BEFORE THE STATE TAX APPEAL BOARD

OF THE STATE OF MONTANA

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| DONALD M. LILIENTHAL,<br><br>Appellant,<br><br>-vs-<br><br>THE DEPARTMENT OF REVENUE OF THE STATE OF MONTANA,<br><br>Respondent. | ) | DOCKET NO.: PT-1997-15<br><br><br><br>FACTUAL BACKGROUND, CONCLUSIONS OF LAW, ORDER and OPPORTUNITY FOR JUDICIAL REVIEW |

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The above-entitled appeal was heard on November 1, 1999, in the City of Great Falls, Montana, in accordance with an order of the State Tax Appeal Board of the State of Montana (the Board). The notice of the hearing was duly given as required by law.

The taxpayer, Donald Lilienthal, presented testimony in support of the appeal. The Department of Revenue (DOR), represented by Appraiser Rich Dempsey, presented testimony in opposition to the appeal. Testimony was presented and exhibits were received. The Board then took the appeal under advisement; and the Board, having fully considered the testimony, exhibits and all things and matters presented to it by all parties, finds and concludes as follows:

## FACTUAL BACKGROUND

1. Due, proper and sufficient notice was given of this matter, the hearing hereon, and of the time and place of the hearing. All parties were afforded opportunity to present evidence, oral and documentary.

2. The taxpayer is the owner of the property which is the subject of this appeal and which is described as follows:

> 10 acres in Section 5, Township 19 N., Range 3 E, County of Cascade, State of Montana; geo code #2892-05-02-02-12-0000. (Assessor code #2373800).

3. For the 1997 tax year, the DOR appraised the subject property at a value of $31,880 for the land.

4. The taxpayer appealed to the Cascade County Tax Appeal Board on October 3, 1997, requesting a reduction in value to $10,000 for the land, stating:

*Appraisal too high.*

5. In its November 5, 1997 decision, the county board disapproved the taxpayer's requested value of $10,000 for the land, stating:

*After hearing testimony and reviewing exhibits, the Board finds the ammended (sic) value of $31,880.00 on the land to accurately represent the market value of the property. This appeal is disapproved.*

6. The taxpayer appealed that decision to this Board on November 21, 1997, stating:

*The appraised (assessed) value of the property as determined by the DOR and the County Tax Appeal Board exceeds its fair market value.*

*The property was improperly classified as commercial property; it should be agricultural.*

## TAXPAYER'S CONTENTIONS

The subject property consists of 10 acres of land that is part of a parcel in excess of 100 acres, also owned by the taxpayer. The subject land, on which a large gravel pit is located, is classified as commercial land, while the remainder of the larger parcel is classified as agricultural land. Mr. Lilienthal, through his attorney, Steven T. Potts, had originally requested that the DOR's value of $31,880 on his land be reduced to $10,000. He now believes that this amount is too high and that his land has been improperly classified, and he is requesting that the subject land be valued at the same rate as his adjacent agricultural land, $16.67 per acre.

Taxpayer's Exhibit 1 is a copy of the "Agreement for Purchase and Sale of Gravel in Place" dated January 12, 1995. This agreement is between Mr. Lilienthal ("Seller") and United Materials of Great Falls ("Buyer"), and it specifies the terms by which the gravel located on Mr. Lilienthal's property will be sold to United Materials. The pertinent parts of this contract are summarized as follows:

The second paragraph of the agreement states: "In consideration of the payment of the purchase price specified herein, and subject to the terms and conditions stated hereafter, Seller hereby sells and conveys to Buyer, and Buyer hereby purchases and accepts from Seller, all fill material, rock, sand and gravel (hereafter referred to collectively as "gravel") in, on or under the following described real property in Cascade County, Montana..."

The land covered by the agreement is divided into Tract I, consisting of 14.54 acres, and Tract II, consisting of 28.92 acres. The total amount of gravel "in, on or under said premises" is estimated to be 630,468 cubic yards of gravel "less gravel extracted under previous agreements..." The commencement date of the agreement is December 31, 1994, and the termination date of the agreement is December 31, 2024. During that period of time, the buyer has the right to enter the premises to remove gravel at any and all times. The base purchase price for the gravel for the year 1995 is $16,234.03. The annual purchase price for the next 10 years is to total "the prior year's base purchase price plus cost of living increase" as provided in the agreement. The agreement provides that the Seller may resume the use of depleted portions of the premises provided that such use shall not interfere with the operations of the Buyer or the

reclamation of the premises (the reclamation is to be conducted according to terms of the "Open Cut Mining Act, Title 82, Chapter 4, part 4, MCA, 1993). Title XVII of the agreement, entitled "Taxes and Assessments," states that "Seller shall pay all taxes and assessments levied against said real property."

Mr. Lilienthal contends that "this agreement shows that I do not own any gravel in that location. Therefore, I do not have any business in that location. I don't own the gravel that I'm being taxed on." He stated that he does own the land, "but this did not increase the value of the land; in fact, it decreased the value of the land." He believes that he is being double taxed, because he does pay federal and state income taxes on the income he receives from the sale of the gravel. Mr. Lilienthal equated the sale of the gravel from his property to his selling an automobile. The automobile would no longer be his property, so he would not be taxed for it. The gravel has been sold so it no longer belongs to him and he should not be taxed for it. He emphasized repeatedly that he owns the land, but he does not own the gravel on the land.

Mr. Lilienthal stated that the gravel removal has been completed on Tract 1, which United Materials will reclaim, and he will be grazing cows there next year. He believes

that the 10 acres of subject land should currently be classified as agricultural land with the rest of his property. He stated that he could "turn his cows loose" on the subject land right now, despite the gravel extraction operation located there.

**DOR'S CONTENTIONS**

DOR's Exhibit A is the 1997 property record card for Mr. Lilienthal's entire parcel of land, including the subject property, which is 10 acres of commercial property valued at $3,188 per acre. Exhibit B is a computer printout of the 1996 subject property information, showing that the subject property was valued at $3,600 per acre in 1996.

Exhibit C is the Computer Assisted Land Pricing (CALP) model for neighborhood 815 (located southwest of Ulm and south and west of Great Falls), showing the sales used to determine land values in that neighborhood and for the subject property. Mr. Dempsey testified that he had placed the subject land in neighborhood 815, which is primarily residential, because it resulted in a lower value than if he had used a different neighborhood. He stated that a CALP model considers sales dates, prices and sizes, then through a multiple regression method determines an adjusted value per square foot for the subject property. This CALP model, which analyzed 67 sales in neighborhood 815, shows a base

rate of 5 acres at $5,500 per acre and an adjustment rate of $875 per acre for anything over 5 acres. Mr. Dempsey explained that this means the first 5 acres are assessed at $5,500 per acre, and the second 5 acres are assessed at $875 per acre. The subject land consists of 10 acres, with the first 5 acres valued at $5,500 per acre for a total of $27,500, and the additional 5 acres valued at $875 per acre for a total of $4,375. The resulting total was rounded to a value of $3,188 per acre for the subject land. Mr. Dempsey testified that he had not been involved in the 1996 valuation of the subject land at $3,600 per acre, but he assumed that it had not been based on a CALP model.

## BOARD'S DISCUSSION

Mr. Lilienthal believes that his land should not be valued as commercial land because he has sold the gravel and no longer owns it, therefore he should not be taxed on it. The Board correlates his situation to that of a landlord who owns land on which an apartment building is located. The landlord rents the apartments to tenants, who pay rent according to an agreement or lease. The property the landlord rents to others provides income to the landlord, therefore the property will be taxed as commercial property. Mr. Lilienthal correlates his situation to that of his

selling an automobile. If the buyer has paid for the automobile yet allows it to remain on Mr. Lilienthal's land, Mr. Lilienthal would no longer own it so would not be taxed on it. In this situation, the automobile **would not** affect the classification of the land nor the value of the land. However, if Mr. Lilienthal had allowed his property to be utilized as a used vehicle lot, and buyers left their purchased automobiles on the lot, it would be a different situation. This would be a commercial business, and Mr. Lilienthal's land would be taxed as such. In this case, the automobiles **would** affect the classification and value of the land. The use of land determines its classification and affects its resulting value. **MCA 15-7-103 (2)** states that "all lands shall be classified **according to their use** or uses..." (emphasis added).

Black's Law Dictionary, Sixth Edition, defines "*commercial*" as *"Relates to or is connected with trade and traffic or commerce in general; is occupied with business and commerce. Generic term for most all aspects of* ***buying and selling****."* (Emphasis added.) Black's defines "*commercial activity*" as *"Any type of business or* ***activity which is carried on for a profit****. Activity relating to or connected with trade and traffic or commerce in general."* (Emphasis added.) Mr. Lilienthal is realizing an annual profit from

the gravel that he has sold to United Materials, and, therefore, he is engaged in a commercial activity. He is not being taxed on the gravel but on the land on which the gravel is located. This land is valued as commercial land because of its use. Section **15-1-101, MCA**, states in pertinent part: *The term "commercial", when used to describe property, means property ... **used for the production of income**,...* (emphasis added). Not only is the gravel being extracted from the subject land, but currently United Materials is also operating a gravel processing plant on the property.

Mr. Lilienthal believes that the 10-acre subject property should be classified as agricultural land. Section **15-7-202, MCA**, states in pertinent part: *(1)(a) contiguous parcels of land totaling 160 acres or more under one ownership are eligible for valuation, assessment, and taxation as agricultural land each year that none of the parcels is devoted to a residential, **commercial, or industrial use**.* (Emphasis added.) *(b)(i) Contiguous parcels of land of 20 acres or more but less than 160 acres under one ownership are eligible for valuation, assessment, and taxation as agricultural land **if the land is used primarily for raising and marketing... products that meet the definition of agricultural...***(emphasis added). The present

use of the subject property would not allow its classification as agricultural land.

Although the subject property as appealed is only 10 acres in size, the actual size of the property, according to Taxpayer's Exhibit 1, is 43.46 acres, divided into Tract I (14.54 acres) and Tract II (28.92 acres). Mr. Dempsey testified that the DOR had not seen the agreement between Mr. Lilienthal and United Materials prior to this hearing. He believes that when the DOR determined in 1996 that the land had a commercial operation on it, the appraiser estimated the size of the gravel pit as 10 acres. This year the DOR has increased the size of the gravel pit from 10 acres to its actual size of 43 acres.

Mr. Dempsey stated that when the gravel has been extracted from the land, and the land has been reclaimed so it can again be used as agricultural land, the DOR will reclassify it as agricultural land. Mr. Lilienthal said that the gravel has been removed from Tract I, and United Materials will be replacing the topsoil next year. Mr. Dempsey said that the DOR can reclassify that portion of the land at that time. If the agreement is terminated prior to its scheduled termination date of 2024 and the land reverts to agricultural use, Mr. Dempsey said that the land would be

reclassified as agricultural if it is being used as agricultural land according to the statutes.

The Board felt that the DOR had properly valued the subject land at $3188 per acre, using the CALP model. **ARM 42.18.112 (6)** states *"Commercial lots and tracts are valued through the use of computer assisted land pricing (CALP) models. Homogeneous areas within each county are geographically defined as neighborhoods..."* Mr. Dempsey testified that he "had placed the subject land in a neighborhood within the 5-mile limit of Great Falls. I could have placed it in another neighborhood which would have given it a much higher value, but I chose to put it in this one." He testified that all sales used within this CALP model were within the prescribed time period. Mr. Dempsey also stated that all gravel pits within the county are now classified in the same manner as is the subject. In 1997 he had driven throughout the county to ensure that all were identified and were valued the same. The Board finds that the subject land does not meet the statutory requirements for agricultural classification and further finds that the evidence presented by Mr. Dempsey supports the DOR's classification and value of the subject land.

## CONCLUSIONS OF LAW

1. The State Tax Appeal Board has jurisdiction over

this matter. **§15-2-301 MCA.**

2. §**15-2-301, MCA. Appeal of county tax appeal board decisions.** (4) In connection with any appeal under this section, 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.

3. §**15-7-103, MCA. Classification and appraisal - general and uniform methods**. (2) All lands shall be classified according to their use or uses...

4. §**15-1-101, MCA. Definitions.** (d)(i) The term "commercial", when used to describe property, means property used or owned by a business, a trade, or a corporation as defined in 35-2-114 or used for the production of income, except property described in subsection (1)(d)(ii).

5. §**15-1-101, MCA. Definitions.** (d)(ii) The following types of property are not commercial: (A) agricultural lands.

6. §**15-7-202. Eligibility of land for valuation as agricultural.** (1)(a) Contiguous parcels of land totaling 160 acres or more under one ownership are eligible for valuation, assessment, and taxation as agricultural land each year that none of the parcels is devoted to a residential, commercial, or industrial use. (b)(i)Contiguous parcels of land of 20 acres or more but less than 160 acres

under one ownership are eligible for valuation, assessment, and taxation as agricultural land if the land is used primarily for raising and marketing, as defined in subsection (1)(c), products that meet the definition of agricultural in 15-1-101. A parcel of land is presumed to be used primarily for raising agricultural products if the owner or the owner's immediate family members, agent, employee, or lessee markets not less than $1,500 in annual gross income from the raising of agricultural products produced by the land.

7. It is true, as a general rule, that the appraisal of the Department of Revenue is presumed to be correct and that the taxpayer must overcome this presumption. The Department of Revenue should, however, bear a certain burden of providing documented evidence to support its assessed values. (Western Airlines, Inc., v. Catherine Michunovich et al., 149 Mont. 347, 428 P.2d 3, (1967).

8. The appeal of the taxpayer is hereby denied, and the decision of the Cascade County Tax Appeal Board is affirmed.

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## ORDER

IT IS THEREFORE ORDERED by the State Tax Appeal Board of the State of Montana that the subject property shall be entered on the tax rolls of Cascade County by the Assessor of that county at the value of $31,880 for the land as determined by the Department of Revenue and upheld by the Cascade County Tax Appeal Board. The appeal of the taxpayer is therefore denied, and the decision of the Cascade County Tax Appeal Board is affirmed.

Dated this 11th day of November, 1999.

BY ORDER OF THE
STATE TAX APPEAL BOARD

( S E A L )

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GREGORY A. THORNQUIST, Chairman

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JAN BROWN, Member

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JEREANN NELSON, Member

NOTICE: You are entitled to judicial review of this Order in accordance with Section 15-2-303(2), MCA. Judicial review may be obtained by filing a petition in district court within 60 days following the service of this Order.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 11th day of November, 1999, the foregoing Order of the Board was served on the parties hereto by depositing a copy thereof in the U.S. Mails, postage prepaid, addressed to the parties as follows:

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