

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Bel Fury Investments Group, LLC
Appellant,

v.

Dodge County Board of Equalization
Appellee

Case No: 11R-247

Decision Reversing
County Board of Equalization

BACKGROUND & PROCEDURAL HISTORY

1. The Subject Property is a residential rental parcel located at 840 East 6th Street, Fremont, Nebraska, with a legal description of Kittles Comp, Lot 4, Block A.
2. The Dodge County State Assessment Office assessed the Subject Property at \$97,000 for tax year 2011.
3. Bel Fury Investments Group, LLC (herein referred to as the “Taxpayer”) protested this value to the Dodge County Board of Equalization (herein referred to as the “County Board”) and requested an assessed value of \$74,550 for tax year 2011.
4. The County Board determined that the assessed value of the Subject Property was \$97,000 for tax year 2011.
5. The Taxpayer appealed the determination of the County Board to the Tax Equalization and Review Commission (herein referred to as the “Commission”).
6. A Single Commissioner hearing was held at the State Office Building, in Lincoln, Nebraska, before Commissioner Thomas D. Freimuth.
7. Scott W. Bloemer, Managing Member, was present at the hearing on behalf of the Taxpayer, Bel Fury Investments Group, LLC.
8. Stacey Hultquist, Deputy Dodge County Attorney, and June Racely, State Appraiser for Dodge County, were present for the County Board.

STANDARD OF REVIEW & GENERAL VALUATION LAW

9. The Commission’s review of the determination of the County Board of Equalization is de novo.¹ “When an appeal is conducted as a ‘trial de novo,’ as opposed to a ‘trial de novo on the record,’ it means literally a new hearing and not merely new findings of fact based upon a previous record. A trial de novo is conducted as though the earlier trial had not been held in the first place, and evidence is taken anew as such evidence is available at the time of the trial on appeal.”²
10. When considering an appeal a presumption exists that the “board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action.”³ That presumption “remains until

¹ See, Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.), *Brenner v. Banner Cty. Bd. of Equal.*, 276 Neb. 275, 286, 753 N.W.2d 802, 813 (2008).

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

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

there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence adduced on appeal to the contrary. From that point forward, the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon all the evidence presented. The burden of showing such valuation to be unreasonable rests upon the taxpayer on appeal from the action of the board.”⁴

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

Actual value of real property for purposes of taxation means the market value of real property in the ordinary course of trade. Actual value may be determined using professionally accepted mass appraisal methods, including, but not limited to, the (1) sales comparison approach using the guidelines in section 77-1371, (2) income approach, and (3) cost approach. Actual value is the most probable price expressed in terms of money that a property will bring if exposed for sale in the open market, or in an arm’s length transaction, between a willing buyer and a willing seller, both of whom are knowledgeable concerning all the uses to which the real property is adapted and for which the real property is capable of being used. In analyzing the uses and restrictions applicable to real property the analysis shall include a full description of the physical characteristics of the real property and an identification of the property rights valued.⁸

GENERAL VALUATION ANALYSIS

15. The Property Record Card submitted by the County Board at the hearing indicates that the Subject Property is a 1,684 square foot residence built in 1892, with an actual age of 119 years and an effective age of 118 years. The Property Record Card rates the Subject Property’s quality and condition as average.
16. The Property Record Card provides that the County Board’s \$97,000 determination for tax year 2011 includes \$20,705 for land and \$76,295 for improvements.
17. The Property Record Card indicates that the County Board’s \$76,295 determination attributable to improvements for tax year 2011 is based on the cost approach using data supplied by Marshall & Swift. The Commission notes that the County’s State Appraiser deducted physical

⁴ *Id.*

⁵ Neb. Rev. Stat. §77-5016(8) (2010 Cum. Supp.).

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

⁷ Cf. *Josten-Wilbert Vault Co. v. Board of Equalization for Buffalo County*, 179 Neb. 415, 138 N.W.2d 641 (1965) (determination of actual value); *Lincoln Tel. and Tel. Co. v. County Bd. Of Equalization of York County*, 209 Neb. 465, 308 N.W.2d 515 (1981)(determination of equalized taxable value).

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

depreciation in the amount of 41% (\$53,020) to arrive at her \$76,295 opinion of value of the Subject Property's improvements.⁹

18. The Property Record Card contains the following assessment history regarding the Subject Property:

2001	\$96,430		2006	\$94,220
2002	\$106,435		2007	\$94,220
2003	\$110,175		2008	\$106,275
2004	\$116,890		2009	\$106,275
2005	\$95,815		2010	\$96,705

19. The Property Record Card indicates that the Taxpayer purchased the Subject Property for \$72,200 in October 2004.
20. Scott W. Bloemer, the Managing Member of the Taxpayer, indicated that his business purchased the Subject Property in a distressed transaction, and that the parcel has been rented by his business for several years.¹⁰ Mr. Bloemer stated that his Omaha-based business owns several residential rental properties in Omaha and the surrounding area. He also stated that, prior to the onset of the economic crisis in 2007, his business focused on purchase of distressed properties followed by repair and resale. After the onset of the economic crisis, however, Mr. Bloemer indicated that the business was forced to rent many properties in inventory due to the depressed real estate market.
21. The Taxpayer asserted that the County Board's \$97,000 assessed valuation for tax year 2011 is in excess of actual value because the Subject Property's condition is fair rather than average. He also asserted that distressed transactions constituted the market in the Subject Property's market area in the aftermath of the economic crisis, and that two foreclosure comparables he submitted at the hearing therefore demonstrate that the County Board's determination was incorrect.
22. June Racely, the State Appraiser for the County, testified and submitted documentation at the hearing in support of the County Board's determination.
23. The County's documentation includes a "Comparable Sales" spreadsheet that sets forth three sales of average condition homes in the Subject Property's market area in 2009, which is within the acceptable two-year look-back period preceding the 2011 assessment date. These transactions generated sales prices amounting to \$109,000, \$106,000, and \$98,500.

⁹ The reliability of the cost approach is limited in the case of older residential properties such as the Subject Property. *Appraising Residential Properties*, 4th Edition, Appraisal Institute, 2007, at p. 260. Due to resource reasons or due to insufficient volume of residential sales to properly construct sales comparison approach mass appraisal models, it is the Commission's understanding that the cost approach is often used by assessors in "Greater Nebraska" Counties other than Douglas, Sarpy and Lancaster. It is also the Commission's understanding that depreciation for purposes of the residential cost approach in these Counties in "Greater Nebraska" is derived from available sales.

¹⁰ The Property Record Card indicates that the Taxpayer purchased the property from William Steyer, the owner of record at least since 2001. Thus, even though the Property Record Card does not indicate that the grantor of the parcel was a financial institution or some other party indicative of a distressed transaction, the Taxpayer indicated at the hearing before the Commission that he purchased the Subject Property as a foreclosure in October 2004. Based on the parcel's assessed value that increased from \$96,430 in 2001 to \$116,890 in 2004, the Commission assumes that the Taxpayer's \$72,200 purchase price stemmed from a distressed transaction.

24. The County's spreadsheet also sets forth two sales of average condition homes in the Subject Property's market area in October 2011 and January 2012. These transactions, which occurred after the assessment date of January 1, 2011, generated sales prices amounting to \$82,500 and \$118,000. The Commission notes that County documentation states that these sales were presented at the June 2012 hearing because sales of rentals comparable to the Subject Property were "somewhat limited until recently."
25. The County submitted a map depicting the location of its five comparables in relation to the Subject Property. The map also depicts the location of the Taxpayer's two distressed sales comparables.
26. The County asserted that the residence located at 429 East 10th Street was the most comparable to the Subject Property. This comparable, which is located less than 10 blocks from the Subject Property, is an 1,823 square foot residence that sold for \$109,000 on January 2, 2009 (\$59.79 per square foot based on sale price, and \$54.87 per square foot based on \$100,035 assessed value for tax year 2011). In comparison, the Subject Property is assessed at \$57.60 per square foot for tax year 2011.
27. The County's documentation includes a cover letter authored by Ms. Racely, which is dated April 20, 2012. This cover letter states that the Ms. Racely conducted a "drive by" neighborhood inspection in early 2010, which lead to a \$9,570 assessment reduction to account for "condition." The cover letter also states that Ms. Racely inspected the interior of the Subject Property in August 2011. Based on these inspections and the County's comparables submitted at the hearing, Ms. Racely's cover letter concludes that the Subject Property did not "warrant any further reduction in value."
28. Ms. Racely's cover letter states that the Subject Property's market area "appears to be stable." As indicated previously, however, the Commission notes that the cover letter also states that sales of rentals comparable to the Subject Property were "somewhat limited until recently."
29. As discussed further below, the Taxpayer asserted that all of the County's comparables were superior in terms of condition as compared to the Subject Property.

CONDITION ANALYSIS

30. The Taxpayer asserted that the Subject Property's average condition rating should be lowered to fair from average. In support of this assertion, the Taxpayer submitted recent exterior photos of the Subject Property and exterior photos of several average condition comparables submitted by the County at the hearing. The Taxpayer stated that the photos demonstrate that the County's comparables, all of which are rated average condition, are superior in terms of condition as compared to the Subject Property. The Taxpayer also stated that pictures of the Subject Property contained in the Property Record Card were taken from a location too distant to sufficiently depict condition deficiencies regarding siding, windows and roof.
31. In addition to photos and testimony regarding condition, the Taxpayer submitted recent estimates to repair the Subject Property's "shot" roof (\$10,200) and "rotted" siding (\$10,500). The Taxpayer also estimated the following costs to address deferred maintenance items: (1) \$500 for repair of interior water damage; (2) \$7,500 for foundation repair (the Taxpayer stated that foundation problems contribute to sloping

floors); (3) \$450 for carpet replacement; and (4) \$2,000 for basement waterproofing. These cost estimates amount to \$31,150.

32. The Taxpayer also asserted that the County's condition rating system is inconsistent. In support of this assertion, the Taxpayer provided recent photographs of homes and related "Real Property Information" documentation. In particular, the Taxpayer submitted photos of a home located at 428 West 8th Street, which depict exterior condition significantly less than its average rating. In response, the County asserted that its condition ratings are derived from a combination of interior and exterior assessment, and that this home had a superior interior.
33. The County submitted photographs of the Subject Property's interior and exterior in support of its condition rating. Additionally, Ms. Racely stated that sloping floors are common in older properties such as the Subject Property, and that an August 2011 storm after the assessment date may have contributed to the siding and roof issues depicted in the Taxpayer's recent photographs.
34. In response to the County's assertions regarding the August 2011 storm, the Taxpayer stated that the photos submitted at the hearing accurately reflected the condition of the Subject Property for tax year 2011 purposes.
35. As indicated previously, the Property Record Card states that the County used Marshall & Swift data to derive a cost approach valuation of the Subject Property's improvements. Page E-6 of the December 2012 edition of the Residential Cost Handbook published by Marshall & Swift states as follows with respect to condition ratings:

Average Condition – Some evidence of deferred maintenance and normal obsolescence with age in that a few minor repairs are needed, along with some refinishing. But with all major components still functional and contributing toward an extended life expectancy, effective age and utility is standard for like properties of its class and usage.

Fair Condition (Badly Worn) - Much repair needed. Many items need refinishing or overhauling, deferred maintenance obvious, inadequate building utility and services all shortening the life expectancy and increasing the effective age.

Poor Condition (Worn Out) - Repair and overhaul needed on painted surfaces, roofing, plumbing, heating, numerous functional inadequacies, substandard utilities etc. (found only in extraordinary circumstances). Excessive deferred maintenance and abuse, limited value-in-use, approaching abandonment or major reconstruction, reuse or change in occupancy is imminent. Effective age is near the end of the scale regardless of the actual chronological age.

36. Based on consideration of the statements and documentation (including photos) submitted at the hearing, the Commission finds that the condition of the residence portion of the Subject Property is fair rather than average under the above Residential Cost Handbook definitions. Therefore, the Commission finds that the Taxpayer provided clear and convincing evidence that the County's average condition rating for tax year 2011 is unreasonable or arbitrary.

THE TAXPAYER'S SALES COMPARISON APPROACH VALUATION

37. The Taxpayer asserted that distressed transactions in the Subject Property's market area were indicators of actual value. In support of this assertion, the Taxpayer presented Multiple Listing Service ("MLS") documents for two area comparable properties subject to recent distressed sales transactions in support of its assertion that the actual value of the Subject Property was \$74,550 for tax year 2011. The Taxpayer averaged the per square foot sale price of these alleged comparable properties for purposes of arriving at its \$74,550 opinion of value for the Subject Property. In part, the Taxpayer's approach can best be described as an attempt to value the Subject Property using the sales comparison approach.
38. Averaging is not an acceptable part of the sales comparison approach. "Simply averaging the results of the adjustment process to develop an averaged value fails to recognize the relative comparability of the individual transactions as indicated by the size of the total adjustments and the reliability of the data and methods used to support the adjustments."¹¹
39. Further, the sales comparison approach has a defined systematic procedure that requires, among other things, that the individual appraiser appraising the Subject Property "[l]ook for differences between the comparable sale properties and the Subject Property using the elements of comparison. Then adjust the price of each sale to reflect how it differs from the Subject Property or eliminate that property as a comparable. This step typically involves using the most comparable sale properties and then adjusting for any remaining differences."¹²
40. 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.¹³ Consideration of many of these characteristics is required under Nebraska Statutes section 77-1371.¹⁴
41. The Taxpayer did not provide analysis regarding adjustments based on the elements of comparison referenced above to determine whether the alleged comparable properties were truly comparable. Therefore, the Commission does not place significant weight on the Taxpayer's \$74,550 sales comparison approach valuation.

DISTRESSED SALES AS INDICATOR OF VALUE ANALYSIS

42. The Taxpayer asserted that the onset of the economic crisis in 2007 and its aftermath created an environment where distressed transactions dominated the Subject Property's market area for tax year 2011 purposes. Consequently, the Taxpayer asserted that distressed transactions such as foreclosures, bank sales, and short sales are valid indicators of value under the sales comparison approach and should be considered by the County in its mass appraisal model. As indicated previously, the Taxpayer presented Multiple

¹¹ *The Appraisal of Real Estate*, 13th Edition, Appraisal Institute (2008) at 308.

¹² *Id.* at 301-302.

¹³ *Id.* at 141.

¹⁴ Neb. Rev. Stat. §77-1371 (Reissue 2009).

Listing Service (“MLS”) documents for two area comparable properties subject to 2009 distressed sales in the amounts of \$57,500 and \$65,000 in support of this assertion.

43. Ms. Racely of the County noted that the Taxpayer’s alleged comparable sales were foreclosures or otherwise not arm’s-length transactions such as “short sales,” and that the County does not consider such distressed transactions valid under the sales comparison valuation approach or for purposes of constructing its mass appraisal cost approach model. Ms. Racely also indicated that the County’s mass appraisal model used to value properties in the Subject Property’s market area excludes foreclosure sales and other distressed sales that are deemed not arm’s-length.
44. *The Dictionary of Real Estate Appraisal* defines an arm’s-length transaction as follows: “A transaction between unrelated parties under no duress.”¹⁵
45. 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.”¹⁶
46. As indicated above in the Standard of Review & General Valuation Law section, Nebraska Statutes section 77-112 references arm’s-length transactions in defining actual (i.e., market) value, stating as follows:

Actual value is the most probable price expressed in terms of money that a property will bring if exposed for sale in the open market, or in an arm’s length transaction, between a willing buyer and a willing seller, both of whom are knowledgeable concerning all the uses to which the real property is adapted and for which the real property is capable of being used.¹⁷

47. 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.”¹⁸
48. 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.¹⁹ 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.²⁰ 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

¹⁵ *The Dictionary of Real Estate Appraisal*, 4th Ed., Appraisal Institute, 2002, at p. 18.

¹⁶ *The Appraisal of Real Estate*, 13th Edition, Appraisal Institute, 2008, at p. 304.

¹⁷ Neb. Rev. Stat. § 77-112 (Reissue 2009).

¹⁸ *Property Assessment Valuation*, 3rd Ed., International Association of Assessing Officers, 2010, at p. 15; *See also, The Appraisal of Real Estate*, 13th ed., Appraisal Institute, 2008, at pgs. 54-77

¹⁹ *Property Assessment Valuation*, 3rd Ed., International Association of Assessing Officers, 2010, at pgs. 73 - 83.

²⁰ *Property Assessment Valuation*, 3rd Ed., International Association of Assessing Officers, 2010, at pgs. 77 - 83.

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.**²¹

49. 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.²²

50. 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.²³
51. With respect to whether distressed sales generally can be considered reliable indicators of market value, several courts outside of Nebraska have issued opinions in the aftermath of the economic crisis.²⁴
52. In terms of the use of distressed sales in the property tax context, in 2012 the Oregon Tax Court considered whether “foreclosures and short sales characterize the market for the

²¹ *Property Assessment Valuation*, 3rd Ed., International Association of Assessing Officers, 2010, at p. 417-18 (emphasis added).

²² *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).

²³ *County of Lancaster v. Union Bank & Trust Co. (In re Estate of Craven)*, 281 Neb. 122, 794 N.W.2d 406 (Neb. 2011).

²⁴ *Sewickley, LLC v. Chicago Title and Trust Company*, 974 N.E.2d 397 (Illinois Court of Appeals 2012); *Greene v. Benton County Assessor*, TC-MD 110687N (Oregon Tax Court 2012); *Voronaeff v. Crook County Assessor*, TC-MD No 110361C (Oregon Tax Court 2012); *Brashnyk v. Lane County Assessor*, TC-MD No 110308 (Oregon Tax Court 2011); *Witkin v. Lane County Assessor*, TC-MD No 110460C (Oregon Tax Court 2012); *Umpqua Bank v. Lane County Assessor*, TC-MD No 110594N (Oregon Tax Court 2012); *Columbus City School Dist. Bd. of Education v. Franklin County*, 983 N.E.2d 1285, 134 Ohio St.3d 529 (Ohio Supreme Court 2012) (bank sale deemed arm's-length because bank acted like a typically motivated seller); *Cattell v. Lake Cty. Bd. of Revision*, 2010-Ohio-4426, 2009-L-161 (Ohio Court of Appeals, Eleventh District 2010) (bank sales deemed arm's-length where properties were listed with a realtor on the open market).

subject property” in *Greene v. Benton County Assessor*.²⁵ In summarizing the Taxpayer’s argument, the Court stated as follows:

The Taxpayer testified that, although he is not a licensed broker or appraiser, he owns 11 properties and is experienced in real estate. As support that the subject property sale is representative of its real market value, Greene provided an article by Alan Smith (Smith), Deputy Assessor, Ada County Assessor’s Office, Boise, Idaho, entitled “Distressed Sales: Anomaly or Market Value?” Smith states that “bank-owned resales, if they are marketed by a realtor, or through a multiple listing service for a time period considered to be an average exposure to the market, will likely be very close to fair market value in this type of market.”²⁶

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

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

54. The Oregon Tax Court has also considered three Oregon Department of Revenue directives issued to county assessors in 2009 and 2010 regarding consideration of

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

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

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

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

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

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

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

56. 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*

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

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

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

*market characteristic, it is appropriate to include such sales in a comparable sale's value analysis or a ratio study.*³¹

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

Sales from banks should not be automatically considered a non-arm's-length transaction especially if you do not have an abundant supply of sales. Typically, values will be on the low end of the value range, but they may be considered arm's length transactions and included in the ratio study if all other criteria for being an open market arm's-length transaction are met.³²

58. As indicated previously, the Taxpayer presented Multiple Listing Service ("MLS") documents for two area comparable properties subject to 2009 sales in the following amounts: \$52,500 and \$65,000. As also indicated previously, based on a review of the MLS documents, Ms. Racely of the County Assessor's Office noted that the Taxpayer's alleged comparable sales were foreclosures or otherwise distressed transactions.
59. Under the guidance above regarding consideration of distressed transactions as indicators of market value in the aftermath of the economic crisis, the Taxpayer's assertions and supporting MLS documentation raise questions regarding the validity of the County's mass appraisal model for purposes of determining actual value for tax year 2011. Of particular note in this regard, while Ms. Racely's cover letter dated April 2012 states that the Subject Property's market area "appears to be stable," it also states that sales of rentals comparable to the Subject Property were "somewhat limited until recently."
60. The Taxpayer did not, however, provide analysis regarding the ratio of distressed sales to sales considered valid by the County in the market area. Therefore, because it is unclear whether distressed transactions constitute either a significant portion or a majority of the total market area sales in the two-year period preceding the assessment date that is analyzed by the County for purposes of constructing its mass appraisal model, the Commission finds that the Taxpayer has not provided clear and convincing evidence that the two distressed transactions presented should have been considered as reliable indicators of value for tax year 2011.

QUANTIFICATION OF FAIR CONDITION FINDING: 2004 SALE AS INDICATOR OF VALUE

61. As indicated previously, based on finding that the condition of the Subject Property was fair rather than average, the Commission finds that the County Board's \$97,000 determination for tax year 2011 is unreasonable or arbitrary.

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

³² 2011 Statewide Equalization Exhibit 107, p. 117.

62. As also indicated previously, for purposes of quantifying the deferred maintenance items that support the Commission's fair condition finding, the Taxpayer submitted recent estimates to repair the Subject Property's roof (\$10,200) and siding (\$10,500). The Taxpayer also estimated the following costs to address deferred maintenance items: (1) \$500 for repair of interior water damage; (2) \$7,500 for foundation repair; (3) \$450 for carpet replacement; and (4) \$2,000 for basement waterproofing. These cost estimates amount to \$31,150.
63. The Taxpayer also stated that the two 2009 sales of the property located at 140 North Platte included on the County's "Comparable Sales" worksheet support his assertion that deferred maintenance had an approximate \$30,000 negative impact on the actual value of the Subject Property. In this regard, the worksheet discloses that the parcel at 140 North Platte sold in a distressed transaction in March 2009 for \$57,500, and then sold for \$91,000 in July 2009 after repair. The Commission notes that this property is approximately five blocks from the Subject Property according to the County's map.
64. In addition to the Taxpayer's evidence above regarding quantification of the fair condition finding, the Commission notes that the \$72,200 sale of the Subject Property in 2004 is a sign of value. The Commission is mindful that "[s]ale price is not synonymous with actual value or fair market value."³³ The Commission is also mindful, however, that the Nebraska Supreme Court stated as follows in *Potts v. Board of Equalization of Hamilton County*: "[W]here, 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."³⁴
65. Based on *Potts*, together with the Nebraska Supreme Court's holding in *In re Estate of Craven* (281 Neb. 122) and the Nebraska Property Assessment Division's Sales File Practice Manual guidance set forth above regarding bank sales, the Commission finds that the Taxpayer's 2004 purchase in the amount of \$72,100 is an indicator of actual market value. In addition, while the case law discussed above from jurisdictions outside of Nebraska regarding distressed transactions is not controlling, the Commission finds that it is instructive for purposes of this finding.
66. The Commission therefore finds that the best evidence of value supported by documentation for tax year 2011 is \$72,200, which is the 2004 sale price of the Subject Property disclosed on the Property Record Card. The Commission notes that this amount exceeds the County Board's \$97,000 determination less the Taxpayer's \$31,150 total estimate to address deferred maintenance items (i.e., \$97,000 - \$31,150 = \$65,850).³⁵
67. The Commission also notes that the 2004 sale price occurred at a time when real estate values were fueled by a variety of factors, including a favorable lending environment. As a consequence of the onset of the economic crisis in 2007 and its aftermath, real estate values in tax year 2011 often were less than or equal to pre-crisis levels. Thus, the Commission finds that the Taxpayer's \$72,100 purchase price in 2004 is a reasonable sign of value for tax year 2011.

³³ *Forney v. Box Butte County Bd. of Equalization*, 7 Neb.App. 417, 424, 582 N.W.2d 631, 637 (1998).

³⁴ *Potts v. Board of Equalization of Hamilton County*, 213 Neb. 37, 48, 328 N.W.2d 175, 328 (1982).

³⁵ The Commission notes that while the Taxpayer submitted documentation regarding estimates for roof and siding replacement, he did not do so for approximately one-third of the total \$31,150 deferred maintenance estimate. Thus, the Commission finds that this total estimate does not constitute the best evidence for actual value purposes.

CONCLUSION

- 68. 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.
- 69. 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 Dodge County Board of Equalization determining the value of the Subject Property for tax year 2011 is vacated and reversed.
- 2. That the taxable value of the Subject Property for tax year 2011 is:

Land	\$20,705
Improvements	\$51,495
Total	\$72,200

- 3. This decision and order, if no further action is taken, shall be certified to the Dodge County Treasurer and the Dodge County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (2012 Cum. Supp.).
- 4. Any request for relief, by any party, which is not specifically provided for by this order is denied.
- 5. Each Party is to bear its own costs in this proceeding.
- 6. This decision shall only be applicable to tax year 2011.
- 7. This order is effective on November 5, 2013.

Signed and Sealed: November 5, 2013.

Thomas D. Freimuth, Commissioner