

**SC 89529**

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**In The  
Supreme Court of Missouri**

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**STATE EX REL. ASHBY ROAD PARTNERS, ET AL.**

**Appellants,**

**v.**

**STATE TAX COMMISSION OF MISSOURI  
and  
PHILIP MUEHLHEAUSLER, ASSESSOR FOR ST. LOUIS COUNTY**

**Respondents.**

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**Appeal from the Circuit Court of Cole County  
The Honorable Patricia S. Joyce, Judge**

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**SUBSTITUTE BRIEF OF RESPONDENT  
PHILIP MUEHLHEAUSLER**

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## STATEMENT OF FACTS

Respondent Philip Muehlheausler (“Assessor”) is the lawfully appointed Assessor for St. Louis County, Missouri, who in his official capacity classified, appraised and assessed Appellants’ properties for the years 2003 and 2004. Assessor is the Respondent in the underlying State Tax Commission (“Commission”) cases that were at issue in the Writ action that is the subject of this appeal.

Relators/Appellants (“Appellants”) are all owners of commercial properties that are situated in St. Louis County. Their individual appeals to the St. Louis County Board of Equalization (“Board”) were consolidated on appeal to the Respondent Commission. Appellants argue that they are suffering from discrimination in that the Assessor has assessed their properties at a higher percentage of true value in money than a statistically significant number of other similar properties in St. Louis County. [L.F. 120] Each Appellant alleges that its own property was accurately assessed at precisely 32% of true market value, while other similarly situated properties were assessed at a lower percentage of true market value.

The Commission is the state agency vested with the authority to hear and decide issues involving tax assessments on real properties. The Commission, in its Decision and Order dated November 13, 2006, affirmed Hearing Officer Luann Johnson’s Orders of June 21, 2006, and August 24, 2006, and held that the Appellants had the burden to prove that their properties suffered from discrimination and were not under-assessed. [L.F. 120, 99, 104] Appellants then filed their Petition for a Writ of Prohibition in Cole County Circuit Court on February 2, 2007, seeking to avoid having to prove the value of

their own properties (which is one element of a discrimination claim), while at the same time seeking to prevent the Assessor from introducing evidence of value. [L.F. 5, 124]

On July 3, 2007, the Cole County Circuit Court found in favor of the Respondent Commission and Assessor, and, holding that the requirements for the issuance of a Writ of Prohibition had not been met, refused to issue the Writ. [L.F. 196]

Appellants subsequently filed an appeal with the Missouri Court of Appeals, Western District. The court, after briefing and oral argument, issued its opinion dismissing the Appellants' appeal upon finding that the judgment of the Cole County Circuit Court was void, and that the court's order denying the Appellants' motion for a preliminary writ was not appealable. State ex rel. Ashby Road Partners, L.L.C. v. State Tax Comm'n, \_\_\_ S.W.3d \_\_\_, 2008 WL 2491956 (Mo.App.W.D. June 24, 2008).

Appellants' Motion for Rehearing was overruled and their Motion for Transfer to the Supreme Court was summarily denied by the Western District on July 29, 2008. On September 30, 2008, this Court granted Appellants' Application for Transfer.

## ARGUMENT

**THE CIRCUIT COURT CORRECTLY REFUSED TO PROHIBIT THE STATE TAX COMMISSION FROM REQUIRING APPELLANTS TO PROVE MARKET VALUE IN THEIR CLAIM OF DISCRIMINATORY ASSESSMENT, BECAUSE (1) PROOF OF MARKET VALUE TO SHOW THAT UNDER-ASSESSMENT OF APPELLANTS' PROPERTY DID NOT OCCUR WOULD BE REQUIRED IN ORDER FOR APPELLANTS TO PREVAIL ON THEIR CLAIM OF DISCRIMINATORY ASSESSMENT, AND SECTION 138.060 RSMO DOES NOT PRECLUDE THE ASSESSOR FROM INTRODUCING EVIDENCE THAT APPELLANTS' PROPERTY WAS ASSESSED PROPORTIONATELY TO OTHER PROPERTIES THROUGHOUT THE COUNTY, AND (2) THE APPELLANTS HAVE AN AVAILABLE AND ADEQUATE REMEDY BY APPEAL.**

**A. Standard of Review.**

The court of appeals for the Western District recently addressed the standard of review in appeals from the denial of a writ of prohibition. In State ex rel. Rosenberg v. Jarrett, 233 S.W.3d 757, 761 (Mo.App. 2007), which involved the denial of a writ requested to prohibit a member of the Administrative Hearing Commission from presiding over the disciplinary hearing of the appellant doctor, the court of appeals noted that: “Discretionary rulings are presumed correct, and an abuse of discretion occurs only if the ruling is ‘clearly against the logic of the circumstances and so arbitrary and unreasonable as to shock the sense of justice.’” (quoting State ex rel. M.D.K. v. Dolan,

968 S.W.2d 740, 745 (Mo.App. 1998)). The court went on to note that appeals in writ cases are “about what the law is, and about whether the law is clear, and about whether the lower court abused its discretion in withholding a remedy. . . . If a writ respondent is entitled to exercise discretion in a matter, a writ of prohibition cannot prevent the exercise of discretion, as long as there is jurisdiction for such discretion.” Rosenberg, 233 S.W.3d at 762, *citing* State ex rel. K-Mart Corp. v. Holliger, 986 S.W.2d 165, 169 (Mo. banc 1999); *see also* State ex rel. Miss. Lime Co. v. Mo. Air Conservation Comm'n, 159 S.W.3d 376, 383 (Mo.App. 2004).

**B. Proof Of Market Value To Show That Under-Assessment Of Appellants’ Property Did Not Occur Would Be Required In Order For Appellants To Prevail On Their Claim Of Discriminatory Assessment, And Section 138.060 RSMo Does Not Preclude The Assessor From Introducing Evidence That Appellants’ Property Was Assessed Proportionately To Other Properties Throughout The County.**

Appellants’ underlying claims are raised in the context of discrimination, not overvaluation, appeals. There are two components necessary to establish Appellants’ claim of discriminatory assessment in this case: first, they must establish that the overall assessment level for commercial property in St. Louis County is significantly lower than the statutory rate of 32%. Then, they must establish that their properties escaped such under-assessment and were instead appraised excessively in comparison, resulting in an unfair (albeit otherwise valid) assessment. “A mere overvaluation of a specific property does not establish a discrimination in the absence of a showing . . . that there is an

undervaluation in the average assessment, or that other property generally is undervalued.” Cupples Hesse Corp. v. State Tax Comm’n, 329 S.W.2d 696, 700 (Mo. 1959).

Evidence (as by a ratio study) proving that the overall assessment level for commercial property is at a level significantly below the statutory rate of 32% would establish the first component of the discriminatory assessment claim, but not the second. Yet although there is no case law suggesting that proof of one component negates the need to prove the other, Appellants nonetheless seek to evade proof of the second component and instead argue that they should prevail simply by proving that properties in St. Louis County are generally under-assessed. They assert that “[a] ratio study showing the common level of assessment would establish discrimination *without evidence of market value*.” Brief at 17 (emphasis added).

Appellants’ argument is absurd and contrary to law. A ratio study, taken alone, proves only the average level of assessment; the study cannot prove that any of the Appellants’ properties was a victim of discrimination. The Appellants can offer their ratio study only to cast doubt on the accuracy of the valuation of each and every commercial property in St. Louis County. Appellants’ argument, that the Respondent Assessor correctly valued each of their 515 properties while undervaluing all other properties, is unsupported by any evidence and is contrary to the ratio study evidence that they have urged the Court to accept. Appellants are asking this Court to do what no court in Missouri has ever sanctioned: To waive the basic requirement that an essential, material fact at issue be proven by the moving party.

Appellants claim that their mere “agreement” to the Assessor’s valuation should substitute for evidence proving value. Existing case law fails to support Appellants’ position that they need not prove the true market value of their properties in this discrimination case. Appellants suggest that the taxpayers in both Savage v. State Tax Comm’n, 722 S.W.2d 72 (Mo. banc 1986) and Koplar v. State Tax Comm’n, 321 S.W.2d 686 (Mo. 1959) were allowed to proceed in their discrimination charges without producing evidence of market value. Substitute Brief at 18 n. 2. (“The issue of whether the taxpayers had to prove the market value of their properties does not appear to have been raised in *Savage*.”). This claim is incorrect as to both cases.

In Savage, “The parties (taxpayers and assessor) stipulated to the true value in money of respondents’ properties.” 722 S.W.2d at 74. These stipulations obviously rendered moot the necessity for other evidence of value. Appellants’ above-referenced footnote contradicts their acknowledgment on the previous page that the Savage “taxpayers and the Assessor stipulated to the value of the taxpayers’ properties in 1980 and 1981.” Substitute Brief at 17.

In Koplar, the taxpayers came forward with the evidence of over-valuation of their downtown office building properties in Kansas City. This evidence was the admission of the Jackson County assessor, who testified on behalf of the property owners that he had intentionally “put a higher assessment ‘on office space’ than on anything else” for 1956. He testified that downtown office assessments “should be around 50%” of current market value. Koplar, 321 S.W.2d at 689.

If parties were permitted to forego proof of the market value of their properties to

prove a discrimination case, then evidence of under-assessment would support a reduction in value for every single parcel of property in the county - even those properties that had been specifically determined to be under-valued as part of the ratio study itself. In a county wherein properties were found to be under-valued by 25%, each property in the county could be reduced another 25% in value simply by appealing and demanding that the “real” ratio be applied to the already-low value assigned by the assessor. And if this “discrimination” were proved in the first year of the two-year re-assessment cycle, the properties would then be reduced still further in value the second year, as the assessed values set for the odd-numbered year appeal control the assessed values in the succeeding even-numbered tax year per the effect of Section 137.115 RSMo. Property values would thus spiral even further downward from actual market value.

The Appellants bear the burden of proving that their properties are the victims of discrimination, not the Respondent Assessor. Both Savage and Koplar support the Respondent Assessor’s contention that the market value of each Appellant’s property is the second prong of proof necessary to prevail in a discrimination appeal.

In arguing that proof of countywide under-assessment is sufficient to establish their discrimination claim, Appellants rely solely on their contention that Assessor is precluded by law from attempting to prove that the subject properties are assessed proportionately (that is, similarly under-assessed) to other properties throughout the county.

In support of their contention, Appellants point to the last sentence of Section 138.060.1 RSMo (Supp. 2007), which provides that:

At any hearing before the state tax commission or a court of competent jurisdiction of an appeal of assessment from a first class charter county or a city not within a county, the assessor shall not advocate nor present evidence advocating a valuation higher than that value finally determined by the assessor or the value determined by the board of equalization, whichever is higher, for that assessment period.

Appellants argue that this clause of Section 138.060.1 dictates that the Commission must exclude from consideration in these discrimination cases, any appraisal reports that conclude an opinion of value higher than the value established by the Assessor or board of equalization. But the language of the statute does not support Appellants' argument. The verb "advocate" means, "to speak, plead, or argue in favor of." The American Heritage Dictionary of the English Language, 4<sup>th</sup> Edition, 2000. "Advocacy" is the act of pleading for or actively supporting a cause or proposal." Black's Law Dictionary, 8<sup>th</sup> Edition, 2004. If the Assessor is only presenting evidence to preserve and not raise his valuation, he cannot be charged with "advocating" a higher value - a fact which is implicitly acknowledged by the Commission's regulation addressing Section 138.060.1:

In any case in a first class charter county or a city not within a county, where the assessor presents evidence which indicates a valuation higher than the value finally determined by the assessor or the value determined by the board of equalization, whichever is higher, for the assessment period, such evidence will only be received for the purpose of sustaining the

assessor's or board's valuation, and not for increasing the valuation of the property under appeal.

12 CSR 30-3.075 (2001). The Commission has routinely enforced this rule since 2001. DNS Electronic Materials, Inc. v. Shipman, STC Appeals 03-32609 through 03-32612 (December 28, 2005).

Moreover, the interpretation offered by Appellants would vitiate the possibility of defending against *any* discrimination case in which countywide under-assessment exists, by eliminating the only method of proving that the subject property is no less under-assessed than any other property. The *only* option available to an Assessor who must defend a claim of discriminatory assessment in an under-assessed county is to establish that an individual property was similarly under-assessed and in fact worth more than the value previously assigned by the Assessor. By arguing that the Assessor cannot produce evidence of undervaluation for the purpose of showing lack of discrimination, Appellants seek to foreclose the only defense available against such claims.

Instead, Appellants argue, Assessor must simply accept as final the very assignment of value that they now seek to discredit by introducing evidence of general under-assessment throughout the County. In arguing that they have "agreed" to the Assessor's valuation, Appellants ignore the fact that "once evidence of unlawful discrimination is introduced, . . . the presumption in favor of the assessor ceases to exist." Savage, 722 S.W.2d at 77. Having been challenged by evidence of general under-assessment, the Assessor does not "agree" that Appellants' properties are accurately assessed if all other properties are deemed under-assessed. In their Substitute Brief,

Appellants first make the claim that their “agreement” with the Assessor’s value is “in effect” a stipulation. Appellants appear to appreciate that there is a legal distinction between the unilateral act of “agreeing” to something, and the mutual meeting of the minds necessary to reach a “stipulation.” However, Appellants seek to avoid that distinction, and go on to argue that market value has become “an irrelevant, proven fact,” based on their willingness to agree to the Assessor’s values. Substitute Brief at 16-17.

Appellants’ attempt to preclude Assessor from defending against their discrimination charge by introducing evidence that Appellants’ properties are no less under-assessed than other properties in the county is insupportable. The preclusion of this defense against discrimination claims would wreak havoc on the assessment system by mandating continued reductions from already under-assessed properties, and would be inconsistent with the constitutional requirement that properties be assessed uniformly. See Mo. Const. Art. X, Sec. 3. Section 138.060.1 clearly does not mandate such a preclusion and should not be interpreted to yield such an absurd and unreasonable consequence. See Care and Treatment of Schottel v. State, 159 S.W.3d 836, 841-42 (Mo. banc 2005) (Statutory interpretation should implement legislative policy and avoid unjust or unreasonable result, presumably the legislature did not intend an absurd result); see also In re Beyersdorfer, 59 S.W.3d 523, 526 (Mo. banc 2004) (“[T]his court presumes that the legislature did not intend an absurd and illogical result.”).

In fact, Appellants’ interpretation of Section 138.060.1 could effectively preclude Assessor from introducing *any* appraisal evidence of value in a discrimination case involving under-assessed property - even an appraisal that only matches and does not

exceed the Assessor's valuation - because an Assessor cannot direct an appraiser to lower his determination of value in order not to exceed the Assessor's valuation. Appraisers are licensed by the State of Missouri, based upon qualifications and experience determined by Missouri Real Estate Appraisers Commission. Sections 339.500 et seq. RSMo (2000 and Supp. 2007). Appraisers are required to comply with the Uniform Standards of Professional Appraisal Practice (USPAP) and are subject to loss of license for failure to do so. Section 339.532.2(7). USPAP requires that the appraiser provide an objective opinion of market value, using methodology approved by the jurisdiction, when the assignment is to determine market value.<sup>1</sup> In other words, an

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<sup>1</sup> **USPAP, 2005, Conduct (ETHICS RULE)**

An appraiser must perform assignments ethically and competently, in accordance with USPAP and any supplemental standards agreed to by the appraiser in accepting the assignment. An appraiser must not engage in criminal conduct. An appraiser must perform assignments with impartiality, objectivity, and independence, and without accommodation of personal interests.

In appraisal practice, an appraiser must not perform as an advocate for any party or issue.

Comment: An appraiser may be an advocate only in support of his or her assignment results. Advocacy in any other form in appraisal practice is a violation of the ETHICS RULE.

**An appraiser must not accept an assignment that includes the reporting of predetermined opinions and conclusions.**

appraiser cannot opine a market value of \$1,000,000 when his research and analysis and the jurisdictionally approved methodology suggest a market value of \$1,200,000. Thus, the Assessor would be unable to present any appraisal evidence if in fact the property had been previously undervalued by the Assessor, because an appraiser could not lower his opinion of value for the purpose of matching and not exceeding the Assessor's valuation. Appellants' interpretation, if adopted, would also require the violation of Section 137.115 RSMo and Article X, Section 4(b) of the Missouri Constitution requiring that assessors appraise each property based on its *true value* in money, by requiring them to assert a value they believe to be inaccurate.

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**An appraiser must not communicate assignment results in a misleading or fraudulent manner. An appraiser must not use or communicate a misleading or fraudulent report or knowingly permit an employee or other person to communicate a misleading or fraudulent report.**

**An appraiser must not use or rely on unsupported conclusions relating to characteristics such as race, color, religion, national origin, gender, marital status, familial status, age, receipt of public assistance income, handicap, or an unsupported conclusion that homogeneity of such characteristics is necessary to maximize value.**

**C. The Appellants Have an Available and Adequate Remedy by Appeal**

Even were this court to disagree with the lower court's reasoning in denying the writ application, the denial cannot be deemed an abuse of discretion in light of the fact that appeal of the underlying order will be available. To establish that a writ of prohibition should issue, Appellants must establish that the remedy of appeal is not available. State ex rel. Degeere v. Appelquist, 748 S.W.2d 855, 856-57 (Mo.App. 1988). Where an adequate remedy by appeal exists, prohibition will not lie. State ex rel. Baldwin v. Dandurand, 785 S.W.2d 547, 549 (Mo. banc 1990).

The Appellants have the statutory right to appeal a Commission Order to the courts. In the instant appeals, the Hearing Officer and the Commission have required merely a single lead Appellant to prove that its property is suffering a discriminatory assessment. Once the Commission issues its decision in that case, the Appellant may pursue its adequate and available statutory appeal. Accordingly, Appellants have failed to meet a critical requirement for a Writ of Prohibition.

## CONCLUSION

This Court should affirm the decision of the Western District of the Court of Appeals, which dismissed Appellants' appeal for lack of jurisdiction. In the alternative, this Court should affirm the decision of Cole County Circuit Court Judge Patricia S. Joyce, as it is well founded and grounded in settled law. The circuit court's judgment correctly declared and applied the law. The State Tax Commission has discretion as to the handling of discovery, evidence, and the administration of its hearings, and has not exceeded or abused that discretion. Also, Relators/Appellants have the ability to appeal any Decision and Order issued by the State Tax Commission. Thus, they have failed to meet the requirements for a writ of prohibition and their appeal is without merit.

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**CERTIFICATE OF SERVICE**

A copy of this Brief of Respondent Muehlheausler and a CD-Rom disk containing the brief were sent by U.S. mail, postage prepaid, on December 18, 2008, to the following:

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**CERTIFICATE OF COMPLIANCE**

The undersigned certifies that this Brief of Respondent Muehlheausler includes the information required by Rule 55.03 and complies with the requirements contained in Rule 84.06. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is **3,319**, excluding the cover, signature block, and certificates of service and compliance.

The undersigned further certifies that the disk filed with this brief was scanned for viruses and was found virus-free through the Symantec anti-virus program.

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Paula J. Lemerman