

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Jack S. Song,
Appellant,

v.

Douglas County Board of Equalization,
Appellee.

Case No: 12R 1111

Decision Reversing
County Board of Equalization

GENERAL BACKGROUND & PROCEDURAL HISTORY

1. The Subject Property is a residential parcel located at 14210 Hamilton Street, Omaha, Douglas County, Nebraska. The Subject Property’s legal description is contained in the Case File.
2. The Douglas County Assessor assessed the Subject Property at \$873,900 for tax year 2012.
3. Jack S. Song (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 a \$637,500 valuation.
4. The County Board determined that the assessed value of the Subject Property was \$873,900 for tax year 2012.
5. The Taxpayer appealed the determinations 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 Bldg., 1313 Farnam, Omaha, Nebraska, before Commissioner Thomas D. Freimuth, on August 29, 2013.
7. Jack S. Song, the Taxpayer, was present at the hearing.
8. Kevin Corcoran and Brian Grimm, employees of the Douglas County Assessor’s Office, were present for the County Board.

SUMMARY OF HEARING DOCUMENTS & STATEMENTS

9. The Property Record File contained in the Assessment Report submitted by the County Board at the hearing indicates that the Taxpayer purchased the Subject Property for \$637,500 on January 3, 2012. It also indicates that the residence situated on the Subject Property was constructed in 1992 and remodeled in 1998.
10. Following is the Subject Property’s sales history contained in the Property Record File:

Sale Date	Sale Price	Deed Type	Reception #	Book	Page #	Grantor
1/3/2012	\$637,500	WD	2012000575	2012	575	Hazer Theodore Etal
5/20/1997	\$635,000	D	2061565	2061	565	
11/20/1990	\$77,500	D	1888110	1888	110	

11. Following is the Subject Property's assessment history contained in the County's Assessment Report at page 21:

YEAR EFFECTIVE	DATE OF CHANGE	LAND VALUE	IMPROVE VALUE	TOTAL VALUE	REASON
2013	3/9/2013	178500	653900	832400	Reappraisal
2012	8/7/2012	178500	695400	873900	Board of Equal.
2010	3/6/2010	178500	695400	873900	Reappraisal
2005	3/19/2005	178500	686300	864800	Reappraisal
2001	7/5/2001	81000	756000	837000	Board of Equal.
2000	7/5/2000	81000	756000	837000	Board of Equal.
2000	3/12/2000	81000	841500	922500	Reappraisal
1999	5/21/1999	810000	612000	693000	State Board of Equal.
1999	3/9/1999	77100	582900	660000	BP
1998	3/4/1998	77100	481700	558800	REV

12. The Assessment Report indicates that the County Assessor's value for tax year 2012 attributable to the Subject Property's improvement component was based on a cost approach mass appraisal model. The County Board's determinations for tax years 2010 through 2012 equaled the County Assessor's \$873,900 reappraisal of the Subject Property in 2010, which reflects an increase from its \$864,800 reappraisal in 2005.
13. The Taxpayer asserted that the actual value of the Subject Property for tax year 2012 equaled his \$637,500 purchase price in January 2012. In support of this opinion of value, the Taxpayer submitted the Real Estate Transfer Statement (Form 521) for the January 2012 transaction. He also stated that the purchase price reflected actual value for tax year 2012 due to: (1) multiple condition issues; (2) distressed prevailing market conditions in the aftermath of the 2007-2008 economic crisis; (3) depressed values of substantially comparable properties in close proximity to the Subject Property, in part illustrated by a glut of 20 homes listed for sale in the Linden Estates subdivision where the Subject Property is located; and (4) traffic noise stemming from close proximity to 144th Street, which is a high-traffic thoroughfare.
14. The Taxpayer stated that he did not obtain an appraisal in connection with his purchase because the transaction involved an exchange under Section 1031 of the Internal Revenue Code.
15. The Taxpayer's stated that the Subject Property was listed for sale for more than two years prior to his purchase, which he asserted involved a valid arm's length transaction. He stated that he first viewed the Subject Property approximately two years prior to his purchase when it was listed for \$900,000, and then again six months prior to the sale when it was listed at \$750,000.
16. The County Board's Referee report attached at the end of the County's Assessment Report indicates that the Subject Property was originally listed for sale for \$1,200,000. The Taxpayer disputed this assertion, indicating that the highest listing price amounted to \$900,000.
17. Mr. Corcoran of the County indicated that the seller was subject to financial distress, thereby questioning whether the Taxpayer's purchase involved an arm's length

transaction. Mr. Corcoran also acknowledged, however, that the Property Record File indicates that the sale was deemed a valid arm's length transaction.

18. In support of its cost approach valuation, the County's Assessment Report includes reference to the sale of three homes in the Subject Property's area. Page 11 of the Assessment Report states that two of these comparables are 1.5-story homes unlike the two-story Subject Property "due to lack of two story sales in Linden Estates."
19. The Assessment Report states that the Subject Property was inspected by the County Assessor's Office in January and February of 2013, which resulted in the lowering of the Subject Property's quality rating from excellent to very good.¹ Mr. Corcoran stated that this action in large part resulted in the lowering of the Subject Property's assessment from \$873,900 in tax year 2012 to \$832,400 in tax year 2013.

STANDARD OF REVIEW

20. The Commission's review of the determination of the County Board of Equalization is de novo.² "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."³
21. 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."⁴ 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."⁵
22. 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.⁶
23. Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.⁷

GENERAL VALUATION LAW

24. A Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued.⁸

¹ Assessment Report, p. 12.

² 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).

³ *Koch v. Cedar Cty. Freeholder Bd.*, 276 Neb. 1009, 1019 (2009).

⁴ *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted).

⁵ *Id.*

⁶ Neb. Rev. Stat. §77-5016(8) (2010 Cum. Supp.).

⁷ *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

25. “Actual value, market value, and fair market value mean exactly the same thing.”⁹
26. Taxable value is the percentage of actual value subject to taxation as directed by Nebraska Statutes section 77-201 and has the same meaning as assessed value.¹⁰
27. All real property in Nebraska subject to taxation shall be assessed as of January 1.¹¹
28. All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.¹²
29. 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.¹³

VALUATION ANALYSIS

30. Based on the Assessment Report’s notation found at page 21 that the Subject Property’s quality rating was lowered from excellent to very good as a result of County inspections in January and February of 2013, together with all of the other documents and statements submitted at the hearing, the Commission finds sufficient evidence that the County Board’s determination for tax year 2012 was arbitrary or unreasonable.¹⁴
31. In the case where it is determined that the County Board’s determination was unreasonable or arbitrary, the Commission must review the evidence and adopt the most reasonable estimate of actual value presented.¹⁵
32. The Taxpayer asserted that the actual value of the Subject Property for tax year 2012 equaled his \$637,500 purchase price in January 2012.

⁸ 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).

⁹ *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).

¹⁰ Neb. Rev. Stat. §77-131 (Reissue 2009).

¹¹ See, Neb. Rev. Stat. §77-1301(1) (Reissue 2009).

¹² Neb. Rev. Stat. §77-201(1) (Reissue 2009).

¹³ Neb. Rev. Stat. § 77-112 (Reissue 2009).

¹⁴ Assessed value, as determined by the County Board for tax year 2012, 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 at the 2012 protest proceeding.

¹⁵ See, *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted); *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002); *Garvey Elevators, Inc. v. Adams County Bd. of Equalization*, 261 Neb. 130, 621 N.W.2d 518 (2001).

33. The Commission is mindful that “[s]ale price is not synonymous with actual value or fair market value.”¹⁶ The Commission is also mindful, however, that where the evidence indicates that the sale of the property was an arm’s length transaction, the sale price should be given strong consideration.¹⁷
34. The County’s representatives noted that the \$637,500 sale of the Subject Property in January 2012 relied upon by the Taxpayer for his opinion of value was possibly a distressed transaction and therefore not arm’s-length. The Commission notes, however, that the Property Record File for the Subject Property and the County representative’s own statements indicates that the Taxpayer’s purchase was deemed a valid arm’s length transaction for County sales roster purposes.
35. While the Taxpayer’s \$637,500 purchase was deemed arm’s length for County sales roster purposes, the County’s representatives indicated that this price did not represent the best evidence of value because it was somehow distressed. Thus, the following is a review of authorities to determine whether the Taxpayer’s \$637,500 purchase in the aftermath of the 2007-2008 economic crisis is the best evidence of value.
36. *The Dictionary of Real Estate Appraisal* defines an arm’s-length transaction as follows: “A transaction between unrelated parties under no duress.”¹⁸
37. 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.”¹⁹
38. As indicated above in the 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.²⁰

39. 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.”²¹
40. The Taxpayer asserted that the economic crisis that began in the 2007 – 2008 timeframe created an environment where distressed transactions were a significant factor in the Subject Property’s market area in the period leading up to tax year 2012. Consequently, the Taxpayer asserted that distressed transactions, including foreclosures, bank sales, short sales and other transactions where the buyer obtains what taxing authorities view as

¹⁶ *Forney v. Box Butte County Bd. of Equalization*, 7 Neb.App. 417, 424, 582 N.W.2d 631, 637 (1998).

¹⁷ *Potts v. Board of Equalization of Hamilton County*, 213 Neb. 37, 48, 328 N.W.2d 175, 328 (1982).

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

¹⁹ *The Appraisal of Real Estate*, 13th Edition, Appraisal Institute, 2008, at p. 304.

²⁰ Neb. Rev. Stat. § 77-112 (Reissue 2009).

²¹ *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

below market, are valid indicators of value under the sales comparison approach and should be considered by the County in its mass appraisal models.

41. 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.²² 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.²³ Additionally, in addressing mass appraisal techniques such as the model used by the County to value the Subject Property, *Property Assessment Valuation* states as follows:

Although the structure of a mass appraisal model may be valid for many years, the model is usually recalibrated or updated every year. To update for short periods, trending factors may suffice. Over longer periods, as the relationships among the variables in market value change, complete market analyses are required. **The goal is for mass appraisal equations and schedules to reflect current market conditions.**²⁴

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

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

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

²² *Property Assessment Valuation*, 3rd Ed., International Association of Assessing Officers, 2010, at pgs. 73 - 83.

²³ *Property Assessment Valuation*, 3rd Ed., International Association of Assessing Officers, 2010, at pgs. 77 - 83.

²⁴ *Property Assessment Valuation*, 3rd Ed., International Association of Assessing Officers, 2010, at p. 417-18 (emphasis added).

unemployment rates are indicative of increased consumer spending on such discretionary items as gaming and entertainment. The perception that the nation's economic trouble was not a transitory downturn, but a long-term recalibration of the economy, was hardening among the public and participants in the financial markets as of the second valuation date.²⁵

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

Our courts today face a similar situation as that faced by the court in [1937] *Levy* during the Great Depression, in that many properties were purchased during a time when real estate values greatly increased (referred to as “the real estate bubble”) **and those same properties plummeted in value after 2006 [and] continuing to the present.** Consequently, many property owners owe much more to the lenders than what the property is worth. While this fact is unquestionably tragic, the value of a given piece of property must be determined by considering all of the pertinent factors as they exist at the time of the sale, whether such sale is made in the open market or through a judicial sale as a result of a foreclosure action.²⁶

44. The Nebraska Supreme Court has also recently considered “current market conditions” in the aftermath of the economic crisis. In *County of Lancaster v. Union Bank & Trust Co. (In re Estate of Craven)*, the Court upheld a ruling issued by the Lancaster County Court that the \$113,000 purchase price of property sold at an estate auction in a weak real estate market after the decedent’s death in 2008 stemmed from an arm’s length transaction and was the best evidence of value for inheritance tax purposes.²⁷
45. With respect to whether distressed sales can be considered reliable indicators of market value in the property tax context, several courts outside of Nebraska have issued opinions in the aftermath of the economic crisis.²⁸ For instance, 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*.²⁹ In noting the view of an Idaho assessment official, the Court stated as follows:

²⁵ *Marina District Development Co., LLC v. City of Atlantic City*, DOCKET NOS. 008116-2009, 008117-2009, 003188-2010, 003194-2010, at pgs. 1- 2, 8 - 9 (New Jersey Tax Court 2013).

²⁶ *Sewickley, LLC v. Chicago Title and Trust Company*, 974 N.E.2d 397, 406 (Court of Appeal of Illinois, First District, Second Division 2012) (emphasis added).

²⁷ *County of Lancaster v. Union Bank & Trust Co. (In re Estate of Craven)*, 281 Neb. 122, 794 N.W.2d 406 (Neb. 2011).

²⁸ *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).

²⁹ *Greene v. Benton County Assessor*, TC-MD 110687N, at p. 8 (Oregon Tax Court 2012).

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 the market, will likely be very close to fair market value in this type of market."³⁰

46. 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).³¹

47. The Oregon Tax Court has also considered the amount of open market exposure necessary to constitute an arm's length transaction. For instance, in *Bennett Family Trust v. Deschutes County Assessor* the Court stated as follows in finding that the sale price of bank-owned property listed on the open market for over two years reflected actual value:

If a property has been marketed for a sufficiently long period of time, and properly exposed to the market, etc., the implication of distress on the part of the seller is removed and a bank sale may be found to be arm's-length.

³⁰ *Greene v. Benton County Assessor*, TC-MD 110687N, at p. 3 (Oregon Tax Court 2012).

³¹ *Greene v. Benton County Assessor*, TC-MD 110687N, at p. 8 (Oregon Tax Court 2012).

Ward v. Dept. of Revenue (Ward), 293 Or 506, 508, 650 P2d 923 (1982). The courts have found that a marketing period of between one and two years is sufficiently long. *Id.* (bank acquired property in 1976, taxpayer agreed to purchase in January 1978, and taxpayer completed purchase in June 1978); *Ernst Brothers Corp. v. Dept. of Rev. (Ernst Bros.)*, 320 Or 294, 305, 882 P2d 591 (1994) (18 month marketing period sufficient where expert had testified that a one to five year marketing period was necessary).³²

48. The Oregon Tax Court has further 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.³³ 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.’³⁴

49. 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.’³⁵

³² *Bennett Family Trust v. Deschutes County Assessor*, TC-MD No 120096C, at p. 8 (Oregon Tax Court 2012).

³³ *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).

³⁴ *Brashnyk v. Lane County Assessor*, TC-MD No 110308, at p. 9 (Oregon Tax Court 2011).

³⁵ *Voronaeff v. Crook County Assessor*, TC-MD No 110361C, at p. 9 (Oregon Tax Court 2012). [Emphasis in original Memorandum.]

50. 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.*’³⁶

51. The Nebraska Department of Revenue Property Assessment Division’s Sales File Practice Manuals for the beginning of the economic crisis in tax year 2008 through tax year 2011 do not address circumstances where foreclosures or short sales could be reliable indicators of market value. Nebraska’s Sales File Practice Manual for tax year 2012, however, states as follows:

A deed transfer in lieu of foreclosure is a deed that is transferring the real property back to the original owner prior to the property being foreclosed on and should be considered a non-arm’s length transaction.

A sale in which a lien holder is the buyer may be in lieu of a foreclosure or a judgment and the sale price may equal the loan balance only.

In a market where foreclosure properties are abundant, buyers may have comparable foreclosure properties to choose over conventional listings. Weak economic conditions in an area may cause the general residential and commercial market to meet the market of the foreclosure property resales, making foreclosures valid indicators of market value for non foreclosure properties.³⁷

52. Nebraska’s 2011 and 2012 Sales File Practice Manuals also 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

³⁶ *Voronaeff v. Crook County Assessor*, TC-MD No 110361C, at pgs. 8-9 (Oregon Tax Court 2012). [Emphasis in original Letter.]

³⁷ 2012 Statewide Equalization Exhibit 107, p. 31.

study if all other criteria for being an open market arm's-length transaction are met.³⁸

53. While it is unclear whether distressed transactions constituted the market and thereby were valid indicators of market value for purposes of tax year 2012, the Taxpayer also asserted that the \$637,500 purchase price is a strong indicator of actual value in part due to the substantial amount of time (over a year) that the Subject Property was exposed on the open market.
54. For purposes of analyzing this assertion, I am mindful that “[s]ale price is not synonymous with actual value or fair market value.”³⁹ I also note, however, that the Nebraska Supreme Court stated as follows in *Potts v. Board of Equalization of Hamilton County*: “where, as in this case, the evidence discloses the circumstances surrounding the sale and shows that it was an arm's length transaction between a seller who was not under compulsion to sell and a buyer who was not compelled to buy, it should receive strong consideration.”⁴⁰ Additionally, as noted above, in *In re Estate of Craven* the Nebraska Supreme Court upheld a ruling issued by the Lancaster County Court that the \$113,000 purchase price of property sold at an estate auction in a weak real estate market after the decedent's death in 2008 stemmed from an arm's length transaction and was the best evidence of value for inheritance tax purposes.⁴¹ I further note that the Nebraska Supreme Court has held that a “single sale may in some instances provide evidence of market value.”⁴²
55. The Oregon Tax Court has considered the amount of open market exposure necessary to constitute an arm's length transaction. For instance, in *Bennett Family Trust v. Deschutes County Assessor*, the Court stated as follows in finding that the sale price of bank-owned property listed on the open market for over two years reflected actual value:

If a property has been marketed for a sufficiently long period of time, and properly exposed to the market, etc., the implication of distress on the part of the seller is removed and a bank sale may be found to be arm's-length. *Ward v. Dept. of Revenue (Ward)*, 293 Or 506, 508, 650 P2d 923 (1982). The courts have found that a marketing period of between one and two years is sufficiently long. *Id.* (bank acquired property in 1976, taxpayer agreed to purchase in January 1978, and taxpayer completed purchase in June 1978); *Ernst Brothers Corp. v. Dept. of Rev. (Ernst Bros.)*, 320 Or 294, 305, 882 P2d 591 (1994) (18 month marketing period sufficient where expert had testified that a one to five year marketing period was necessary).⁴³

56. The County did not refute the Taxpayer's evidence indicating that the Subject Property was marketed for over a year. Therefore, based on the Nebraska Supreme Court's holdings in *Potts*, *In re Estate of Craven* and *Firethorn*, together with the Nebraska

³⁸ 2011 Statewide Equalization Exhibit 107, p. 117; 2012 Statewide Equalization Exhibit 107, p. 32.

³⁹ *Forney v. Box Butte County Bd. of Equalization*, 7 Neb.App. 417, 424, 582 N.W.2d 631, 637 (1998).

⁴⁰ *Potts v. Board of Equalization of Hamilton County*, 213 Neb. 37, 48, 328 N.W.2d 175, 328 (1982).

⁴¹ *County of Lancaster v. Union Bank & Trust Co. (In re Estate of Craven)*, 281 Neb. 122, 794 N.W.2d 406 (2011).

⁴² *Firethorn Inv. v. Lancaster County Bd. Of Equalization*, 261 Neb. 231, 241, 622 N.W.2d 605, 612 (2001).

⁴³ *Bennett Family Trust v. Deschutes County Assessor*, TC-MD No 120096C, at p. 8 (Oregon Tax Court 2012).

Property Assessment Division's Sales File Practice Manual guidance set forth above regarding distressed sales, I would find that the Taxpayer's \$637,500 purchase was a strong indicator of actual market value as of the assessment date of January 1, 2012. I note that while the case law discussed above from jurisdictions outside of Nebraska is not controlling, it is instructive for purposes of this finding.

57. In the case where it is determined that the County Board's determination was unreasonable or arbitrary as concluded at the start of this analysis, the Commission must review the evidence and adopt the most reasonable estimate of actual value presented.⁴⁴ With respect to the best evidence of value as of the assessment date on January 1, 2012, the County did not refute the evidence that the Subject Property was marketed for more than a year during which time its listing price was decreased at least once.
58. I also note that the reliability of the County's cost approach is limited in the case of older residential properties such as the Subject Property.⁴⁵
59. Even assuming that the cost approach is a reliable indicator of value in this case, I further note that page 15 of the County's Assessment report indicates that no economic depreciation was applied to account for the onset of the 2007-2008 economic crisis. Thus, I have significant concern whether the County sufficiently considered "current market conditions" in the aftermath of the economic crisis.
60. Based on the above analysis, together with all of the documents and statements submitted at the hearing, The Commission finds that the best evidence of value in this case is the Taxpayer's \$637,500 purchase price in January 2012.

CONCLUSION

61. The Taxpayer has produced competent evidence that the County Board failed to faithfully perform its duties and to act on sufficient competent evidence to justify its actions.
62. The Taxpayer has 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 vacated and reversed.

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 2012 is vacated and reversed.
2. That the taxable value of the Subject Property for tax year 2012:

⁴⁴ See, *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted); *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002); *Garvey Elevators, Inc. v. Adams County Bd. of Equalization*, 261 Neb. 130, 621 N.W.2d 518 (2001).

⁴⁵ *Appraising Residential Properties*, 4th Edition, Appraisal Institute, 2007, at p. 260.

Land	\$178,500
Improvements	\$459,000
Total	\$637,500

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 2012.
7. This order is effective on August 4, 2014.

Signed and Sealed: August 4, 2014.

Thomas D. Freimuth, Commissioner