

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

Central Nebraska Housing Corp.,  
Appellant,

v.

Dawson County Board of Equalization,  
Appellee.

Case No: 18C 0001

Decision and Order  
Reversing the Decision of the  
Dawson County Board of Equalization

**For the Appellant:**

Kevin J. Dostal,  
Locher, Pavelka, Dostal, Braddy & Hammes

**For the Appellee:**

Jared R. Dean,  
Deputy Dawson County Attorney

This appeal was heard before Commissioners Robert W. Hotz and James D. Kuhn.

**I. THE SUBJECT PROPERTY**

The Subject Property is a commercial parcel located in Lexington, Dawson County, Nebraska. The parcel is improved with a 22-unit, 18,870 square foot apartment complex consisting of seven separate buildings, built in 2015. The legal description and property record card for the Subject Property are found at Exhibit 2:21-30.

**II. PROCEDURAL HISTORY**

The Dawson County Assessor (the Assessor) determined that the assessed value of the Subject Property was \$1,350,657 for tax year 2018. Central Nebraska Housing Corp. (the Taxpayer) protested this assessment to the Dawson County Board of Equalization (the County Board) and requested an assessed valuation of \$1,000,000. The County Board determined that the taxable value of the Subject Property for tax year 2018 was \$1,350,657.<sup>1</sup>

The Taxpayer appealed the decision of the County Board to the Tax Equalization and Review Commission (the Commission). The Commission held a hearing on July 24, 2019, with Commissioner Hotz presiding. Exhibits 1 and 2 were admitted without objection.

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<sup>1</sup> Exhibit 1.

### III. STANDARD OF REVIEW

The Commission's review of a determination by a county board of equalization is de novo.<sup>2</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>3</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>4</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>5</sup> Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.<sup>6</sup>

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>7</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>8</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>9</sup> The Commission may also take notice of judicially cognizable facts as well as general, technical, or scientific facts within its specialized knowledge, and it may utilize its

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<sup>2</sup> 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>3</sup> *Brenner* at 283, 811 (Citations omitted).

<sup>4</sup> *Id.*

<sup>5</sup> Neb. Rev. Stat. § 77-5016(9) (Reissue 2018).

<sup>6</sup> *Omaha Country Club v. Douglas County Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

<sup>7</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>8</sup> *Bottorf v. Clay County Bd. of Equal.*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).

<sup>9</sup> Neb. Rev. Stat. § 77-5016(8) (Reissue 2018).

experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to it.<sup>10</sup> The Commission's Decision and Order shall include findings of fact and conclusions of law.<sup>11</sup>

#### IV. APPLICABLE LAW

Under Nebraska law,

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.<sup>12</sup>

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 Neb. Rev. Stat. § 77-1371, (2) income approach, and (3) cost approach.<sup>13</sup> Actual value, market value, and fair market value mean exactly the same thing.<sup>14</sup> Taxable value is the percentage of actual value subject to taxation as directed by Neb. Rev. Stat. § 77-201 and has the same meaning as assessed value.<sup>15</sup> All real property in Nebraska subject to taxation shall be assessed as of January 1.<sup>16</sup> All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.<sup>17</sup>

Taxes shall be levied by valuation uniformly and proportionately upon all real property and franchises as defined by the Legislature except as otherwise provided in or permitted by the Nebraska Constitution.<sup>18</sup> Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value.<sup>19</sup> If taxable values are to be equalized it is necessary for a taxpayer to establish by clear and convincing evidence that

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<sup>10</sup> Neb. Rev. Stat. § 77-5016(6) (Reissue 2018).

<sup>11</sup> Neb. Rev. Stat. § 77-5018(1) (Reissue 2018).

<sup>12</sup> Neb. Rev. Stat. § 77-112 (Reissue 2018).

<sup>13</sup> *Id.*

<sup>14</sup> *Omaha Country Club* at 180, 829 (2002).

<sup>15</sup> Neb. Rev. Stat. § 77-131 (Reissue 2018).

<sup>16</sup> Neb. Rev. Stat. § 77-1301(1) (Reissue 2018).

<sup>17</sup> Neb. Rev. Stat. § 77-201(1) (Reissue 2018).

<sup>18</sup> *Neb. Const.*, Art. VIII, § 1.

<sup>19</sup> *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).

valuation placed on his or her property when compared with valuations placed on similar property is grossly excessive and is the result of systematic will or failure of a plain legal duty, and not mere error of judgment.<sup>20</sup> There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity.<sup>21</sup>

## V. FINDINGS OF FACT

The Taxpayer owns two adjacent parcels improved with apartment buildings, both of which were discussed at the hearing before the Commission. One is the Subject Property, a 22-unit apartment complex, built in 2015. The other is a 10-unit apartment complex, built in 1982 (the Adjacent Property). The witnesses who testified at the hearing agreed that the Subject Property and the Adjacent Property were unusual within their market area because the quality of construction was similar to the quality typically found in rent-restricted housing,<sup>22</sup> but the Taxpayer's apartments are not rent-restricted.

Darrel L. Stanard, who testified at the hearing, is a licensed appraiser in Nebraska and holds the State Assessor Certificate. He is associated with Stanard Appraisal Services, Inc. (Stanard Appraisal). Stanard Appraisal appraised the Subject Property for the County Assessor, John Philip Moore. Stanard considered all three approaches to value identified in Nebraska law. Moore testified that the Subject Property is similar to rent-restricted housing in construction quality, but rent-restricted housing is not comparable to the Subject Property in value because the value of rent-restricted property is affected by tax incentives.<sup>23</sup> For this reason, both Moore and Stanard believed that there were no comparable properties in the market for use in a sales comparison approach.

For the cost approach, Stanard determined that the Subject Property was construction class D, of average quality and good condition, with walls constructed of single-cement fiber on wood with stud-brick veneer.<sup>24</sup> The Subject Property also has 100% warmed and cooled air. The Subject Property is improved with seven buildings: one two-unit apartment building, five four-

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<sup>20</sup> *Newman v. County of Dawson*, 167 Neb. 666, 670, 94 N.W.2d 47, 49-50 (1959) (Citations omitted).

<sup>21</sup> *Id.* at 673, 94 N.W.2d at 50.

<sup>22</sup> See Neb. Rev. Stat. § 77-1333 (Reissue 2018). The witnesses at the hearing sometimes referred to this type of housing as LIHTC or Section 42 housing.

<sup>23</sup> Nebraska law requires rent-restricted housing to be assessed using a specific methodology which is different than typical appraisal practices. Neb. Rev. Stat. § 77-1333 (Reissue 2018).

<sup>24</sup> Exhibit 2:21-28.

unit apartment buildings, and one service garage.<sup>25</sup> Using a MIPS computer-assisted mass appraisal system based on the Marshall & Swift Valuation Service (Marshall) costing guidelines, Stanard determined that the Subject Property had a base value of \$1,215,715 and \$84,115 in miscellaneous improvements, for a total replacement cost new of \$1,299,830.<sup>26</sup> No physical depreciation was applied; both Stanard and Moore were of the opinion that the Subject Property was like new, even though the property was built in 2015. This resulted in a replacement cost new less depreciation (RCNLD) of \$1,299,830 for the improvements.<sup>27</sup> The land value was determined on a flat per-lot basis at \$50,827.<sup>28</sup> The cost approach indicated a value of \$1,350,657, which is the exact value determined by both the County Assessor during the assessment process and the County Board following the Taxpayer's protest.<sup>29</sup>

According to Stanard's testimony, an income approach was also used in determining the assessed value of the Subject Property. The Taxpayer submitted income and expense projections for 2017 and 2018 to the County Assessor.<sup>30</sup> These income and expense projections grouped the "Old Apartments" (the Adjacent Property) together with the "New Apartments" (the Subject Property) for the purpose of listing expenses. The Taxpayer's projections indicate that the old apartments rent for \$650 per month and the new apartments rent for \$750 per month, producing an annual total of \$78,000 in potential gross income<sup>31</sup> for the Adjacent Property and \$198,000 in potential gross income for the Subject Property. The Taxpayer reported 10% vacancy and collection losses. In addition to projected expenses, the Taxpayer included \$15,613 per month in mortgage costs and \$12,000 annually in property insurance, without any further explanation of how these costs broke down between the two parcels, and \$16,392 annually in property taxes specifically for the Subject Property.

Stanard used the \$750 per month per unit rent to determine the Subject Property's potential gross income, but for vacancy and collection losses and total expenses, he used rates determined

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<sup>25</sup> The service garage was of average condition rather than good and uses a different heating and cooling system than the six apartment buildings.

<sup>26</sup> Exhibit 2:22.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Exhibits 1:1, 2:22.

<sup>30</sup> These projections are found at both Exhibit 2:11-13 and Exhibit 2:36-38. All of the information in this paragraph regarding the income and expenses for the Subject Property is drawn from these exhibits. The third page of the projections appears to contemplate a rent increase for both properties; the record contains no evidence as to whether this rent increase was actually implemented. It is also unclear from the record whether the projections were actual amounts or projected amounts.

<sup>31</sup> Potential gross income is the total potential income attributable to the real property at full occupancy before vacancy and operating expenses are deducted. Appraisal Institute, The Appraisal of Real Estate, 14th ed. (2013).

by analyzing income and expense reports from similar properties throughout the market area.<sup>32</sup> He used a vacancy and collection loss rate of 5% and total expenses of 20% for his income approach. He used a “loaded” capitalization rate of 11% that included a rounded 2% local tax levy. The result of this income approach calculation was \$1,368,000.

Stanard inspected the Subject Property after the Taxpayer filed the protest. Nothing he observed changed his opinions about the qualities or value of either property. Mark Stanard served as referee for the protest hearing.<sup>33</sup> Mark Stanard is also associated with Stanard Appraisal. His notes indicate that he performed an abbreviated income approach based on 22 units at \$750 per month, 5% vacancy and collection loss rate, 20% expense rate, and a loaded capitalization rate of 11%, which again indicated an income approach valuation of \$1,368,000.<sup>34</sup> Based on this review, Mark Stanard recommended no change in valuation from the assessment of \$1,350,657. Darrel Stanard, who was serving as referee coordinator, concurred; both Darrel Stanard and Mark Stanard signed the referee report.<sup>35</sup>

The Adjacent Property was built in 1982 and consists of three apartment buildings and a tool shed. The assessment for this property was last reviewed in 2014; the property was assessed at \$203,598 for tax year 2017.<sup>36</sup> The records provided for the hearing were generated in 2019; they reflect only the cost approach and show a total appraised value of \$299,873.<sup>37</sup> According to these records, the total building area is 7,780 square feet.<sup>38</sup> The quality of construction and condition are both rated as average.<sup>39</sup> The exterior walls are stud-vinyl siding, and the heating and cooling is 100% electric.<sup>40</sup> In addition to the listed factors, there are other changes to construction costs generally from 1982 to 2015, such as the availability of components for exterior walls and the availability of long-lasting highly durable composite shingles.<sup>41</sup> The Taxpayer’s income and expense information indicates that the apartments on the Adjacent Property rented for \$650 per

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<sup>32</sup> Exhibit 2:39-40, testimony of Stanard. All of the information in this paragraph describing Stanard’s income approach is drawn from these sources.

<sup>33</sup> A referee may be hired by a county board to conduct the protest hearing and must make a written recommendation to the county board. However, the county board is not required to follow the recommendation made by the referee. Neb. Rev. Stat. § 77-1502.01.

<sup>34</sup> Exhibit 2:15.

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

<sup>36</sup> We infer from Stanard’s testimony that this value did not change for tax year 2018.

<sup>37</sup> Exhibit 2:16-2:20.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> Testimony of Stanard.

month in 2017 and were projected to rent for \$650 or \$700 per month in 2018.<sup>42</sup> The Subject Property and the Adjacent Property are not comparable properties for assessment purposes.

## VI. ANALYSIS

### A. Reasonableness of the Assessment and Protest Processes

Stanard Appraisal was hired by the County Assessor to complete the initial assessment. That assessment made a value determination of \$1,350,657, based upon the cost approach. After receiving an assessment notice of \$1,350,657, the Taxpayer filed a protest.

Once the protest was filed, the County Board hired Stanard Appraisal to serve as a referee in the protest proceeding.<sup>43</sup> The essence of a protest proceeding is to give a taxpayer an opportunity to protest the assessment made by a county assessor to a county board of equalization. Under Nebraska law, a referee is defined as an “impartial credentialed appraiser ... who conducts protest hearings as the representative of, and under the direction of, the county board of equalization.”<sup>44</sup> A referee may be hired by a county board to conduct the protest hearing and must make a written recommendation to the county board.<sup>45</sup> However, the county board is not required to follow the recommendation made by the referee.<sup>46</sup>

After Stanard Appraisal performed the initial assessment for the County Assessor, an employee of Stanard Appraisal, Mark Stanard, then conducted the protest proceeding for the County Board and made a referee recommendation of \$1,350,657, the same amount as determined by Stanard Appraisal when working for the County Assessor.<sup>47</sup> On the same day, Darrel Stanard, employed by the County Board as the referee coordinator, agreed with the recommendation made by Mark Stanard, and signed a “Referee Value Recommendation” of \$1,350,657.<sup>48</sup>

In sum, Stanard Appraisal completed the initial assessment for the County Assessor and then, when acting on behalf of the County Board as the appointed referee in the protest proceeding, Stanard Appraisal reviewed and then agreed with the assessment determination that Stanard Appraisal had previously made when it recommended a taxable value of \$1,350,657. Upon

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<sup>42</sup> Exhibit 2:11-13 and Exhibit 2:36-38.

<sup>43</sup> Neb. Rev. Stat. § 77-1502.01.

<sup>44</sup> See Title 350 Neb. Admin. Code, Chapter 50, § 001.24 (2017).

<sup>45</sup> Neb. Rev. Stat. § 77-1502.01.

<sup>46</sup> *Id.*

<sup>47</sup> Exhibit 2:14. The record does not indicate whether the County Board was aware that Stanard Appraisal had conducted the initial assessment.

<sup>48</sup> Exhibit 2:15.

receiving the recommendation from the referee, the County Board set the taxable value at \$1,350,657. As noted above, the county board is not required to set the taxable value at the same amount as recommended by the referee.

The assessment and protest processes described above raise significant concerns. It is tantamount to a county board hiring a county assessor (assuming the assessor is a credentialed appraiser) to conduct the protest proceeding challenging the assessment made by the assessor. We would be hard-pressed to find that such a process involves someone who is *impartial*, as the rules require. When the elected county officials (county assessor and county board of equalization) each hire the same company to perform both the assessment role and the protest decision role, such an arrangement raises serious concerns regarding the propriety of the decision by the County Board that has been appealed to this Commission.

### **B. Taxable Value Analysis**

The Taxpayer's central contention at the hearing was that the Subject Property and the Adjacent Property generated similar income when their size was taken into consideration, but the properties were assessed at different values per square foot. The Taxpayer argued, in essence, that the Subject Property and the Adjacent Property were comparable and should be equalized.

We disagree. A comparable real property is one that is similar to the property being assessed in significant physical, functional, and location characteristics and in their contribution to value.<sup>49</sup> To set the valuation of similarly situated property, i.e. comparables, at materially different levels, i.e., value per square foot, is by definition, unreasonable and arbitrary.<sup>50</sup> However, properties are not comparable when the record supports such a determination.<sup>51</sup> Dissimilarities preventing properties from being comparable include style, quality, size, location, improvements, and age.<sup>52</sup> The evidence shows that the Adjacent Property is not comparable to the Subject Property: It is less than half the size, the condition is worse, and the construction components are different. Even the rental income, which the Taxpayer claimed was similar, is more than 15% greater per unit in the Subject Property.<sup>53</sup>

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<sup>49</sup> *County of Webster v. Neb. Tax Equal. and Rev. Comm.*, 296 Neb. 751, 896 N.W.2d 887 (2017).

<sup>50</sup> *Scribante v. Douglas County Board of Equalization*, 8 Neb.App. 25, 39, 588 N.W.2d 190, 199 (1999).

<sup>51</sup> See, e.g., *Bottorf v. Clay County Bd. of Equal.*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).

<sup>52</sup> *Id.*, 72nd Property LLC v. Douglas County Bd. of Equal., 10 Neb.App. 826, 638 N.W.2d 872 (2002).

<sup>53</sup> \$750 per month, the per-unit rent of the Subject Property, is 115.4% of the \$650 per-unit rent of the Adjacent Property. Even if the Taxpayer raised rent in 2018 as proposed at Exhibit 2:13 and 2:38, the difference would be more than 10% (\$775 per month is 110.7% of \$700 per month).



Furthermore, although we infer from Stanard's testimony that the assessed value of the Adjacent Property did not change from 2017 to 2018, the evidence does not show how that assessed value was calculated for any tax year. The 2018 cost approach provided by the County Board shows a different conclusion of value than the 2017 assessed value. Even if we were convinced that the record supported an equalization of values, we would not be able to determine the breakdown of per square foot value between land and improvements of the Adjacent Property for tax year 2018 based on the evidence provided. As noted above, if taxable values are to be equalized, it is necessary for a taxpayer to establish by clear and convincing evidence that valuation placed on his or her property when compared with valuations placed on similar property is grossly excessive and is the result of systematic will or failure of a plain legal duty, and not mere error of judgment.<sup>54</sup> The Taxpayer has not carried this burden.

Although the bulk of the testimony elicited at the hearing related to the income approach, the County Assessor and the County Board assessed the property at the value indicated by Stanard's cost approach, to the dollar. That cost approach is detailed in the property record card.<sup>55</sup> No evidence was received that would rebut the application of that approach.

However, after a review of the cost approach and the applicable Marshall life expectancy and depreciation tables, we find that the appropriate depreciation was not applied to the replacement cost new of the seven buildings of the Subject Property. Stanard and Moore both testified that they believed the property was like new, having been built in 2015. However, per Marshall's life expectancy table, the D class property at average quality of construction would have a life expectancy of 45 years. Since the effective age of the property was two years as of the effective date of January 1, 2018, under Marshall's depreciation schedule the property should be given one year of depreciation. We therefore find that it was unreasonable to give the property no depreciation.

We find that the appropriate cost approach value of the Subject Property is determined by deducting 1% from the replacement cost new of \$1,299,830. This results in a replacement cost new less depreciation of the buildings at \$1,286,832.<sup>56</sup> No evidence was received regarding a land value other than \$50,827. Therefore, based upon the cost approach relied upon by the

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<sup>54</sup> *Newman v. County of Dawson*, 167 Neb. 666, 670, 94 N.W.2d 47, 49-50 (1959) (Citations omitted).

<sup>55</sup> Exhibit 2:21-28.

<sup>56</sup> \$1,299,830 x .99 = \$1,286,832.

County Assessor and the County Board, we find that the taxable value of the Subject Property should be \$1,337,659.<sup>57</sup>

## **VII. 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 determination. The Commission also finds that there is clear and convincing evidence that the County Board's decision was arbitrary or unreasonable.

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

## **VIII. ORDER**

IT IS ORDERED THAT:

1. The decision of the Dawson County Board of Equalization determining the taxable value of the Subject Property for tax year 2018 is vacated and reversed.
2. The taxable value of the Subject Property for tax year 2018 is \$1,337,659.
3. This Decision and Order, if no appeal is timely filed, shall be certified to the Dawson County Treasurer and the Dawson County Assessor, pursuant to Neb. Rev. Stat. § 77-5018 (Reissue 2018).
4. Any request for relief, by any party, which is not specifically provided for by this Decision and Order is denied.
5. Each party is to bear its own costs in this proceeding.
6. This Decision and Order shall only be applicable to tax year 2018.

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<sup>57</sup> \$1,286,832 + \$50,827.

7. This Decision and Order is effective for purposes of appeal on December 9, 2020.<sup>58</sup>

Signed and Sealed: December 9, 2020

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Robert W. Hotz, Commissioner

SEAL

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James D. Kuhn, Commissioner

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<sup>58</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.