

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Cheema Investments, LLC,
Appellant,

v.

Kimball County Board of Equalization,
Appellee.

Case No: 11R 018

Decision and Order Affirming the Kimball
County Board of Equalization

For the Appellant:

Cheema Investments, LLC,
Kuldip Singh, Member, Pro Se

For the Appellee:

David L. Wilson,
Kimball County Attorney

The appeal was heard before Commissioners Nancy J. Salmon and Thomas D. Freimuth.

I. THE SUBJECT PROPERTY

The Subject Property is a residential parcel located in Kimball County. The parcel is improved with a modular home. The legal description of the parcel is found at Exhibit 1. The property record card for the Subject Property is found at Exhibit 3.

II. PROCEDURAL HISTORY

The Kimball County Assessor determined that the assessed value of the Subject Property was \$94,430 for tax year 2011. Cheema Investments, LLC (the Taxpayer) protested this assessment to the Kimball County Board of Equalization (the County Board) and requested an assessed valuation of \$22,080. The Kimball County Board determined that the assessed value for tax year 2011 was \$73,322.¹

The Taxpayer appealed the decision of the County Board to the Tax Equalization and Review Commission (Commission). The Commission held a hearing on July 25, 2012.

¹ E1.

III. STANDARD OF REVIEW

The Commission's review of the determination by a County Board of Equalization is de novo.² When the Commission considers an appeal of a decision of a County Board of Equalization, a presumption exists that the "board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action."³

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.⁴

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 Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.⁶

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 The County Board need not

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). "When an appeal is conducted as a 'trial de novo,' as opposed to a 'trial de novo on the record,' it means literally a new hearing and not merely new findings of fact based upon a previous record. A trial de novo is conducted as though the earlier trial had not been held in the first place, and evidence is taken anew as such evidence is available at the time of the trial on appeal." *Koch v. Cedar Cty. Freeholder Bd.*, 276 Neb. 1009, 1019 (2009).

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

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).

put on any evidence to support its valuation of the property at issue unless the taxpayer establishes the Board's valuation was unreasonable or arbitrary.⁸

In an appeal, the commission “may determine any question raised in the proceeding upon which an order, decision, determination, or action appealed from is based. The commission may consider all questions necessary to determine taxable value of property as it hears an appeal or cross appeal.”⁹ The commission may also “take notice of judicially cognizable facts and in addition may take notice of general, technical, or scientific facts within its specialized knowledge...,” and may “utilize its experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to it.”¹⁰

IV. VALUATION

A. Law

Under Nebraska law,

[a]ctual value is the most probable price expressed in terms of money that a property will bring if exposed for sale in the open market, or in an arm’s length transaction, between a willing buyer and a willing seller, both of whom are knowledgeable concerning all the uses to which the real property is adapted and for which the real property is capable of being used. In analyzing the uses and restrictions applicable to real property the analysis shall include a full description of the physical characteristics of the real property and an identification of the property rights valued.¹¹

“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.”¹² “Actual value, market value, and fair market value mean exactly the same thing.”¹³ Taxable value is the percentage of actual value subject to taxation as directed by section 77-201 of Nebraska Statutes and has the same meaning

⁸ *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).

⁹ Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.).

¹⁰ Neb. Rev. Stat. §77-5016(6) (2012 Cum. Supp.).

¹¹ Neb. Rev. Stat. §77-112 (Reissue 2009).

¹² *Id.*

¹³ *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).

as assessed value.¹⁴ All real property in Nebraska subject to taxation shall be assessed as of January 1.¹⁵ All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.¹⁶

B. Summary of the Evidence

Kuldip Singh, a member of Cheema Investments, LLC, and real estate investor for the last 17 years, testified that the Taxpayer purchased the Subject Property in April 2010 at an auction for \$25,000. At the time of the sale, the Department of Housing and Urban Development (HUD) owned the Subject Property and put it up for auction. Singh testified that the Subject Property had been listed on the open market for 527 days, and was a UBC type modular home.

According to Singh, the Subject Property had been unoccupied for nearly two years and the Taxpayer had to complete repairs before the property could be livable. Singh testified that at the time of purchase in April 2010 the Subject Property had obvious deficiencies including: (1) no stove; (2) missing base board heaters from a small portion of one room; (3) missing light bulbs; (4) a few missing electrical covers; and (5) holes in the walls.¹⁷ Singh testified that repairs were made to the Subject Property to bring it to a standard of “livable.” Singh testified that this meant that he only made the repairs necessary to make the Subject Property reasonably safe and attractive to prospective tenants. These repairs included installing new carpet in the front room and repairing the listed deficiencies.

Singh testified that he could not remember exactly when the repairs were made, but that most repairs were made in January 2011. He did not consider the Subject Property livable as of January 1, 2011. Singh testified that the Subject Property was livable and rented to tenants sometime between January 2011 and April 2011.

Singh testified that although the Subject Property was purchased at an auction and title had previously passed into the ownership of HUD due to a foreclosure, that the sale of the Subject Property in April 2010 was an arm’s length transaction. He asserted that the assessed value of the Subject Property as of January 1, 2011, should be equal to the sale price in April 2010. He further asserted that the assessed values of other classes of properties in Kimball

¹⁴ Neb. Rev. Stat. §77-131 (Reissue 2009).

¹⁵ See, Neb. Rev. Stat. §77-1301(1) (Reissue 2009).

¹⁶ Neb. Rev. Stat. §77-201(1) (Reissue 2009).

¹⁷ The Taxpayer did not provide photographs of the interior of the Subject Property prior to renovations.

County had decreased in tax year 2011, while rural residential property had increased. He alleged that this increase was inappropriate.

Singh testified that Kimball County was subject to a real estate market slow down, and that at one point there were 5 foreclosed properties on the market in the city of Kimball. He stated that there were other examples in neighboring counties, and claimed that Kimball County was effected the same as any other county. He asserted that Kimball County had 15 to 20 distressed sales a year. Singh did not offer any property records for any of the alleged foreclosed properties, or any evidence indicating the nature or characteristics of the real property involved in the sales.

Singh asserted that Deborah Huff, the Kimball County Assessor, offered him \$25,000 for the Subject Property at the County Board Hearing. He additionally asserted that he had a conversation with Mr. Huff. The content of the conversation was stricken from the record following a timely objection by the County as inadmissible hearsay evidence and cannot be considered by the Commission.

Deborah Huff, the Kimball County Assessor, testified that in her opinion the sale of the Subject Property in April 2010 was a distressed sale and not representative of the actual value of the Subject Property. Even though the Subject Property had been listed for several weeks, Huff asserted that in her opinion HUD had an incentive to sell the house at less than market value. She asserted that the longer a property sits with HUD the more willing they are to sell the property at less than market value. She additionally asserted that “chasing sales” or setting the value of a parcel of real property at its sales price was not a commonly accepted mass appraisal technique.

Huff valued the Subject Property using the cost approach and the *Marshall and Swift* cost manual.¹⁸ She testified that the value of lots in town, rural residential lots, and agricultural lots are determined separately using the sales comparison approach and a mass appraisal model. The same model was used to value all rural residential properties in Kimball County. Rural residential properties’ site values are determined on a per acre basis, and site values were determined using a rural residential study conducted in 2007.¹⁹ While Huff acknowledged that the general real estate market is not “real good” in Kimball County, she asserted that after

¹⁸ See, E3:6.

¹⁹ E3:1.

valuing all rural residential properties using the cost approach, a ratio study is conducted using the sales of rural residential properties in Kimball County. The County Assessor initially valued the Subject Property at \$94,430.²⁰ She testified that there had been approximately 30 arm's length sales of residential properties in Kimball County within two years prior to 2011 used to determine the applicable physical depreciation attributable to the Subject Property.

Huff and the County Board performed an exterior inspection of the Subject Property in July 2011. As a result of that inspection, Huff revised her opinion of value to \$73,322. Huff testified that the revision was necessary because the deck and some outbuildings had been removed from the Subject Property and the inspection revealed that the Subject Property had greater depreciation than it was originally assigned. In determining the revised value of the Subject Property, Huff testified that she factored into her opinion comments made by members of the County Board who were present at the inspection that the Subject Property looked to be worth somewhere in the \$70,000 range, and depreciation tables that were constructed by the previous assessor in 2007.

Huff asserted that there were approximately 3 or 4 residential foreclosure sales in Kimball County a year. She contended that she understands the theory that foreclosures can establish a market given the correct economic environment, but she asserted the rural residential market in Kimball County is not in that position.

Huff testified that she did not offer to purchase the Subject Property from the Taxpayer at any time. She stated that she asked Singh at the hearing whether he would be willing to sell the Subject Property to anyone for \$25,000. She testified that she was not making an offer to purchase the Subject Property. She additionally testified that she had no personal knowledge of any alleged conversation between Singh and Mr. Huff, her husband.

C. Analysis

Nebraska Statutes permit the county assessor to value the Subject Property using the sales comparison approach, cost approach, income approach, or any commonly accepted mass appraisal technique and define actual value.²¹ Nebraska Statutes section 77-112 defines actual value:

²⁰ See, E1:1.

²¹ Neb. Rev. Stat. § 77-112 (Reissue 2009).

Actual value of real property for purposes of taxation means the market value of real property in the ordinary course of trade. Actual value may be determined using professionally accepted mass appraisal methods, including, but not limited to, the (1) sales comparison approach using the guidelines in section 77-1371, (2) income approach, and (3) cost approach. Actual value is the most probable price expressed in terms of money that a property will bring if exposed for sale in the open market, or in an arm's length transaction, between a willing buyer and willing seller, both of whom are knowledgeable concerning all the uses to which the real property is adapted and for which the real property is capable of being used. In analyzing the uses and restrictions applicable to real property, the analysis shall include a consideration of the full description of the physical characteristics of the real property and an identification of the property rights being valued.²²

The Nebraska Supreme Court has consistently held that sales price is not synonymous with actual value.²³ Sales price may be taken into consideration, but it is not conclusive of actual value.²⁴ It is necessary to know the “character and circumstances” of a sale in order to determine that a sale is competent evidence of actual value.²⁵ Sale price “is only evidence to be considered along with all other evidence.”²⁶ Where evidence indicates that a sale was part of an arm’s length transaction, the sale price should be given strong consideration.²⁷ An auction price is admissible evidence and *may* be taken into consideration.²⁸ Under some conditions the auction price may be better evidence of sale price than appraisal evidence.²⁹ Sales price or auction price is not always the best evidence of value, and that each determination must be made on a case by

²² Neb. Rev. Stat. 77-112 (Reissued 2009).

²³ *Josten-Wilbert Vault Co. v. Board of Equalization*, 179 Neb. 415, 417, 138 N.W.2d 641, 643 (1965); *Potts v. Board of Equalization of Hamilton County*, 213 Neb. 37, 46, 328 N.W.2d 175, 180 (1982); *Dowd v. Board of Equalization*, 240 Neb. 437, 482 N.W.2d 583 (1992).

²⁴ See, *Novak v. Board of Equalization*, 145 Neb. 664, 666, 17 N.W.2d 882, 883 (1945); *Collier v. County of Logan*, 169 Neb. 1, 8, 97 N.W.2d 879, 885 (1959); *Josten-Wilbert Vault Co. v. Board of Equalization*, 179 Neb. 415, 417, 138 N.W.2d 641, 643 (1965); *Potts v. Board of Equalization of Hamilton County*, 213 Neb. 37, 46, 328 N.W.2d 175, 180 (1982); *US Ecology, INC., v. Boyd County Board of Equalization*, 256 Neb. 7, 18, 588 N.W.2d 575, 583 (1999); *Cabela’s Inc. v. Cheyenne County Bd. Of Equalization*, 8 Neb.App. 582, 591, 597 N.W.2d 623, 632 (1999) (citations omitted).

²⁵ *Josten-Wilbert Vault Co. v. Board of Equalization*, 179 Neb. 415, 417, 138 N.W.2d 641, 643 (1965).

²⁶ *Id.*

²⁷ *Potts v. Board of Equalization of Hamilton County*, 213 Neb. 37, 47, 328 N.W.2d 175, 181 (1982).

²⁸ *In re Estate of Craven v. Union Bank and Trust*, 281 Neb. 122, 128, 794 N.W.2d 406, 410 (2011).

²⁹ *Id.* at 128, 794 N.W.2d at 411.

case basis.³⁰ “The statutory measure of actual value is not what an individual buyer may be willing to pay for property, but, rather, its ‘market value in the ordinary course of trade.’”³¹ This interpretation is required by Nebraska Statutes section 77-112.³²

Nebraska Statutes section 77-112 and Nebraska common law comport with current professionally accepted mass appraisal methods. “The terms *price*, *cost*, and *value* are used and defined carefully by appraisers.”³³ “The term price refers to the amount a particular purchaser agrees to pay and a particular seller agrees to accept under the circumstances surrounding their transaction.”³⁴ “Actual value, market value, and fair market value mean exactly the same thing.”³⁵ Actual value is defined by Nebraska Statutes section 77-112 and means “the most probable price expressed in terms of money that a property will bring if exposed for sale in the open market” and not the particular amount of a specific transaction.³⁶ The distinctions between *price* and *actual value* are meaningful. They acknowledge that circumstances and factors may effect a particular purchase price to such an extent that it is of limited value or irrelevant in determining the actual value of a property. Factors which tend to illustrate that a transaction is not an arm’s length transaction harm the credibility and relevance of a purchase price in determining the actual value of a subject property.

An arm’s length transaction is defined as: “A transaction between unrelated parties under no duress.”³⁷ Some types of transactions are generally considered to be non-arm’s-length transactions because they are not made on the open market or one or all of the parties involved in the transaction are not operating with the objective of maximizing their financial position.³⁸ These sales include: (1) Sales involving courts, governmental entities, or public utilities; (2) Sales involving charitable, religious, or educational institutions; (3) Sales in which the financial institution is the buyer; (4) Sales in which a financial institution is the seller and not on the open

³⁰ *Id.*

³¹ *US Ecology, INC., v. Boyd County Board of Equalization*, 256 Neb. 7, 18, 588 N.W.2d 575, 583 (1999) (citing Neb. Rev. Stat. §77-112). See also, *Cabela’s Inc. v. Cheyenne County Bd. Of Equalization*, 8 Neb.App. 582, 591, 597 N.W.2d 623, 632 (1999) (citations omitted).

³² *Cabela’s Inc. v. Cheyenne County Bd. Of Equalization*, 8 Neb.App. 582, 591, 597 N.W.2d 623, 632 (1999) (citations omitted).

³³ Appraisal Institute, *The Appraisal of Real Estate*, at 21 (13th ed. 2008).

³⁴ *Id.*

³⁵ *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).

³⁶ Neb. Rev. Stat. §77-112 (Reissued 2009).

³⁷ Appraisal Institute, *The Dictionary of Real Estate Appraisal*, at 18 (4th ed. 2002).

³⁸ International Association of Assessing Officers, *Mass Appraisal of Real Property*, at 53-54 (1999).

market; (5) Sales between relatives or corporate affiliates; (6) Sales of convenience; and (7) Estate sales.³⁹

In the current case, the sale of the Subject Property in April 2010 was between the Taxpayer and HUD, a governmental entity operating as a financial institution. Consideration of the purchase price from this transaction in determining the actual value of the Subject Property should be viewed with caution.⁴⁰ While Singh was able to testify that he was operating under an objective to maximize his financial position in the transaction, he offered limited evidence that HUD was operating under the same objective, and most of this evidence can best be characterized as hearsay. Singh cannot competently testify concerning the motivations of HUD in the transaction, nor does he possess the personal knowledge necessary to support many of his assertions. The Commission finds that the sale was not part of an arm's length transaction, and should not be given strong consideration.

Even if the transaction was arm's length, the common law only requires that the Commission give the purchase price strong consideration.⁴¹ An arm's length transaction is not conclusive of the actual value of the Subject Property.⁴² When giving the sale consideration, the Commission may assign weight to the sale based upon the other evidence presented.⁴³ The mere fact that only a single sale is presented as evidence of actual value may be given weight by the trier of fact.⁴⁴ Given the current statutory scheme, the Commission finds instructive the Nebraska Supreme Court's reasoning that, "the statutory measure of actual value is not what an individual buyer may be willing to pay for property, but, rather, its market value in the ordinary course of trade."⁴⁵

The dissent has asserted that *In re Estate of Craven v. Union Bank and Trust*,⁴⁶ supports the contention made in this case, that sales price at an auction is the best evidence of value. However, the Commission finds that the evidence in the current case is significantly dissimilar

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Firethorn Inv. v. Lancaster County Bd. of Equalization*, 261 Neb. 231, 240, 622 N.W.2d 605, 611

(2001)(Citations Omitted) ("Rather, the fact that evidence of other sales is not presented goes to the weight of the evidence.").

⁴⁵ *US Ecology, INC., v. Boyd County Board of Equalization*, 256 Neb. 7, 18, 588 N.W.2d 575, 583 (1999) (citing Neb. Rev. Stat. §77-112).

⁴⁶ 281 Neb. 122, 794 N.W.2d 406 (2011).

from *In re Estate of Craven*. In *In re Estate of Craven*, the residential property at issue had unique and significant condition issues.⁴⁷ Testimony at trial indicated that animals had been allowed to urinate and defecate throughout the property, and that even after the carpets were removed the smell was unbearable and the floors and subfloors under the carpet were stained from the urine and feces.⁴⁸ Further, the appellee's only evidence of actual value was derived from a retroactive appraisal made after significant improvements had been made to the residence.⁴⁹

The Supreme Court held that an auction transaction is not inherently a non-arm's length transaction.⁵⁰ In *In re Estate of Craven*, there was specific testimony under oath by individuals with personal knowledge that the property had been listed for 5 weeks prior to auction,⁵¹ shown multiple times,⁵² and sold at a well-attended auction.⁵³ The Supreme Court held that an auction price is admissible evidence and *may* be taken into consideration.⁵⁴ The Supreme Court held that under some conditions the auction price may be better evidence of sale price than appraisal evidence.⁵⁵ The Supreme Court reasoned that the deficiencies in the property caused there to be "no truly comparable properties in the area[.]"⁵⁶ The Supreme Court also held that sales price or auction price is not always the best evidence of value, and that each determination must be made on a case by case basis.⁵⁷

The dissent asserts that *Craven* supports a contention that an auction in a weak market is better evidence of value than a value determined by an expert. While the Court indicates that witnesses mentioned the weak market, the Court in *In re Estate of Craven* did not rely on the weak market in making its determination that the sale price was better evidence of the actual value of the subject property.⁵⁸ Instead the Court focused on the lack of truly comparable properties in the market, horrible condition of the subject property, and ample evidence in the appeal, while limiting their holding to the facts in the case and cautioning that any determination

⁴⁷ *Id.* at 124-125, 794 N.W.2d at 408-409.

⁴⁸ *Id.* at 124-125, 794 N.W.2d at 408-409.

⁴⁹ *Id.* at 126, 794 N.W.2d at 409.

⁵⁰ *Id.* at 127-128, 794 N.W.2d at 410.

⁵¹ *Id.* at 125, 794 N.W.2d at 408-409.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 128, 794 N.W.2d at 410.

⁵⁵ *Id.* at 128, 794 N.W.2d at 411.

⁵⁶ *Id.* at 129, 794 N.W.2d at 410.

⁵⁷ *Id.*

⁵⁸ *Id.* at 125, 794 N.W.2d at 409.

that auction price is better evidence than appraisal evidence must be based on similar ample evidence.⁵⁹

The Commission has reviewed the specific facts of this case and decides that the auction price is not clear and convincing evidence that the County Board was unreasonable or arbitrary for reasons including, but not limited to, the following: (1) comparable properties were available for use in the mass appraisal model; (2) the evidence offered to indicate that the sale was arm's length was testimony from an interested individual; (3) none of the evidence concerning the length of time the Subject Property was on the market or uninhabited, number of interested buyers, or number of times the property was shown was produced from an individual with personal knowledge of any of these facts; (4) while the Subject Property had deferred maintenance it was not so unique that the effects of these deficiencies could not be calculated by mass appraisal techniques; (5) the deficiencies associated with the Subject Property were minor and easily resolved; (6) while the Taxpayer asserted the Subject Property was unlivable as of January 1, 2011, the Taxpayer's own testimony of the type and extent of issues refutes this assertion ; (8) the conditions of the sale indicate that the seller was likely not attempting to maximize its profit, and at best it is highly questionable whether the sale was arm's length; and (9) rural residential properties in Kimball County are common, and not unique.⁶⁰ All of these factors distinguish the present appeal from *In re Estate of Craven*.

The Taxpayer took issue that the last inspection of the Subject Property prior to Huff determining the assessed value for 2011 was in 2005,⁶¹ but the Commission notes that the County Board and Huff preformed an exterior inspection of the Subject Property prior to the County Board making its decision. Of the interior items that Singh asserted contributed to the depreciation of the Subject Property, the Commission finds that missing or damaged items of personal property, including the missing stove and light bulbs, would not have contributed to the actual value of the real property. Items of personal property are often included in the sale of homes, but the cost approach only values the real property. The absence or presence of personal property would not, therefore, contribute to the actual value of real property.

The Taxpayer did not quantify the value of any other alleged items of depreciation. Exposed electrical components, bad carpet, holes in the wall, and partially removed heating

⁵⁹ *Id.* at 128-30, 794 N.W.2d at 409-11.

⁶⁰ 2011 Statewide Equalization Exhibit 53, p. 50 (indicating 261 rural residential properties in Kimball County).

⁶¹ E3:2.

would contribute to the depreciation of the Subject Property; however the Taxpayer provided no evidence of the cost to cure these physical defects. While Singh asserted that an interior inspection would be necessary to determine the actual value of the Subject Property on January 1, 2011, he also testified that many of the items of deferred maintenance and depreciation had been repaired prior to the end of January 2011.

As part of her cost approach calculations Huff applied market derived depreciation, and after an exterior inspection she made adjustments. The Commission notes that the County Assessor's Property Value Summary for tax years 2010 and 2011 indicates that Huff assigned a 29% depreciation based on the condition of the Subject Property.⁶² This is an increase of 19% due to her observations.⁶³ The Commission finds that the cost approach is a statutorily permitted method of determining the actual value of real property for ad valorem purposes in Nebraska.⁶⁴ The Commission also finds that Huff's method for setting the depreciation for the Subject Property comported with commonly accepted mass appraisal techniques and was reasonable and not arbitrary.

Concerning allegations that the foreclosures in Kimball County may be setting the market, Huff testified that there were only three or four residential foreclosures per year in the county. She further testified that there were about 30 qualified sales in her sale roster used to determine the assessment ratio of residential properties. Both Singh and Huff agreed that most markets in Kimball County had experienced a softening for tax year 2011. However, Huff testified that empirical data obtained from market sales examined as part of her ratio study indicated that the rural residential property market was actually increasing in 2011. Singh's only counter evidence consisted of statements that if all classes of property were examined, then the number of foreclosures were three to four times the numbers reported by Huff. The Taxpayer did not provide any property record cards or transaction documents indicating that the amount of foreclosures in the rural residential market was anywhere near sufficient to cause foreclosure sales to become the market.

Huff clearly testified that she never made an offer to purchase the Subject Property. At the County Board hearing, Huff asked Singh if he was willing to sell the Subject Property for \$25,000. Huff repeatedly testified that the question was not intended as a specific offer to buy,

⁶² E3:5.

⁶³ See, E3:5.

⁶⁴ Neb. Rev. Stat. §77-112 (Reissue 2009).

but as a question as to whether Singh would be willing to sell the Subject Property to anyone for \$25,000. While the Commission's opinion of whether an offer was made can have no legal consequences on any potentially alleged contractual relationship between Huff and Singh, the Commission finds the Nebraska law helpful in determining whether there is evidence that Huff made an offer which Singh alleges constitutes impropriety and may affect the credibility of the witnesses' testimony concerning the actual value of the Subject Property.

An offer is an expression of willingness to enter into an agreement with another, made in such a way that the other party is justified in believing that its acceptance is invited and will result in a contract.⁶⁵ Questions concerning the formation of a contract must be viewed from an objective standpoint.⁶⁶ Given Huff's repeated testimony of her specific words, the context of the exchange, and the location of the question, the Commission finds that it is unreasonable to interpret Huff's statements as an offer to buy. From an objective standpoint no reasonable person would conclude that Huff's question constituted an offer to buy or created within Singh any legal power to accept the offer and enforce a contract. Instead Huff's question was intended to illustrate that while Singh asserts that the Subject Property was only worth \$25,000, he would not be willing to sell the Subject Property to anyone else for that price. The Commission finds that any interpretation of Huff's question as an offer to buy constitutes a gross mischaracterization of the evidence.

In the hearing before the Commission, the county attorney timely objected to comments from Singh, and questions to Huff, concerning any statements made by Mr. Huff, who was not at the hearing. Upon request, and acting within the Commission's rules of evidence, the presiding hearing officer, sustained the objection and ordered stricken from the record all testimony regarding the content of any conversations between Mr. Huff and Singh on the basis that these statements constituted hearsay. It would be inappropriate, and legally erroneous, to utilize hearsay statements which are not part of the record when making a determination concerning the merits of this appeal. The Commission can give no weight to statements which were stricken from the record.

⁶⁵ See, *Fast Ball Sports, LLC v. Metropolitan Entertainment & Convention Authority*, 21 Neb.App. 1, 835 N.W.2d 782 (2013). The term "offer" is also defined as follows: "A manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." *Black's Law Dictionary 6th Edition*, West Group, p. 1081 (1990).

⁶⁶ See, *Viking Broadcasting Corporation v. Snell Publishing Co., Inc.*, 243 Neb. 92, 497 N.W.2d 383 (1993).

The Commission's Case File was admitted into evidence for the limited purpose of establishing jurisdiction. While there was no objection to the receipt of the protest the Taxpayer filed with the County Board,⁶⁷ the Commission finds that any assertions concerning the content of an alleged conversation between Singh and Mr. Huff, whether made orally or written, suffer from the same inherent problems. Hearsay is hearsay. While the allegation based on hearsay made by Singh on his Protest form is part of the record,⁶⁸ any reliance on these statements as facts suffers from the same deficiencies which render the statements inadmissible upon timely objection. The Commission gives no weight to these hearsay statements.

Finally, there is no evidence that Huff's use of the cost approach was due to a lack of resources or sales.⁶⁹ The cost approach is a statutorily permissible and professionally accepted method for determining the actual value of the Subject Property.⁷⁰ Use of the cost approach does not inherently signify anything other than that a county assessor has acted within his or her statutory authority and utilized a professionally accepted method of determining actual value.

V. CONCLUSION

The Commission finds that there is not competent evidence to rebut the presumption that the County Board faithfully performed its duties and had sufficient competent evidence to make

⁶⁷ E1:2.

⁶⁸ E1:2.

⁶⁹ The dissent relies in part on the 2011 Reports and Opinions of the Property Tax Administrator (PTA) when determining that there are insufficient sales to conduct a sales comparison approach to value or to appropriately determine applicable depreciation. The Commission notes that Statewide Equalization is a performance analysis of assessment practices with the limited role of determining whether classes and counties are assessed at equalized values. This performance analysis is not required to use the same sales utilized by Huff to set the depreciation for the cost approach, nor is the calculation of physical and economic depreciation limited to only sales of rural residential properties. Huff testified that she utilized 30 sales. Huff is not required to use the same sales as the PTA. Additionally, the Commission notes that the Statewide Equalization performance analysis of the rural residential properties in Kimball County indicated that there were sufficient sales to arrive at a statistically significant measurement of the level of assessed value within the subclass of real property, and that the median assessed value to sale price ratio for rural residential property was only 83% of actual value for tax year 2011. 2011 Statewide Equalization Exhibit 53, p. 11-12.

⁷⁰ See, Neb. Rev. Stat. §77-112 (Reissue 2009) (granting authority to use the cost approach to determine actual value). See Appraisal Institute, *The Appraisal of Real Estate*, at 141-142 (13th ed. 2008) (identifying the cost approach as an acceptable method for determining actual value); International Association of Assessing Officers, *Property Assessment Valuation*, at Chapter 9 (2010) (identifying the cost approach as an acceptable method for determining actual value); International Association of Assessing Officers, *Mass Appraisal of Real Property*, at 6 (1999) (identifying the cost approach as an acceptable method for determining actual value); and Appraisal Institute, *The Dictionary of Real Estate*, at 67 (4th ed. 2002) (defining the cost approach as a set of procedures to determine actual value).

its determination. The Commission also finds that there is not clear and convincing evidence that the County Board's decision was arbitrary or unreasonable.

For all of the reasons set forth above, the appeal of the Taxpayer is denied.

VI. ORDER

IT IS ORDERED THAT:

1. The decision of the Kimball County Board of Equalization determining the value of the Subject Property for tax year 2011 is affirmed.⁷¹
2. The assessed value of the Subject Property for tax year 2011 is:

Land	\$7,080
<u>Improvements</u>	<u>\$66,242</u>
Total	\$73,322

3. This Decision and Order, if no appeal is timely filed, shall be certified to the Kimball County Treasurer and the Kimball 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 Decision and Order is denied.
5. Each party is to bear its own costs in this proceeding.
6. This Decision and Order shall only be applicable to tax year 2011.
7. This Decision and Order is effective for purposes of appeal on March 11, 2014.

Signed and Sealed: March 11, 2014

Nancy J. Salmon, Commissioner

⁷¹ 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.

SEAL

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

Commissioner Thomas D. Freimuth, dissenting,

Kuldip Singh, a member of Cheema Investments, LLC (herein referred to as the “Taxpayer”), asserted that the Taxpayer’s \$25,000 purchase of the Subject Property with significant deferred maintenance issues from the Secretary of Housing and Urban Development (herein referred to as “HUD”) in April 2010 reflects actual value for tax year 2011.⁷² I would find that the Taxpayer’s purchase price reflected actual market value for tax year 2011.

The parcel’s Property Record File indicates that it is classified and valued as a rural residential parcel by the County.⁷³ The open space and absence of neighboring dwellings depicted in the photos of the Subject Property contained in the Property Record File illustrate the rural nature of the Subject Property’s location.⁷⁴

Mr. Singh’s testimony and the attachment to the Taxpayer’s appeal to the Commission assert that the April 2010 purchase price reflects actual value for tax year 2011 purposes because the Subject Property was: (1) unoccupied for approximately two years prior to purchase, which contributed to a condition that was not “livable”; (2) listed on the open market via the Multiple Listing Service (“MLS”) for 527 days and shown by a Scottsbluff, Nebraska realty company at least 30 times during that period; and (3) not placed in a livable condition until after January 1, 2011.⁷⁵ Consequently, Mr. Singh’s testimony and the Taxpayer’s appeal attachment assert that the County’s valuation of the Subject Property on an equalized basis with four occupied neighbor properties is unreasonable or arbitrary.⁷⁶

⁷² Mr. Singh testified that he has no quarrel with the County’s higher valuation for tax year 2012 because the Subject Property was placed in rentable condition prior to January 1, 2012.

⁷³ E3:1.

⁷⁴ E3:3.

⁷⁵ Case File & E1:2. The Taxpayer’s evidence concerning the 527-day MLS listing period and the two-year vacancy is supported by the Property Record file (E3:8), which indicates that HUD owned the Subject Property as of March 17, 2009. Additionally, in addition to the deferred maintenance items referenced in the majority opinion, Mr. Singh testified that the Subject Property’s residence was improved with paint and a new roof after the April 2010 purchase.

⁷⁶ Case File & E1:2.

In further support of his assertion that the April 2010 purchase price reflects actual value, Mr. Singh indicated that the area real estate market was depressed as a result of the economic crisis that began in 2007, and that distressed transactions constituted a significant portion of the market for tax year 2011 purposes. In effect, Mr. Singh asserted that distressed transactions such as foreclosures, bank sales and short sales are valid indicators of value and should be considered by the County in its mass appraisal model.

The Taxpayer's appeal attachment further asserts that the \$25,000 purchase price reflects actual value in part because the County Assessor and her husband expressed interest in purchasing the Subject Property for only that amount – not more -- during and after the County Board's hearing on the Taxpayer's protest in July 2011.⁷⁷ In this regard, the attachment to the Taxpayer's appeal to the Commission states: "She made the offer during the county board of equalization hearing, and her husband has approached us after the hearing and they show much interest in buying. When we asked if the price is assessed value \$94,430, can they pay a set price, they said no, only \$25,000."⁷⁸

The majority opinion states that the County Assessor, who took office in January 2011, acknowledged that the general real estate market was not "real good" in Kimball County for purposes of tax year 2011.⁷⁹ I also note that page 5 of Exhibit 3 indicates that the County

⁷⁷ Case File & E1:2. While the Commission ruled in favor of the County's motion to strike a portion of Mr. Singh's testimony in this regard, this ruling does not relate to the assertions set forth in writing in the Taxpayer's appeal attachment contained in the Case File and at page 2 of Exhibit 1. Additionally, while the County Assessor testified that she did not offer to purchase the Subject Property for \$25,000 at the Taxpayer's protest hearing before the County Board in July 2011, she stated that her husband contacted Mr. Singh regarding the property. Thus, while there is no evidence in the record to support the Taxpayer's allegation that the \$25,000 purchase price reflects actual value because the County Assessor and/or her husband expressed interest in purchasing the Subject Property for no more than that amount during and after the County Board's hearing in July 2011, that does not mean the Taxpayer's assertion is not true. In other words, the Commission would have needed to hear the testimony of the County Assessor's husband to make a determination regarding the Taxpayer's assertion in this regard. Finally, under the circumstances in this case where the self-represented Taxpayer simply attempted to meet his significant proof burden by patiently submitting every piece of evidence that he deemed important, and based on my observance of the statements of the parties during the hearing (especially the County Assessor's acknowledgment that her husband had contact with the Taxpayer regarding the Subject Property), I believe that the majority's use of the following language reflects a level of disrespect for the Taxpayer that is unwarranted to put it as mildly as I can:

- "From an objective standpoint no reasonable person would conclude that Huff's question constituted an offer to buy or created within Singh any legal power to accept the offer and enforce a contract."
- "The Commission finds that any interpretation of Huff's question as an offer to buy constitutes a gross mischaracterization of the evidence."

⁷⁸ Case File & E1:2.

⁷⁹ In an effort to support the County Board's valuation of the Subject Property for tax year 2011, the County Assessor testified that she increased rural residential values by 11.5% in tax year 2012. As indicated at page 4 of Exhibit 3, however, this 11.5% increase occurred in tax year 2012. This is a 2011 appeal, so 2012 actions by the County Assessor are irrelevant. I note that the County Assessor testified that the 11.5% rural residential increase in

Assessor used the year 2006 as the baseline for 2011 cost approach valuation purposes, and that no economic depreciation was applied to account for the onset of the economic crisis in 2007. Thus, I have significant concern whether the County sufficiently considered the economic crisis and the weak real estate market.

Notwithstanding the County Assessor's acknowledgment regarding the weakness of the real estate market for tax year 2011 purposes, she asserted that the April 2010 sale price should not be an indicator of value because it did not stem from an arm's length transaction. The County Assessor also indicated that the mass appraisal model used to value properties in the Subject Property's market area excludes foreclosure sales and other distressed sales that are deemed non-arm's-length.⁸⁰

The Dictionary of Real Estate Appraisal defines an arm's-length transaction as follows: "A transaction between unrelated parties under no duress."⁸¹ 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."⁸²

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.⁸³

2012 was based on a review of assessed-to-sales ratios relating to transactions in the two-year look-back period contained in the State Sales File. The State Sales File is reflected annually in the State Property Tax Administrator's Reports and Opinions that are reviewed by the Commission in April during Statewide Equalization proceedings. Pages 10 - 12 of the 2011 Reports and Opinions of the Property Tax Administrator for Kimball County indicate that only eight rural residential sales occurred in the two-year look-back period used for tax year 2011, and pages 10 - 11 of the 2012 Reports and Opinions of the Property Tax Administrator for Kimball County indicate that only 11 rural residential sales occurred in the two-year look-back period used for tax year 2012 (annual Reports and Opinions can be accessed at the Commission's website). Thus, especially in light of the County Assessor's testimony that she was unaware of the number of sales that provided the basis of the 11.5% increase, and because she was unable to respond to Mr. Singh's question regarding whether some or all of these rural residential transactions were influenced by commercial or agricultural factors, I do not place significant weight on this increase.

⁸⁰ E2:2.

⁸¹ *The Dictionary of Real Estate Appraisal*, 4th Ed., Appraisal Institute, 2002, at p. 18.

⁸² *The Appraisal of Real Estate*, 13th Edition, Appraisal Institute, 2008, at p. 304.

⁸³ Neb. Rev. Stat. § 77-112 (Reissue 2009).

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.”⁸⁴

While the foregoing authorities highlight the significance of meeting the requirements of an arm’s length transaction, the onset of the economic crisis in 2007 and its aftermath have generated considerable litigation regarding whether distressed transactions are valid indicators of actual value. 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.⁸⁵ 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.⁸⁶ 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:

Model calibration is the process of adjusting mass appraisal formulas, tables, and schedules **to the current market**. During model calibration, the relationships are quantified; that is, the coefficient (as an amount or percentage adjustment) for each independent variable is determined, for example, dollars per square foot of living area. The primary tool for calibration is multiple regression analysis (MRA). . . .

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.**⁸⁷

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):

⁸⁴ *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

⁸⁵ *Property Assessment Valuation*, 3rd Ed., International Association of Assessing Officers, 2010, at pgs. 73 - 83.

⁸⁶ *Property Assessment Valuation*, 3rd Ed., International Association of Assessing Officers, 2010, at pgs. 77 - 83.

⁸⁷ *Property Assessment Valuation*, 3rd Ed., International Association of Assessing Officers, 2010, at pgs. 415, 417-18 (emphasis added).

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

By October 1, 2009, the national economic condition had further deteriorated. According to one expert who testified at trial “as of October 1, 2009, the macro economy had entered into what many commentators termed a ‘New Normal,’ meaning that the developed nations would enter into a prolonged period of low growth, high unemployment and a need for de-leveraging. This would add to the uncertainty surrounding the gaming industry in general and in Atlantic City specifically, as of the valuation date.” Unemployment rates started to increase significantly in 2008 and were still rising as of September 2009. This fact is significant because low unemployment rates are indicative of increased consumer spending on such discretionary items as gaming and entertainment. The 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.⁸⁸

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.⁸⁹

⁸⁸ *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).

⁸⁹ *Sewickley, LLC v. Chicago Title and Trust Company*, 974 N.E.2d 397, 406 (Illinois Court of Appeals 2012) (emphasis added).

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 July 2008 stemmed from an arm’s length transaction and was the best evidence of value for inheritance tax purposes.⁹⁰ I note that the Court’s holding in this case is based in part on testimony that “indicated that auctioning the property was a reasonable alternative to listing with a real estate agent.”⁹¹ This testimony included reference to the “slow real estate market” after the decedent’s death on July 17, 2008, so I respectfully disagree with the assertion contained in the majority opinion that the Court’s holding did not rely in part on this factor.⁹²

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.⁹³ 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*.⁹⁴ 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 the market, will likely be very close to fair market value in this type of market.”⁹⁵

⁹⁰ *County of Lancaster v. Union Bank & Trust Co. (In re Estate of Craven)*, 281 Neb. 122, 794 N.W.2d 406 (Neb. 2011).

⁹¹ *Id.* at 129, 411.

⁹² *Id.* at 124, 408.

⁹³ *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).

⁹⁴ *Greene v. Benton County Assessor*, TC-MD 110687N, at p. 8 (Oregon Tax Court 2012).

⁹⁵ *Greene v. Benton County Assessor*, TC-MD 110687N, at p. 3 (Oregon Tax Court 2012).

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).⁹⁶

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.⁹⁷ 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.’⁹⁸

⁹⁶ *Greene v. Benton County Assessor*, TC-MD 110687N, at p. 8 (Oregon Tax Court 2012).

⁹⁷ *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).

⁹⁸ *Brashnyk v. Lane County Assessor*, TC-MD No 110308, at p. 9 (Oregon Tax Court 2011).

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.’⁹⁹

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.*’¹⁰⁰

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

⁹⁹ *Voronaeff v. Crook County Assessor*, TC-MD No 110361C, at p. 9 (Oregon Tax Court 2012). [Emphasis in original Memorandum.]

¹⁰⁰ *Voronaeff v. Crook County Assessor*, TC-MD No 110361C, at pgs. 8-9 (Oregon Tax Court 2012). [Emphasis in original Letter.]

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.¹⁰¹

With respect to time periods relevant to the 2011 tax year, Mr. Singh testified that at least five properties in the County were marketed by HUD via MLS, and that there were many distressed transactions in the area annually. Mr. Singh did not, however, provide sufficient analysis regarding the ratio of distressed sales to sales considered valid by the County in the market area.¹⁰² Therefore, it is unclear whether distressed transactions constituted either a significant portion or a majority of the total market area sales in the two-year period preceding the assessment date analyzed by the County for purposes of constructing its mass appraisal model for tax year 2011.

While it is unclear whether distressed transactions constituted the market and thereby were valid indicators of market value for purposes of tax year 2011, the Taxpayer also asserted that the April 2010 purchase price is a strong indicator of actual value in part due to the substantial amount of time (527 days) that the Subject Property was exposed on the open market. For purposes of analyzing this assertion, I am mindful that “[s]ale price is not synonymous with actual value or fair market value.”¹⁰³ 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.”¹⁰⁴ 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.¹⁰⁵ I further note that the

¹⁰¹ 2011 Statewide Equalization Exhibit 107, p. 117.

¹⁰² While Ms. Huff testified that three to four foreclosures occurred annually since the onset of the economic crisis in 2007, Mr. Singh asserted that distressed transactions occurred at a rate of four to five times this amount. Mr. Singh, however, did not provide Property Record Cards or other documentation for these transactions.

¹⁰³ *Forney v. Box Butte County Bd. of Equalization*, 7 Neb.App. 417, 424, 582 N.W.2d 631, 637 (1998).

¹⁰⁴ *Potts v. Board of Equalization of Hamilton County*, 213 Neb. 37, 48, 328 N.W.2d 175, 328 (1982).

¹⁰⁵ *County of Lancaster v. Union Bank & Trust Co. (In re Estate of Craven)*, 281 Neb. 122, 794 N.W.2d 406 (2011).

Nebraska Supreme Court has held that a “single sale may in some instances provide evidence of market value.”¹⁰⁶

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).¹⁰⁷

The County did not refute the Taxpayer’s evidence indicating that the Subject Property was (1) unoccupied for approximately two years prior to sale; (2) subject to deferred maintenance issues; and (3) listed on the open market via the Multiple Listing Service for 527 days and shown by a local realtor at least 30 times during that period.¹⁰⁸ Therefore, based on the Nebraska Supreme Court’s holdings in *Potts, In re Estate of Craven* and *Firethorn*, together with the Nebraska Property Assessment Division’s Sales File Practice Manual guidance set forth above regarding bank sales, I would find that the County Board’s failure to consider the Taxpayer’s \$25,000 purchase as a strong indicator of actual market value as of April 2010 was

¹⁰⁶ *Firethorn Inv. v. Lancaster County Bd. Of Equalization*, 261 Neb. 231, 241, 622 N.W.2d 605, 612 (2001). In reaching its conclusion that one sale can constitute a reliable indicator of actual value, the *Firethorn* Court noted the “unique” nature of the property under consideration. *Id.* at 238, 611. As of the April 2010 purchase date until placed in rentable condition after January 1, 2011, the unoccupied Subject Property was also unique for the following reasons: (1) located in a rural portion of a sparsely populated County (while the Taxpayer’s appeal attachment indicates that the parcel is valued on an equalized basis with four neighboring rural residential properties, the open space and absence of neighboring dwellings depicted in the photos contained in the Property Record File illustrate the unique nature of the Subject Property’s location); (2) only eight rural residential sales occurred in the County during the two-year look-back period prior to 2011 according to pages 10 - 12 of the 2011 Reports and Opinions of the Property Tax Administrator for Kimball County, and I believe it is fair to assume that few if any of these transactions involved distressed sales of parcels unoccupied for two years subject to significant deferred maintenance issues. Thus, I find that it is reasonable to apply *Firethorn* “one sale can make a market” reasoning to the Subject Property for tax year 2011 valuation purposes.

¹⁰⁷ *Bennett Family Trust v. Deschutes County Assessor*, TC-MD No 120096C, at p. 8 (Oregon Tax Court 2012).

¹⁰⁸ See, Case File & E1:2.

unreasonable or arbitrary.¹⁰⁹ 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.

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.¹¹⁰ With respect to the best evidence of value as of the assessment date on January 1, 2011, the County did not sufficiently refute Mr. Singh's testimony that the Subject Property was not placed in livable condition until after that date. I also note that the reliability of the County's cost approach is limited in the case of residential properties such as the Subject Property.¹¹¹ Thus, I would find that the \$25,000 sale price is better evidence of value than the cost approach in this case where the vacant Subject Property was exposed on the open market for a substantial period and where the County Assessor did not apply any economic depreciation to a cost model constructed by her predecessor in 2006 – 2007, even though she acknowledged that the area real estate market was not “real good” in the aftermath of the economic crisis.¹¹²

Thomas D. Freimuth, Commissioner

¹⁰⁹ As indicated above, the Nebraska Property Assessment Division's Sales File Practice Manual states as follows: “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.**” 2011 Statewide Equalization Exhibit 107, p. 117 (emphasis added). The majority opinion states that the County Assessor testified that only 30 qualified sales occurred in the two-year look-back period used to construct the County's 2011 rural residential model. Pages 10 - 12 of the 2011 Reports and Opinions of the Property Tax Administrator for Kimball County, however, indicate that only eight rural residential sales occurred in the two-year look-back period. Thus, in light of this low volume of sales (whether 30 or eight), I find that application of the guidance contained in the Sales File Practice Manual is reasonable and warranted.

¹¹⁰ 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).

¹¹¹ *Appraising Residential Properties*, 4th Edition, Appraisal Institute, 2007, at p. 260. It is my understanding that the cost approach is often used by assessors in “Greater Nebraska” Counties other than Douglas and Lancaster due to resource reasons or due to insufficient volume of residential sales to properly construct sales comparison approach mass appraisal models. Additionally, although the County Assessor testified that she was uncertain regarding the mechanics of depreciation calculations, it is my understanding that depreciation for purposes of the residential cost approach in these Counties in “Greater Nebraska” is derived from available sales.

¹¹² See, E3:5.