

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

Village at Sidney, LP,  
Appellant,

v.

Cheyenne County Board of Equalization,  
Appellee.

Case No: 13C 103

Decision and Order Reversing the  
Determination of the Cheyenne County  
Board of Equalization

**For the Appellant:**

William E. Peters,  
Peters & Chunka, PC LLO,  
and  
Christopher A. Stafford,  
Fredrikson & Byron,  
Pro Hac Vice.

**For the Appellee:**

Paul Schaub,  
Cheyenne County Attorney.

This appeal was heard before Commissioners Robert W. Hotz and Nancy J. Salmon.

**I. THE SUBJECT PROPERTY**

The Subject Property is a commercial parcel located at 1200 Village Way, in the City of Sidney, Cheyenne County, Nebraska. The parcel is improved with rent-restricted housing that receives low-income housing tax credits (LIHTC). The legal description and property record card for the Subject Property are found at Exhibit 2.

**II. PROCEDURAL HISTORY**

The Cheyenne County Assessor (County Assessor) determined that the assessed value of the Subject Property was \$1,416,426 for tax year 2013. The Village at Sidney, LP (the Taxpayer) protested this assessment to the Cheyenne County Board of Equalization (the County Board) and requested an assessed valuation of \$650,000. The County Board determined that the taxable value for tax year 2013 was \$1,416,426.<sup>1</sup>

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<sup>1</sup> E1.

The Taxpayer appealed the decision of the County Board to the Tax Equalization and Review Commission (Commission). Prior to the hearing, the parties exchanged exhibits. The Commission held a hearing on June 2, 2014.

### III. STANDARD OF REVIEW

The Commission's review of the determination by a County Board of Equalization is de novo.<sup>2</sup> When the Commission considers an appeal of a decision of a County Board of Equalization, a presumption exists that the "board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action."<sup>3</sup>

That presumption remains until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence adduced on appeal to the contrary. From that point forward, the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon all the evidence presented. The burden of showing such valuation to be unreasonable rests upon the taxpayer on appeal from the action of the board.<sup>4</sup>

The order, decision, determination or action appealed from shall be affirmed unless evidence is adduced establishing that the order, decision, determination, or action was unreasonable or arbitrary.<sup>5</sup> Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.<sup>6</sup>

A Taxpayer must introduce competent evidence of actual value of the Subject Property in order to successfully claim that the Subject Property is overvalued.<sup>7</sup> The County Board need not put on any evidence to support its valuation of the property at issue unless the taxpayer establishes the Board's valuation was unreasonable or arbitrary.<sup>8</sup>

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<sup>2</sup> See, Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.), *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>3</sup> *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted).

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

<sup>5</sup> Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.).

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

<sup>7</sup> Cf. *Josten-Wilbert Vault Co. v. Board of Equalization 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 Equalization of York County*, 209 Neb. 465, 308 N.W.2d 515 (1981)(determination of equalized taxable value).

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

In an appeal, the commission “may determine any question raised in the proceeding upon which an order, decision, determination, or action appealed from is based. The commission may consider all questions necessary to determine taxable value of property as it hears an appeal or cross appeal.”<sup>9</sup> The commission may also “take notice of judicially cognizable facts 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>10</sup> The Commission’s Decision and Order shall include findings of fact and conclusions of law.<sup>11</sup>

#### IV. VALUATION

##### A. Law

Under Nebraska law,

[a]ctual value is the most probable price expressed in terms of money that a property will bring if exposed for sale in the open market, or in an arm’s length transaction, between a willing buyer and a willing seller, both of whom are knowledgeable concerning all the uses to which the real property is adapted and for which the real property is capable of being used. In analyzing the uses and restrictions applicable to real property the analysis shall include a full description of the physical characteristics of the real property and an identification of the property rights valued.<sup>12</sup>

“Actual value may be determined using professionally accepted mass appraisal methods, including, but not limited to, the (1) sales comparison approach using the guidelines in section 77-1371, (2) income approach, and (3) cost approach.”<sup>13</sup> “Actual value, market value, and fair market value mean exactly the same thing.”<sup>14</sup> Taxable value is the percentage of actual value subject to taxation as directed by section 77-201 of Nebraska Statutes and has the same meaning as assessed value.<sup>15</sup> All real property in Nebraska subject to taxation shall be assessed as of January 1.<sup>16</sup> All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.<sup>17</sup>

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<sup>9</sup> Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.).

<sup>10</sup> Neb. Rev. Stat. §77-5016(6) (2012 Cum. Supp.).

<sup>11</sup> Neb. Rev. Stat. §77-5018(1) (2012 Cum. Supp.).

<sup>12</sup> Neb. Rev. Stat. §77-112 (Reissue 2009).

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

<sup>14</sup> *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).

<sup>15</sup> Neb. Rev. Stat. §77-131 (Reissue 2009).

<sup>16</sup> See, Neb. Rev. Stat. §77-1301(1) (Reissue 2009).

<sup>17</sup> Neb. Rev. Stat. §77-201(1) (Reissue 2009).

Nebraska Statutes require county assessors to perform an income approach calculation for all rent-restricted housing projects<sup>18</sup> and prohibit county assessors from including as income in this calculation any tax credits received.<sup>19</sup> Such tax credits may be considered when determining the capitalization rate when capitalizing the income stream.<sup>20</sup> Rules and regulations adopted by the Nebraska Department of Revenue further establish procedures for determining the actual value of rent-restricted properties for ad valorem tax purposes.<sup>21</sup> Specifically, rent for rent-restricted units should not include the allowance for utilities.<sup>22</sup> Contract rent, economic rent or market rent, Fair Market Rent (FMR), and Maximum Restricted Rent, are terms of art in the assessment of rent-restricted property.<sup>23</sup>

Contract rent, also known as actual rent, is the rent actually received for the units at any given time.<sup>24</sup> Economic rent or market rent is the amount of rent a property would receive on the open market for non-restricted units.<sup>25</sup> FMR is a term that describes “the maximum rent allowed to be collected on housing units subject to federal subsidy payments.”<sup>26</sup> FMR is developed by the Department of Housing and Urban Development (HUD) for the Lincoln area, Omaha area, South Sioux City area, and then for any individual county not included in the preceding three areas.<sup>27</sup> FMR is published annually.<sup>28</sup> “Maximum restricted rent is the maximum rent allowed to be collected on housing units subject to the applicable restrictions.”<sup>29</sup> Maximum restricted rent may be different for each rent-restricted property, and depends upon the unique target levels contained in the land use restriction agreement (LURA) for each property and the median incomes published by HUD.<sup>30</sup>

Rules and Regulations promulgated by the Nebraska Department of Revenue contain instructions for use of the cost approach, sales comparison approach, and income approach when

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<sup>18</sup> See, Neb. Rev. Stat. §77-1333 (Reissue 2009). The requirement applies to projects where rent restrictions are allowed under Section 42 of the Internal Revenue Code and which have been approved by the Nebraska Investment Finance Authority (NIFA).

<sup>19</sup> See, Neb. Rev. Stat. §77-1333 (Reissue 2009).

<sup>20</sup> See, Neb. Rev. Stat. §77-1333 (Reissue 2009).

<sup>21</sup> See, 350 Neb. Admin. Code, Ch. 51 (3/09).

<sup>22</sup> See, 350 Neb. Admin. Code, Ch. 51 §002.01A(6) (3/09).

<sup>23</sup> See, 350 Neb. Admin. Code, Ch. 51 §002.01 E, F, G, and H (3/09).

<sup>24</sup> See, 350 Neb. Admin. Code, Ch. 51 §002.01 E; See also, 350 Neb. Admin. Code, Ch. 51 §004.06C (3/09).

<sup>25</sup> See, 350 Neb. Admin. Code, Ch. 51 §002.01 F; See also, 350 Neb. Admin. Code, Ch. 51 §004.06A (3/09).

<sup>26</sup> See, 350 Neb. Admin. Code, Ch. 51 §002.01 G (3/09).

<sup>27</sup> See, 350 Neb. Admin. Code, Ch. 51 §002.01 G (3/09).

<sup>28</sup> See, 350 Neb. Admin. Code, Ch. 51 §002.01 G (3/09).

<sup>29</sup> 350 Neb. Admin. Code, Ch. 51 §002.01 H (3/09); See also, 350 Neb. Admin. Code, Ch. 51 §004.06B (3/09).

<sup>30</sup> See, 350 Neb. Admin. Code, Ch. 51 §002.01 H (3/09); See also, 350 Neb. Admin. Code, Ch. 51 §004.06B (3/09).

valuing rent-restricted properties.<sup>31</sup> When an assessor or appraiser uses the income approach to value a rent-restricted property the potential gross income (PGI) should be calculated “using the lesser of market rent or the Maximum Restricted Rent[.]”<sup>32</sup> When determining the capitalization rate, the assessor or appraiser must consider the tax credits, rental rates, and restrictions using generally accepted appraisal methods.<sup>33</sup>

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

George Tesar, Jr., a Nebraska Certified General Appraiser,<sup>34</sup> conducted an appraisal and prepared an appraisal report for the Subject Property and asserted a final opinion of value of \$942,000.<sup>35</sup> Tesar performed both a sales comparison approach and an income approach.<sup>36</sup> Tesar testified that the Subject Property contained seven buildings; one building consisting of units with one bedroom and one bathroom, five buildings consisting of a mixture of two bedroom and three bedroom units, and a seventh building consisting of a manager’s apartment and other amenities for tenants. He indicated that there were 48 units rent-restricted under a LURA, and a 49<sup>th</sup> unit for use of the manager.<sup>37</sup> According to Tesar, the rent restriction for the Subject Property was applicable for 25 years with an option for another 15 years thereafter.

Tesar examined five sales in his sales comparison approach. Of the five sales, none were completely restricted by a LURA and only one, Comparable Sale No. 1, was partially subject to a rent restriction with one-half of the units restricted at the time of sale.<sup>38</sup> Comparable Sale No. 1 had previously been fully rent-restricted, but the owner opted out of the agreement after only two years and removed 50% of the units from the program. After only four years, the entire complex had been converted to market rents.

Tesar testified that he examined sales in Nebraska, Iowa, Missouri, Colorado, and South Dakota in his attempts to find arm’s length transactions of rent-restricted properties, but was unable to find any. Based upon his experience, he asserted that either people do not want to buy

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<sup>31</sup> See, 350 Neb. Admin. Code, Ch. 51 §005 (3/09).

<sup>32</sup> 350 Neb. Admin. Code, Ch. 51 §005.04A (3/09).

<sup>33</sup> 350 Neb. Admin. Code, Ch. 51 §005.04E (3/09).

<sup>34</sup> See, E16:81 (profession qualifications).

<sup>35</sup> See, *Id.* at 2.

<sup>36</sup> See, E16.

<sup>37</sup> See, E12 (LURA for the Subject Property).

<sup>38</sup> See, E16:68 (chart of alleged comparable properties).

rent-restricted properties or owners of rent-restricted properties do not want to sell them. Tesar utilized sales of non-restricted properties that consisted of residential complexes with multiple apartment buildings that were not located in the Omaha or Lincoln area. Tesar adjusted the sales for location, age, condition, size, and density.<sup>39</sup> Tesar's total adjustments were between -25% and -65%.<sup>40</sup> Tesar's final sales comparison approach opinion of value was \$912,000.<sup>41</sup>

Tesar asserted that under Rules and Regulations promulgated by the Nebraska Department of Revenue, when conducting an income approach for a rent-restricted property enrolled in an LIHTC program, the potential gross income (PGI) must be calculated by using the lesser of the market rents or the Maximum Restricted Rent.<sup>42</sup> Tesar asserted that in the case of the Subject Property, the Maximum Restricted Rent was less than the market rents. Tesar asserted that the Department's Rules and Regulations also required that when using the income approach that the utility allowance be subtracted from the Maximum Restricted Rent.<sup>43</sup>

Tesar utilized rents derived from what he called "Tax Credit Max Rents effective 12-18-2013 / Utility Allowances effective 07-01-2013, HOME Max Rents effective 04-2013 / HOME Income Limits effective 12-11-2012" to calculate the Maximum Allowable Rents given the current occupants of the Subject Property.<sup>44</sup> He concluded that the Maximum Allowable Rents were less than the market rents.<sup>45</sup> Tesar included the manager's unit as a rent-restricted unit.<sup>46</sup> He used a stabilized vacancy rate of 7.5%, based upon three years of the Subject Property's actual vacancy and collection loss rate.<sup>47</sup> He additionally used a stabilized expense ratio of 64.6%, based upon three years of the Subject Property's actual expenses, excluding property taxes.<sup>48</sup> Tesar derived a net operating income (NOI) of \$128,780.<sup>49</sup>

Tesar asserted that he took into account the rent restrictions and economic incentives associated with low-income housing tax credits when deriving his capitalization rate. Tesar

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<sup>39</sup> See, E16:68-71.

<sup>40</sup> See, E16:72.

<sup>41</sup> See, E16:72.

<sup>42</sup> See generally, 350 Neb. Admin. Code, Ch. 51 §002.01 E & F.

<sup>43</sup> 350 Neb. Admin. Code, Ch. 51 §002.01A(6).

<sup>44</sup> See, E16:92.

<sup>45</sup> See, E16:73 (showing use of Maximum Allowable Rents to calculate actual value).

<sup>46</sup> See, E16:92.

<sup>47</sup> See, E16:76.

<sup>48</sup> See, E16:76.

<sup>49</sup> See, E16:76.

concluded that the rent restrictions on the Subject Property increased the risk associated with the Subject Property more than the benefits derived from the program reduced the risk. He expressed that the positive qualities associated with an LIHTC property included the ability to sell tax credits and utilize the proceeds to increase the amount of equity in the property. He asserted that these incentives were outweighed by rent restrictions, lower quality tenants, higher management fees and maintenance costs, and the risk that while the owner waited thirty years for the rent restrictions to cease, the market for similar properties could change drastically.

Tesar determined his capitalization rate using the band of investment and direct market capitalization methods.<sup>50</sup> Data used in his band of investment method was not confined to rent-restricted properties and was derived from loan rates and equity rates from multiple markets including the Omaha market. Additionally, while Tesar testified that a benefit of rent-restricted properties was a lower loan ratio, his loan ratio was based on ratios derived from unrestricted properties. His base capitalization rate derived from the band of investment method was 11.75%, which he then loaded with an effective tax rate of 2.3234% for a final rounded capitalization rate of 14%.<sup>51</sup>

Tesar used the same five sales from his sales comparison approach to calculate the capitalization rate using the direct capitalization method.<sup>52</sup> A table of the derived capitalization rates for the alleged comparable properties appears at Exhibit 16, page 77. Comparable Sale No. 1, the partially rent-restricted property, had a derived capitalization rate of 9.21%.<sup>53</sup> The derived capitalization of all five sales ranged from 8.00% to 10.78%.<sup>54</sup> Comparable Sale No. 2 had a derived capitalization rate of 10.78%, more than 1% higher than any other sale.<sup>55</sup> Tesar determined that the applicable loaded capitalization rate derived from the direct capitalization method was 13.30%.<sup>56</sup>

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<sup>50</sup> See, E16:76-77.

<sup>51</sup> See, E16:76.

<sup>52</sup> See, E16:77.

<sup>53</sup> See, E16:77.

<sup>54</sup> See, E16:77.

<sup>55</sup> See, E16:77.

<sup>56</sup> See, E16:77.

Tesar reconciled his band of investment derived capitalization rate and his capitalization rate derived from the direct capitalization method to a final rounded capitalization rate of 13.75%.<sup>57</sup> Tesar's direct capitalization income approach opinion of value was \$930,000.<sup>58</sup>

Tesar also performed an effective gross income multiplier method, where the effective gross income multiplier (EGIM) was derived from the same five sales utilized in the sales comparison approach.<sup>59</sup> Tesar's effective gross income multiplier method derived an opinion of actual value of the Subject Property of \$1,014,500.<sup>60</sup>

Tesar stated that his reconciled opinion of value derived from his various income approaches for the Subject Property was \$972,000.<sup>61</sup> Tesar testified that he gave equal weight to both his \$972,000 reconciled income approach opinion of value and his \$912,000 sales comparison approach opinion of value to derive a final reconciled opinion of the actual value of the Subject Property of \$942,000.<sup>62</sup>

On cross examination, Tesar testified that he had not examined the LURA for the Subject Property at any point of the appraisal process, that he did not conduct any independent analysis of the HUD-approved rents for the units at the Subject Property, that he was unaware of the amount of tax credits received by the owners of the Subject Property, that he could not quantify the impact of the tax credits on the capitalization rate although he did testify that he took them into account, and that in all of his appraisal experience he had appraised only one rent-restricted property besides the Subject Property. The Commission further notes that no property record cards for Tesar's alleged comparable properties were ever submitted into evidence.

Louella Pippitt, Cheyenne County Assessor, testified that she valued the Subject Property using the income approach.<sup>63</sup> Pippitt inspected the Subject Property in 2012 and examined the interior of two different apartments. She testified that there were 49 units on the Subject Property, including a unit used by the manager, but which could be rented out at market rent.

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<sup>57</sup> See, E16:77.

<sup>58</sup> See, E16:77.

<sup>59</sup> See, E16:78.

<sup>60</sup> See, E16:79.

<sup>61</sup> See, E16:79.

<sup>62</sup> See, E16:80.

<sup>63</sup> See, E3:2.

Pippitt referred to an audit report and statements from the Taxpayer as of 2006 to support this position.

Pippitt indicated that she obtained information for her income approach from the Taxpayer's income expense report submitted to the County.<sup>64</sup> Pippitt used market rental rates instead of contract or Maximum Restricted Rents.<sup>65</sup> Pippitt acknowledged that the market rental rate was greater than the contract rental rate. She additionally acknowledged that she incorrectly included Section 8 subsidies as miscellaneous income when using market rents in the income approach. The undisputed testimony at the hearing indicated that the Section 8 subsidies received by the Subject Property do not constitute additional income, but indicate that part of the rent that is paid by the federal government. Pippitt derived a 3% vacancy and collection loss rate from census information, but did not perform a separate analysis on the vacancy and collection loss rate for rent-restricted property.<sup>66</sup> Pippitt applied the vacancy and collection loss to the miscellaneous income as well as income from rental rates.<sup>67</sup> Pippitt acknowledged in her testimony that the vacancy and collection loss rate should not be applied to the miscellaneous income. She obtained an expense ratio of 64% from the market, and determined her loaded capitalization rate of 12% through a band of investment method not in the record.<sup>68</sup>

In an attempt to offer a corrected opinion of value during cross examination, Pippitt subtracted the \$59,060 for the Section 8 subsidies from the NOI and then applied her 12% capitalization rate to derive a new opinion of value of \$924,258.

### **C. Analysis**

During appeals from a determination of the County Board, there is both a presumption in favor of the County Board and a burden of persuasion placed upon an appealing party.<sup>69</sup> The presumption in favor of the County Board, and the burden of persuasion cannot be conflated, and

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<sup>64</sup> See, E10.

<sup>65</sup> See, E3:2.

<sup>66</sup> See, E3:2.

<sup>67</sup> See, E3:2.

<sup>68</sup> See, E3:2.

<sup>69</sup> See generally, *JQH La Vista Conference Center Development LLC v. Sarpy Cty. Bd. Of Equal.*, 285 Neb. 120, 825 N.W.2d 447 (2013).

require separate analysis.<sup>70</sup> Both the presumption and burden of persuasion relate to the determinations of the County Board.<sup>71</sup>

The presumption is:

[T]hat a board of equalization has faithfully preformed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action. 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.<sup>72</sup>

Competent evidence is defined as relevant and material evidence or that evidence “which the very nature of the thing to be proven requires.”<sup>73</sup> The Nebraska Supreme Court has held that, “when an independent appraiser using professionally approved methods of mass appraisal certifies that an appraisal was performed according to professional standards, the appraisal is considered competent evidence under Nebraska law.”<sup>74</sup>

Tesar conducted an appraisal of the Subject Property and certified that it was performed according to professional appraisal standards.<sup>75</sup> The Commission finds that the appraisal constitutes competent and relevant evidence concerning the County Board’s determinations. The Commission, therefore, finds that the presumption in favor of the County Board’s determination is rebutted.

Having determined that the presumption in favor of the County Board’s determination is rebutted, the reasonableness of the County Board’s determination of value based upon the evidence in the appeals is a question of fact.<sup>76</sup> The Taxpayer has the burden to show that the valuation determination by the County Board was unreasonable or arbitrary.<sup>77</sup> This burden is

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<sup>70</sup> See, *JQH La Vista Conference Center Development LLC v. Sarpy Cty. Bd. Of Equal.*, 285 Neb. 120, 125-126, 825 N.W.2d 447, 452-453 (2013).

<sup>71</sup> See generally, *JQH La Vista Conference Center Development LLC v. Sarpy Cty. Bd. Of Equal.*, 285 Neb. 120, 125-126, 825 N.W.2d 447, 452-453 (2013).

<sup>72</sup> See, *JQH La Vista Conference Center Development LLC v. Sarpy Cty. Bd. Of Equal.*, 285 Neb. 120, 124, 825 N.W.2d 447, 451-452 (2013) (citing *US Ecology v. Boyd Cty. Bd of Equal.*, 256 Neb. 7, 588 N.W.2d 575 (1999) and *Schmidt v. Thayer Cty. Bd. Of Equal.*, 10 Neb.App. 10, 624 N.W.2d 63 (2001)).

<sup>73</sup> *Black’s Law Dictionary 6th Edition*, West Group, p. 284 (1990).

<sup>74</sup> *JQH La Vista Conference Center Development LLC v. Sarpy Cty. Bd. Of Equal.*, 285 Neb. 120, 126, 825 N.W.2d 447, 453 (2013) (citations omitted).

<sup>75</sup> See generally, E16.

<sup>76</sup> See, Neb. Rev. Stat. 77-5016(9) (Cum. Supp. 2012); See also, *JQH La Vista Conference Center Development LLC v. Sarpy Cty. Bd. Of Equal.*, 285 Neb. 120, 124-125, 825 N.W.2d 447, 451-452 (2013).

<sup>77</sup> See, Neb. Rev. Stat. 77-5016(9) (Cum. Supp. 2012); See also, *JQH La Vista Conference Center Development LLC v. Sarpy Cty. Bd. Of Equal.*, 285 Neb. 120, 124-125, 825 N.W.2d 447, 451-452 (2013).

only met by clear and convincing evidence.<sup>78</sup> Where clear and convincing evidence shows that the County Board's determination was arbitrary or unreasonable, the Taxpayer is entitled to relief.<sup>79</sup>

The Taxpayer asserted, and the County Assessor concurred, that the County Assessor, when calculating her opinion of actual value based on the income approach, incorrectly included \$59,060 received from Section 8 subsidies as miscellaneous income and did not discount the rental rate.<sup>80</sup> The result was a double count of \$59,060 attributable to the Subject Property.<sup>81</sup> Additionally, the County Assessor, in her income worksheet, incorrectly applied the vacancy and collection loss rate not only to the PGI, but also to the miscellaneous income.<sup>82</sup> The items of miscellaneous income were derived from actual reported income for the Subject Property.<sup>83</sup> The effect of vacancy and collection loss was, therefore, already accounted for in the actual miscellaneous income.

The Commission finds that there is clear and convincing evidence that the County Board's determination, which relied upon the County Assessor's opinion of value, is arbitrary or unreasonable. The only issue left for the Commission is the actual value of the Subject Property based upon the evidence presented to it.

The Commission finds that the County Assessor's corrected income approach as presented in the hearing is also erroneous. The parties asserted that if the PGI was corrected so that a double count of the Section 8 subsidies did not occur, then the County Assessor's income approach value would be \$924,258, less than the Taxpayer's asserted \$942,000.<sup>84</sup> However, the County Assessor used percentages obtained from the market to determine the vacancy and collection loss and expenses.<sup>85</sup> When calculating the actual value of the Subject Property using a corrected County Assessor's income approach, the parties did not recalculate the vacancy and collection loss or expenses. Instead, the parties used the figures that were calculated using a PGI which

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<sup>78</sup> See, *JQH La Vista Conference Center Development LLC v. Sarpy Cty. Bd. Of Equal.*, 285 Neb. 120, 124-125, 825 N.W.2d 447, 451-452 (2013).

<sup>79</sup> Neb. Rev. Stat. § 5016(8) (Reissue 2009).

<sup>80</sup> See, E10:2.

<sup>81</sup> *Id.*

<sup>82</sup> See, E10:2; See also, Appraisal Institute, *The Appraisal of Real Estate*, at 483 (13th ed. 2008) (stating that a determination must be made as to whether items of misc. income are subject to vacancy and collection loss rates).

<sup>83</sup> See, E10:2.

<sup>84</sup> See, E16:2 (Taxpayer's appraisal final opinion of value).

<sup>85</sup> See, E3:2.

included a double count of the Section 8 subsidies. Additionally, both the parties again incorrectly applied the vacancy and collection loss rate not only to the PGI, but also to the miscellaneous income. The parties' calculation of the corrected County Assessor's income approach was as follows:

$$\begin{array}{r}
 \$427,687 \text{ (PGI plus misc. income without double count)} \\
 \underline{-\$14,602 \text{ (Vacancy \& Collection Loss equaling 3\% of the PGI with the double count)}} \\
 \$413,085 \text{ (EGI)} \\
 \\
 \underline{-\$302,174 \text{ (Expenses equaling 64\% of the PGI with the double count)}} \\
 \$110,911 \text{ (NOI)} \\
 \\
 \underline{\$110,911 \text{ (NOI)} / .12 \text{ (Cap Rate)}} = \mathbf{\$924,258 \text{ (Actual Value)}}
 \end{array}$$

As discussed above, this calculation is flawed. The County Assessor's income approach after correction of the double count of Section 8 subsidies and application of the vacancy and collection loss to miscellaneous income is shown below:

$$\begin{array}{r}
 \$417,480 \text{ (PGI)} \\
 \underline{-\$12,524 \text{ (Vacancy \& Collection Loss)}^{86}} \\
 \underline{+\$10,207 \text{ (Misc. Income)}^{87}} \\
 \$415,163 \text{ (EGI)} \\
 \\
 \$415,163 \text{ (EGI)} \\
 \underline{-\$265,704 \text{ (Expenses)}^{88}} \\
 \$149,459 \text{ (NOI)} \\
 \\
 \underline{\$149,459 \text{ (NOI)} / .12 \text{ (Cap Rate)}} = \mathbf{\$1,245,492 \text{ (Actual Value)}} \\
 \underline{.12 \text{ (Cap Rate)}^{89}}
 \end{array}$$

The Commission also finds that Tesar's opinion of value is erroneous. Tesar's appraisal relied on maximum rents given the current configuration of the tenants, referred to as the Maximum Allowable Rents,<sup>90</sup> instead of the Maximum Restricted Rents.<sup>91</sup>

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<sup>86</sup> Based on a 3% vacancy and collection loss as determined by the County Assessor and rounded to the nearest whole number. See, E3:2. \$417,480 x .03 = \$12,524.4.

<sup>87</sup> See, E3:2; See also, E10:2.

<sup>88</sup> Based on a 64% expense ratio as determined by the County Assessor and rounded to the nearest whole number. See, E3:2. \$415,163 x .64 = \$265,704.32.

<sup>89</sup> Based on a 12% capitalization rate as determined by the County Assessor. See, E3:2.

<sup>90</sup> See, *Id.*

<sup>91</sup> See, E16:73.

Maximum Restricted Rent is defined as, “[T]he maximum rent allowed to be collected on housing units subject to the applicable restriction.”<sup>92</sup> When an assessor or appraiser uses the income approach to value a rent-restricted property, the PGI should be calculated “using the lesser of market rent or the Maximum Restricted Rent[.]”<sup>93</sup> The Taxpayer submitted evidence of the Maximum Allowable Rents given the current configuration of lessees, but a different configuration of tenants could result in higher Maximum Restricted Rents.<sup>94</sup> Based on the LURA for the Subject Property, the maximum rent configuration would be that configuration that results in 48 units being rented with an average overall rental rate determined affordable at 46.13% and 1 unit (the manager’s unit) rented at market rent.<sup>95</sup> This results in a PGI of \$385,667.<sup>96</sup>

Additionally, Tesar’s capitalization rate was calculated based on sales that are not comparable to the Subject Property. In all of his approaches, Tesar used sales of apartment buildings without rent restrictions. Only Comparable Sale No. 1 was subject to any rent restrictions at the time of sale. However, Tesar gave the same weight to the data from the partially restricted property as any other property. The problem appears obvious, when calculating the capitalization rate using a direct capitalization method the derived capitalization rate for Comparable Sale No. 1 was 9.21%.<sup>97</sup> Tesar derived a base capitalization rate of 11.00%, higher than any of the alleged comparable sales.<sup>98</sup> Tesar attempted to support this rate with a band of investment formula.<sup>99</sup> However, his band of investment formula relied upon the typical

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<sup>92</sup> 350 Neb. Admin. Code, ch. 51 §002.01H.

<sup>93</sup> 350 Neb. Admin. Code, Ch. 51 §005.04A.

<sup>94</sup> See, E16:92 (Maximum Allowable Rents given current configuration of tenants); See also, E12:3 (LURA summary page indicating that overall rents must be affordable at or below 46.13% of the applicable area median income).

<sup>95</sup> See, E12:3.

<sup>96</sup> The 100% rents are calculated by using the 45% and 50% rents as provided by the Taxpayer in E16:92 as follows: 8 one bedroom units with a rental rate of \$1,320 at 100% of affordable rent as determined by federal government = \$10,560 per month. 20 two bedroom units with a rental rate of \$1,584 at 100% of affordable rent as determined by federal government = \$31,680 per month. 20 three bedroom units with a rental rate of \$1,830 at 100% of affordable rent as determined by federal government = \$36,600 per month. \$10,560 + \$31,680 + \$36,600 = \$78,840 total per month rents at 100% of affordability as established by the federal government. \$78,840 x 12 month = \$946,080 annual rents affordable at 100%. \$946,080 x .4613 restricted rent rate as stated in the LURA at E12:3 = \$436,427 Maximum Restricted Rent plus utility allowance. \$436,427 - \$59,280 (utility allowance) = \$377,147 annual Maximum Restricted Rent + \$710 manager’s apartment x 12 months = \$385,667 (PGI).

In this calculation the Utility Allowance is based on the number of units and allowances contained in the Taxpayer’s Appraisal report. See, E16:92. The \$710 for the manager’s unit was derived by the County Assessor. See, E3:2. The County Assessor testified that this rent is actually her determination of the average allowed net rents for a unit in the Subject Property. The Taxpayer stated that actual rent collected for the Manager’s unit is \$621.<sup>96</sup> However, the actual rent is not a good indicator of market value because testimony indicated that the rent for the manager is reduced as part of his work benefits.

<sup>97</sup> See, E16:77.

<sup>98</sup> See, E16:77.

<sup>99</sup> See, E16:76.

equity distribution of non-restricted properties.<sup>100</sup> Tesar asserted that investors in rent- restricted properties often use the money garnered from the sale of tax credits to increase the equity in the property. Additionally, Tesar’s computation of the mortgage constant is not based on comparable properties.

Pippitt asserted that she took into account the tax credits in her 12% capitalization rate.<sup>101</sup> While she did not provide specific evidence of the computation of this factor, the only evidence that her capitalization rate is incorrect is Tesar’s approach which is inherently flawed. If Tesar’s direct capitalization approach were adjusted to give Comparable Sale No. 1 more weight, then the calculation would support Pippitt’s 12% capitalization rate.

Given the forgoing, the Commission determines that the actual value of the Subject Property is not demonstrated by either Pippitt’s or Tesar’s final opinion of value. However, the Commission determines that sufficient evidence is available in the record to correctly calculate the actual value of the Subject Property for tax year 2013.

The Commission determines that the actual value of the Subject Property is calculated as follows:

$$\begin{array}{r}
 \$377,147 \text{ (Rent from Restricted Units)}^{102} \\
 + \$8,520 \text{ (Rent from Manager's Unit)}^{103} \\
 - \$11,570 \text{ (vacancy and collection loss)}^{104} \\
 \underline{+\$10,207 \text{ (Misc. Income)}}^{105} \\
 \$384,304 \text{ (EGI)} \\
 \\
 \$384,304 \text{ (EGI)} \\
 - \underline{\$245,955 \text{ (Expenses)}}^{106} \\
 \$138,349 \text{ (NOI)} \\
 \\
 \frac{\$138,349 \text{ (NOI)}}{.12 \text{ (Cap Rate)}}^{107} \div .12 \text{ (Cap Rate)} = \mathbf{\$1,152,908 \text{ (Actual Value)}}
 \end{array}$$

<sup>100</sup> See, *Id.*

<sup>101</sup> See, E3:2 (indicating a 12% cap rate).

<sup>102</sup> See *infra*, footnote 93.

<sup>103</sup> See *infra*, footnote 93.

<sup>104</sup>  $\$385,667 \times .03$  (market vacancy and collection loss rent E3:2) = \$11,570.01 rounded to \$11,570.

<sup>105</sup> See, E3:2; See also E10:2.

<sup>106</sup>  $\$384,304 \text{ (EGI)} \times .64$  (market derived expense ratio E3:2) = \$245,954.56 rounded to \$245,955.

<sup>107</sup> See, E3:2.

## V. CONCLUSION

The Commission finds that there is competent evidence to rebut the presumption that the County Board faithfully performed its duties and had sufficient competent evidence to make its determination. The Commission also finds that there is clear and convincing evidence that the County Board's decision was arbitrary or unreasonable.

For all of the reasons set forth above, the decision of the County Board is vacated and reversed.

## VI. ORDER

IT IS ORDERED THAT:

1. The decision of the Cheyenne County Board of Equalization determining the value of the Subject Property for tax year 2013 is vacated and reversed.<sup>108</sup>
2. The assessed value of the Subject Property for tax year 2013 is \$1,152,908.
3. This Decision and Order, if no appeal is timely filed, shall be certified to the Cheyenne County Treasurer and the Cheyenne County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (2012 Cum. Supp.).
4. Any request for relief, by any party, which is not specifically provided for by this Decision and Order is denied.
5. Each party is to bear its own costs in this proceeding.
6. This Decision and Order shall only be applicable to tax year 2013.

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<sup>108</sup> Assessed 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 at the protest proceeding.

7. This Decision and Order is effective for purposes of appeal on August 19, 2014.

Signed and Sealed: August 19, 2014

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Robert W. Hotz, Commissioner

SEAL

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Nancy J. Salmon, Commissioner

Appeals from any decision of the Commission must satisfy the requirements of Neb. Rev. Stat. §77-5019 (2012 Cum. Supp.) and other provisions of Nebraska Statutes and Court Rules.