

IN THE SUPREME COURT OF OHIO

15-1813

EAST COLLEGE STREET LLC,)
Appellant,)
-vs-)
LORAIN COUNTY BOARD OF REVISION,)
THE LORAIN COUNTY AUDITOR,)
OBERLIN CITY SCHOOLS BOARD OF)
EDUCATION AND TAX COMMISSIONER)
OF OHIO)
Appellees.)

CASE NO.

Appeal from the Ohio Board of Tax Appeals

Board of Tax Appeals Case Nos.
2014-4339 thru 2014-4345

NOTICE OF APPEAL OF EAST COLLEGE STREET LLC

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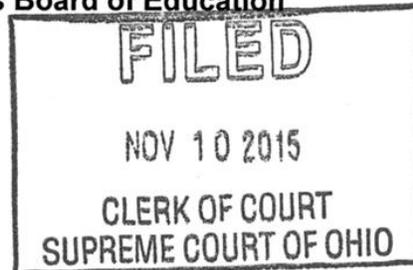
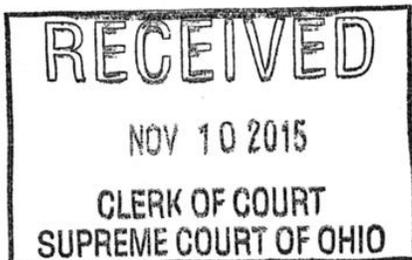
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NOTICE OF APPEAL

Appellant East College Street LLC hereby gives notice of its appeal as of right under R.C. 5717.04 to the Supreme Court of Ohio from a Decision and Order of the Board of Tax Appeals journalized in Case Nos. 2014-4339 through 2014-4345 on October 13, 2015. A true copy of the Decision and Order of the Board being appealed is attached hereto as Exhibit A and incorporated herein by reference. Appellant hereby complains of the following errors in the Decision and Order of the Board of Tax Appeals:

1. The Board of Tax Appeals abused its discretion when it found that the Property Owner failed to establish that an out-of-state witness' inability to attend the Board of Revision hearing due to a scheduling conflict was not good cause, and, as a result, its decision and order is unreasonable and unlawful.
2. The Board of Tax Appeals' decision and order is unreasonable and unlawful since the Board of Tax Appeals unilaterally removed the case from the small claims docket to the general docket after conducting a hearing in the small claims matter during which Ben Ezinga—one of the three owners—testified on behalf of the Property Owner. Prior to the small claims hearing, the parties had extensively briefed whether the subject properties were eligible for participation in the small claims division. The Board of Tax Appeals ruled that they were properly in the small claims docket. However, after reversing itself on the issue, the Board of Tax Appeals unlawfully and unreasonably failed to acknowledge Mr. Ezinga's participation and testimony in the small claims process in its decision related to the whether the Property Owner "showed good cause."
3. The Board of Tax Appeals' decision and order is unreasonable and unlawful since the Board of Tax Appeals abused its discretion when it declined to consider the Property Owner's competent, probative and credible testimony at the Board of Tax Appeals merit hearing.
4. The Board of Tax Appeals abused its discretion when it heard but did not consider the Property Owner's testimony at the merit hearing, and, as a result, its decision and order is unreasonable and unlawful.
5. The Board of Tax Appeals' decision and order is unreasonable and unlawful since the Board of Tax Appeals ignored the Property Owner's appraisal witness' competent, probative and credible testimony on value at the Board of Tax Appeals merit hearing.

6. The Board of Tax Appeals' decision and order is unreasonable and unlawful since the only reason "there is no evidence in the record" is because the Board of Tax Appeals unreasonably and unlawfully excluded competent, probative and credible evidence and testimony at the Board of Tax Appeals merit hearing.
7. The Board of Tax Appeals' decision and order is unreasonable and unlawful since the Property Owner authenticated and verified the Developer's Agreement, which was properly contained in the statutory transcript on appeal.
8. The Board of Tax Appeals' decision and order is unreasonable and unlawful as it is against the manifest weight of the evidence.
9. The Board of Tax Appeals' decision and order is unreasonable and unlawful as it states in its decision that the Developer's Agreement will not be considered as evidence but then expressly relies on the Developer's Agreement to reach its holding.
10. The Board of Tax Appeals' decision and order is unreasonable and unlawful since the Board of Tax Appeals misinterprets and/or misapplies R.C. 5311.11, which states that condominium units are to be given distinct parcel numbers and individually taxed. Nothing in the Property Owner's appraiser's report or testimony conflicts with R.C. 5311.11. Further, the Board of Tax Appeals erred in not considering *Woda Ivy Glen Ltd. P'ship v. Fayette Cty. Bd. of Revision*, 121 Ohio St.3d 175, 2009-Ohio-762 where individual parcels each containing one, single-family low income tax credit rental home were appraised as one economic unit.
11. The Board of Tax Appeals' decision and order is unreasonable and unlawful since it retains the County Auditor's value when such value was arrived at using the cost approach to value. Established Ohio case law has ruled that the cost approach to value is not a valid method of valuing affordable housing properties.
12. Since the subject parcels are affordable restricted rental units with long-term governmental rent and income restrictions, the Board of Tax Appeals erred in determining that higher market rents should have been utilized in contravention of Ohio law.
13. The Board of Tax Appeals unreasonably and unlawfully relied on David Ross' testimony relating to the low income tax credit program when it was demonstrated on cross-examination that he lacked the knowledge and expertise to discuss the differences in affordable housing programs.
14. The Board of Tax Appeals' decision violates the Property Owner's right to due process under the Ohio and U.S. Constitution and, as a result, is unreasonable and unlawful.

15. The Board of Tax Appeals unreasonably and unlawfully failed to value the subject parcels at their true value in money as required by the Ohio Constitution and case law.
16. The Board of Tax Appeals' decision results in an unlawful taking of property under the Ohio and U.S. Constitution and, as a result, is unreasonable and unlawful.

Appellant requests that the Court vacate the Board of Tax Appeals' decision and order the Board of Tax Appeals to consider Ms. Sabel's testimony and the testimony and appraisal of Richard G. Racek, Jr. MAI in determining the subject property's true values of the subject parcels.

Respectfully submitted,



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PROOF OF SERVICE

I hereby certify that a copy of this Notice of Appeal was sent this 9th day of November, 2015
by certified mail, return receipt requested to:

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OHIO BOARD OF TAX APPEALS

EAST COLLEGE STREET LLC, (et. al.),

CASE NO(S). 2014-4339, 2014-4340, 2014-4341,
2014-4342, 2014-4343, 2014-4344, 2014-4345

Appellant(s),

vs.

(REAL PROPERTY TAX)

LORAIN COUNTY BOARD OF REVISION, (et.
al.),

DECISION AND ORDER

Appellee(s).

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Entered Tuesday, October 13, 2015

Mr. Williamson, Ms. Clements, and Mr. Harbarger concur.

Appellant appeals decisions of the board of revision ("BOR") which determined the value of the subject real property, parcel numbers 09-00-086-711-010, 09-00-086-711-024, 09-00-086-711-025, 09-00-086-711-026, 09-00-086-711-027, 09-00-086-711-031, and 09-00-086-711-035 for tax year 2013. These consolidated matters are now considered upon the notices of appeal, transcripts certified by the BOR pursuant to R.C. 5717.01 ("S.T."), the record of hearing before this board ("H.R."), and any written argument submitted by the parties. In addition, the owner's renewed objection to the assignment of these matters to the regular docket, which was made through its post hearing brief, is construed by this board as a motion for reconsideration. Upon consideration, the owner's motion is not well taken, and is hereby denied. See *Matthews v. Matthews* (1981), 5 Ohio App. 3d 140.

The subjects' total true values were initially assessed at \$153,940; \$143,940; \$143,940; \$144,020; \$145,760; \$225,920; and \$147,880, respectively. Decrease complaints were filed with the BOR seeking reductions in values, in each instance, to \$55,000, which amount was amended to \$35,000 at the BOR's hearing, to conform with the appraisal evidence. In each instance, a counter complaint was filed on behalf of the Oberlin City Schools Board of Education ("BOE") requesting to maintain the initially assessed valuation.

The subject parcels are part of a larger mixed-use development project which is "comprise[d of] two, four-story elevator apartment buildings. The basement level contains a parking garage, the first floor comprises street-level commercial and retail space, while the upper two floors have been built as residential condominium units. The buildings contain an approximate combined total of 61,190 of gross building area that were constructed in 2009 and completed in July 2010. *** [T]here are a total of 33 residential condominium units" of which, only seven units are at issue in these appeals. S.T., Ex. F-1 at 20.

At the hearing before the BOR all parties were represented by counsel. In support of the requested decrease, counsel for the property owner offered the appraisal and testimony of Richard G. Racek, Jr., MAI, a state-certified general real estate appraiser in Ohio. Notably, the appraisal report contains several "additional special assumptions." Of particular importance is number three:

"The subject property is currently operated as a rent restricted apartment complex. The contract rents which are in place may not reflect fair market rent based upon market conditions. When this is the case, the Ohio Supreme Court ruled in *Woda Ivy Glen Limited Partnership v. Fayette County Board of Revision* [121 Ohio St.3d 175, 2009-Ohio-762] that these types of properties should be valued based upon their income generating capabilities subject to the contract rent. This decision was further affirmed by the Ohio Board of Tax Appeals in the case identified as *West Lafayette Townhomes, L.P. v. Coshocton County Board of Revision* [(Nov. 8, 2011), BTA Nos. 2008-Q-953, 2010-Q-1237, unreported] and *Pershing House Limited v. Fairfield County Board of Revision* [(May 8, 2012), BTA No. 2009-K-1134, unreported] that the best way of determining a value for a Low Income Housing Tax Credit project is by utilizing an Income Approach." S.T., F-1 at 11.

Based upon this determination, Mr. Racek valued the property using only the income approach to value, and using only the subjects' actual, rather than market, rents, to determine a total fair market value of \$245,000, or \$35,000 per unit, as of January 1, 2013.

There was no testimony before the BOR from any member of the property owner to explain circumstances relating to the subject property, such as agreements, financing, actual programs the owner participates in, or any restrictions imposed. Furthermore, Mr. Racek appeared unable to substantiate his inclusion of the third additional special assumption when questioned by BOR members, e.g., the type or source of the alleged rent restriction(s). S.T., Ex. E. When asked how tenants are "screened" or "picked," how rental rates are determined, and who determines rental rates, Mr. Racek stated that the owner sets the rental rate, but also stated that he did not know how tenants were screened or how rental rates were determined; in fact, Mr. Racek indicated that such questions were questions for the ownership. *Id.*

We acknowledge counsel for the owner attempted to provide explanation to the BOR, in support of Mr. Racek's third assumption, and stated, for example, "to finance the deal there were multiple layers of financing and as part of the deal, I believe the city entered into an agreement with the property owner for their line on financing and these seven units would be rented out at a restricted affordable basis, so that's where the *Woda Ivy Glen [Ltd. Partnership v. Fayette Cty. Bd. of Revision, 121 Ohio St.3d 175, 2009-Ohio-762]**** and *Pine Grove [Apartments v. Athens Cty. Bd. of Revision (Jan. 29, 2013), BTA No.*

2009-Y-1584, unreported] case law flows into here. *** These seven units are government restricted affordable housing." Id. Moreover, counsel also stated "the City set the affordable rent guidelines," and that "the application process would obviously have to confirm income and verify that income and if they fall within the/under the criteria they can't make too much or they can afford market rent they should be given the benefit of an affordable unit. They cannot make to little where it would be the rent would be too large of a percent of their income." S.T. Ex. E. Nevertheless, we are mindful that there was no sworn testimony of any witness regarding any specific circumstances, agreements, financing, or restrictions imposed, before the tribunal, only the statements of counsel. It is well established that statements of counsel are not evidence. *Corporate Exchange Bldgs. IV & V, L.P. v. Franklin Cty. Bd. of Revision* (1998), 82 Ohio St.3d 297, 299. See, also, *Hardy v. Delaware Cty. Bd. of Revision*, 106 Ohio St.3d 359, 2005-Ohio-5319, at ¶13, (discussing adverse consequences which may result from a party's failure to present witness testimony before the board and electing instead to rely upon documentary exhibits discussed by counsel).

Subsequent to the BOR's hearing, and pursuant to the BOR's request, the property owner submitted additional information to the BOR; specifically, the owner provided a "Development Agreement entered into between the City of Oberlin, Ohio and Sustainable Community Associates Ltd." (an entity sharing common ownership with the appellant), and "[v]arious documentation from Richard G. Racek, Jr." S.T., Ex. F-2 at 2. Notably, despite the fact that the owner did not provide and authenticate the Development Agreement to the BOR during its hearing, through written legal argument submitted to this board, it appears that the owner relies upon Section 2 of the agreement, entitled "Affordable Housing," in support of its contention that rental rates are restricted and to substantiate the appraiser's assumption number three, i.e., that the subject property should be valued according to the court's holding *Woda Ivy Glen*. Section two of the Development Agreement states, in relevant part:

"At least 20% of the residential units constructed shall be sold or leased to qualify as affordable housing, according to the Department of Housing and Urban Development ["HUD"] standards regarding family income and maximum rents in effect for the City as of the date of occupancy *** [for] a period of at least ten (10) years." S.T., F-2 at Development Agreement at 3.

However, as aptly pointed out by the county appellees, "[a]ffordable housing is a relative term, based on the cost of housing compared to the household income. The Developer's Agreement for the subject uses an affordability standard rather than a low income standard. There are various definitions of 'affordable housing' but HUD employs a 30% of household income figure as an affordability test. 'Affordable Housing: In general, housing for which the occupant(s) is/are paying no more than 30% of his or her income for gross housing costs, including utilities.'" County Appellees' Post-Hearing Brief at 7-8 (citing HUD Glossary at www.huduser.org/portal/glossary_a.html).

Upon consideration of the information available to it, the BOR decided not rely upon the owner's appraisal evidence and instead, issued decisions maintaining each parcel's initially assessed valuation, with one exception, relating to parcel number 09-00-086-711-031, the value of which was reduced to \$144,460, due to a "clerical error" relating to square footage. S.T., Exs. E, G. Dissatisfied with the decisions, the property owner appealed to this board.

At this board's hearing, the owner again presented the report and testimony of Mr. Racek, and the testimony of Naomi Sabel, a member of the owner. The county appellees presented the testimony of David Ross, MAI, who testified generally about the appraisal of low income housing properties. Mr. Ross highlighted the differences in the restrictions imposed on LIHTC properties and those apparently imposed on the subject through the Development Agreement.

When cases are appealed from a board of revision to this board, an appellant must prove the adjustment in value requested. See, e.g., *Shinkle v. Ashtabula Cty. Bd. of Revision*, 135 Ohio St.3d 227, 2013-Ohio-397.

As the Supreme Court of Ohio has consistently held, “[t]he best method of determining value, when such information is available, is an actual sale of such property between one who is willing to sell but not compelled to do so and one who is willing to buy but not compelled to do so. *** However, such information is not usually available, and thus an appraisal becomes necessary.” *State ex rel. Park Invest. Co. v. Bd. of Tax Appeals* (1964), 175 Ohio St. 410. See, also, Justice Pfeifer’s concurrence in *LTC Properties, Inc. v. Licking Cty. Bd. of Revision*, 133 Ohio St.3d 111, 2012-Ohio-3930. Furthermore, the Supreme Court has held once competent and probative evidence of true value has been presented by an appealing party, any opposing parties then has a corresponding burden of providing evidence which rebuts appellant’s evidence of value. *Cleveland Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (1994), 68 Ohio St.3d 336; *Mentor Exempted Village Bd. of Edn. v. Lake Cty. Bd. of Revision* (1988), 37 Ohio St.3d 318, 319.

Initially, we address the county appellees’ objection, levied at the hearing before this board and renewed through written legal argument, relating to the testimony of Ms. Sabel. The county argues that since the witness did not testify before the BOR, she should be excluded from testifying before this board because no good cause has been shown for the lack of her testimony before the BOR, as is required by R.C. 5715.19(G). In contrast, counsel for the property owner argues that an owner was disclosed to the BOR and further, that an owner of the property was previously disclosed for, and participated in, a small claims telephone conference before this board. H.R.; Property Owner’s Post Hearing Reply Brief at 3. During the hearing, this board’s attorney examiner reserved ruling on the county appellees’ objection. R.C. 5715.19(G) provides:

"A complainant shall provide to the board of revision all information or evidence within the complainant's knowledge or possession that affects the real property that is the subject of the complaint. A complainant who fails to provide such information or evidence is precluded from introducing it on appeal to the board of tax appeals or the court of common pleas, except that the board of tax appeals or court may admit and consider the evidence if the complainant shows good cause for the complainant's failure to provide the information or evidence to the board of revision."

As indicated above, the owner argues that Ms. Sabel’s testimony should be allowed because a disclosure was made for an owner to testify before the BOR. While it may be true that such a witness was disclosed to the BOR, a review of the BOR audio recording reveals that the owner’s representative, Mr. Ben Ezinga (another owner), did not, in fact, appear or testify before the BOR and further, counsel represented to this board that Mr. Ezinga was unavailable for the BOR hearing due to a "scheduling conflict." S.T., Ex. E; H.R. at 56. Upon examination, there is nothing in the record to suggest that Ms. Sabel was not available to attend the BOR hearing, nor was good cause shown at this board’s hearing as to why a member of the owner did not testify before the BOR. Accordingly, based upon the foregoing, we must sustain the county appellee’s objection and the testimony of Ms. Sabel will not be considered in our analysis herein. See *Casa 94, L.P. v. Franklin Cty. Bd. of Revision*, 89 Ohio St.3d 622, 2000-Ohio-3.

Next, we address the additional information, which was attached to "Appellant’s Merit Brief," marked as Exhibits A, B & D, and consist of a community development fact sheet and internal revenue service information, both of which relate to New Markets Tax Credits, and a document entitled "Master Lease." Here we are confronted with a situation where, for the first time on appeal, the property owner has presented a select set of documents without offering witnesses to authenticate them and explain how such documentation establishes and/or supports the value sought by the owner. While these documents were referenced at this board’s hearing, subject to an objection levied by the county appellees (which objection was renewed through written legal argument), ultimately, these documents were not offered/received into evidence. Upon review, we find these exhibits were submitted outside the record and as a result, do not rise to the level of evidence upon which this board may rely in making our determination herein. See, e.g., *Columbus Bd. of Edn. v. Franklin Cty. Bd. of Revision* (1996), 76 Ohio St.3d 13.

Moving to the merits of these appeals, at the outset, we note, it is undisputed that there are no low income housing tax credits ("LIHTC"), as described in *Woda Ivy Glen*, at issue in relation to the subject property of this appeal. Instead, the owner asserts that the restrictions imposed upon the subject property are "like LIHTC properties" and therefore, the subject property should be valued in accordance with the court's holding in *Woda Ivey Glen*. In support of this assertion, the owner cites to decisions of this board approving the valuation of non-LIHTC properties using the methodology approved by the court in *Woda Ivy Glen*, supra. See *Notestine Manor Inc. v. Logan Cty. Bd. of Revision* (Apr. 20, 2015), BTA No. 2014-2543, unreported, appeal pending Sup. Ct. No. 15-791; *Pine Grove*, supra; and *Vernon Ridge 2 v. Knox Cty Bd. of Revision* (Jan. 29, 2013), BTA No. 2009-2789 et al., unreported.

In contrast, the county appellees argue "[t]he [a]ppellants blur the distinction between *low-income* housing and *affordable* housing" and assert "[t]he Developer's Agreement for the subject uses an affordability standard rather than a low income standard." County Appellees' Hearing Brief at 3-4. Furthermore, the county appellees aver "[a]ppellant failed to provide documentary evidence to show *binding* restrictions limiting the units to be used as apartments that are affordable for *low income* families" and claims such documentation does not exist, because "[t]he Developer's Agreement does not actually restrict the rents because there is no clear limitation that the units should be rented both as 'affordable' and as 'affordable for *low income* families.'" County Appellees' Reply Brief at 3 (emphasis sic). Moreover, the county argues, "[t]he absence of a low income schedule or definition renders the 'affordable housing' classification meaningless in terms of a rent restriction." County Appellees' Post-Hearing Brief at 8. Additionally, the county points out, per the Development Agreement, "the units can be sold, [and therefore] they are not restricted as low income rental units." Id. at 8-10.

In addition, subject to its objection, the county also addresses the owner's reference, made for the first time on appeal through its merit brief, relating "to New Market Tax Credit[s,]" and argues, "[n]o competent or probative evidence was provided to demonstrate that these New Market Tax Credits require restricted rents as affordable housing." Id. at 8.

Finally, the county asserts that the appellant has failed to satisfy its burden, before the BOR, and before this board, because "the subject properties must be appraised as single condominiums." Here, however, Mr. Racek "valued the seven individual condominiums as a seven unit apartment building, [and] a single economic unit," contrary to R.C. 5311.11, which mandates that condominiums be valued as individual units. Id. at 3-4.

When, as here, parties rely on an appraiser's opinion of value, this board may accept all, part, or none of that appraiser's opinion. *Witt Co. v. Hamilton Cty. Bd. of Revision* (1991), 61 Ohio St.3d 155. Ordinarily, a property should be valued as unencumbered, and the effects of government subsidies should be disregarded by considering economic rent in an income approach to value. *Alliance Towers v. Stark Cty. Bd. of Revision* (1988), 37 Ohio St.3d 16; R.C. 5713.03; *Canton Towers, Ltd. v. Bd. of Revision* (1983), 3 Ohio St.3d 4. However, in *Woda Ivey Glen*, supra, the court considered "federal tax credits tied to amounts invested in qualifying low-income housing projects," and explained:

"As a trade-off for the valuable tax credits, I.R.C. 42 imposes severe rent restrictions. Owners must elect to assure either that 20 percent or more of the units are occupied by individuals whose income is 50 percent or less of median gross income in the area, or that 40 percent or more of the units are occupied by individuals whose income is 60 percent or less of the median. I.R.C. 42(g)(1)(A) and (B). Rent is restricted to 30 percent of an imputed income figure based on size of household as prescribed by the statute. The restrictions apply through a 'compliance period' of 15 years from the first year the credit is available, and then through an additional 'extended low-income housing commitment' period prescribed by the agreement with the state, which must be at least 15 years. I.R.C. 42(h)(6)(D). See Rosenblum at 34

("LIHTC projects are also subject to agreements with state housing agencies to restrict rents for a period of at least 15 years in excess of the 15-year federal restriction."). The commitments under the LIHTC program are specifically made binding on successors to the owner and must be recorded in the chain of title to the property. I.R.C. 42(h)(6)(B)(vi); Rosenblum at 34 ***. Violations of the restrictions lead to recapture of the tax credits previously enjoyed, the repayment of taxes previously offset by credits, plus penalties and interest. I.R.C. 42(j) ***." Id. at ¶17.

In that case, the Supreme Court carved out a specific exception for properties subject to LIHTC limitations imposed under the government's police power, through legislation providing for the general welfare of the nation. Id. See, also, *Muirfield Assn., Inc. v. Franklin Cty. Bd. of Revision* (1995), 73 Ohio St.3d 710, 711. As a result, the court found "governmental restrictions for the general welfare *** must be taken into account when determining the value" of LIHTC property. Id. at ¶30.

Thereafter, in *Pine Grove*, supra, this board found that the exception set forth in *Woda Ivy Glen* applied not only to restrictions in connection with federal low income housing tax credits, but also to limitations set forth to receive a rural rental housing loan through the USDA Rural Development Program. In that case, we noted that although the restrictions were imposed through a mortgage agreement rather than a deed, the limitations were "nonetheless imposed by a governmental agency for the general welfare of the public" and should be considered in the value of the subject property. *Pine Grove*, supra, at 9. See, also, *Vernon Ridge*, supra; *Belle Prairie Ltd. Partnership v. Washington Cty. Bd. of Revision* (Aug. 3, 2015), BTA No. 2014-2692, unreported. Notably, the cases decided by this board and involving the Rural Development Program all involved projects constructed with LIHTC funding. Subsequently, in *Notestine*, supra, this board found the exception set forth in *Woda Ivy Glen* applied to limitations set forth to receive a capital advance grant from the U.S. Department of Housing and Urban Development ("HUD") pursuant to section 202 of the Housing Act of 1959 ("§202"), which provides supportive housing for low income elderly individuals. In that case, we noted "the property is limited by various restrictions pursuant to the use and regulatory agreements, including an inability to transfer ownership without prior approval or earn profits from its operation." Id. at 11. In addition, the property in *Notestine* could only be rented to individuals below a certain income threshold. See, also, *Elim Manor Homes, L.P. v. Franklin Cty. Bd. of Revision* (July 30, 2015), BTA No. 2014-3180, unreported.

Here, however, while counsel for the owner has characterized the nature of the subject property as low-income housing apartments with restricted rental rates, there has been no testimony or evidence offered to substantiate such characterization, e.g., detailing the specifics of the actual programs, including goals of the programs, requirements for participation, the steps taken by the appellants to participate, or use restrictions imposed. S.T., Ex. E; H.R. While counsel for the owner has offered explanations through statements and written argument, we remain ever mindful that statements of counsel are not evidence. *Corporate Exchange Bldgs. IV & V, L.P.*, supra.

In light of the lack of information before this board concerning the specific federal government programs in which appellant participates, upon review, we find there is insufficient evidence before us to substantiate counsel's characterization of the nature of the subject property or to support the applicability of the appraiser's third "additional special assumption" contained in his report. Simply put, the record before this board shows that owner's counsel alludes to, but does not develop and provide sufficient documentary support, corroborated by witness testimony, to substantiate counsel's assertions that the subject property should be valued in the same manner as a LIHTC property.

While the owner cites to prior decisions of this board, i.e., *Notestine*, supra; *Pine Grove*, supra; and *Vernon Ridge*, supra, in support of its argument, we find the facts in those matters are clearly distinguishable from those in the instant appeal. In those matters, unlike the present appeal, the records were developed by documentary evidence, corroborated by witness testimony, and demonstrated that the properties were

constructed and operated to benefit low-income individuals. Specifically, in those cases, involving the federal section 202 program and the USDA Rural Development program, the residential units could only be rented to individuals meeting a specific income threshold. In contrast, in this matter, the limited evidence in the record indicates that no total income threshold applies to renters of the subject units; instead, it appears that the amount of rent that can be charged cannot exceed a percentage of the individual's total income. The restrictions imposed on the subject units are not the same as those imposed in other cases where consideration of only actual rental, rather than market, rents has been found appropriate. We find such an expansion of the specific exception created by the *Woda Ivy Glen* court to be in appropriate in these matters.

Based upon the record before this board, we agree with the BOR, and find Mr. Racek's valuation of the subject property, in the absence of market data, to be inappropriate. See *Alliance Towers*, supra; *Olmsted Falls Village Assn. v. Cuyahoga Cty. Bd. of Revision* (1996), 75 Ohio St.3d 552, 555 ("an appraiser may employ actual income as reduced by actual expenses if both amounts conform to market."). Accordingly, we find the owner's appraisal evidence is fatally flawed and does not constitute competent and probative evidence of value upon which this board may rely. The owner provided no other evidence of value.

In the absence of competent evidence of value, we turn to the auditor's valuation of the subject parcels. The owner cites to *Colonial Village v. Washington Cty. Bd. of Revision*, 114 Ohio St.3d 493, 2007-Ohio-4641, and asserts that the cost approach used by the auditor (as reflected on the property record card) is an improper method to value the subject property. In *Colonial Village*, the court stated that "[f]or subsidized housing, we generally disfavor appraisals based on the cost approach. *Canton Towers, Ltd. v. Stark Cty. Bd. of Revision* (1983), 3 Ohio St.3d 4, 7, *** ('Without a federal loan guarantee, favorable mortgage terms, rent subsidy, and income tax advantages, the cost of construction for such housing would be prohibitively expensive'); *Alliance Towers* *** ('The apartment buildings herein were constructed at a cost greater than could be justified by market rents'); *Sunset Square, Ltd. v. Miami Cty. Bd. of Revision* (1990), 50 Ohio St.3d 42, 44 ***." *Colonial Village*, supra, at ¶20. In that case, the court found that this board's reversion to the auditor's value upon our finding that the owner had failed to meet its burden of persuasion was improper, and that this board had a duty to independently determine value. However, in that case, the appraisal evidence submitted contained evidence of market rent data. *Id.* at ¶24. Here, the record is void of any market rent information from which this board may derive value. The BOR apparently reached the same conclusion when it rejected the owner's appraisal evidence and affirmed the auditor's valuation.

In *Dublin City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 139 Ohio St.3d 193, 2013-Ohio-193, the court rejected a similar argument, stating that "the facts of *Colonial Village II* [*Colonial Village, Ltd. v. Washington Cty. Bd. of Revision*, 123 Ohio St.3d 268, 2009-Ohio-4975] are distinguishable from the facts of this case because there, the board of revision initially adopted the auditor's valuation. [*Colonial Village II*, supra] at ¶18. Thus, after finding that the taxpayer had not met its burden on appeal, the BTA affirmed the conclusion of the board of revision in reinstating the auditor's valuation." *Id.* at ¶20. The court emphasized that "it is proper to revert to [the auditor's] valuation when the BTA finds that the owner has not proved a lower value and there is otherwise "no evidence from which the BTA can independently determine value." *** [*Vandalia-Butler City Schools Bd. of Edn. v. Montgomery Cty. Bd. of Revision*], 130 Ohio St.3d 291, 2011-Ohio-5078, ***, at ¶24, quoting *Simmons v. Cuyahoga Cty. Bd. of Revision*, 81 Ohio St.3d 47, 49 ***." *Dublin* at ¶21. Such is the case here. We find that appellant has failed to meet its burden on appeal, and that there is no evidence in the record from which this board can independently determine value. We are constrained, therefore, to find that the auditor's valuations of the subject parcels, as confirmed by the BOR, are the parcels' values as of tax lien date.

It is therefore the order of this board that the true and taxable values of the subject properties, as of January 1, 2013, were as follows:

PARCEL NUMBER 09-00-086-711-010
TRUE VALUE

\$153,940
TAXABLE VALUE
\$53,880

PARCEL NUMBER 09-00-086-711-024
TRUE VALUE
\$143,940
TAXABLE VALUE
\$50,380

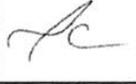
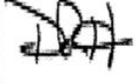
PARCEL NUMBER 09-00-086-711-025
TRUE VALUE
\$143,940
TAXABLE VALUE
\$50,380

PARCEL NUMBER 09-00-086-711-026
TRUE VALUE
\$144,020
TAXABLE VALUE
\$50,410

PARCEL NUMBER 09-00-086-711-027
TRUE VALUE
\$145,760
TAXABLE VALUE
\$51,020

PARCEL NUMBER 09-00-086-711-031
TRUE VALUE
\$144,460
TAXABLE VALUE
\$50,560

PARCEL NUMBER 09-00-086-711-035
TRUE VALUE
\$147,880
TAXABLE VALUE
\$51,760

BOARD OF TAX APPEALS		
RESULT OF VOTE	YES	NO
Mr. Williamson		
Ms. Clements		
Mr. Harbarger		

I hereby certify the foregoing to be a true and complete copy of the action taken by the Board of Tax Appeals of the State of Ohio and entered upon its journal this day, with respect to the captioned matter.



Kathleen M. Crowley, Board Secretary