

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

IN RE PETITIONS OF
LANCASTER COUNTY
BOARD OF EQUALIZATION

CASE NOS: 23OP 0001 –
23OP 0021

DECISION AND ORDER
GRANTING THE PETITIONS
OF THE LANCASTER
COUNTY BOARD OF
EQUALIZATION

For the Petitioner:

Daniel J. Zieg,
Chief Deputy Lancaster County Attorney

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

I. THE SUBJECTS OF THE PETITIONS

The Lancaster County Board of Equalization filed twenty-one petitions with the Commission pursuant to Neb. Rev. Stat. § 77-1333(10), seeking permission to use a professionally accepted mass appraisal method, other than the method set forth in Neb. Rev. Stat. § 77-1333, to determine the assessed values of Rent-Restricted Housing Projects.

II. PROCEDURAL HISTORY

The Lancaster County Board of Equalization filed the petitions on January 31, 2023. On February 7, 2023, the Commission sent a Notice of Petition and Notice of Hearing to the Petitioner, as well as the registered agents of the interested persons named in the County's

petitions. An Amendment to the Notice of Petition and Notice of Hearing was sent on February 10, 2023.

The Commission held a consolidated hearing on March 2 and March 3, 2023. Prior to the hearing, the Petitioner and some of the named interested parties submitted exhibits to the Commission prior to the hearing and exchanged exhibits as ordered by the Commission. Exhibits 1-47 were admitted into evidence.

III. STANDARD OF REVIEW

The Commission's review of the County Board's petitions is governed by Neb. Rev. Stat. § 77-1333(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 to it in section 77-5007, enter its order based on evidence presented to it at such hearing.

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.¹ The Commission's Decision and Order shall include findings of fact and conclusions of law.²

IV. RELEVANT 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.³

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.⁴ Nebraska courts have held that actual value, market value, and fair market value mean exactly the same thing.⁵ 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.⁶ All real property in Nebraska subject to taxation shall be assessed as of January 1.⁷ All

¹ Neb. Rev. Stat. § 77-5016(6) (Reissue 2018).

² Neb. Rev. Stat. § 77-5018(1) (Reissue 2018).

³ Neb. Rev. Stat. § 77-112 (Reissue 2018).

⁴ Neb. Rev. Stat. § 77-112 (Reissue 2018).

⁵ *Omaha Country Club v. Douglas County Bd. of Equal.*, 11 Neb. App. 171, 180, 645 N.W.2d 821, 829 (2002).

⁶ Neb. Rev. Stat. § 77-131 (Reissue 2018).

⁷ See Neb. Rev. Stat. § 77-1301(1) (Reissue 2018).

taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.⁸

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.⁹ Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value.¹⁰ 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.¹¹ 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.¹² 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.¹³ 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.¹⁴ There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity.¹⁵

⁸ Neb. Rev. Stat. § 77-201(1) (Reissue 2018).

⁹ Neb. Const., art. VIII, § 1.

¹⁰ *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).

¹¹ *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).

¹² *Banner County v. State Bd. of Equal.*, 226 Neb. 236, 411 N.W.2d 35 (1987).

¹³ *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).

¹⁴ *Newman v. County of Dawson*, 167 Neb. 666, 670, 94 N.W.2d 47, 49-50 (1959) (citations omitted).

¹⁵ *Id.* at 673, 94 N.W.2d at 50.

A. Rent-Restricted Housing Valuation 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 that meet certain criteria, using an income approach utilizing the project's *actual* income and *actual* expenses as provided each year to the Nebraska Department of Revenue.¹⁶ Additionally, a capitalization rate set by the Rent-Restricted Housing Projects Valuation Committee shall be used in this income approach.¹⁷

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.¹⁸ A planned low-income housing development in Nebraska may apply to the Nebraska Investment Finance Authority (NIFA) for certain tax credits. These 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. These LURAs are recorded and are enforceable against subsequent buyers for the life of the LURA, typically 30 to 45 years. These LURAs, as their names suggest, restrict 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.¹⁹

¹⁶ Neb. Rev. Stat. § 77-1333(8) (Reissue 2018).

¹⁷ *Id.*

¹⁸ See generally 26 USC § 42 (2020).

¹⁹ Neb. Rev. Stat. § 77-1333(9) (Reissue 2018).

V. FINDINGS OF FACT AND ANALYSIS

A. Summary of the Evidence

The County Board called Derrick Niederklein, Deputy Lancaster County Assessor, to testify. Niederklein stated that six recent sales of rent-restricted housing demonstrated that the sales of this type of property were generally higher than the assessed value, with the sales price being two to three times the assessed value. Niederklein states that when applying the actual income and actual expenses to a rent-restricted housing project for tax year 2023, some projects received an assessed valuation of \$0, whereas others resulted in a negative valuation. Niederklein testified that this disparity in valuations presented equalization concerns that he felt must be brought to the Lancaster County Board of Equalization under Neb. Rev. Stat. § 77-1333(10).

Niederklein stated that he consulted with experts to begin developing a new methodology in which to appraise the petitioned projects. Niederklein stated that a cost approach was considered, but depreciation was difficult to estimate. A sales comparison approach was also considered, but Niederklein stated that the usefulness of such an approach would be limited by the low number of sales.

Niederklein testified that an income approach, using *typical* income and expenses for rent-restricted housing projects would be the more equitable approach, essentially treating rent-restricted housing projects as a separate subclass for assessment. Niederklein admitted that the land-use restriction agreements (LURAs) for each project do differ, but that those differences are similar enough to properly quantify because the assessment to sale ratios for different rent-restricted housing projects are similar.

The County Board next called Phillip Hughes, a commercial appraiser employed by the Lancaster County Assessor. Hughes testified that he assisted Niederklein in developing a model which valued rent-restricted housing projects using an income approach with typical income and expenses. Hughes stated that initially, the model

used a 45% expense ratio, but that as of the date of the hearing, the model had been refined to reflect a 52% expense ratio. Hughes stated that the final income and expense numbers may be subject to change as additional information is obtained.

Seven interested persons, through counsel, were called to provide testimony in opposition to the County Board's petitions. The first witness called by the interested persons was Kelly Schultze, the Low-Income Housing Tax Credit Compliance Manager for NIFA. Schultze testified generally as to the rent-restricted housing program process and some of the restrictions imposed upon participating projects.

The interested persons next called Brent Williams, CEO of Excel Development Group, and Dan Kuber, President of Crown Pointe Management. Both Williams and Kuber gave testimony as to the difficulties facing rent-restricted housing projects, including low cash flow, and the restrictiveness of the LURAs on their ability to navigate unforeseen business expenses.

The interested persons called Ward Hoppe to testify. Hoppe is a principal for Hoppe Development. Hoppe stated that in his experience as a rent-restricted housing developer, he relies upon the use of the Section 77-1333 valuation method to provide a measure of financial stability, as property taxes represent a significant annual expense. Hoppe further testified that the LURAs essentially render rent-restricted housing projects unmarketable, especially in the initial 15-year period. Hoppe asserted that with no market, it is not unreasonable for a zero or negative assessed value for these projects.

Lastly, Hoppe stated that the LURAs placed upon the projects render each project unique and therefore inappropriate for mass appraisal.

B. Analysis

a. The County Board is not required to demonstrate a specific alternative valuation method under Neb. Rev. Stat. § 77-1333(10).

The interested parties suggest that the County Board must propose a different valuation method which is professionally accepted, and that the proposed valuation method must be approved by the Commission.²⁰ However, the interested persons misconstrue the burden of proof. As noted above, the County Board has the burden of showing 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. We construe this to mean that the County Board must demonstrate that using the methodology required by section 77-1333 would result in valuations not in accordance with the law.

We find no requirement in section 77-1333(10) that the County Board must present a specific alternative methodology which must be used. When statutory language is plain and unambiguous, no interpretation is needed to ascertain the statute's meaning.”²¹ Nor will the Commission read meaning into a statute that is not there or read any plain and direct language out of a statute.²²

b. Neb. Rev. Stat. § 77-1333 contemplates valuing rent-restricted housing projects at actual value.

“Our law is also established that, for purposes of taxation, the terms “fair market value” and “actual value” mean exactly the same

²⁰ Brief of Interested Persons, at 6.

²¹ *State Bd. of Ag. v. State Racing Comm.*, 239 Neb. 762, 767, 478 N.W.2d 270, 273 (1992); *State v. Woods*, 255 Neb. 755, 763-64, 587 N.W.2d 122, 128 (1998).

²² *See State v. Taylor*, 310 Neb. 376, 384, 966 N.W.2d 510, 517 (2021).

thing.”²³ Market value is “the amount for which property may be sold by a willing seller who is not compelled to sell it to a buyer who is willing but not compelled to buy it.”²⁴ In deciding market value, “the situation and condition of the property as it was at that time and all the other facts and circumstances shown by the evidence that affected or had a tendency to establish its value.”²⁵ Fair market value “must still be measured as an economic unit, i.e., related to what, in terms of value, one could receive for his or her property. . . . [F]air market value is a term which has been used and is generally understood by experts and lay people alike. . . .”²⁶

Testimony presented by the County Board demonstrates that for the 2023 tax year, preliminary values determined using the formula prescribed in section 77-1333 results in valuations for some projects as \$0, and others with a negative value, meaning that the projects, as improved, would be worth more if the improvements were destroyed and the land returned to a vacant parcel or parcels. The Nebraska Legislature, in enacting section 77-1333, found:

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

²³ *In re Estate of Craven*, 281 Neb. 122, 127, 794 N.W.2d 406, 410 (2011) (citing *Xerox Corp. v. Karnes*, 217 Neb. 728, 350 N.W.2d 566 (1984)).

²⁴ *Henn v. American Family Mut. Ins. Co.*, 295 Neb. 859, 866, 894 N.W.2d 179, 184-85 (2017).

²⁵ *Henn v. American Family Mut. Ins. Co.*, 295 Neb. 859, 866, 894 N.W.2d 179, 184-85 (2017).

²⁶ *Henn v. American Family Mut. Ins. Co.*, 295 Neb. 859, 867, 894 N.W.2d 179, 185 (2017).

methodology results in the most accurate determination of the *actual value* of such projects. (emphasis added).

Thus, section 77-1333 clearly contemplates rent-restricted housing projects to be valued at actual value.

c. A lack of comparable sales is not fatal to a determination of actual value.

The interested persons assert that, due to the use restrictions placed upon the projects by the LURAs, the projects are essentially unmarketable, as demonstrated by the lack of similar sales, and therefore a zero or negative value is not necessarily inequitable. However, the Nebraska Supreme Court has stated: “We recognize, of course, that in cases such as this where there is no market or no sale of like property, actual or market value must be arrived at by theoretical methods commonly used by appraisers qualified in the particular field.”²⁷ Accordingly, a mere lack of comparable sales does not necessarily mean that market value, and actual value, are \$0.

d. The Commission’s prior order regarding a different rent-restricted property is not relevant to these proceedings.

The interested parties assert that a \$0 or negative assessed value is acceptable in these cases because “TERC itself has reversed a county board of equalization in finding that a LIHTC property had a \$0 value for a given year.”²⁸ The interested persons cite to the Commission’s decision in *Legend Oaks, LLC v. Dawson County Board of Equalization*, 16C 0022 & 16C 0023.²⁹ The interested persons are correct that the Commission did order that the “taxable value of the

²⁷ *Lincoln Tel. and Tel. Co. v. County Bd. of Equal.*, 209 Neb. 465, 476, 308 N.W.2d 515, 522 (1981).

²⁸ Brief for Interested Persons, at 8.

²⁹ Exhibit 38.

Subject Property in Case No. 16C 0023 for tax year 2016 is \$0.”³⁰ However, the reliance upon the outcome of that proceeding for the proposition that a \$0 is not inequitable is inapposite. As the Commission noted within that same order, the county board in *Legend Oaks* did not follow the statutory process set forth in section 77-1333(10) to petition the Commission to use an alternative valuation methodology. Accordingly, the valuations set by the county board in that case were arbitrary and unreasonable.³¹

In these proceedings, the County Board has followed the process set forth to request utilization of an alternative valuation method. As such, the burden of proof, facts presented, and ultimate analysis are different, and *Legend Oaks* is not dispositive to our decision.

e. The LURAs may be more akin to a conservation easement than a leasehold interest, but that is not dispositive of the issue.

In the County Board’s post-hearing brief, it asserts that actual value must be determined by valuing all interests in the property, and cites to the Nebraska Court of Appeals decision in *Omaha Country Club v. Douglas County Board of Equalization*³² for the proposition that “actual or fair market value of the real property can only be ascertained by first determining the fee simple value, including the value of the leasehold estate, the leased fee estate, and any other severed estate.”³³

The interested persons assert to the contrary that the use rights restricted by the LURA “have simply disappeared for the 30-to-45-year life of the LURA, which runs with the land.”³⁴ Instead, the interested

³⁰ Exhibit 38:5.

³¹ Exhibit 38:4-5.

³² 11 Neb. App. 171, 645 N.W.2d 821 (Neb. Ct. App. 2002).

³³ *Id.* at 182, 645 N.W.2d at 831.

³⁴ Brief for interested persons, at 8.

persons assert that the LURAs are “a use restriction imposed by the State...more akin to a conservation easement than a lease.”³⁵

The Commission finds neither comparison to be particularly useful to the resolution of the issue. While the LURAs may be closer in comparison to conservation easements, “[r]eal property subject to a conservation easement shall be assessed with due regard to the restricted uses to which the property may be devoted.”³⁶ Thus, this comparison is unhelpful as it demonstrates that even conservation easements are still subject to assessment at fair market value, with adjustments made in consideration of the use restrictions present in the conservation easement.

f. The County Board has met its burden to show that using the statutory methodology would result in assessed values not equitable and in accordance with the law.

The keystone to this analysis is whether the statutory methodology provided in section 77-1333 provides an assessed value that is commensurate with actual value. The County Board presented evidence of the preliminary values of the subject projects using the statutory section 77-1333 methodology.³⁷ As testified to by Niederklein and Hughes, the County Assessor, in reviewing the preliminary valuations, calculated an estimated market value for each of the subject projects using an income approach with a normalized³⁸ expense ratio of 52%.³⁹ The remaining column of Exhibit 15:5-7 demonstrates an assessed value-to-estimated market ratio. These values range from a minimum of 0%, meaning that the estimated market value is greater than the section 77-1333 methodology value, to 203%, meaning that

³⁵ Brief for interested persons, at 9.

³⁶ Neb. Rev. Stat. § 76-2,116 (Reissue 2018).

³⁷ Exhibit 15:5-7

³⁸ Per their testimony, the expense ratios were normalized between rent-restricted housing projects in Lancaster County.

³⁹ The results of these calculations are found at Exhibit 15:5-7

the section 77-1333 methodology value is more than twice what the estimated market value would be. Additionally, the restrictions on the properties contained in the LURA's are consistent throughout the term of the agreement and do not change from year to year while the yearly expenses incurred by each project vary widely from year to year causing large swings in the assessed value determined using the section 77-1333 valuation method.

Another example of these discrepancies is shown in Exhibit 1. The section 77-1333 valuation method results in a total valuation of \$28,100, whereas the calculated replacement-cost-new-less-depreciation shows an improvement valuation of \$220,795.⁴⁰ The remaining parcels making up the project demonstrate a similar discrepancy.⁴¹

The vast differential between the individualized valuations calculated using the section 77-1333 methodology and the alternative uniform mass appraisal methodology demonstrates that the 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. If the Commission were to deny the petitions, as the County Board's evidence and testimony demonstrate, an inequitable tax burden would be borne not only by non-rent-restricted properties, but also by those rent-restricted properties that reported higher net operating incomes compared to those rent-restricted properties that reported an operating loss.

It must be noted that the grant of these petitions does not prevent the owners of the subject projects from protesting the valuations assigned by the Lancaster County Assessor. Nor is it an approval of the final valuation methodology utilized by the Lancaster

⁴⁰ Exhibit 1:10-11.

⁴¹ Exhibit 1:16-17; 1:22-23; 1:28-29; 1:34-35

County Assessor's office when determining assessed values for low-income properties for tax year 2023.

VI. CONCLUSION

The Commission finds that the County Board has shown 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.

For all of the reasons set forth above, the County Board's petitions are granted.

VII. ORDER

IT IS ORDERED THAT:

1. The petitions of the Lancaster County Board of Equalization requesting that the Lancaster County Assessor be allowed to utilize a different assessment methodology than that provided in Neb. Rev. Stat. § 77-1333 are granted.
2. This Decision and Order shall only be applicable to tax year 2023.

Signed and Sealed: March 16, 2023

SEAL



Robert W. Hotz, Commissioner

Steven A. Keetle, Commissioner

James D. Kuhn, Commissioner