

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

CHERRY RIDGE LIMITED  
PARTNERSHIP,  
APPELLANT,

V.

DAKOTA COUNTY BOARD OF  
EQUALIZATION,  
APPELLEE.

CASE NOS: 21C 0436,  
22C 0291

DECISION AND ORDER  
REVERSING THE DECISION  
OF THE DAKOTA COUNTY  
BOARD OF EQUALIZATION

**For the Appellant:**

Steven Davidson,  
Baird Holm, LLP

**For the Appellee:**

Kim Watson,  
Deputy Dakota County Attorney

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

**I. THE SUBJECT PROPERTY**

The Subject Property is a 4,438 square foot rent-restricted low-income housing project located in Dakota County, Nebraska. The legal description and Property Record Files (PRF) of the Subject Property are found at Exhibits 6 and 10.

**II. PROCEDURAL HISTORY**

The Dakota County Assessor (the County Assessor) determined the assessed value of the Subject Property was \$1,879,445 for tax year 2021 and \$1,920,904 for tax year 2022. Cherry Ridge Limited Partnership (Cherry Ridge) protested this assessment to the Dakota County Board of Equalization (the County Board) and requested

taxable values of \$1,122,366 for tax year 2021 and \$1,217,874 for tax year 2022. The County Board determined the taxable value of the Subject Property for tax year 2021 was \$1,820,770<sup>1</sup> and \$1,920,905 for tax year 2022.<sup>2</sup>

Cherry Ridge appealed the decisions of the County Board to the Tax Equalization and Review Commission (the Commission). The Commission held a hearing on June 27, 2023. Prior to the hearing, the parties exchanged exhibits and submitted a pre-hearing conference Report, as ordered by the Commission. Exhibits 1 through 15 were admitted into evidence.

### III. STANDARD OF REVIEW

The Commission's review of the County Board's determination 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

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<sup>1</sup> Exhibit 1.

<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 v. Banner County Bd. of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (citations omitted).

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>

The Taxpayer must introduce competent evidence of actual value of the Subject Property 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 that 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 take notice of judicially cognizable facts, 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>

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<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).

<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).

#### 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>13</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>14</sup> Nebraska courts have held that actual value, market value, and fair market value mean exactly the same thing.<sup>15</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>16</sup> All real property in Nebraska subject to taxation shall be assessed as of January 1.<sup>17</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>18</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

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<sup>13</sup> Neb. Rev. Stat. § 77-112 (Reissue 2018).

<sup>14</sup> Neb. Rev. Stat. § 77-112 (Reissue 2018).

<sup>15</sup> *Omaha Country Club v. Douglas County Bd. of Equal.*, 11 Neb. App. 171, 180, 645 N.W.2d 821, 829 (2002).

<sup>16</sup> Neb. Rev. Stat. § 77-131 (Reissue 2018).

<sup>17</sup> See Neb. Rev. Stat. § 77-1301(1) (Reissue 2018).

<sup>18</sup> Neb. Rev. Stat. § 77-201(1) (Reissue 2018).

Constitution.<sup>19</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>20</sup> The purpose of equalization of assessments is to bring the assessment of different parts of a taxing district to the same relative standard, so that no one of the parts may be compelled to pay a disproportionate part of the tax.<sup>21</sup> Uniformity requires that whatever methods are used to determine actual or taxable value for various classifications of real property that the results be correlated to show uniformity.<sup>22</sup> Taxpayers are entitled to have their property assessed uniformly and proportionately, even though the result may be that it is assessed at less than the actual value.<sup>23</sup> If taxable values are to be equalized it is necessary for a Taxpayer to establish by clear and convincing evidence that the valuation placed on the property when compared with valuations placed on other similar properties is grossly excessive and is the result of systematic exercise of intentional will or failure of plain legal duty, and not mere errors of judgment.<sup>24</sup> There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity.<sup>25</sup>

#### **V. Rent-Restricted Housing Project Valuations Under Neb. Rev. Stat. § 77-1333.**

Except as provided in Neb. Rev. Stat. §§ 77-1333(9) or 77-1333(10), county assessors must value low-income housing projects using an income approach, utilizing the project's *actual* income and *actual* expenses as filed each year with the Nebraska Department of Revenue.<sup>26</sup> Additionally, a capitalization rate set by the Rent-

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<sup>19</sup> Neb. Const., art. VIII, § 1.

<sup>20</sup> *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).

<sup>21</sup> *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991); *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb. App. 582, 597 N.W.2d 623 (1999).

<sup>22</sup> *Banner County v. State Bd. of Equal.*, 226 Neb. 236, 411 N.W.2d 35 (1987).

<sup>23</sup> *Equitable Life v. Lincoln County Bd. of Equal.*, 229 Neb. 60, 425 N.W.2d 320 (1988); *Fremont Plaza v. Dodge Cty. Bd. of Equal.*, 225 Neb. 303, 405 N.W.2d 555 (1987).

<sup>24</sup> *Newman v. County of Dawson*, 167 Neb. 666, 670, 94 N.W.2d 47, 49-50 (1959) (citations omitted).

<sup>25</sup> *Id.* at 673, 94 N.W.2d at 50.

<sup>26</sup> Neb. Rev. Stat. § 77-1333(8) (Reissue 2018). *Lincoln Cty. Bd. of Equal. v. Western Tabor Ranch Apts.*, 314 Neb. 582, \_\_ N.W.2d \_\_ (2023).

Restricted Housing Projects Valuation Committee (the Valuation Committee) shall be used in this income approach.<sup>27</sup>

To qualify for the assessment method prescribed by Neb. Rev. Stat. § 77-1333, the housing project must qualify under Section 42 of the Internal Revenue Code.<sup>28</sup> A planned low-income housing development in Nebraska may apply to the Nebraska Investment Finance Authority (NIFA) for certain tax credits. The applications are handled through a competitive process, with consideration given to the percentage of units that would be rent-restricted, amenities offered to residents, etc. Upon approval of the application, a land-use restriction agreement (LURA) is created. The LURA is recorded and is enforceable against subsequent buyers for the life of the LURA, typically 30 to 45 years. The LURA, as the name suggests, restricts project owners from engaging in certain land uses, such as raising rents on tenants outside of a specific range, or from refusing to rent to an otherwise-qualified tenant.

If a rent-restricted housing project owner fails to timely provide the required income and expense information to the Department of Revenue, the county assessor may use any professionally accepted mass appraisal method to value the housing project.<sup>29</sup>

## **VI. FINDINGS OF FACT**

### **A. Summary of the Evidence**

#### **1. Testimony of Corey Checketts**

Corey Checketts testified on behalf of Cherry Ridge. Checketts was a consultant and asset manager. From 2014 to 2021, he was an employee of Community Development, Inc. (CDI), a 501(c)(3) non-profit and the parent company of Cherry Ridge. Since 2021, Checketts had

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<sup>27</sup> *Id.* For both tax years 2021 and 2022, the Committee set the capitalization rate at 6.3% for the jurisdiction including Dakota County. Exhibits 12:1 and 13:1.

<sup>28</sup> See generally 26 USC § 42 (2020).

<sup>29</sup> Neb. Rev. Stat. § 77-1333(9) (Reissue 2018).

been employed as a consultant for Cherry Ridge. CDI was the general partner and asset manager for Cherry Ridge.

Checketts testified he was familiar with the income and expense reporting requirements imposed by Neb. Rev. Stat. § 77-1333 for Cherry Ridge as set forth in that statute. He stated the required information was timely provided to the Department of Revenue and accurately reflected the actual income and actual operating expenses of the Subject Property for each of the two relevant tax years. Checketts also confirmed the Subject Property was a rent-restricted housing project.

Checketts stated a Net Operating Income (NOI) for the Subject Property of \$65,362 for 2019.<sup>30</sup> Total real estate taxes were reported at \$29,025. Using these amounts, Checketts asserted the Section 77-1333 income approach, with a capitalization rate of 8.3%, would have resulted in a valuation of \$1,137,190, an 8.4% capitalization rate would result in a value of \$1,123,652, and an 8.5% capitalization rate would result in a value of \$1,110,433.

Using the 2020 financial data reported in July 2021 for use in the tax year 2022 assessment,<sup>31</sup> Checketts confirmed an NOI of \$82,152.49 with total real estate taxes of \$29,213. Checketts stated these amounts would result in a value of \$1,341,754 using an 8.3% capitalization rate, \$1,325,781 using an 8.4% rate, and \$1,310,183 with an 8.5% rate.

Checketts stated a range of capitalization rates was used in calculating the value as he was unsure exactly how to determine the effective tax rate to be added to the 'unloaded' capitalization rate provided by the Valuation Committee.<sup>32</sup> Checketts conceded that

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<sup>30</sup> Exhibit 14:7. The 2019 financial data is reported in July 2020. The 2020 report is then used in the statutory income approach calculation for the tax year 2021 assessment.

<sup>31</sup> Exhibit 15:7. The 2020 financial data is reported in July 2021. The 2021 report is then used in the statutory income approach calculation for the tax year 2022 assessment.

<sup>32</sup> See Neb. Rev. Stat. § 77-1333(4) (Reissue 2018). The Committee is charged with developing a market capitalization rate to be used by County Assessors in valuing rent-restricted housing projects under Neb. Rev. Stat. § 77-1333.

whichever effective tax rate is applicable, his determination of value would correspond to the capitalization rate which uses that tax rate.

## **2. Testimony of Darrel Stanard**

Darrel Stanard testified on behalf of the County Board. Stanard was a licensed appraiser whose company, Stanard Appraisal, worked in various roles with approximately 56 counties in Nebraska. Stanard assisted the Dakota County Assessor in assessing the Subject Property for both tax years. He was later hired by the County Board in each tax year to serve as the referee in relation to the protest filed by Cherry Ridge,<sup>33</sup> and was then hired by the County Board to testify at the hearing in the instant appeal.

At the hearing, Stanard provided an opinion of value of the Subject Property for both tax years.<sup>34</sup> When valuing the Subject Property, Stanard testified he considered other approaches to value but found the cost approach to be irrelevant as applied to rent-restricted housing projects and found the sales approach to be unhelpful due to a lack of sales of similar rent-restricted housing projects. Stanard admitted he did not fully comply with what the statute required for an income approach,<sup>35</sup> instead he used his professional judgment to reduce the vacancy and collection loss and expense amounts. Stanard stated he

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<sup>33</sup> County Board's of Equalization are authorized by Neb. Rev. Stat. § 77-1502.01 to hire a referee to review Taxpayer assessment protests.

<sup>34</sup> Stanard is a licensed residential appraiser, credentialed to appraise residential property. See, Neb. Rev. Stat. § 76-2213. He is not a certified general appraiser, who would be credentialed to appraise commercial property. See, Neb. Rev. Stat. § 76-2207.20. A licensed residential appraiser doing assessment work for a County Assessor is exempted from the requirements of the Real Property Appraiser Act. Neb. Rev. Stat. § 76-2221(9). However, a licensed residential appraiser working for a County Board may be in violation of the Real Property Appraiser Act if an opinion of value is given outside the scope of the appraiser's credentials. Neb. Rev. Stat. § 76-2201, *et seq.* In this case, it appears Stanard was not credentialed to give an opinion of value of the Subject Property, which was a commercial property.

<sup>35</sup> Stanard testified he did not use the actual expense amounts as required by Neb. Rev. Stat. § 77-1333(5) (Reissue 2018).



did not take jurisdictional exception to using the actual income and actual expense amounts that were required by statute.<sup>36</sup>

**a. Tax Year 2021**

Stanard testified that in his initial assessment of the Subject Property for tax year 2021, he considered three approaches to value the property: the sales comparison approach; the cost approach; and the income approach. He testified that because there were few sales of comparable properties, he did not rely upon a sales comparison approach. Since the Subject Property was an income-producing commercial property, Stanard relied most heavily on an income approach. As a result, the tax year 2021 assessment was \$1,879,445.<sup>37</sup>

Later, in his role as referee, Stanard recommended reducing the assessment to \$1,820,770 after considering income and expense data from Cherry Ridge. As referee, he testified his income approach calculations were partly based upon the actual data from Cherry Ridge's Section 77-1333 filing and partly based upon what Stanard opined was typical for the market in Dakota County.

In his income approach calculation as referee, Stanard asserted he used the effective gross income (EGI) based upon Cherry Ridge's July 2020 filing of 2019 income and expenses.<sup>38</sup> He also testified he used a vacancy & collection loss rate of 5% and an expense ratio of 60%,<sup>39</sup>

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<sup>36</sup> When an appraiser or assessor is required by the laws of a local jurisdiction to deviate from specific professional appraisal standards – this is known in appraisal parlance as taking jurisdictional exception – such a legal requirement precludes compliance with those standards. See *Uniform Standards of Professional Appraisal Practice (USPAP)* regarding what are known as jurisdictional exceptions. In Nebraska, for example, assessors take jurisdictional exception to what is known as the acceptable range, which under USPAP standards is .90 to 1.10. Under Nebraska law, the acceptable range is limited to .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>37</sup> Exhibit 4:1.

<sup>38</sup> Exhibit 5:53. However, Stanard used an EGI of \$403,389.83, but the EGI in Cherry Ridge's filing was \$402,486 per Exhibit 5:4.

<sup>39</sup> Exhibit 5:53. Filings by Cherry Ridge indicated actual expenses of \$337,124 as shown at Exhibit 5:6, or 79%.

neither of which were consistent with Cherry Ridge's filings.<sup>40</sup> These values were each lower than what was filed by Cherry Ridge and resulted in a higher indication of value in Stanard's calculations. Stanard asserted he also went through the line-item expenses reported by Cherry Ridge to determine which expenses were management expenses and which were capital improvements to be amortized over several years. However, he was not able to recall or identify in the exhibits which expenses were discounted. Stanard stated that he used a 5% vacancy rate because he had spoken to the manager of the Subject Property on several occasions and learned there was no vacancy in the Subject Property. Stanard testified he felt the management fees reported by Cherry Ridge were very high, and so he assigned a market based typical expense rate of 60%, according to his knowledge and experience. Based upon his calculations and opinions of income, vacancy and collection, and expenses, Stanard determined a net operating income (NOI)<sup>41</sup> and divided the NOI by a capitalization rate.

Stanard applied an income capitalization rate of 8.4%, based upon the 6.3% unloaded capitalization rate provided by the Valuation Committee and the addition of the 2.1% effective tax rate. The result was a value of \$1,820,770 for tax year 2021, which Stanard recommended to the County Board as the referee of the protest.<sup>42</sup> The County Board accepted Stanard's recommendation and issued its determination that the value of the parcel for tax year 2021 was \$1,820,770.<sup>43</sup>

#### **b. Tax Year 2022**

The assessment for tax year 2022 was for \$1,920,905, based upon a cost approach.<sup>44</sup> At the instant hearing, Stanard testified he assisted in

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<sup>40</sup> Exhibit 5:4. The filings by Cherry Ridge showed an actual vacancy and collection loss amount of \$23,663 and income of \$426,149, or 5.55%.

<sup>41</sup> Stanard's income approach calculation does not include the NOI total, but his value conclusion is based upon the calculations discussed above.

<sup>42</sup> Exhibit 5:52-53.

<sup>43</sup> Exhibit 1.

<sup>44</sup> Exhibit 10:2.

the assessment but that as a referee he utilized an income approach to recommend a value to the County Board.

In that income approach, he utilized a similar process as was used for tax year 2021.<sup>45</sup> As referee, Stanard recommended increasing the assessment to \$1,994,441, after considering income and expense data from Cherry Ridge.<sup>46</sup> He testified his income approach calculations were again partly based upon the actual data from Cherry Ridge's Section 77-1333 filing and partly based upon what Stanard opined was typical for the market in Dakota County.

Stanard used an EGI based upon Cherry Ridge's July 2021 filing of 2020 income and expenses.<sup>47</sup> Again, a 5% vacancy & collection loss rate and a 60% expense rate were used,<sup>48</sup> neither of which were consistent with Cherry Ridge's filings.<sup>49</sup>

These values were each lower than what was filed by Cherry Ridge and resulted in a higher indication of value in Stanard's calculations. Stanard asserted he also went through the line-item expenses reported by Cherry Ridge to determine which expenses were management expenses and which were capital improvements to be amortized over several years. And again, he was not able to recall or identify in the exhibits which expenses were discounted. As was the case for tax year 2021, Stanard stated that he used a 5% typical market vacancy rate because he had spoken to the manager of the Subject Property and had learned there was no vacancy at the Subject Property. Stanard again testified he felt the management fees reported by Cherry Ridge were very high, and so he assigned a market based typical expense rate of 60%, according to his knowledge and experience. Based upon his calculations and opinions of income, vacancy and collection, and

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<sup>45</sup> Exhibit 9:56.

<sup>46</sup> Exhibit 9:55-56.

<sup>47</sup> Exhibit 9:56. However, Stanard used an EGI of \$447,122, but the EGI in Cherry Ridge's filing was \$403,390 per Exhibit 9:62.

<sup>48</sup> Exhibit 9:56. Filings by Cherry Ridge indicated actual expenses of \$321,237 as shown at Exhibit 9:64, or 79%.

<sup>49</sup> Exhibit 9:62. The filings by Cherry Ridge showed an actual vacancy and collection loss amount of \$26,084 and income of \$429,474, or 6.07%.

expenses, Stanard determined a net operating income (NOI)<sup>50</sup> and divided the NOI by a capitalization rate.

Stanard then applied an income capitalization rate of 8.519%, based upon the 6.3% unloaded capitalization rate provided by the Valuation Committee and the addition of the 2.219% effective tax rate. The result was a value of \$1,994,441 for tax year 2022, which Stanard recommended to the County Board as the referee of the protest.<sup>51</sup> It appears the County Board did not accept Stanard's referee recommendation and issued its determination that the value of the parcel for tax year 2022 was \$1,920,905.<sup>52</sup>

### **3. Testimony of Christy Abts**

Abts had been the Dakota County Assessor for four years and held that office during the tax years at issue. Abts held the State Assessor's Certificate but was not a licensed appraiser.

Abts testified that she relied on Stanard's valuations of the Subject Property for tax years 2021 and 2022. She also stated she did not ask the County Board to petition the Commission under subsection (10) for permission to use a valuation method other than the income approach specified in subsection (5) to value the Subject Property, for tax years 2021 or 2022.

Abts confirmed that a 2.1% effective tax rate for tax year 2021 was correct, and a 2.219% for 2022 was also correct, and these values reflected the local effective tax rate, rather than a three-year average.

### **B. Analysis**

Because the Subject Property is a rent-restricted housing project, the assessment is specifically governed by Neb. Rev. Stat. § 77-1333. Subsection (3) states: "the county assessor shall utilize an income-approach calculation to determine the actual value of a rent-restricted

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<sup>50</sup> Stanard's income approach calculation does not state the NOI total, but his value conclusion is based upon the calculations discussed above.

<sup>51</sup> Exhibit 9:55-56.

<sup>52</sup> Exhibit 2.

housing project when determining the assessed valuation to place on the property for each assessment year.”<sup>53</sup> Subsection (8) further directs a 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>54</sup>

There are three methods in the statute to allow for deviation from the above requirements. Subsection (9) allows a county assessor to use any professionally accepted mass appraisal method if a rent-restricted housing project owner fails to provide the required income and expense data for a particular tax year.<sup>55</sup> Subsection (10) allows a county assessor ask the County Board to petition the Commission for permission to use an alternative valuation method if the assessor demonstrates that the approach specified in § 77-1333 does not result in valuation at actual value.<sup>56</sup> Lastly, subsection (11) allows petitions to the Commission to consider adjustment of the capitalization rate set by the Rent-Restricted Housing Projects Valuation Committee.<sup>57</sup> Neither the County Assessor nor the County Board employed any of the three methods listed above to allow deviation from the statutorily prescribed valuation method in § 77-1333. As the Nebraska Supreme Court recently held:

Reading § 77-1333 in its entirety, we conclude that in calculating the actual value of rent-restricted housing projects for each assessment year using the income approach, § 77-1333 requires a county assessor to use income and expense data from the prior year

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<sup>53</sup> Neb. Rev. Stat. § 77-1333(3) (Reissue 2018).

<sup>54</sup> Neb. Rev. Stat. § 77-1333(8) (Reissue 2018).

<sup>55</sup> Neb. Rev. Stat. § 77-1333(9) (Reissue 2018).

<sup>56</sup> Neb. Rev. Stat. § 77-1333(10) (Reissue 2018).

<sup>57</sup> Neb. Rev. Stat. § 77-1333(11) (Reissue 2018).

only, which is timely filed as described in subsection (5), and to use no income or expense data from other years.<sup>58</sup>

Abts testified she relied upon the valuations performed by Stanard to set the valuations of the Subject Property. As Stanard testified, he did not use the actual income and actual expenses submitted by Cherry Ridge in the respective filings per subsection (5). It is not disputed that Cherry Ridge submitted the actual income and actual expense data as required by subsection (5). It is also undisputed that the County Board did not petition the Commission to deviate from the statutory income approach method. It follows that Cherry Ridge is entitled to have the Subject Property valued in accordance with the statutorily prescribed income approach methodology. Therefore, the Commission finds Cherry Ridge has presented clear and convincing evidence the County Board's decision to rely on a different valuation method for both tax years was arbitrary and unreasonable.

The Commission finds, using the actual income and expense data filed by Cherry Ridge, the 2019 Net Operating Income (NOI) for the Subject Property to be used in setting the 2021 taxable value is \$65,362.<sup>59</sup> The 2020 NOI to be used in setting the 2022 taxable value is \$82,152.<sup>60</sup> In calculating these NOIs, Cherry Ridge's filing treats the real estate taxes as expenses, so the NOIs must be adjusted to include those values.<sup>61</sup> This results in adjusted NOIs of \$94,387 for 2021 and \$111,366 for 2022. The capitalization rate determined by the Rent-Restricted Housing Valuation Committee for both years was 6.3%. Because this capitalization rate does not include the effective tax rate, that figure must be 'loaded' into the Committee's capitalization rate. Competent evidence adduced during the hearing established an

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<sup>58</sup> *Lincoln Cty. Bd. of Equal. v. Western Tabor Ranch Apts.*, 314 Neb. 582, 593, \_\_\_ N.W.2d \_\_\_ (2023).

<sup>59</sup> Exhibit 14:7 (rounded from \$65,361.79).

<sup>60</sup> Exhibit 15:7 (rounded from \$82,152.49).

<sup>61</sup> International Association of Assessing Officers, *Fundamentals of Mass Appraisal* 175 (2011) ("Taxpayers generally treat property taxes as fixed expenses. IAAO generally advocates that they be treated as a component of the capitalization rate, because they are based largely on the assessor's determination of market value. Thus, they are not recognized as an allowable expense; instead the capitalization rate is increased by the estimated effective tax rate.").

effective tax rate of 2.1% for tax year 2021 and 2.219% for tax year 2022. Thus, the capitalization rate for 2021 should be 8.4% and for 2022 should be 8.519%. Using these amounts, the taxable value for the Subject Property should be \$1,123,655 for tax year 2021 and \$1,307,254 for tax year 2022.

## VII. CONCLUSIONS OF LAW

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 there is clear and convincing evidence that the County Board's decisions were arbitrary or unreasonable.

For the reasons set forth above, the determinations of the County Board should be vacated and reversed.

## VIII. ORDER

IT IS ORDERED THAT:

1. The decisions of the Dakota County Board of Equalization determining the value of the Subject Property for tax years 2021 and 2022 are vacated and reversed.

2. The assessed value of the Subject Property for tax year 2021 is:  
**\$ 1,123,655**

The assessed value of the Subject Property for tax year 2022 is:  
**\$ 1,307,254**

3. This Decision and Order, if no appeal is timely filed, shall be certified to the Dakota County Treasurer and the Dakota 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 years 2021 and 2022.

7. This Decision and Order is effective for purposes of appeal on September 15, 2023.<sup>62</sup>

Signed and Sealed: September 15, 2023

SEAL



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Robert W. Hotz, Commissioner

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James D. Kuhn, Commissioner

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<sup>62</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.