

WHITEFISH, LTD.,

Appellant,

v.

STATE OF MONTANA,
DEPARTMENT OF REVENUE,

Respondent.

CASE №: PT-2020-25

**FINDINGS OF FACT, CONCLUSIONS
OF LAW, ORDER AND OPPORTUNITY
FOR JUDICIAL REVIEW**

STATEMENT OF THE CASE

This case is an appeal of a decision by the Flathead County Tax Appeal Board (FCTAB), denying Whitefish LTD, an owner and operator of low-income housing in Whitefish, a request for a reduction in property value for the tax years 2019 and 2020. The FCTAB did not adjust the property value and affirmed the DOR value. We affirm the FCTAB’s decision.

ISSUE TO BE DECIDED

Whether the Department of Revenue erred in arriving at an appraised value of \$1,499,820.00 for the improvements.

PROPERTY DESCRIPTION

The property is located at 899 Ashar Avenue in Whitefish. The property geocode is 07-4293-32-3-04-40-0000, and the legal description is Stone Creek Addition, Section 32, Township 31 North, Range 21 West, Lot 001. The assessment code is 978806, and the subject property is in neighborhood 207.246C. The complex was developed in 1992 and contains 41 rental units.

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EXHIBIT LIST

The following evidence was submitted at the hearing:

The following exhibits were submitted by the DOR:

- a. DOR Exhibit A: 2019 Property Record Card;
- b. DOR Exhibit A: FC-2019-040 Appeal Packet (confidential);
- c. DOR Exhibit B: Sales Grid (confidential);
- d. DOR Exhibit C: Land Sales Map (confidential);
- e. DOR Exhibit D: Land Sales Packet (confidential);
- f. DOR Exhibit E: Sales Comparison (confidential);
- g. DOR Exhibit F: Income Valuation (confidential);
- h. DOR Exhibit G: DOR Assessment Information Packet;
- i. DOR Exhibit H: Sales Comparison of Recent Sales (confidential); and
- j. DOR Exhibit I: Income analysis for the subject property (confidential).

The following Exhibits were submitted by the Taxpayer:

- a. TXPR Exhibit 1-A: Revised Memorandum;
- b. TXPR Exhibit I: Flathead County Tax Appeal Board Decision;
- c. TXPR Exhibit II: State of Montana Property Record Card;
- d. TXPR Exhibit III: Real Property Tax Statement (2019);
- e. TXPR Exhibit IV: Warranty Deed;
- f. TXPR Exhibit V: USDA RD – Loan Agreement;
- g. TXPR Exhibit VI: USDA RD – Promissory Note;
- h. TXPR Exhibit VII: Declarations of Restrictive Covenants for Low-Income Housing Credits;
- i. TXPR Exhibits VIII: Audited Financial Statements (2016-2019); and

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- j. TXPR Exhibit IX: Indication Value Summary – Utilizing Income Approach;
- k. TXPR Exhibit X: Authorized Representative’s Resume & Professional Experience.

The record includes all materials submitted to the county tax appeal board, including the transcript of the FCTAB hearing and additional materials submitted by the parties during the MTAB appeal.

FINDING OF FACT

1. To whatever extent the foregoing findings of fact may be construed as conclusions of law, they are incorporated accordingly.
2. David Pace represented the Whitefish LTD, the taxpayer. *MTAB Hrg. Transcr. 02:40*. Mr. Pace was designated as representative by power of attorney and presented as an expert regarding the matters at hand. *Id.* Mr. Pace has twenty years of experience as a financial planner. *Taxpayer Ex. X*. Mr. Pace has also taken several courses on valuing properties and predicting income streams. *Id.* All financial information presented by Mr. Pace was compiled using standard audit and accounting methods. *Taxpayer Ex. VII*.
3. The Taxpayer did not contest the land's value, and the only issue on appeal is the value of the improvements. *MTAB Hrg. Transcr. 3:02:18*.
4. The Department of Revenue assessed the subject property at \$540,480 for the land and \$1,499,820 for the improvements for a total combined value of \$2,040,000 for the 2019/2020 valuation cycle. *Dep Ex. A*.

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5. Mr. Pace submitted a DOR Request for Informal Classification and Appraisal Review, AB-26, on June 13, 2019. *Dep Ex. A*. In response, the DOR made an adjustment based on the appraiser's review of the property, increased the expense percentage and upon consideration of information provided by the Taxpayer, which he believed was at odds with the financial premises used in the DOR's mass appraisal model. *Dep Ex. IX; MTAB Hrg. Transcr. 3:42:00*. At the conclusion of the AB-26 process, the value of the taxpayer's property was reduced from \$2,102,400 to \$2,040,300. *Id.*

6. The Taxpayer appealed to the FCTAB and a hearing in this matter was held on February 14, 2020 in Kalispell. At the conclusion of the hearing FCTAB declined to further reduce the value of the property and affirmed the DOR's value, noting that the DOR had properly defended its valuation and that the value had been reduced during the AB-26 process. *MTAB Dkt. 21/2*.

7. Taxpayer appealed the county decision to Montana Tax Appeal Board (MTAB) on March 16, 2020 and a hearing was held on September 17, 2020, in Helena. The parties exchanged information and submitted proposed exhibits and information prior to the hearing. Mr. Pace appeared for the hearing from Oregon by Zoom platform. Ms. Morgan and Ross Halvorson also appeared by Zoom.

8. Mr. Pace believes that DOR had not given due consideration to the fact that the property participates in a government low-income housing program with rent restrictions, and any future owner will be subject to these same restrictions. *Taxpayer Ex. 1-A*. These limitations will apply to this Class 4 commercial multiple housing property until 2042. *Id.*

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9. Mr. Pace claims that because the subject property is encumbered by a public uses restriction, specifically the amount of rent that can be charged, DOR must account for the public use restrictions and consider both the benefits and burdens of the restrictions in the valuation process. *MTAB Hrg. Transcr. 3:05:40.*
10. Parties agree that the income method of appraisal is the best method to use determining the market value of an affordable housing project but differ as to the extent to which the taxpayer's actual income and expense inputs should be used in creating a model to estimate market value. *MTAB Hrg. Transcr. 3:05:00.*
11. Mr. Pace prepared an income capitalization report marked at *Taxpayer Ex. 8*, audited financials specific to this property produced as required by the Section 515 program and showing gross income of \$245,213 and expenses of \$182,704, representing a 74% expense ratio. *MTAB Hrg. Transcr. 3:08:12; Taxpayer Ex. IX.*
12. The DOR's income model for this property yielded \$266,801 of income and \$106,720 of expenses, representing a 40% expense ratio. *Dept. Ex. G.*
13. Mr. Pace introduced an income capitalization report marked as *Taxpayer Ex. IX*. When calculating the income capitalization report, Mr. Pace used audited income and expense information specific to this property. *Taxpayer Ex. IX.*
14. The Taxpayer received a 50-year USDA Rural Development Section 515 low interest loan to construct the housing development in 1992. *MTAB Hrg. Transcr. 3:13:04.* The loan expires in 2042, at which time the Taxpayer will own the property with no encumbrances. *Id.* The loan has an interest rate of 1% and must be repaid according to the loan amortization schedule. *Id.*

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15. The maximum amount of income that can be distributed from the project to the owner/developer is \$3,711 per year, under the terms of the Section 515 program. *MTAB Hrg. Transcr. 3:16:15.*
16. The subject property construction was financed by contributions from the Taxpayer, the Section 515 loan, and income tax credits that were issued and sold to third parties at the time of construction. *MTAB Hrg. Transcr. 3:18:26.* The income tax credit issued during construction has since expired and cannot be transferred. *MTAB Hrg. Transcr. 3:19:03.*
17. Mr. Pace's central contention is that the DOR overvalued the gross income and undervalued the expenses of the subject property when calculating an income method of value. *MTAB Hrg. Transcr. 3:03:33.*
18. The DOR relied on Mont Code Ann. § 15-8-111, 15-7-101, 15-6-134, and Admin Rule 42.20.107, 42.20.108, to determine the subject property's market value. *MTAB Hrg. Transcr. 3:24:52.* She testified under Montana law, the DOR must equalize valuations among similarly situated taxpayers. Mont. Code Ann. § 15-9-101. Ms. Morgan equalizes values by using market data voluntarily submitted by commercial property owners to build the DOR's income models for commercial rentals to estimate market values and then uses the models to appraise properties. *Id.*
19. For the 2019/2020 tax cycle, the subject property was appraised via the income method, using a regional low-income housing model. *MTAB Hrg. Transcr. 3:28:15.* The DOR model at issue uses a capitalization rate of 7.8%. To account for low-income housing restrictions, the model uses a reduced rental rate of 3 (down from 4 which they use in modeling for-profit housing) on a scale from 1-7 and increases the average expenses (as

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a percentage of revenue) from the 29% that is used for normal housing, to 40% for low-income housing. *Id.*

20. The DOR does not use actual taxpayer expenses and income when assessing the value of an individual property because of the equalization requirements under Montana law. *MTAB Hrg. Transcr. 3:32:45.*
21. Ms. Morgan testified the value found using the cost approach was very similar to the income approach, thus validating her model. *MTAB Hrg. Transcr. 3:34:18.* Ms. Morgan chose to use the income method because it is the most reliable. *Id.*
22. Ms. Morgan questioned the project's reported administration expenses for 2016 because they were double what was reported in 2017 and 2018. *MTAB Hrg. Transcr. 3:39:15.* Because the maintenance and repairs costs were much higher than in other years, Ms. Morgan believes the taxpayer has included capital improvement projects in the calculation of expenses. *Id.*
23. Mr. Pace testified that he did not include property tax as an expense in the income capitulation model he presented to the Board. *MTAB Hrg. Transcr. 3:09:45.*
24. Mr. Pace's 74% expense ratio includes items that DOR does not incorporate into its calculations, *MTAB Hrg. Transcr. 3:53:50.* The Taxpayer included business expenses, including management fees, utility costs, and member distributions in their calculation. *Id.* The DOR does not include these expenses in its model because its legal mandate is to value the property and not the business. *Id.*

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25. Ms. Cordone contends that using all actual data for each property is impossible when conducting a mass appraisal because of equalization statutes. *MTAB Hrg. Transcr. 3:56:00*. Instead, DOR uses the information provided by non-profit housing projects to build an income and expense model. *Id.* The DOR contends the real property is being valued, not the business itself. The commercial property's owner's expenses are based on real property. By law, the allowed expenses were removed to determine the income value. The values provided by the property owner are not the same.

26. DOR Whiteness Ross Halvorson testified that any information given to the DOR by the Taxpayer after 2018 could not be used in creating the income model for tax years 2019/2020. *MTAB Hrg. Transcr. 4:13:30*.

27. The DOR Appraiser Dana Morgan does not think the DOR is unfairly valuing the subject property. The Taxpayer has chosen to maximize their benefits as provided by the low-income housing project. Ms. Morgan felt the property had been thoroughly reviewed with considerations for Montana Law and rent restrictions. This process is the same for every rent-subsidized property with below market rents.

28. The Taxpayer has not provided any market data to support the requested values.

JURISDICTION AND STANDARD OF REVIEW

29. The Montana Tax Appeal Board (Board) is an independent agency not affiliated with the Montana Department of Revenue (DOR). Under the authority of Mont. Code Ann. § 15-2-301.

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30. The Taxpayers filed a timely appeal of the FCTAB decision to the MTAB. Therefore, this Board maintains jurisdiction to hear and decide this matter. Mont. Code Ann. §15-2-301(1)(b).
31. This Board hears CTAB appeals de novo. *CHS Inc. v DOR*, 2013 MT 100, 299 P.3d 813 (2013). “A trial de novo means trying the matter anew, the same as if it had not been heard before and as if no decision had been previously rendered.” *McDunn v. Arnold*, 2013 MT 138, 303 P.3d 1279 (2013). As such, this matter will be reviewed without merit to the DCTAB hearing and subsequent decision. *Id.*

CONCLUSIONS OF LAW

32. To whatever extent the following conclusions of law may be construed as findings of fact, they are incorporated accordingly.
33. Under Montana law, all taxable property must be assessed at 100 percent of its market value except as otherwise provided. Mont. Code Ann. §15-8-111(1), market value being the value at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts. Mont. Code Ann. §15-8-111(2)(a).
34. The Department is authorized to use one or more approaches to value residential property, including the comparable sales, income approach or market data approach. *Albright v. State*, 281 Mont. 196, 208-09, 933 P.2d 815, 823 (1997). In this case both parties agreed the income approach to finding value was the proper method.

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35. For the taxable years from January 1, 2019, through December 31, 2020, all property classified in Mont. Code Ann. § 15-6-134, (class four) must be appraised at its market value as of January 1, 2018. Mont. Code Ann. § 15-7-111.
36. The taxpayer bears the burden of proving the error of DOR's decision. *Farmers Union Cent. Exch., Inc. v. Dep't of Revenue of State of Mont.*, 272 Mont. 471, 476, 901 P.2d 561, 564 (1995); *Western Air Lines, Inc. v. Michunovich*, 149 Mont. 347, 353, 428 P.2d 3, 7 (1967).
37. DOR is entitled to a "presumption of correctness if its decisions are pursuant to an administrative rule or regulation, and the rule or regulation is not arbitrary, capricious or otherwise unlawful." *Dep't of Revenue v. Burlington N. Inc.*, 169 Mont. 202, 214, 545 P.2d 1083, 1090 (1976). However, DOR cannot rely entirely on the presumption in its favor and must present a modicum of evidence showing the propriety of their action. *Western Air Lines*, 149 Mont. at 353, 428 P.2d at 7.
38. "'Assessment formulations' by [the Montana Tax Appeal Board] should be upheld unless there is a clear showing of an abuse of discretion." *Peretti v. State, Dep't of Revenue*, 2016 MT 105, ¶ 15, 383 Mont. 340, 344, 372 P.3d 447, 450 (citing *O'Neill v. Dep't of Revenue*, 2002 MT 130, ¶ 23, 310 Mont. 148, 155, 49 P.3d 43, 47); see *Northwest Land & Dev. of Montana, Inc. v. State Tax Appeal Bd.*, 203 Mont. 313, 317, 661 P.2d 44, 47 (1983) overruled on other grounds by *DeVoe v. Dep't of Revenue of State of Mont.*, 263 Mont. 100, 866 P.2d 228 (1993).
39. In *Voegelé's Inc., v. Department of Revenue*, this Board supported the principle that Montana law does not require the DOR to reduce property values to account for business decisions made by taxpayers, which could result in below market rents. 2016

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Mont. Tax LEXIS 7. Even though we find the DOR did consider, and made an adjustment for, these factors in the present case, it was not required in their quest to value the property. The DOR's duty is to discover the market value of the property, not assess the business associated with the property.

40. Other jurisdictions have examined this very question about low-income housing and come to the same conclusion. Participants in Section 515 programs are not necessarily entitled to additional property value reductions, because they are handsomely rewarded for their participation with low-interest mortgage loans, rent subsidies, income tax credits from the federal government and other benefits to financially incentivize their owners to provide affordable housing in rural communities. *The Harbours v. Townsite of Saugatuck*, 1996 Mich. Tax Lexis 32.
41. Finally, in *Happy Valley Storage LLC. v. Department of Revenue*, another case where the Taxpayer argued that the DOR should exclusively use his actual income and expense information, rather than a mass appraisal model, this Board upheld the policy of the DOR to *consider* actual data but *use* averages of similarly situated taxpayers when establishing a valid income model for valuing like commercial rental property. 2018 Mont. Tax LEXIS 24.
42. The Board finds and concludes that the DOR met its burden by considering actual data, and was reasonable in adjusting expenses up to 40%, the equivalent of adjustments made for the other taxpayers in the model. The DOR also reduced the rent rating to recognize the below market rents, which reduced the valuation of the property.

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43. And finally, we find that the DOR was reasonable in using averaged incomes within the low-income housing income model even though they were not identical to those of the Taxpayer. *Id.*

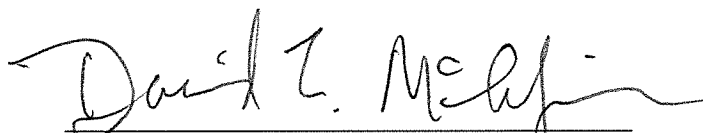
44. The DOR witnesses who appeared for the hearing in this case provided credible evidence and testimony to support their methods. The DOR convinced this Board that they had carefully considered the information provided within the financial statements submitted by the taxpayer in making the appraisal. Their duty to equalize values is not lost on this board. Their job is to generate market values from the actual data from thousands of commercials rentals, precluding the ability of the DOR to perform a fee-style appraisal of this property. The DOR has met its burden under the mass appraisal system in which it operates.

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ORDER

- 45. Whitefish Investment Group, LTD.'s appeal, and complaint are denied.
- 46. DOR is ordered to set the property's value at \$2,040,300 for the 2019/2020 tax years.


Ordered December 17, 2020



David L. McAlpin, Chairman
MONTANA TAX APPEAL BOARD



Stephen A. Doherty, Member
MONTANA TAX APPEAL BOARD



Eric Stern, Member
MONTANA TAX APPEAL BOARD

Notice: You may be entitled to judicial review of this Order by filing a petition in district court within 60 days of the service of this Order. Mont. Code Ann. § 15-2-303(2). The Department of Revenue shall promptly notify this Board of any judicial review to facilitate the timely transmission of the record to the reviewing court. MCA §15-2-303(2).

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Certificate of Service

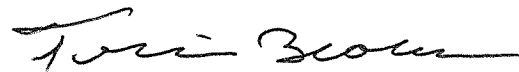
I certify that I caused a true and correct copy of the foregoing Findings of Fact, Conclusions of Law, Order and Opportunity for Judicial Review to be sent by Email and by United States Mail via Print & Mail Services Bureau of the State of Montana on December 17, 2020 to:

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