

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

The Orchards at Wildewood, LP,  
Appellant,

v.

Sarpy County Board of Equalization,  
Appellee.

Case No. 17C 0084

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

Case No. 18C 0095

Decision and Order Affirming the Decision  
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 one building containing 48 one-bedroom and two-bedroom apartments. 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 card for the Subject Property is 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 \$1,990,000 for tax year 2017. The Orchards at Wildewood, 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 \$1,990,000.<sup>1</sup>

The County Assessor determined that the assessed value of the Subject Property was \$1,850,000 for tax year 2018. The Taxpayer protested this assessment to the County Board. The

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<sup>1</sup> Ex 1.

County Board determined that the taxable value of the Subject Property for tax year 2018 was \$1,850,000.<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 August 20, 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. The parties stipulated to the receipt of Exhibits 3 through 8, 10 through 18, and 30 through 35. Exhibits 9, 20 and 24 were admitted in the course of the hearing, and Exhibits 19, 21 through 23, and 25 through 29 were 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 of equalization 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> Ex 2.

<sup>3</sup> See Neb. Rev. Stat. § 77-5016(8) (Reissue 2018), *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 286, 753 N.W.2d 802, 813 (2008). "When an appeal is conducted as a 'trial de novo,' as opposed to a 'trial de novo on the record,' it means literally a new hearing and not merely new findings of fact based upon a previous record. A trial de novo is conducted as though the earlier trial had not been held in the first place, and evidence is taken anew as such evidence is available at the time of the trial on appeal." *Koch v. Cedar Cty. Freeholder Bd.*, 276 Neb. 1009, 1019 (2009).

<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 Cty. 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 Cty.*, 179 Neb. 415, 138 N.W.2d 641 (1965) (determination of actual value); *Lincoln Tel. and Tel. Co. v. Cty. Bd. of Equal. of York Cty.*, 209 Neb. 465, 308 N.W.2d 515 (1981) (determination of equalized taxable value).

<sup>9</sup> *Bottorf v. Clay Cty. 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.

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(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 the assessor to utilize another approach to value a subject property if the actual income and

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<sup>14</sup> See Neb. Rev. Stat. § 77-1333 (Reissue 2018) (emphasis added). The full text of the statute is attached to this Order as an appendix.

expense data is not timely filed. If the county assessor believes the use of such actual income and expense data in a subject property's income-approach calculation would not result in a valuation that is at actual value, then the assessor is required to present the facts and circumstances relating to that opinion to the county board of equalization. If the county board concurs, then it is required to file a petition with the Commission. Finally, if the Tax Commissioner believes that the capitalization rate set by the Valuation Committee, when applied to a particular assessment of a rent-restricted housing project, does not result in a valuation at actual value, then the Tax Commissioner is required to file a petition with the Commission.

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 the 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 \$353,484.29, and \$239,538.84 in actual total expenses, including \$54,255.28 in total real estate taxes, resulting in net operating income (NOI) of \$113,945.45, or adjusted net operating income (net operating income plus real estate taxes) of

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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 Ex. 7 for tax year 2017 and Ex. 15 for tax year 2018.

\$168,200.73.<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 2.31% is added to reflect the local property tax levy,<sup>18</sup> resulting in a loaded capitalization rate of 8.81%. Under the Taxpayer's proposed methodology, its actual adjusted NOI is divided by the loaded capitalization rate to indicate a value of \$1,909,202.38, rounded to \$1,909,202.

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 the other 12 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 \$354,178, its NOI was \$175,074, and its adjusted NOI was \$233,359.<sup>19</sup> By dividing this adjusted NOI by the loaded capitalization rate of 8.81%, the County Assessor determined that the actual value of the Subject Property was \$1,987,219.07. The County Assessor rounded this amount to the nearest ten thousand, pursuant to office policy, resulting in an assessed value of \$1,990,000, which was affirmed by the County Board in its determination of taxable value for tax year 2017.

## **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 effective gross income (EGI) of \$364,176.43, and \$246,419.96 in actual total expenses, including \$43,902.87 in total real estate taxes, resulting in net operating income (NOI) of \$117,756.47, or adjusted net operating income

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<sup>16</sup> Ex 7:3, 7:4.

<sup>17</sup> Ex. 32. 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. 6.2. 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.

<sup>19</sup> Ex. 6:1, testimony of Ederer.

(net operating income plus real estate taxes) of \$161,659.34.<sup>20</sup> The Valuation Committee determined that the base capitalization rate for tax year 2018 was 6.5%,<sup>21</sup> to which 2.23% was added to reflect the local property tax levy,<sup>22</sup> resulting in a loaded capitalization rate of 8.73%. Under the Taxpayer's proposed methodology, its actual adjusted NOI is divided by the loaded capitalization rate to indicate a value of \$1,851,767.93, rounded to \$1,851,768.

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, Ederer testified that the County Assessor reached the same conclusion of value as the Taxpayer. However, as in 2017, the County Assessor rounded the value conclusion to the nearest ten thousand, resulting in an assessed value of \$1,850,000, 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>23</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

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<sup>20</sup> Ex. 15:4, 15:6.

<sup>21</sup> Ex. 33:1.

<sup>22</sup> Ex. 14.

<sup>23</sup> Emphasis added.

opinion, this approach was consistent with the rules and regulations promulgated by the Tax Commissioner and with principles of mass appraisal.<sup>24</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. This is problematic for a number of reasons.

Section 77-1333 was originally enacted in 2005.<sup>25</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>26</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>27</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

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<sup>24</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 (containing the substantive portions of the current Neb. Rev. Stat. § 77-1333). 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.

<sup>25</sup> 2005 Nebraska Laws, LB 263 § 6.

<sup>26</sup> *Id.*

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



cost approach.<sup>28</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>29</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>30</sup>

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>31</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>32</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.

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<sup>28</sup> 2015 Neb. Laws, LB 356, Section 1.

<sup>29</sup> 2015 Neb. Laws, LB 356, Section 1, Neb. Rev. Stat. § 77-1333(2)(d).

<sup>30</sup> 2015 Neb. Laws, LB 356, Section 1, Neb. Rev. Stat. § 77-1333(9).

<sup>31</sup> 2015 Neb. Laws, LB 356, Section 1, Neb. Rev. Stat. § 77-1333(3).

<sup>32</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).

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>33</sup> Since that data was timely filed, the assessor was not permitted to use any approach to value other than the income approach.<sup>34</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>35</sup> Therefore, in the assessment of the Subject Property, the assessor was required to follow the requirements of § 77-1333(8).

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>36</sup> As noted above, the county assessor asserted that for tax year 2017<sup>37</sup> 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. Such an interpretation of the statute gives no effect to the changes made by the legislation. Specifically, 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>38</sup> When interpreting a statute, a court<sup>39</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>40</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>41</sup> If a statute is susceptible to more than one reasonable construction, the

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<sup>33</sup> Neb. Rev. Stat. § 77-1333(5).

<sup>34</sup> Neb. Rev. Stat. § 77-1333(9).

<sup>35</sup> Neb. Rev. Stat. § 77-1333(5).

<sup>36</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>37</sup> Ederer testified that because of subsequent changes to applicable rules and regulations, the County Assessor utilized the actual income and actual expenses in the income approach for tax year 2018.

<sup>38</sup> 2015 Neb. Laws, LB 356 Section 1. In each instance the result was “actual income and actual expense.”

<sup>39</sup> The Tax Equalization and Review Commission is an intermediate appellate tribunal. *Brenner* at 284, 814.

<sup>40</sup> *Brown v. State*, 305 Neb. 111, 939 N.W.2d 354 (2020).

<sup>41</sup> *State v. Phillips*, 302 Neb. 686, 924 N.W.2d 699 (2019).

reviewing court uses the construction that will achieve the statute's purpose and preserve the statute's validity.<sup>42</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.

In accordance with Neb. Rev. Stat. § 77-1333, we find that the taxable value of the Subject Property for tax year 2017 should be \$1,909,202, 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.

The record indicates that, for tax year 2018, the County Assessor used 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 to determine the value of the Subject Property. Although Ederer testified as to his belief that the County Assessor had the authority to disallow expenses on a line item basis, the County Assessor did not do so because no expenses were identified which were deemed suspect. The result of the calculation of value by the County Assessor was \$1,851,767.93. We agree with the Taxpayer that this is the correct value. Ederer testified that this value conclusion was then rounded down to the nearest ten thousand dollars, resulting in an assessed value of \$1,850,000.

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>43</sup> No such notice was given in these appeals. Accordingly, we find that \$1,850,000 is the appropriate value for the Subject Property for tax year 2018, and we should affirm the determination of the County Board.

## V. CONCLUSION

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<sup>42</sup> *Mason v. State*, 267 Neb. 44, 672 N.W.2d 28 (2003).

<sup>43</sup> 442 Neb. Admin. Code Ch. 5 § 016.02A.

In Case No. 17C 0084, 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. The decision of the County Board should be vacated and reversed.

In Case No. 18C 0095, 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. However, under these circumstances the Commission is barred by rule from raising the value of the Subject Property. Therefore, the decision of the County Board must be affirmed.

## **VI. ORDER**

### **IT IS ORDERED THAT:**

1. The decision of the Sarpy County Board of Equalization determining the taxable value of the Subject Property for tax year 2017 is vacated and reversed.<sup>44</sup>
2. The taxable value of the Subject Property for tax year 2017 is \$1,909,202.
3. The decision of the Sarpy County Board of Equalization determining the taxable value of the Subject Property for tax year 2018 is affirmed.
4. The taxable value of the Subject Property for tax year 2018 is \$1,850,000.
5. 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).
6. Any request for relief, by any party, which is not specifically provided for by this Decision and Order is denied.
7. Each party is to bear its own costs in this proceeding.
8. This Decision and Order shall only be applicable to tax years 2017 and 2018.

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<sup>44</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.

9. This Decision and Order is effective for purposes of appeal on August 27, 2020.<sup>45</sup>

Signed and Sealed: August 27, 2020.

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Robert W. Hotz, Commissioner

SEAL

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James D. Kuhn, Commissioner

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<sup>45</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.

Appendix: Neb. Rev. Stat. § 77-1333

**77-1333. Rent-restricted housing projects; county assessor; perform income-approach calculation; owner; duties; Rent-Restricted Housing Projects Valuation Committee; created; members; meetings; report; county board of equalization; filing; hearing; Tax Commissioner; powers; petition; hearing.**

(1) For purposes of this section, rent-restricted housing project means a project consisting of five or more houses or residential units that has received an allocation of federal low-income housing tax credits under section 42 of the Internal Revenue Code from the Nebraska Investment Finance Authority or its successor agency and, for the year of assessment, is a project as defined in section 58-219 involving rental housing as defined in section 58-220.

(2) The Legislature finds that:

(a) The provision of safe, decent, and affordable housing to all residents of the State of Nebraska is a matter of public concern and represents a legitimate and compelling state need, affecting the general welfare of all residents;

(b) Rent-restricted housing projects effectively provide safe, decent, and affordable housing for residents of Nebraska;

(c) Such projects are restricted by federal law as to the rents paid by the tenants thereof;

(d) Of all the professionally accepted mass appraisal methodologies, which include the sales comparison approach, the income approach, and the cost approach, the utilization of the income-approach methodology results in the most accurate determination of the actual value of such projects; and

(e) This section is intended to (i) further the provision of safe, decent, and affordable housing to all residents of Nebraska and (ii) comply with Article VIII, section 1, of the Constitution of Nebraska, which empowers the Legislature to prescribe standards and methods for the determination of value of real property at uniform and proportionate values.

(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.

(4) The Rent-Restricted Housing Projects Valuation Committee is created. For administrative purposes only, the committee shall be within the Department of Revenue. The committee's purpose shall be to develop a market-derived capitalization rate to be used by county assessors in determining the assessed valuation for rent-restricted housing projects. The committee shall consist of the following four persons:

(a) A representative of county assessors appointed by the Tax Commissioner. Such representative shall be skilled in the valuation of property and shall hold a certificate issued under section 77-422;

(b) A representative of the low-income housing industry appointed by the Tax Commissioner. The appointment shall be based on a recommendation made by the Nebraska Commission on Housing and Homelessness;

(c) The Property Tax Administrator or a designee of the Property Tax Administrator who holds a certificate issued under section 77-422. Such person shall serve as the chairperson of the committee; and

(d) An appraiser from the private sector appointed by the Tax Commissioner. Such appraiser must hold either a valid credential as a certified general real property appraiser under the Real Property Appraiser Act or an MAI designation from the Appraisal Institute.

(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.

(6) The Rent-Restricted Housing Projects Valuation Committee shall meet annually in November to examine the information on rent-restricted housing projects that was provided pursuant to subsection (5) of this section. The Department of Revenue shall electronically publish notice of such meeting no less than thirty days in advance. The committee shall also solicit information on the sale of any such rent-restricted housing projects and information on the yields generated to investors in rent-restricted housing projects. The committee shall, after reviewing all such information, calculate a market-derived capitalization rate on an annual basis using the band-of-investment technique or other generally accepted technique used to derive capitalization rates depending upon the data available. The capitalization rate shall be a composite rate weighted by the proportions of total property investment represented by equity and debt, with equity weighted at eighty percent and debt weighted at twenty percent unless a substantially different market capital structure can be verified to the county assessor. The yield for equity shall be calculated using the data on investor returns gathered by the committee. The yield for debt shall be calculated using the data provided to the committee pursuant to subsection (5) of this section. If the committee determines that a particular county or group of counties requires a different capitalization rate than that calculated for the rest of the state pursuant to this subsection, then the committee may calculate an additional capitalization rate that will apply only to such county or group of counties.

(7) After the Rent-Restricted Housing Projects Valuation Committee has calculated the capitalization rate or rates under subsection (6) of this section, the committee shall provide such rate or rates and the information reviewed by the committee in calculating such rate or rates in an annual report. Such report shall be forwarded by the Property Tax Administrator to each county assessor in Nebraska no later than December 1 of each year for his or her use in determining the valuation of rent-restricted housing projects. The Department of Revenue shall publish the annual report electronically but may charge a fee for paper copies. The Tax Commissioner shall set the fee based on the reasonable cost of producing the report.

(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. Any low-income housing tax credits authorized under section 42 of the Internal Revenue Code that were granted to owners of the project shall not be considered income for purposes of the 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. Petitions must be filed no later than January 31. The burden of proof is on the petitioning county board of equalization to show that failure to make a determination that a different methodology should be used would result in a value that is not equitable and in accordance with the law. At the hearing, the commission may receive testimony from any interested person. After a hearing, the commission shall, within the powers granted in section 77-5007, enter its order based on evidence presented to it at such hearing.

(11) If the Tax Commissioner, based on the facts and circumstances, believes that the applicable capitalization rate set by the Rent-Restricted Housing Projects Valuation Committee to value a rent-restricted housing project does not result in a valuation at actual value for such rent-restricted housing project, then the Tax Commissioner shall petition the Tax Equalization and Review Commission to consider an adjustment to the capitalization rate of such rent-restricted housing project. Petitions must be filed no later than January 31. The burden of proof is on the Tax Commissioner to show that failure to make an adjustment to the capitalization rate employed would result in a value that is not equal to the rent-restricted housing project's actual value. At the hearing, the commission may receive testimony from any interested person. After a hearing, the commission shall, within the powers granted in section 77-5007, enter its order based on evidence presented to it at such hearing.