

**BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION**

Walnut Creek CDI LP,  
Appellant,

v.

Sarpy County Board of Equalization,  
Appellee.

Case Nos. 17C 0083 & 18C 0094

Decision and Order Affirming the Decisions  
of the Sarpy County Board of Equalization

**For the Appellant:**

Steven D. Davidson,  
Baird Holm, LLP

**For the Appellee:**

Andrea Gosnold-Parker,  
Deputy Sarpy County Attorney

These appeals were heard before Commissioners Robert W. Hotz and James D. Kuhn.

**I. THE SUBJECT PROPERTY**

The Subject Property is a rent-restricted housing project located in Sarpy County, consisting of three buildings containing 60 one-bedroom and two-bedroom apartments, of which 52 are rent restricted. The project was developed using federal tax credits under section 42 of the Internal Revenue Code. The legal description of the parcel is found at Exhibits 1 and 2. The property record cards for the Subject Property are found at Exhibit 5 (tax year 2017) and Exhibit 13 (tax year 2018).

**II. PROCEDURAL HISTORY**

The Sarpy County Assessor (the County Assessor) determined that the assessed value of the Subject Property was \$2,500,000 for tax year 2017. Walnut Creek CDI LP (the Taxpayer) protested this assessment to the Sarpy County Board of Equalization (the County Board). The County Board determined that the taxable value of the Subject Property for tax year 2017 was \$2,500,000.<sup>1</sup>

The County Assessor determined that the assessed value of the Subject Property was \$2,625,000 for tax year 2018. The Taxpayer protested this assessment to the County Board. The

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<sup>1</sup> Exhibit 1.

County Board determined that the taxable value of the Subject Property for tax year 2018 was \$2,625,000.<sup>2</sup>

The Taxpayer appealed the decisions of the County Board to the Tax Equalization and Review Commission (the Commission). The Commission held a hearing on March 21, 2019, with Commissioner Hotz presiding. Prior to the hearing, the parties exchanged exhibits and submitted a Pre-Hearing Conference Report, as ordered by the Commission. Exhibits 1 and 2 were admitted without objection. The parties stipulated to the receipt of Exhibits 3 to 8, 10 to 18, and 30 to 40. Exhibits 9 and 19 through 26 were admitted in the course of the hearing, and Exhibits 27, 28, and 29 were marked but not offered or received.

### III. STANDARD OF REVIEW

The Commission's review of a determination by a county board of equalization is *de novo*.<sup>3</sup> When the Commission considers an appeal of a decision of a county board of equalization, a presumption exists that the board has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action.<sup>4</sup>

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.<sup>5</sup>

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.<sup>6</sup> Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.<sup>7</sup>

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<sup>2</sup> Exhibit 2.

<sup>3</sup> See Neb. Rev. Stat. § 77-5016(8) (Reissue 2018), *Brenner v. Banner County 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 County Freeholder Bd.*, 276 Neb. 1009, 1019 (2009).

<sup>4</sup> *Brenner* at 283, 811.

<sup>5</sup> *Id.*

<sup>6</sup> Neb. Rev. Stat. § 77-5016(9) (Reissue 2018).

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

The Taxpayer must introduce competent evidence of actual value of the Subject Property in order to successfully claim that the Subject Property is overvalued.<sup>8</sup> The County Board need not put on any evidence to support its valuation of the property at issue unless the taxpayer establishes the County Board's valuation was unreasonable or arbitrary.<sup>9</sup>

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.<sup>10</sup> 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.<sup>11</sup> The Commission's Decision and Order shall include findings of fact and conclusions of law.<sup>12</sup>

#### IV. VALUATION

##### A. Law

In 2015, the Nebraska Legislature amended laws affecting the valuation of rent-restricted housing projects. Such legislation, LB 356, is codified at Neb. Rev. Stat. § 77-1333.<sup>13</sup> The central issue in dispute between the parties in these appeals is the proper interpretation and application of the changed statutory requirements.

As applicable to both tax years 2017 and 2018, Neb. Rev. Stat. § 77-1333 provides, in relevant part:

(3) *Except as otherwise provided in this section*, the county assessor shall utilize an income-approach calculation to determine the actual value of a rent-restricted housing project when determining the assessed valuation to place on the property for each assessment year. *The income-approach calculation shall be consistent with this section and any rules and regulations adopted and promulgated by the Tax Commissioner and shall comply with professionally accepted mass appraisal techniques.*

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<sup>8</sup> Cf. *Josten-Wilbert Vault Co. v. Bd. of Equal. 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 Equal. of York County*, 209 Neb. 465, 308 N.W.2d 515 (1981) (determination of equalized taxable value).

<sup>9</sup> *Bottorf v. Clay County Bd. of Equal.*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).

<sup>10</sup> Neb. Rev. Stat. § 77-5016(8) (Reissue 2018).

<sup>11</sup> Neb. Rev. Stat. § 77-5016(6) (Reissue 2018).

<sup>12</sup> Neb. Rev. Stat. § 77-5018(1) (Reissue 2018).

<sup>13</sup> 2015 Neb. Laws, LB 356.

(5) The owner of a rent-restricted housing project shall file a statement electronically on a form prescribed by the Tax Commissioner with the Rent-Restricted Housing Projects Valuation Committee on or before July 1 of each year that details *actual* income and *actual* expense data for the prior year, a description of any land-use restrictions, a description of the terms of any mortgage loans, including loan amount, interest rate, and amortization period, and such other information as the committee or the county assessor may require for purposes of this section. The Department of Revenue, on behalf of the committee, shall forward such statements on or before August 15 of each year to the county assessor of each county in which a rent-restricted housing project is located.

\* \* \* \* \*

(8) Except as provided in subsections (9) through (11) of this section, each county assessor shall use the capitalization rate or rates contained in the report received under subsection (7) of this section and the *actual* income and *actual* expense data filed by owners of rent-restricted housing projects under subsection (5) of this section in the county assessor's income-approach calculation. \* \* \*.

(9) If the *actual* income and *actual* expense data required to be filed for a rent-restricted housing project under subsection (5) of this section is not filed in a timely manner, the county assessor may use any method for determining actual value for such rent-restricted housing project that is consistent with professionally accepted mass appraisal methods described in section 77-112.

(10) If a county assessor, based on the facts and circumstances, believes that the income-approach calculation does not result in a valuation of a rent-restricted housing project at actual value, then the county assessor *shall* present such facts and circumstances to the county board of equalization. If the county board of equalization, based on such facts and circumstances, concurs with the county assessor, then the county board of equalization *shall* petition the Tax Equalization and Review Commission to consider the county assessor's utilization of another professionally accepted mass appraisal technique that, based on the facts and circumstances presented by a county board of equalization, would result in a substantially different determination of actual value of the rent-restricted housing project. \* \* \*.<sup>14</sup>

In sum, § 77-1333 provides the statutory requirements for the valuation of rent-restricted property by a county assessor. It requires the assessor to use an income approach to assess each subject property after receiving actual income and actual expense data from each property owner. It authorizes the Rent-Restricted Housing Projects Valuation Committee (Valuation Committee) to determine the appropriate capitalization rate for the county assessor to use in each income approach for each rent-restricted housing project. It permits

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<sup>14</sup> Neb. Rev. Stat. § 77-1333 (Reissue 2018) (emphasis added).

the assessor to utilize another approach to value a subject property if the actual income and expense data is not timely filed.

The County Board asserts that the statute permits the County Assessor to determine and apply market-derived income and expense rates based upon all of the data submitted by rent-restricted housing projects within the county. The Taxpayer disagrees, and contends that the statute requires that the Subject Property be valued using only its actual expense and actual income data as provided by the Taxpayer. The parties also disagree on whether the County Assessor has the discretion to exclude certain expenses from the actual expenses submitted by the Taxpayer.

## **B. Summary of the Evidence**

Two witnesses testified at the hearing. Corey Checketts was an employee of Community Development, Inc., which held an ownership interest in the Taxpayer. Timothy Ederer had worked for the Sarpy County Assessor since 2004 and held the State Assessor's Certificate. He assessed the Subject Property for the County Assessor for tax years 2017 and 2018.

### **1. 2017 Valuation**

For tax year 2017, the Taxpayer submitted a statement, including the data required by Neb. Rev. Stat. § 77-1333(5), to the Valuation Committee by the statutory deadline.<sup>15</sup> This report showed actual effective gross income (EGI) of \$474,818.15 and \$362,900.01 in actual total expenses, including \$80,791.74 in total real estate taxes, resulting in net operating income (NOI) of \$111,918.14, or adjusted net operating income (net operating income plus real estate taxes) of \$192,709.88.<sup>16</sup> The Valuation Committee had previously determined that the base capitalization rate for tax year 2017 was 6.5%,<sup>17</sup> to which 2.75% is added to reflect the local property tax levy,<sup>18</sup> resulting in a loaded capitalization rate of 9.25%. Under the Taxpayer's proposed methodology, its actual adjusted NOI is divided by the loaded capitalization rate to indicate a value of \$2,083,350.05, rounded to \$2,083,350.

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<sup>15</sup> The Taxpayer's reports can be found at several points within the exhibits; for convenience, we will refer to Exhibit 8 for tax year 2017 and Exhibit 15 for tax year 2018.

<sup>16</sup> Exhibit 8:6-8.

<sup>17</sup> Exhibit 32:1. The Valuation Committee's report further provides that local property taxes must be removed from the expenses that have been received by the County Assessor, and the effective consolidated tax rate applicable to the project should be loaded onto the statewide capitalization rate in determining value.

<sup>18</sup> Ex. 6.1. The parties appear to agree that the local tax rate should be calculated by averaging the rates for the three years prior to the tax year in issue.

However, per the testimony of Ederer, the County Assessor used the capitalization rate from the annual report issued by the Valuation Committee, but did not use the *actual income* and *actual expense* data filed by the Taxpayer in the income-approach calculation for the Subject Property for tax year 2017. Instead, the County Assessor combined the information received from the Taxpayer with information received from other rent-restricted housing projects in the county to derive typical amounts for income, vacancy and collection losses, and expenses. For income, the County Assessor determined the maximum available rent for each unit in the Subject Property and adjusted it downward by the amount provided by the Land Use Restriction Agreement (LURA) governing the rent restrictions of the Subject Property. After applying market-derived expense amounts, the County Assessor concluded that the Subject Property's EGI was \$463,803 and its adjusted NOI was \$231,811.<sup>19</sup> By dividing this adjusted NOI by the loaded capitalization rate of 9.25%, the County Assessor determined that the actual value of the Subject Property was \$2,505,058.<sup>20</sup> The County Assessor rounded this amount to \$2,500,000, which was affirmed by the County Board in its determination of taxable value for tax year 2017.

Ederer testified that he would use a different methodology to value the Subject Property if he were to reassess it based on his current understanding of the requirements of Neb. Rev. Stat. § 77-1333. He would use the actual income and actual expense amounts listed by the Taxpayer on its report to the Valuation Committee. However, based on the statutory provision that the “income-approach calculation shall be consistent with this section and any rules and regulations adopted and promulgated by the Tax Commissioner and shall comply with professionally accepted mass appraisal techniques,”<sup>21</sup> Ederer believed that the County Assessor could disallow certain expenses reported by owners of rent-restricted housing projects, if the inclusion of such expenses was inconsistent with relevant regulations or professionally accepted mass appraisal techniques. Specifically, Ederer testified:

One of the mass appraisal processes, or appraisal processes, general, when analyzing income and expense reports, those income and expenses need to reflect the direct operation of the real estate itself.<sup>22</sup> Whether it's with the Appraisal Institute or the [International Association of Assessing Officers], in analyzing income and expense

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<sup>19</sup> Exhibit 6:1. The Supplemental Income Worksheet identifies this amount as NOI, but it is clear from the context that the amount includes real estate taxes.

<sup>20</sup> Our findings here are a reconciliation of Ederer's testimony and the exhibits produced by the parties, which contained some unexplained inconsistencies.

<sup>21</sup> Neb. Rev. Stat. § 77-1333(3) (Reissue 2018).

<sup>22</sup> Testimony of Ederer, hearing record at 1:16.

reports, one of the primary functions, and appraisal techniques, is to look at those expenses and determine if they're related to real estate.<sup>23</sup>

Notably, Ederer also testified that he attended training on assessing rent-restricted properties conducted by the Nebraska Department of Revenue, Property Assessment Division, which instructed trainees to review the expense reports and exclude non-operational expenses.<sup>24</sup>

Ederer testified that he would now exclude \$58,152 in partnership expenses and \$14,751 in asset management fees listed on the Taxpayer's income and expense report,<sup>25</sup> because Ederer considered these items to be financial management expenses of the owner rather than expenses directly related to the management of the property. Use of the actual income and expenses reported by the Taxpayer, with the exclusion of the expenses identified by Ederer as impermissible, results in adjusted NOI of \$265,612.67.<sup>26</sup> Divided by the loaded cap rate of 9.25%, this indicates an actual value of \$2,871,488.32, rounded to \$2,871,488.

## **2. 2018 Valuation**

For tax year 2018, the Taxpayer again submitted the required information to the Valuation Committee by the statutory deadline. Its report showed actual EGI of \$488,468.11 and \$306,682.26 in actual total expenses, including \$60,005.15 in total real estate taxes, resulting in net operating income (NOI) of \$181,785.85, or adjusted NOI of \$241,791.<sup>27</sup> The Valuation Committee determined that the base capitalization rate for tax year 2018 was 6.5%,<sup>28</sup> to which 2.70% was added to reflect the local property tax levy,<sup>29</sup> resulting in a loaded capitalization rate of 9.20%. Under the Taxpayer's proposed methodology, its actual adjusted NOI is divided by the loaded capitalization rate to indicate a value of \$2,628,163.04, rounded to \$2,628,163.

The County Assessor did not use the same methodology for tax year 2018 as it used for tax year 2017. Instead of utilizing market-derived figures for income and expenses, the County Assessor utilized the actual income and expenses reported by the Taxpayer. Following this methodology, the County Assessor reached the same conclusion of value as the Taxpayer, but

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<sup>23</sup> Testimony of Ederer, hearing record at 1:42.

<sup>24</sup> Testimony of Ederer, hearing record at 1:43.

<sup>25</sup> Exhibit 8:7.

<sup>26</sup> See Exhibit 8:7-8. \$111,918.14 previous NOI + \$58,151.79 + \$14,751 + \$80,791.74 property taxes = \$265,612.67 adjusted NOI.

<sup>27</sup> Exhibit 15:4-6.

<sup>28</sup> Exhibit 33:1.

<sup>29</sup> Exhibit 14:1.

rounded the value down to \$2,625,000,<sup>30</sup> which was affirmed by the County Board in its determination of taxable value for tax year 2018.

### C. Analysis

The County Board asserts that the methodology used by the County Assessor for tax year 2017, which made use of the income and expense reports submitted by all rent-restricted housing projects in the county to derive income and expenses typical of the rent-restricted housing market, met the requirements of Neb. Rev. Stat. § 77-1333. Specifically, the County Board relies upon the following language:

(8) Except as provided in subsections (9) through (11) of this section, each county assessor shall use the capitalization rate or rates contained in the report received under subsection (7) of this section and the actual income and actual expense data filed by *owners* of rent-restricted housing projects under subsection (5) of this section in the county assessor's income-approach calculation.<sup>31</sup>

Ederer testified that, in his view, the use of the plural “owners” as opposed to the singular “owner” in this subsection indicated that the County Assessor was required to use all of the income and expense reports submitted to the Valuation Committee and forwarded to the County Assessor to determine market derived income and expense amounts for the income approach calculation applied to the assessment of the Subject Property. He further testified that, in his opinion, this approach was consistent with the rules and regulations promulgated by the Tax Commissioner and with principles of mass appraisal.<sup>32</sup> However, we observe that by combining the information received from the Taxpayer with information received from the twelve other rent-restricted housing projects in the county to derive typical amounts, the County Assessor appears to have made income and expense determinations for the Subject Property no differently than if LB 356 had not been enacted. We considered similar issues in *The Orchards at*

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<sup>30</sup> Exhibit 14:1.

<sup>31</sup> Emphasis added.

<sup>32</sup> The Department of Revenue repealed its chapter of rules and regulations entitled Assessment Process for Affordable Housing Projects on July 5, 2017, more than two years after the Legislature’s adoption of LB 356. See *former* 350 Neb. Admin. Code Ch. 51. Those regulations authorized some of the procedures employed by Ederer, such as the use of market-derived figures for income and expenses. However, the regulations set forth an assessment methodology that was inconsistent with the provisions adopted in 2015 because, among other things, the regulations allowed the assessor to determine the capitalization rate used in the income approach and permitted use of alternative approaches to value without specific authorization. In order to be valid, a rule or regulation must be consistent with the statute under which the rule or regulation is promulgated. *City of Omaha v. Kum & Go*, 263 Neb. 724, 642 N.W.2d 154 (2002). To the extent the County Board is asserting that its determination was based on appraisal methodology that was authorized by *former* 350 Neb. Admin. Code Ch. 51, the regulation was invalid following the effective date of LB 356.



*Wildewood, LP v. Sarpy County Board of Equalization*, Case Nos. 17C 0084 and 18C 0095.<sup>33</sup> As we found in that Decision and Order, the methodology used by the County Assessor in these similar appeals is problematic for a number of reasons.

Section 77-1333 was originally enacted in 2005.<sup>34</sup> The law required the taxpayer to provide income and expense information to the county assessor and required the county assessor to “perform an income-approach calculation for all rent-restricted housing projects,” which “shall comply with professionally accepted mass appraisal techniques.”<sup>35</sup> The law also allowed the county assessor to “consider other methods of determining value that are consistent with professionally accepted mass appraisal methods.”<sup>36</sup> Thus, prior to the enactment of LB 356, when assessors used an income approach to assess rent-restricted housing projects, such methods were to be consistent with professionally accepted mass appraisal techniques. According to such standards, an income approach would have involved gathering income and expense data from comparable rent-restricted housing projects and determining typical income, typical vacancy and collection losses, and typical expenses, based upon the actual income and actual expense data from that market, including similar data from the Subject Property, if available. Prior to the enactment of LB 356, the income approach calculation would have also involved a determination of the appropriate capitalization rate. The capitalization rate is not at issue in these appeals.

The amendments made by LB 356 to § 77-1333 in 2015 made substantial changes to the assessment of rent-restricted properties. LB 356 repealed the language that permitted the assessor to consider other methods of determining value, including the sales comparison approach and the cost approach.<sup>37</sup> To that end, LB 356 included within its findings that “the utilization of the income-approach methodology results in the most accurate determination of the actual value of such projects.”<sup>38</sup> Further, LB 356 stated that “the county assessor shall utilize an income-approach calculation to determine the actual value of a rent-restricted housing project when determining the assessed valuation to place on the property for each assessment year.”<sup>39</sup>

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<sup>33</sup> That Decision and Order is available at [https://terc.nebraska.gov/sites/terc.nebraska.gov/files/doc/18C%200095%20The%20Orchards\\_Sarpy.pdf](https://terc.nebraska.gov/sites/terc.nebraska.gov/files/doc/18C%200095%20The%20Orchards_Sarpy.pdf). To assist the reader, much of the analysis of that Decision and Order is repeated in this Decision and Order verbatim.

<sup>34</sup> 2005 Nebraska Laws, LB 263 § 6.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> 2015 Neb. Laws, LB 356, Section 1.

<sup>38</sup> 2015 Neb. Laws, LB 356, Section 1, Neb. Rev. Stat. § 77-1333(2)(d).

<sup>39</sup> 2015 Neb. Laws, LB 356, Section 1, Neb. Rev. Stat. § 77-1333(9).

We note that LB 356 explicitly required the use of an “income-approach calculation to determine value,” and that the income-approach calculation not only be consistent with rules and regulations adopted and promulgated by the Tax Commissioner and compliant with professionally accepted mass appraisal techniques, but also that the calculation be “consistent with this section.”<sup>40</sup> This is particularly important because when an appraiser or assessor is required by the laws of a local jurisdiction to deviate from specific professional appraiser standards -- this is known in appraiser parlance as taking jurisdictional exception -- such a legal requirement precludes compliance with the standards.<sup>41</sup> In other words, under the requirements of LB 356, the county assessor must utilize an income-approach calculation consistent with the regulations and the appraisal standards, but that income-approach calculation must be consistent with all of the specific requirements of Neb. Rev. Stat. § 77-1333. In sum, this is the argument of the Taxpayer, asserting that the specific provisions of the statute require the County Assessor to conduct an income-approach calculation for the Subject Property that is different from what was required prior to the enactment of LB 356. We agree.

As noted above, prior to the enactment of LB 356, rent-restricted housing projects could be assessed using any method of determining value that was consistent with professionally accepted mass appraisal methods. If the income approach were used, it was required that the approach be utilized according to those professional standards. We find that LB 356 effectively required the assessor to take jurisdictional exception to those standards.

Based upon the evidence received in these appeals, we find that the Taxpayer timely filed actual income and actual expense data as required by the statute.<sup>42</sup> Since that data was timely filed, the assessor was not permitted to use any approach to value other than the income approach.<sup>43</sup> Further, there is no evidence that the assessor presented facts and circumstances relating to the income-approach to the county board, or that the county board filed a petition with the Commission.<sup>44</sup> Therefore, in the assessment of the Subject Property, the assessor was required to follow the requirements of § 77-1333(8).

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<sup>40</sup> 2015 Neb. Laws, LB 356, Section 1, Neb. Rev. Stat. § 77-1333(3).

<sup>41</sup> See Uniform Standards of Professional Appraisal Practice (USPAP) regarding what are known as jurisdictional exceptions. In Nebraska, assessors take jurisdictional exception, for example, to what is known as the acceptable range, which under appraisal standards is .90 to 1.10, but under Nebraska law is .92 to 1.00 for commercial and residential parcels and .69 to .75 for agricultural parcels. See Standard On Ratio Studies, International Association of Assessing Officers, April 2013, Section 9.1, Level of Appraisal, and Neb. Rev. Stat. § 77-5023(2).

<sup>42</sup> Neb. Rev. Stat. § 77-1333(5).

<sup>43</sup> Neb. Rev. Stat. § 77-1333(9).

<sup>44</sup> Neb. Rev. Stat. § 77-1333(5).

Central to the resolution of these appeals is the interpretation of this subsection. In pertinent part it states, “each county assessor shall use ... the actual income and actual expense data filed by owners of rent-restricted housing projects ... in the income approach calculation.”<sup>45</sup> As noted above, the county assessor asserted that for tax year 2017 the income approach utilized to determine the value of the Subject Property combined the information received from the Taxpayer with information received from the twelve other rent-restricted housing projects in the county to derive typical amounts. We find that this resulted in an income approach calculation as related to the income and the expenses that would have been no different than prior to the enactment of LB 356.

During the legislative process, an amendment, AM930, was adopted that added the word “actual” to three different subsections of the bill, including where it was codified at § 77-1333(8).<sup>46</sup> When interpreting a statute, a court<sup>47</sup> must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.<sup>48</sup> A court must look to a statute’s purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.<sup>49</sup> If a statute is susceptible to more than one reasonable construction, the reviewing court uses the construction that will achieve the statute’s purpose and preserve the statute’s validity.<sup>50</sup> In order to give effect to this amendment, and to all of the changes made to § 77-1333 by LB 356, we are persuaded that § 77-1333(8) should be construed as requiring that the actual income and actual expenses of the Subject Property be used when calculating the income-approach for the Subject Property. To interpret the statute otherwise would amount to giving little or no effect to the changes made by LB 356 which are discussed in this Decision and Order. And even if both constructions were reasonable, we find that our understanding of the statute will better achieve the statute’s purpose and preserve the statute’s validity.

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<sup>45</sup> Neb. Rev. Stat. § 77-1333(8). It is important to note that an income approach calculation is specific to only one property, including primarily a rental rate applied to actual square footage, a vacancy and collection loss rate, expenses (or an expense rate), and a cap rate. Even if properties are within the same market, where the assessor has determined that all of the rates should be the same, the calculation that is specific to that one property cannot properly be applied to other properties because of the differences in square footage.

<sup>46</sup> 2015 Neb. Laws, LB 356 Section 1. In each instance the result was “actual income and actual expense.”

<sup>47</sup> The Tax Equalization and Review Commission is an intermediate appellate tribunal. *Brenner* at 284, 814.

<sup>48</sup> *Brown v. State*, 305 Neb. 111, 939 N.W.2d 354 (2020).

<sup>49</sup> *State v. Phillips*, 302 Neb. 686, 924 N.W.2d 699 (2019).

<sup>50</sup> *Mason v. State*, 267 Neb. 44, 672 N.W.2d 28 (2003).

We must now determine whether the jurisdictional exception required by § 77-1333 also prohibits an assessor from excluding expenses that would be deemed inappropriate under the professionally accepted mass appraisal methods that would apply but for the special provisions of § 77-1333.

Most categories of allowable expenses are uncontroversial. These include variable expenses for such things as cleaning, repairs and maintenance, utilities, road and grounds, security, and administration. Allowable fixed expense categories include business insurance, licenses, and the like. [...] Any reported expenses that relate more to the business enterprise than to the property (such as mortgage payments and income taxes) must be disallowed. Potentially problematic categories of expenses include property taxes, pass-throughs (recoveries), leasing commissions, and tenant improvement allowances.<sup>51</sup>

However operating expenses are organized, an appraiser analyzes and reconstructs expense statements to develop an estimate of the typical operating expense forecast for the property on an annual cash basis.<sup>52</sup>

Operating statements for large properties frequently list many types of variable expenses such as the following: management [...] miscellaneous—e.g., administrative, security, supplies, rubbish removal, and exterminating[.]<sup>53</sup>

The operating statements prepared for real estate owners typically list all expenditures made during a specific year. An owner's statement may include nonrecurring items that should not be included in an expense estimate intended to reflect typical annual expense. [...] The expenses attributable to corporate operations also pertain to the type of ownership. Corporate expenses are not part of a reconstructed operating statement developed for appraisal purposes.<sup>54</sup>

These standards drawn from appraisal literature suggest that an income approach analysis typically excludes expenses “that relate more to the business enterprise than to the property,” “nonrecurring items that should not be included in an expense estimate intended to reflect typical annual expense,” and “corporate expenses.”

The record includes “Financial Statements and Additional Information” for the years ending December 31, 2014 and December 1, 2015.<sup>55</sup> According to this information,

The [Subject Property] is managed by Somerset Pacific, LLC (Somerset), a wholly owned subsidiary of Community Development, Inc. (CDI). CDI is the parent company of

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<sup>51</sup> International Association of Assessing Officers, *Fundamentals of Mass Appraisal* 174 (2011).

<sup>52</sup> The Appraisal Institute, *The Appraisal of Real Estate* 479 (14th ed. 2013).

<sup>53</sup> *Id.* at 480.

<sup>54</sup> *Id.* at 487.

<sup>55</sup> Exhibit 8:15 et seq.

the general partner. The [Taxpayer] has a management fee agreement with Somerset to pay management fees calculated at 7% of gross rents, 2% of gross rents shall be payable only from net cash flow.<sup>56</sup>

#### *Partnership Management Fee*

The [Taxpayer] has agreed to pay the general partner, solely from net cash flow, a management fee of \$9,000 annually. The fee is increased annually by 3%, beginning January 1, 2013. For the years ending December 31, 2015 and 2014, asset management fees of \$9,834 and \$9,548 were incurred, of which \$28,827 and \$27,818 is due at December 31, 2015 and 2014, respectively.<sup>57</sup>

#### *Investor Service Fee*

The [Taxpayer] has agreed to pay the limited partner, an investor service fee a management fee [*sic*] of \$4,500 annually. The fee is increased annually by 3%, beginning January 1, 2013. For the years ending December 31, 2015 and 2014, asset management fees of \$4,917 and \$4,774 were incurred, of which \$4,917 and \$4,774 is due at December 31, 2015 and 2014, respectively.<sup>58</sup>

The Taxpayer asserts that Neb. Rev. Stat. § 77-1333(10), *supra*, specifies the only available remedy for the inclusion of impermissible expenses in the reports. We disagree. The remedy described in § 77-1333(10) is to be applied “If a county assessor, based on the facts and circumstances, believes that the income-approach calculation does not result in a valuation of a rent-restricted housing project at actual value[.]” We find that the “income-approach calculation” referenced in § 77-1333(10) is the same “income-approach calculation” described in § 77-1333(3), which “shall comply with professionally accepted mass appraisal techniques.” In other words, although § 77-1333 requires county assessors to use the income and expense data specific to each rent-restricted housing project, § 77-1333 still permits the county assessors to evaluate that data using professionally accepted mass appraisal techniques.

We understand the fee owed to Somerset for the operation of the Subject Property to be the \$23,703 listed as “management fee” in the Taxpayer’s report, which should not be excluded.<sup>59</sup> We agree with Ederer’s analysis that the expenses described as the Partnership Management Fee and the Investor Service Fee are not directly related to the operation of the Subject Property and would be excluded from an income approach calculation under professionally accepted mass

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<sup>56</sup> Exhibit 8:28.

<sup>57</sup> Exhibit 8:29.

<sup>58</sup> Exhibit 8:29.

<sup>59</sup> See Exhibit 8:28, 8:7.

appraisal techniques.<sup>60</sup> It follows that the taxable value for the Subject Property for 2017, should be \$2,871,488,<sup>61</sup> a value determined using the actual income and actual expenses, as provided by the Taxpayer, and the capitalization rate provided by the Valuation Committee, appropriately loaded to reflect the local tax rate.

However, under our rules and regulations, we may only consider and find a taxable value in excess of the highest taxable value for which notice was given if notice of such value and the intent to offer proof in its support is given by a party.<sup>62</sup> No such notice was given in these appeals. Accordingly, we find that \$2,500,000 is the taxable value for the Subject Property for tax year 2017, and we should affirm the determination of the County Board.

For tax year 2018, the County Board determined that the value of the Subject Property was \$2,625,000, and the Taxpayer's principal witness asserts that the value was \$2,628,163.<sup>63</sup> As with tax year 2017, no notice of intent to prove a higher taxable value was given for tax year 2018. Accordingly, we find that \$2,625,000 is the appropriate value for the Subject Property for tax year 2018, and we should affirm the determination of the County Board.

## V. CONCLUSION

The Commission finds that there is competent evidence to rebut the presumption that the County Board faithfully performed its duties and had sufficient competent evidence to make its determinations. The Commission also finds that there is clear and convincing evidence that the County Board's decisions were arbitrary or unreasonable. However, the Commission is barred by rule from raising the value of the Subject Property for either tax year. Therefore, the decisions of the County Board must be affirmed.

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<sup>60</sup> We also note that the Partnership Management Fee does not appear to be a typical annual expense. Compare Exhibit 8:7-8 with Exhibit 15:4-6.

<sup>61</sup> See Exhibit 8:7-8.  $\$111,918.14$  previous NOI +  $\$58,151.79$  +  $\$14,751$  +  $\$80,791.74$  property taxes =  $\$265,612.67$  adjusted NOI  $\div$  9.25% capitalization rate =  $\$2,871,488.32$ .

<sup>62</sup> 442 Neb. Admin. Code Ch. 5 § 016.02A.

<sup>63</sup> We note that the Taxpayer's expense report for 2018 includes an expense of \$19,500 asset management fee, apparently the same line item Ederer believed should be excluded for tax year 2017. The result of either including this expense for 2017 or excluding it for 2018 is an indicated value greater than the County Board's determination of value, and as explained above, we are barred by rule from considering a higher taxable value without notice.

## VI. ORDER

IT IS ORDERED THAT:

1. The decisions of the Sarpy County Board of Equalization determining the taxable value of the Subject Property for tax years 2017 and 2018 are affirmed.<sup>64</sup>
2. The taxable value of the Subject Property for tax year 2017 is: \$2,500,000.
3. The taxable value of the Subject Property for tax year 2018 is: \$2,625,000.
4. This Decision and Order, if no appeal is timely filed, shall be certified to the Sarpy County Treasurer and the Sarpy County Assessor, pursuant to Neb. Rev. Stat. § 77-5018 (Reissue 2018).
5. Any request for relief, by any party, which is not specifically provided for by this Decision and Order is denied.
6. Each party is to bear its own costs in this proceeding.
7. This Decision and Order shall only be applicable to tax years 2017 and 2018.
8. This Decision and Order is effective for purposes of appeal on October 2, 2020.<sup>65</sup>

Signed and Sealed: October 2, 2020

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Robert W. Hotz, Commissioner

SEAL

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James D. Kuhn, Commissioner

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<sup>64</sup> Taxable 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.

<sup>65</sup> Appeals from any decision of the Commission must satisfy the requirements of Neb. Rev. Stat. § 77-5019 (Reissue 2018) and other provisions of Nebraska Statutes and Court Rules.