

BEFORE THE MONTANA TAX APPEAL BOARD **FILED**

DEC 05 2019

Montana Tax Appeal Board

COLSTRIP PROPERTIES, INC AND
RICHARD S. BURNETT,

Appellant,

v.

STATE OF MONTANA,
DEPARTMENT OF REVENUE,

Respondent.

CASE №: PT-2018-63
(#1324 & 1329 4 & 10 Larkspur)

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

This is an appeal from a Rosebud County Tax Appeal Board (County Board) decision regarding two commercial properties for tax years 2017 and 2018. The properties are owned by Mr. Richard S. Burnett and are located in the town of Colstrip. The County Board upheld the Department of Revenue's (Department) valuation of the properties and Mr. Burnett filed an appeal with the Montana Tax Appeal Board (MTAB) on December 14, 2018. A hearing at the MTAB was held on Tuesday, September 24, 2019 at 2:26pm.

As reflected in the following opinion, Mr. Burnett's appeal is denied, and the Department's valuation stands.

PROPERTY DESCRIPTION

The two properties in this appeal contain one 4-plex apartment building, and three 4-plex apartment buildings (respectively). *MTAB Hrg. 7:24-25*. They are identified by Geocodes 29-1151-34-3-22-01-0000 and 29-1151-34-3-19-01-0000, and are located at 4 and 10 Larkspur Drive (respectively) in Colstrip. *Dept. Ex. K and O*. The Legal Descriptions are S34, T02 N, R41 E, Block 032, Lot 001, Colstrip 32 and S34, T02, N, R41 E, Block 052, Lot 001, Colstrip 52 (respectively). *Id.*

The four apartment buildings, in total, are identical in size and have similar amenities. *MTAB Hrg. 7:13-14*. Each complex maintains two 2-bedroom/1-bath apartments, and two 3-bedroom/1-bath apartments. *MTAB Hrg. 7:15-16*.

BACKGROUND

Mr. Burnett asked the Department to “reduce the value to ½ price paid in 1999 or appraised value then.” *Burnett File Doc. 1, MTAB Appeal p.3*. During the hearing before the MTAB Mr. Burnett sought a value of \$8,500 for the single 4-plex property, and \$26,500 for the three 4-plex property. *MTAB Hrg. 3:13-16 and 4:3-5*.

The Department defended the appraised value of \$151,100 for the single 4-plex property, and \$453,300 for the three 4-plex property. *MTAB Hrg. 3:9 and 3:25*.

EXHIBIT LIST

¹The MTAB admitted the following exhibits submitted by Mr. Burnett:

1: Online article from qz.com (QUARTZ) titled *Most Coal-fired Power Plants in the US are Nearing Retirement Age*, dated March 12, 2013.

2: Page 24 of the fee appraisal report created by R.E. McFarland, Certified General Real Estate Appraiser, indicating the value of Mr. Burnett’s 4-plex units, 8-plex units and mobile home court, established from the Cost Approach, issued April 9, 2003.

3: Letter from R.E. McFarland to Albert A. Martens of the First State Bank of Forsyth, concerning the Fort Union Inn Real Estate Fee Appraisal, dated December 31, 2002.

¹ Mr. Burnett submitted one set of exhibits for both appeal PT-2018-67 and PT-2018-63. The MTAB accepted the exhibits and used the same exhibits for both appeals.

4: Document titled *Bid Specification Breakdown* from Shylo Construction, concerning the cost to repair the foundation damage to Mr. Burnett's previous property located at 15 Elm CT, Colstrip, Montana, dated June 5, 1994.

5: Montana Code Annotated §15-8-111, with marks and underlining made by Mr. Burnett, dated 2015.

6: Advertisement listed by A.L. Koelzer of Business Properties, titled *For Sale Apartment and Mobile Home Project*, concerning the Cactus and Larkspur apartments and mobile homes, located in Colstrip, Montana.

7: Page 20 of the fee appraisal report created by R.E. McFarland, indicating the value of the apartments and mobile home court established from the Income Approach, issued April 9, 2003.

8: Page 28 of the 2000 MTAB opinion: *Department of Revenue of the State of Montana v. Richard Burnett, PT-1999-46, Factual Background, Conclusions of Law, Order and Opportunity for Judicial Review*, concerning the final determination of the MTAB, dated August 25, 2000.

9: One page of the fee appraisal report created by R.E. McFarland, titled *Description of Improvements*, concerning Mr. Burnett's mobile home project, 8-plex apartments and 4-plex apartments, issued April 9, 2003.

10: Page 25 of the fee appraisal report created by R.E. McFarland, titled *Comments and Reconciliation*, indicating the values established from the market data approach, income approach and cost approach, issued April 9, 2003.

11: Page 3 of the 2000 MTAB opinion: *Department of Revenue of the State of Montana v. Richard Burnett, PT-1999-46, Factual Background, Conclusions of Law, Order and Opportunity for Judicial Review*; dated August 25, 2000.

12: Realty listing titled *Colstrip Apartments and Duplexes*, offered by Alan Lees Realty, concerning the sale of 32 properties owned by Montana Power.

13: Online article from sierraclub.org (Sierra Club) titled "*Fighting for a Responsible Retirement for Colstrip*", dated June 18, 2019.

14: Map titled *South Trailer Court to Cherry Street*; Mr. Burnett shaded the occupied lots.

15: Document titled *Agreement to Sell and Purchase*, concerning the Cactus and Larkspur apartments and apx. 132 mobile lots, dated September 21, 1999.

16: 2000 MTAB opinion: *The Department of Revenue of the State of Montana v. Richard Burnett, PT-1999-46, Factual Background, Conclusions of Law, Order and Opportunity for Judicial Review*, dated August 25, 2000.

17: Document titled *Declaration and Affidavit of Richard Burnett*, dated September 11, 2019.

The MTAB admitted the following exhibits submitted by the Department:

A: *Comparable Sales for Subject Property*, the exhibit was compiled by the Department for the County Board hearing to compare the supporting properties for the amount they sold versus the Department's valuation of the subject properties.

B: *Property Classification and Appraisal Notice* issued by the Department for the subject properties, dated July 3, 2017.

C: *AB-26 Request for Informal Classification and Appraisal Review*, filed by Mr. Burnett for the subject property located at 10 Larkspur, dated received May 16, 2018.

D: *AB-26 Request for Informal Classification and Appraisal Review*, filed by Mr. Burnett for the subject property located at 4 Larkspur, dated received May 16, 2018.

E: *Final Request Letter* from the Department's Property Assessment Division to Mr. Burnett, requesting income and expense information for the subject property located at 10 Larkspur, dated August 22, 2018.

F: *Final Request Letter* from the Department's Property Assessment Division to Mr. Burnett, requesting income and expense information for the subject property located at 4 Larkspur, dated August 22, 2018.

G: *Form AB-26 Determination Letter*, from the Department's Property Assessment Division to Mr. Burnett, for the subject property located at 10 Larkspur, dated September 4, 2018.

H: *Form AB-26 Determination Letter*, from the Department's Property Assessment Division to Mr. Burnett, for the subject property located at 4 Larkspur, dated September 4, 2018.

I: *Department of Revenue's Compiled Data for the State Office Model* concerning income and expense, uploaded into the Orion system and used to value properties.

J: Economic Data from <https://DataUSA>, the exhibit was compiled by the Department for the County Board hearing to compare the economic viability of communities in and around Colstrip.

K: *Montana Department of Revenue Assessment Information Packet*, originally submitted to the County Board, for the subject property located at 4 Larkspur, dated January 1, 2016.

L: *Land Model Sales Information*, used to create the land sales model for Colstrip.

M: Colstrip Neighborhood Model, map of the land sales for Colstrip, and an aerial view of the subject properties' 4-plex units.

O: *Property Record Card*, for the subject property located at 10 Larkspur, dated September 24, 2019.

P: *Property Record Card*, for the subject property located at 4 Larkspur, dated September 24, 2019.

FINDINGS OF FACT

1. On July 3, 2017, the Department mailed Mr. Burnett a Property Classification and Appraisal Notice concerning tax years 2017 and 2018, for the subject properties. *Dept. Ex. B.*

2. On May 16, 2018, over ten months after the issuance of the appraisal notice, Mr. Burnett filed a Form AB-26 Request for Informal Classification and Appraisal Review with the Department for both of the subject properties, stating:

“The value of all the property I own or my corporation owns is based on an appraisal or the sales price all supported by Montana code annotated and the decision of the state tax appeal board in tax appeal PT-1999-45, PT-1999-46, and [PT]-1999-47. Nothing has changed in Colstrip since these appeals except that 2 of the 4 power plants has to be closed by 2022 and the life of the other 2 is estimated between 7 years and 18 years before they close from old age. ... My trailer court, 34 court through 45 court, has only 49 trailers renting. There has been only 1 new trailer in 17 years come in and it was to replace an old one. I have 81 vacant spaces now and had over 100 rented 17 years ago. Colstrip is in decline as evidenced by this and headed for a closure of the town in the future. The DOR has no comparable to use to set values. ... My apartments are 17 [y]ears older since purchase and have a very high vacancy rate. I set their value at ½ purchase value. The same with all other properties I or my corporation own in rosebud county.” *Dept. Ex. C and D.*

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3. Department Area Manager Liz Franz reviewed Mr. Burnett's two AB-26 forms. *MTAB Hrg. 14:7-9*. Ms. Franz contacted Mr. Burnett and requested an appointment to review the subject properties. *Id.* Mr. Burnett declined stating nothing had changed since the Department's review in 2016. *Id.*

4. On August 22, 2018, Ms. Franz issued a final request for information for Mr. Burnett's two properties seeking income and expense information for the properties for the years 2016 and 2017. *Dept. Ex. E and F*.

5. Mr. Burnett did not respond to the Department's request for information. *MTAB Hrg. 15:1-3*. Without the requested information, on September 4, 2018 the Department denied Mr. Burnett's two AB-26 requests. *Id.* Subsequently, Mr. Burnett filed an appeal with the County Board. *Id. at 15*.

6. The County Board hearing was held on November 8, 2018. *Burnett File Doc. 9, County Board Minutes*. At the conclusion of the hearing the County Board upheld the Department's values of \$151,100 (4 Larkspur) and \$453,300 (10 Larkspur). *Id.*

7. Following the County Board hearing, Mr. Burnett filed appeals for both properties with the MTAB on December 14, 2018. *Burnett File Doc. 1, MTAB Appeal Form*. Mr. Burnett stated the 4-plex properties should be reduced in value to half of the price he originally paid for the properties in 1999. *Id.*

8. Pursuant to a second telephonic scheduling conference held on July 9, 2019, both Mr. Burnett and the Department stipulated to a scheduling order, which set the MTAB hearing for October 1, 2019 at 10:00am. *Burnett File Doc. 11, Scheduling Order*. Due to a scheduling conflict the appeal was rescheduled for a hearing on September 24, 2019. *Burnett File Doc. 17, Order Vacating Hearing and Adopting Proposed Hearing Date*.

9. The MTAB hearing was held on September 24, 2019 at 2:26pm. *MTAB Hrg. Tr.* During the hearing Mr. Burnett presented testimony and evidence concerning future expected closures of portions of the Colstrip power plant, and their effect on the local market. *Id. at 39:3-25 and 40:1-16.*

10. Mr. Burnett also questioned the validity of the comparable sales of commercial property chosen by the Department to value his property, which were from towns other than Colstrip. *MTAB Hrg. 4:16-25.* “Different circumstances in the towns. They’ve got colleges, freeways, railroads. ... It’s a much different community and none of those are going away at the end of this year or within ten years.” *Id. at 21-25.*

11. Mr. Burnett did not offer testimony or evidence concerning 4-plex sales in communities similar to Colstrip. *MTAB Hrg. 9:19-21.*

12. The Department used the income method to value Mr. Burnett’s two properties. *MTAB Hrg. 16:7-12.* A comparable sales document was created by the Department, but Ms. Franz testified the document was only used as supporting documentation. *Id.*

13. Mr. Burnett testified that in 2016 his secretary gave the Department his actual rental income data for the two subject properties to allow the Department to calculate an income method of value. *MTAB Hrg. 9:1-9.* At the MTAB hearing Mr. Burnett testified he was unable to provide a vacancy rate for any of his 4-plex units during the same 2016 rental period. *Id. at 11:8-11.*

14. Ms. Franz said she did receive income information in 2016 from Mr. Burnett’s secretary, but when updated rental income and vacancy information was requested from Mr. Burnett in 2018, she was told the properties remained unchanged, and as such Ms.

Franz used the same information for the year 2017/2018 valuation cycle. *MTAB Hrg. 23:15-16.*

JURISDICTION AND STANDARD OF REVIEW

1. Mr. Burnett filed a timely appeal of the County Board decision to the MTAB. Therefore, the MTAB maintains jurisdiction to hear and decide this matter. *MCA §15-2-301(1)(b).*

2. In reviewing this appeal, "... the state board is not bound by common law and statutory rules of evidence or rules of discovery and may affirm, reverse, or modify any decision. To the extent that this section is in conflict with the Montana Administrative Procedure Act, this section supersedes that act." *MCA §15-2-301(5).*

3. The MTAB hears County Board appeals de novo. *CHS Inc. v. DOR, 2013 MT 100.* "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.*

PRINCIPLES OF LAW

4. "[T]axable property must be appraised at 100% of its market value except as otherwise provided [in the law]." *MCA §15-8-111(1).*

5. "Market value is 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." *MCA §15-8-111(2)(a).*

6. "...[T]he taxing agency should bear a certain burden of showing the propriety of their action. It is true as a general rule that the taxpayer must overcome the presumption

in favor of the correctness of the assessment.” *Western Airlines v. Michunovich*, 149 Mont. 347, 353, 428 P.2d 3.

7. “The initial burden of producing evidence as to a particular fact is on the party who would be defeated if no evidence were given on either side. Thereafter, the burden of producing evidence is on the party who would suffer a finding against that party in the absence of further evidence.” *MCA §26-1-401*.

Income Approach

8. “In valuing class four residential and commercial property described in 15-6-134, the department shall conduct the appraisal following the appropriate uniform standards of professional appraisal practice for mass appraisal promulgated by the appraisal standards board of the appraisal foundation. In valuing the property, the department shall use information available from any source considered reliable.” *MCA §15-8-111(3)*.

9. “Income Approach – One of the three traditional approaches to value which measures the present growth of the future benefits of a property by the capitalization of its net income stream over its remaining economic life. The approach involves making an estimate of the potential net income the property may be expected to yield, and capitalizing that income into an indication of value.” *Montana Department of Revenue Appraisal Guide, Property Assessment Division, Valuation Date January 1, 2016*

10. “The income approach is based on the theory that the market value of income-producing property is related to the amount, duration, and certainty of its income-producing capacity. The formula used by the department to estimate the market value of income-producing property through application of the income approach to value is $V = I/R$ where:

(a) "V" is the value of the property to be determined by the department;

(b) "I" is the typical property net income which shall reflect market rents, not investment value income or other rents, for the type of properties being appraised; and

(c) "R" is the capitalization rate determined by the department as provided..."

ARM 42.20.108.

11. "We conclude that the language of § 15-8-111(2)(b) MCA, provides strong evidence that the Legislature did not intend for only one approach to value to be utilized when property is appraised and assessed. In fact, if the Legislature did intend for only one approach to be utilized, then § 15-8-111(2)(b), MCA, would be superfluous." *Albright v. State, 281 Mont. 196, 22, 933 P.2d 815.*

12. "...[The] use of more than one appraisal method [is] permitted, so long as 'the appraisal method as a whole constitutes relevant and reliable evidence of market value.'" *Parker Cnty. Appraisal Dist. v. Bosque Disposal Sys., LLC, 506 S.W.3d 665, 676 (quoting Houston R.E. Income Props. XV, Ltd. v. Waller Cty. Appraisal Dist., 123 S.W.3d 859).*

Economic Obsolescence

13. "Economic obsolescence, also referred to as external obsolescence, is a condition caused by factors extraneous to the property itself, such as changes in population characteristics and economic trends, encroachment of inharmonious land uses, excessive taxes, and governmental restrictions. The condition is generally incurable in that the cause or causes lie outside the property owner's control." *2017-2018 Montana Reappraisal Plan, MDOR p.30.*

Timeliness

14. The filing of an AB-26 Request for Informal Classification and Appraisal Review is time sensitive, and must be completed within 30 days of the date on the appraisal

notice. *Department Property Appraisal Notices – Informal Review Process*. If the AB-26 is filed past the 30-day filing date, you may still request an informal review, but any changes in valuation will only apply to the second year in the valuation cycle. *Id.*

BOARD DISCUSSION AND CONCLUSIONS OF LAW

15. Mr. Burnett's land was valued at \$17,242 (4 Larkspur) and \$45,799 (10 Larkspur) using a Comparable Land Sales Pricing (CALP) model comparing actual land sales from the Colstrip area. *Dept Ex. K and O*. The land sales were based on vacant land sales as enough commercial land sales were unavailable. *MTAB Hrg. 27:11-15*. The sales were submitted as evidence in the appeal by the Department and were unrefuted by any specific testimony or contrary evidence from Mr. Burnett. *Dept. Ex. L*. We find the value assigned to the land to be supported by the evidence and testimony of the Department.

16. As to the four 4-plex apartment buildings and other improvements on the land, the Department considered both the cost approach and income approach to estimate market value, and they yielded almost identical valuations. *Dept. Ex. A*. Mr. Burnett requested a valuation of \$8,500 for the single 4-plex property, and \$26,500 for the three 4-plex property for the land and improvements, but failed to provide comparative sales or other concrete testimony or evidence to support this value. *MTAB Hrg. 3:13-16, 4:3-5 and 9:19-21*.

17. While Mr. Burnett took issue with the comparable sales considered from neighboring towns identified by the Department, the Department ultimately used the income method to value both of the subject properties' improvements, utilizing the income data provided by Mr. Burnett's secretary during the Department's 2016 review. *MTAB Hrg. 4:16-25, 16:7-12, 33:22-25 and 23:9-11*. As the Department did not receive income data from Mr. Burnett for the following two-year cycle, the decision was made

not to increase the value of the properties, and the Department gave Mr. Burnett the benefit of the doubt. *Id.* We find the Department gave credible testimony and evidentiary support for their decision to utilize the income method, and appropriately used actual income data in the income method to estimate market value. We uphold the Department's valuation for the improvements to be \$133,858 (4 Larkspur) and \$407,501 (10 Larkspur).

18. Mr. Burnett's argument regarding the Colstrip market is one of economic obsolescence, and asserts that the possibility of economic loss due to the potential closures is already having a negative effect on real estate prices, and should therefore require valuations to be made at a steep discount. *Burnett Ex. 17.* Mr. Burnett's appraisal date, however, was January 1, 2016, and the announcement of the closures of certain sections of the Colstrip power plant was not made until several years later. Furthermore, while the shutdown of half the plant seems likely to occur within the next few years, it is far from certain as to whether the remainder of the facility will close at any time in the near future. We would note that NorthWestern Energy is estimating the life of units three and four could possibly run into the year 2042. It is true the plant's closure is a topic of lawsuits, speculation and discussion, but at the time of the Department's lien date and appraisal, the Department reviewed the market and no discernable negative effect could be found in the sales of property in the broader market in Colstrip.

19. Moreover, if Mr. Burnett had desired to make his own analysis of comparable sales of properties in the Colstrip community to try to prove his case, the data was available to him just as it is for all appellants who request review by the department. *MTAB Hrg. 38:9-22.* Mr. Burnett failed to make a showing or analysis to rebut the testimony of the Department that the Colstrip market, as of the appraisal date, showed no signs of an overall depression of market value.

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20. Finally, we agree with the Department as to the issue of timeliness with regard to Mr. Burnett's 2017 claim. Mr. Burnett's Property Classification and Appraisal Notice was issued by the Department on July 3, 2017. *Dept Ex. B.* Mr. Burnett failed to make his initial requests for the AB-26 informal reviews until May 16, 2018, more than 10 months beyond the 30-day deadline, therefore the MTAB will only consider his 2018 appeal. *Dept. Ex. C and D.*

ORDER

IT IS THEREFORE ORDERED by the Montana Tax Appeal Board that the Montana Department of Revenue shall value the subject properties as follows:

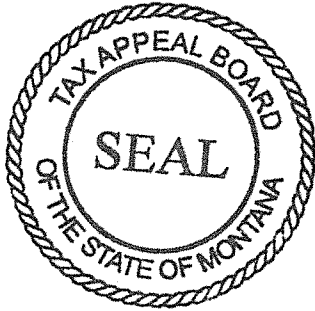
- a. The property located at 4 Larkspur (Geocode: 29-1151-34-3-22-01-0000)
 - i. The land shall have a value of \$17,242;
 - ii. The improvements shall have a value of \$133,858;
 - iii. For a total value of \$151,100.

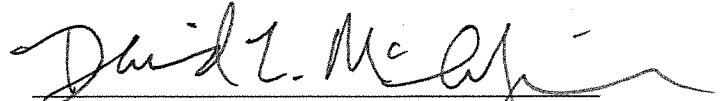
- b. The property located at 10 Larkspur (Geocode: 29-1151-34-3-19-01-0000)
 - i. The land shall have a value of \$45,799;
 - ii. The improvements shall have a value of \$407,501;
 - iii. For a total value of \$453,300.

The ordered value is an adoption of the Department's original valuation of Mr. Burnett's properties. As such the issue of timeliness does not affect Mr. Burnett's property tax obligation in 2017 or 2018.

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Ordered December 5, 2019





David L. McAlpin, Chairman
MONTANA TAX APPEAL BOARD



Steve Doherty, Board Member
MONTANA TAX APPEAL BOARD



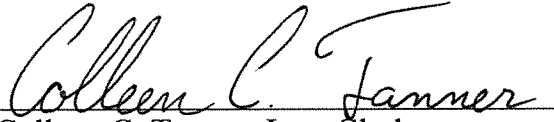
Eric Stern, Board Member
MONTANA TAX APPEAL BOARD

Certificate of Service

I certify that I caused a true and correct copy of the foregoing Order to be sent by United States Mail via Print and Mail Services Bureau of the State of Montana on December 5, 2019 to:

Colstrip Properties, Inc.
c/o Richard S. Burnett
P.O. Box 1892
Colstrip, Montana 59323

Anthony Zammit, Nicholas Gochis
Montana Department of Revenue
P.O. Box 7701
Helena, Montana 59604-7701


Colleen C. Tanner, Law Clerk
MONTANA TAX APPEAL BOARD