

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Valary A. Tieszen,
Appellant,

v.

Douglas County Board of Equalization,
Appellee.

Case No: 12R 697

Decision Reversing
County Board of Equalization

GENERAL BACKGROUND & PROCEDURAL HISTORY

1. The Subject Property is a residential parcel improved with a 2,627 square foot condominium located at 735 Riverfront Drive, Omaha, Douglas County, Nebraska.
2. The Douglas County Assessor assessed the Subject Property at \$463,900 for tax year 2012.
3. Valary A. Tieszen (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 \$315,000 valuation.
4. The County Board determined that the assessed value of the Subject Property was \$410,000 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. Valary A. Tieszen, 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 Profile contained in the Assessment Report submitted by the County Board at the hearing indicates that the Taxpayer purchased the Subject Property for \$315,000 on March 23, 2012. The three-story, 2,627 square foot condominium situated on the Subject Property was constructed in 2005.
10. The Property Record Profile for the Subject Property indicates that the County Board’s \$410,000 determination for tax year 2012 includes \$22,200 for land and \$387,800 for the improvement component.
11. The Assessment Report indicates that the County Assessor’s \$463,900 (Land: \$22,200; Improvement: \$441,700) notice 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 2008 through 2011 equaled the County Assessor’s \$463,900 cost approach valuation.
12. The County’s Assessment Report indicates that the County Board’s \$410,000 determination for tax year 2012 was not based on the County Assessor’s cost approach mass appraisal model, which valued the Subject Property at \$463,900. Based on statements by both parties at the hearing, together with County Board Referee notes

contained in the Assessment Report, the County Board equalized the Subject Property with the \$410,000 2012 assessed value of a condominium located at 525 Riverfront Plaza, which sold for \$417,500 on December 10, 2010.

13. The Taxpayer asserted that the actual value of the Subject Property for tax year 2012 equaled her \$315,000 purchase price in March 2012. In support of this opinion of value, the Taxpayer submitted a \$320,000 fee appraisal of the Subject Property dated "AS OF" April 19, 2012, which she obtained in connection with purchase financing.
14. The Taxpayer's appraisal is based on the sales comparison valuation approach. The three comparable sales analyzed in the appraisal include one two-story Riverfront condominium (\$280,000 sale in March 2012, adjusted to \$319,000 in the Taxpayer's appraisal) and two parcels located approximately one mile to the south of the Subject Property in Omaha's Old Market area that sold in January 2012 and May 2011. The County's representatives noted that the appraisal did not include time or location adjustments.
15. The Taxpayer's appraisal includes analysis of a fourth comparable subject to listing rather than sale. This property, which is a three-story condominium substantially similar to the Subject Property in the same complex, is located at 725 Riverfront Drive. That comparable was listed at \$349,000 as of April 2012, and the Taxpayer's \$320,000 appraisal valued the property at \$333,500 for analysis purposes.
16. The Taxpayer's appraisal states that the Subject Property was originally listed in the Multiple Listing Service system in February 2011 for \$455,000. Upon expiration of that listing the parcel was re-listed for \$350,000 on October 20, 2011, and then reduced to \$319,000 on November 9, 2011, prior to cancellation. The Subject Property was re-listed for \$350,000 on February 28, 2012.
17. The Taxpayer's appraisal states as follows regarding general market conditions: "The market for condos in the Omaha area was strong in 2007-2008 and then slowed after the market slowed in 2008." The appraisal further states as follows in this regard:

Based on the analysis of MLS data for condos in the urban, downtown Omaha over the past 12 months, it is the appraiser's opinion based on evidence from current MLS records, there is an over-supply of condo units currently on the market, which has resulted in longer market times and an approximate 24+ month supply of condos.

18. The Taxpayer's appraisal provides that the Subject Property is subject to a \$710 per month association fee, which the Taxpayer stated has an adverse effect on value.
19. In further support of her \$315,000 opinion of value, the Taxpayer submitted documentation analyzing the sale history of six condominiums in the Riverfront complex where the three-story Subject Property is located. This documentation includes Property Record Profiles for each of the six sale parcels.
20. The transactions submitted by the Taxpayer include the sale of three three-story (all 2,627 sq. ft.) condominiums and three two-story condominiums. The three-story sales include the following: (1) 527 Riverfront Plaza - \$389,000 sale on November 4, 2009; (2) 725 Riverfront Drive - \$395,000 sale on March 19, 2010, and \$300,000 sale on July 12,

2013;¹ and (3) 525 Riverfront Plaza - \$417,500 sale on December 10, 2010. The three two-story sales include two sales in 2010 for \$305,000 (535 & 537 Riverfront Plaza, each of which is 2,026 sq. ft.) and one sale for \$280,000 on March 9, 2012 (723 Riverfront Place, which is 2,182 sq. ft.).

21. The County's Assessment Report includes reference to the \$417,500 three-story sale at 525 Riverfront Plaza and the \$280,000 two-story sale at 723 Riverfront Place. The Assessment Report also includes reference to the \$470,000 sale of the three-story condominium located at 733 Riverfront Drive on August 25, 2009, which is situated in the same complex as the Subject Property.

STANDARD OF REVIEW

22. 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
23. 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
24. 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
25. Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.⁷

GENERAL VALUATION LAW

26. 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 The \$300,000 sale of 725 Riverfront Drive in July 2013 is referenced on a Real Estate Transfer Statement (Form 521) submitted by the Taxpayer at the hearing. The other sales referenced herein are reflected on the Property Profiles submitted by the Taxpayer and the County.

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).

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).

27. “Actual value, market value, and fair market value mean exactly the same thing.”⁹
28. 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
29. All real property in Nebraska subject to taxation shall be assessed as of January 1.¹¹
30. All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.¹²
31. 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

32. The Taxpayer’s \$320,000 fee appraisal and other sales analysis documentation that she submitted can best be described as an attempt to value the Subject Property using the sales comparison approach.
33. The sales comparison approach has a defined systematic procedure that requires, among other actions, that the appraiser “[l]ook for differences between the comparable sale properties and the subject property using all appropriate elements of comparison. Then adjust the price of each sale property, reflecting how it differs, to equate it to the subject property or eliminate that property as a comparable. This step typically involves using the most similar sale properties and then adjusting for any remaining differences.”¹⁴
34. 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.¹⁵ Consideration of many of these characteristics is required under Nebraska Statutes section 77-1371, which provides that “[c]omparable sales are recent sales of properties that are similar to the property being

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 *The Appraisal of Real Estate*, 13th Edition, Appraisal Institute, 2008, at pgs. 301 - 302.

¹⁵ *The Appraisal of Real Estate*, 13th Edition, Appraisal Institute (2008) at 141.

assessed in significant physical, functional, and location characteristics and in their contribution to value.”¹⁶

35. Based on a review of the Taxpayer’s fee appraisal, which relies on the sales comparison approach, together with all of the other documents and statements submitted at the hearing, the Commission finds clear and convincing evidence that the County Board’s determination for tax year 2012 was arbitrary or unreasonable.¹⁷
36. The Commission further finds that the best evidence of value in this case is the \$320,000 valuation contained in the Taxpayer’s fee appraisal.¹⁸

DISTRESSED SALES AS INDICATOR OF VALUE ANALYSIS

37. The Taxpayer asserted that the actual value of the Subject Property for tax year 2012 equaled her \$315,000 purchase price in March 2012.
38. In determining whether 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, the Commission is mindful that “[s]ale price is not synonymous with actual value or fair market value.”¹⁹ 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.²⁰
39. The County’s representatives noted that the \$315,000 sale of the Subject Property in March 2012 relied upon by the Taxpayer for her opinion of value was a foreclosure or otherwise distressed transaction and therefore not arm’s-length. The Commission notes that the Property Profile for the Subject Property indicates that the grantor in the March 2012 transaction was Deutsche Bank, which indicates that the sale was distressed in some manner.
40. The County’s representatives stated that the County does not consider distressed transactions valid for use in its valuation models. The County’s representatives further indicated that the County Assessor’s mass appraisal models used to value properties in the Subject Property’s market area exclude foreclosure sales and other distressed sales that are deemed not arm’s-length.
41. *The Dictionary of Real Estate Appraisal* defines an arm’s-length transaction as follows: “A transaction between unrelated parties under no duress.”²¹

¹⁶ Neb. Rev. Stat. §77-1371 (Reissue 2009).

¹⁷ The Commission notes that the three-story condominium located at 725 Riverfront Drive – which the parties agreed is similar to the Subject Property -- sold for \$300,000 in July 2013, as indicated on the Real Estate Transfer Statement (Form 521) submitted by the Taxpayer at the hearing. 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.

¹⁸ With respect to the County’s concern regarding time and location adjustment, the Commission finds that the two comparables used in the fee appraisal located in Omaha’s Old Market area approximately one mile from the Subject Property are valid comparables that sold sufficiently close to the assessment date of January 1, 2012 (January 2012 for one comparable and May 2011 for the other).

¹⁹ *Forney v. Box Butte County Bd. of Equalization*, 7 Neb.App. 417, 424, 582 N.W.2d 631, 637 (1998).

²⁰ *Potts v. Board of Equalization of Hamilton County*, 213 Neb. 37, 48, 328 N.W.2d 175, 328 (1982).

²¹ *The Dictionary of Real Estate Appraisal*, 4th Ed., Appraisal Institute, 2002, at p. 18.

42. 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.”²²
43. 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.²³

44. 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.”²⁴
45. The Taxpayer asserted that the economic crisis that began in 2007 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 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 models.
46. 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.²⁵ 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.²⁶ 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.**²⁷

²² *The Appraisal of Real Estate*, 13th Edition, Appraisal Institute, 2008, at p. 304.

²³ Neb. Rev. Stat. § 77-112 (Reissue 2009).

²⁴ *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

²⁵ *Property Assessment Valuation*, 3rd Ed., International Association of Assessing Officers, 2010, at pgs. 73 - 83.

²⁶ *Property Assessment Valuation*, 3rd Ed., International Association of Assessing Officers, 2010, at pgs. 77 - 83.

²⁷ *Property Assessment Valuation*, 3rd Ed., International Association of Assessing Officers, 2010, at p. 417-18 (emphasis added).

47. 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.²⁸

48. 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.²⁹
49. 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.³⁰ 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*.³¹ In noting the view of an Idaho assessment official, 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

²⁸ *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).

²⁹ *County of Lancaster v. Union Bank & Trust Co. (In re Estate of Craven)*, 281 Neb. 122, 794 N.W.2d 406 (Neb. 2011).

³⁰ *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).

³¹ *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.³²

50. 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).³³

51. 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. *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

³² *Greene v. Benton County Assessor*, TC-MD 110687N, at p. 3 (Oregon Tax Court 2012).

³³ *Greene v. Benton County Assessor*, TC-MD 110687N, at p. 8 (Oregon Tax Court 2012).

where expert had testified that a one to five year marketing period was necessary).³⁴

52. 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.³⁵ 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.’³⁶

53. 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.’³⁷

54. 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

³⁴ *Bennett Family Trust v. Deschutes County Assessor*, TC-MD No 120096C, at p. 8 (Oregon Tax Court 2012).

³⁵ *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).

³⁶ *Brashnyk v. Lane County Assessor*, TC-MD No 110308, at p. 9 (Oregon Tax Court 2011).

³⁷ *Voronaeff v. Crook County Assessor*, TC-MD No 110361C, at p. 9 (Oregon Tax Court 2012). [Emphasis in original Memorandum.]

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.*³⁸

55. 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.³⁹

56. 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 study if all other criteria for being an open market arm's-length transaction are met.⁴⁰

57. As noted above, the Nebraska Supreme Court recently 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

³⁸ *Voronaeff v. Crook County Assessor*, TC-MD No 110361C, at pgs. 8-9 (Oregon Tax Court 2012). [Emphasis in original Letter.]

³⁹ 2012 Statewide Equalization Exhibit 107, p. 31.

⁴⁰ 2011 Statewide Equalization Exhibit 107, p. 117; 2012 Statewide Equalization Exhibit 107, p. 32.

arm's length transaction and was the best evidence of value for inheritance tax purposes.⁴¹

58. Based on this Nebraska Supreme Court holding and the Nebraska Property Assessment Division's Sales File Practice Manual guidance set forth above regarding distressed sales, together with statements in the Taxpayer's \$320,000 appraisal noted previously concerning less than optimum market conditions in 2012 in the aftermath of the economic crisis, the Commission finds that the Taxpayer's purchase price is strong evidence of actual market value **in this particular case** as of January 1, 2012. In addition, while the cases discussed above from jurisdictions outside of Nebraska are not controlling, the Commission finds that they are instructive for purposes of this finding.

CONCLUSION

59. 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.
60. 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:

Land	\$ 22,200
Improvements	\$297,800
Total	\$320,000

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 February 7, 2014.

Signed and Sealed: February 7, 2014.

Thomas D. Freimuth, Commissioner

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