledgeable and willing buyer and a willing seller.” *Ward v. Dept. of Revenue*, 293 Or 506, 508, 650 P2d 923 (1982). “There are narrow exceptions determined on a case-by-case basis to the holding that bank-owned property sales are not typically representative of real market value.” *Brashnyk v. Lane County Assessor (Brashnyk)*, TC-MD No 110308 at 8, WL 6182028 *5 (Dec 12, 2011). “[W]here the majority of sales are distress, it would seem that that kind of sale would provide a more accurate reflection of the market.” *Morrow Co. Grain Growers v. Dept. of Rev. (Morrow)*, 10 OTR 146, 148 (1985)..... Plaintiffs have not presented any evidence that foreclosures and short sales characterize the market for the subject property. Plaintiffs provided a list of sales that occurred between 2003 and 2011 in the subject property neighborhood; unadjusted sale prices in 2008, 2009, and 2010, ranged from \$335,000 to \$452,000. It is not clear which, if any, of those sales were foreclosures or short sales. Plaintiffs’ purchase of the subject property for \$295,000 in May 2009 is the lowest sale price identified for any of the years, 2003 through 2011. “Usually, one sale does not make a market.” *Truitt Brothers, Inc. v. Dept. of Rev.*, 302 Or 603, 609, 732 P2d 497 (1987).²⁷

38. The Oregon Tax Court has also considered three Oregon Department of Revenue directives issued to county assessors in 2009 and 2010 regarding consideration of distressed transactions for purposes of the sales comparison approach and ratio studies.²⁸ For instance, in *Brashnyk v. Lane County Assessor*, the Oregon Tax Court addressed whether bank sales were valid indicators of market value and quoted the Oregon Department of Revenue’s memorandum entitled “Valid Market Sales for Oregon Assessment Purposes” issued to county assessors on January 21, 2009:

‘[s]o long as the nominal standards for an acceptable comparable sale are met – arm’s length, voluntary, knowledgeable parties, exposure to the market, cash equivalent, etc. – such [bank] sales are appropriate to consider. Under the market value definition standard, any sale that meets those criteria should be considered as a potential comparable.’²⁹

²⁶ *Greene v. Benton County Assessor*, TC-MD 110687N, at p. 3 (Oregon Tax Court 2012).

²⁷ *Greene v. Benton County Assessor*, TC-MD 110687N, at p. 8 (Oregon Tax Court 2012).

²⁸ *Brashnyk v. Lane County Assessor*, TC-MD No 110308, at p. 9 (Oregon Tax Court 2011); *Voronaeff v. Crook County Assessor*, TC-MD No 110361C, at p. 8-9 (Oregon Tax Court 2012).

²⁹ *Brashnyk v. Lane County Assessor*, TC-MD No 110308, at p. 9 (Oregon Tax Court 2011).

39. In *Voronaeff v. Crook County Assessor*, the Oregon Tax Court addressed whether short sales were valid indicators of market value and quoted the Oregon Department of Revenue’s memorandum entitled “Valid Market Sales for Oregon Assessment Purposes” issued to county assessors on January 21, 2009:

‘[Short sales] should be carefully reviewed to determine if they meet the relevant criteria for a comparable. The mere fact that there is, presumably, some duress on the part of the seller (the upside down owner) that prompts the sale, does not itself disqualify the transaction from consideration, especially when there is some duress in the market. This situation is analogous to the owner losing his job and selling because he can’t make the mortgage payments. *We wouldn’t discount that sale simply because the owner was very motivated to sell* (some duress) so long as the sale was an arm’s-length with adequate exposure and contained no unusual financing terms or elements that couldn’t be adjusted out.’³⁰

40. In *Voronaeff v. Crook County Assessor*, the Oregon Tax Court also included the following excerpt from a letter from the Oregon Department of Revenue to the Crook County Assessor dated February 1, 2010:

‘We recommend you analyze all sales, foreclosure, short or otherwise, and determine if they represent market conditions. If elements of a particular sale raise reasonable doubt that the sale doesn’t represent the market, prevailing wisdom suggests eliminating that sale in the market value study. However, in a declining market, foreclosures and short sales are common and in many cases can and should be used in market value studies. *If, in your opinion, the current economics and market conditions, as of the valuation date, indicate some level of distress is a common market characteristic, it is appropriate to include such sales in a comparable sale’s value analysis or a ratio study.*’³¹

41. The Nebraska Department of Revenue Property Assessment Division’s Sales File Practice Manuals for tax years 2010 and 2011 do not address circumstances where foreclosures or short sales could be reliable indicators of market value. The 2011 Sales File Practice Manual does, however, state as follows with respect to consideration of sales from banks for purposes of determining whether such a transaction is arm’s-length:

Sales from banks should not be automatically considered a non-arm’s-length transaction especially if you do not have an abundant supply of sales. Typically, values will be on the low end of the value range, but they may be considered arm’s length transactions and included in the ratio

³⁰ *Voronaeff v. Crook County Assessor*, TC-MD No 110361C, at p. 9 (Oregon Tax Court 2012). [Emphasis in original Memorandum.]

³¹ *Voronaeff v. Crook County Assessor*, TC-MD No 110361C, at pgs. 8-9 (Oregon Tax Court 2012). [Emphasis in original Letter.]

study if all other criteria for being an open market arm's-length transaction are met.³²

42. As indicated previously, the Taxpayer presented Multiple Listing Service ("MLS") documents for five area comparable properties subject to recent sales ranging from \$17,500 to \$32,000. As also indicated previously, based on a review of the MLS documents, Mr. Thomsen of the County Assessor's Office noted that some if not all of the Taxpayer's alleged comparable sales were foreclosures or otherwise distressed transactions.
43. Under the guidance above regarding consideration of distressed transactions as indicators of market value in the aftermath of the economic crisis, the Taxpayer's MLS documentation raises significant questions regarding the validity of the County's mass appraisal model for purposes of determining actual value for tax year 2011. The Taxpayer did not, however, provide analysis regarding the ratio of distressed sales to sales considered valid by the County in the market area. Therefore, because it is unclear whether distressed transactions constitute either a significant portion or a majority of the total market area sales in the two-year period preceding the assessment date that is analyzed by the County for purposes of constructing its mass appraisal model, the Commission finds that the Taxpayer has not provided clear and convincing evidence that the County Board's determination for tax year 2011 is unreasonable or arbitrary.

CONCLUSION

44. The Taxpayer has not produced competent evidence that the County Board failed to faithfully perform its duties and to act on sufficient competent evidence to justify its actions.
45. The Taxpayer has not adduced sufficient, clear and convincing evidence that the determination of the County Board is unreasonable or arbitrary and the decision of the County Board should be affirmed.

ORDER

IT IS ORDERED THAT:

1. The Decision of the Douglas County Board of Equalization determining the value of the Subject Property for tax year 2011 is Affirmed.
2. That the taxable value of the Subject Property for tax year 2011:

Land	\$ 4,600
Improvements	\$33,700
Total	\$38,300

³² 2011 Statewide Equalization Exhibit 107, p. 117.

3. This decision and order, if no further action is taken, 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 2011.
7. This order is effective on September 24, 2013.

Signed and Sealed: September 24, 2013.

Thomas D. Freimuth, Commissioner