

Before The Montana Tax Appeal Board**COLSTRIP PROPERTIES, INC.,***Appellant,*

v.

**STATE OF MONTANA,
DEPARTMENT OF REVENUE,***Respondent.*

CASE №: PT-2021-2

4 Larkspur Drive

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

This is an appeal by Colstrip Properties Inc., represented by Richard S. Burnett (Taxpayer) of a decision by the Rosebud County Tax Appeal Board (RCTAB), which upheld the Department of Revenue's (DOR) appraised value of a multifamily residential apartment located in Colstrip. We deny the Taxpayer's appeal and affirm the RCTAB decision.

ISSUE TO BE DECIDED

Whether the Rosebud County Tax Appeal Board erred in affirming the DOR's appraised value of \$123,200 for this property.¹

PROPERTY DESCRIPTION

The physical address of this property is 4 Larkspur Drive, Colstrip. The property Geocode is 29-1151-34-3-22-01-0000, and the Legal description is Colstrip, S34, T02 N, R41 E, Block 032, Lot 001, Colstrip 32. The assessment code is 001324, and the property is in DOR neighborhood 229.210A. The subject property improvements consist of a 4-unit residential rental building built in 1973.

¹ RCTAB heard both PT-2021-2 and PT-2021-3 in conjunction and found a combined value of \$492,000 for the two separate legal properties identified by geocodes 29-1151-34-3-22-01 and 29-1151-34-3-19-01. The \$123,200 cited in this appeal represents the RCTAB decision for PT-2021-2 with a street address of 4 Larkspur Drive.

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EXHIBIT LIST

The following evidence was submitted at the hearing:

Department of Revenue Exhibits;

- A. Land Model Packet, MDOR bates numbered 000009-000011;
- B. Classification and Appraisal Notice, MDOR bates numbered 000030-31;
- C. CTAB Exhibit A: Property Record Card and appeal documents, MDOR bates numbered 000036-51;
- D. CTAB Decision, MDOR bates numbered 000052-54;
- E. 2019 State B Hotel/Motel Model, MDOR bates numbered 000400.

Colstrip Properties and Richard Burnett Exhibits;

- A-1. 3/9/21 Article by Pete Zimmerman at Daily Montanan;
- B-2. 3/26/14 Buy-Sell Agreement (Land) dated 3/26/14 for vacant land (not subject to this appeal), page 1 of 7;
- C-3. 2/5/21 Casper Star Article;
- D-4. What is Colstrip...part of an article (no reference source);
- E-5. 1/2021 EDF case study article (select pages) - 3pages;
- F-6. Confidential Comparables for 11 Larkspur Drive - 2 pages MDOR 000268;
- G-7. 5/2/2008 Colstrip companies water lawsuit Billings Gazette articles -- 1 page;
- H-8. 2015 MCA 15-8-111 Market Value Standard-exceptions – 1 page;
- K-11. 3/13/20 Four Foundation Underpinning Bids – 4 separate pages;
- L-12. 3/12/13 Coal-fired Power plant article – Quartz 3 pages;
- M-13. TriMedia Envir. article on coal-fired power plants, unknown date – 1 page;
- N-14. 6/26/19 EIA article ‘Today in Energy’ – 2 pages;
- O-15. 4/25/21 Daily Inter Lake article – 1 page;

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- P-16. Daily Montanan article approx. date 5/7/21, Colstrip Utilities sue NW Talen - 5 pages;
- Q-17. 5/13/21 Email with Krista Hazel – 2 pages;
- R-18. 12/5/2019 MTAB Opinion PT-2018-63 related to geocodes 29-1151-34-3-22-01-0000 and 29-1151-34-3-19-01-0000;
- S-19. 8/25/2000 MTAB Opinion PT-1999-45, related to the Taxpayer’s Mobile Home Park;
- T-20. Packet of pictures of parts of the different apartments owned by Taxpayer;
- U-21. Pages 11-12 from MTAB Opinion in transcript PT-1999-45;
- V-22. Packet of pictures (13) of motel PT-2021-1;
- W-00. (No Exhibit labeled W-23);
- X-23. ‘Not the Future’ article from Missoula Current, unknown date – 1 page.

The Montana Tax Appeal Board (MTAB) hearing was conducted in Helena on May 18, 2021, and the following were present:

- a. Richard Burnett; and
- b. Anthony Zammit and Dave Burleigh, DOR Counsel; Liz Franz, DOR Regional Manager, and Maureen Celandier, DOR Commercial Appraiser from Billings who had reviewed the subject properties in place of the previous DOR appraiser.

The Board was represented at hearing by Board Members David McAlpin, Amie Zendron, and Fred Thomas. Board Member Thomas subsequently resigned his position and was replaced by Daniel Zolnikov. Board Member Zolnikov has read the case file and listened to the audio recording of the hearing and was therefore designated to participate in the deliberations. Mont. Code Ann. § 2-4-622.

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The record includes all materials submitted to the county tax appeal board, the audio recording of the hearing at the county tax appeal board, and additional exhibits submitted by the parties for the MTAB hearing.

FINDINGS OF FACT

1. To whatever extent the foregoing findings of fact may be construed as conclusions of law, they are incorporated accordingly.
2. The DOR valued the subject property at \$151,100 for the 2017/2018 appraisal cycle. *Dept. Ex. B.* For the 2019/2020 tax cycle, the DOR valued the subject property at \$150,100 using a lien date of January 1, 2018. *Id.*
3. Rather than file Form AB-26 request for informal review by the DOR, the Taxpayer appealed directly to the RCTAB. The DOR inspected the property on November 25, 2020. *Dept. Ex. C.* After the inspection, the DOR reduced the property's value to \$123,200. *Id.*
4. The Taxpayer's CTAB hearing was delayed until Taxpayer's prior MTAB appeals PT-2018-63 & PT-2018-67 had concluded.
5. A county hearing was held on December 2, 2020. *Dept. Ex. D.* The RCTAB heard evidence and testimony regarding multiple addresses, including 4, 10, 16, and 22 Larkspur Drive. *MTAB Dkt. 3.*
6. RCTAB upheld the DOR's property value due to "lack of evidence" provided by the Taxpayer. *Id.* RCTAB set all the Larkspur residential rental property value at \$492,700. *Id.*
7. The Taxpayer appealed the county decision to MTAB on January 7, 2021, and the Board held a hearing on May 18, 2021. For the 4 Larkspur Drive Property (PT-2021-2), the

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Taxpayer requested a value of \$25,000, and the DOR requested a value of \$123,200. *MTAB Hrg. Transcr. 79:8-80:7.*

8. At the MTAB hearing, the Board and the parties agreed to hear all Larkspur properties (PT-2021-2 & PT-2021-3) simultaneously in the interest of time and to avoid repetition of similar or identical arguments. *MTAB Hrg. Transcr. 78:17-79:18.*

9. This property is one of six cases the Taxpayer concurrently appealed on the general theory of economic obsolescence. The basis of the Taxpayer's arguments in all cases was the adverse economic effect of the Colstrip power plant pending shutdown. Taxpayer contends the town of Colstrip has a life span of forty-five to fifty years, and a town with an end date means the property's market value in the town will also have an end date. *MTAB Hrg. Transcr. 6:17-23.* The Taxpayer contended that, with the clock "running/counting down" on the town, as an entrepreneur and property purchaser, he would not purchase the property. *MTAB Hrg. Transcr. 7:3-5.* When valuing the property, Taxpayer argued the DOR appraisers failed to consider the length of the town's life, the employment at the powerplant, and the cost to repair the apartments. *MTAB Hrg. Transcr. 13:21-14:13.* Taxpayer testified he believes the entire plant will close within five years, and unless remediation work is undertaken on a large scale at the power plant, the apartments will be valueless and boarded up in four to five years. *Id.*

10. Taxpayer presented pictures of the subject property showing damage to the roofs, siding, and foundation. *Taxpayer Ex. T.* Taxpayer testified if the apartment's condition deteriorates any further, he will start boarding the apartment buildings up and moving his tenants into alternative apartments owned by the Taxpayer. *MTAB Hrg. Transcr. 80:13-81:10.* The Taxpayer claims the apartments are habitable, but not worth fixing up because the "town is

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going to close in a few years,” creating little demand for the apartments. *Id.* The Taxpayer describes the apartments as “junk quality that cannot be sold.” *Id.*

11. Taxpayer responded to Board questioning in the affirmative that the subject property was part of a lawsuit involving the power plant in Colstrip for property damage to the subject property, which the Taxpayer settled out of court. *MTAB Hrg. Transcr. 81:21-82:9.*
12. The Taxpayer testified that rents for the subject property are \$375 per month for a three-bedroom apartment and \$300-\$325 per month for a two-bedroom apartment, depending on the carpet's condition. *MTAB Hrg. Transcr. 81:10-20.*
13. The Taxpayer contends the DOR should value the property at the sale price from the original purchase of the property in 1999, the last time there was a willing buyer and seller. *MTAB Hrg. Transcr. 84:6-18.*
14. Taxpayer did not provide any other expenditure or income information regarding the properties and testified he uses vacancy rates to determine if the apartment will keep operating. *MTAB Hrg. Transcr. 85:2-25.* If a 4-unit building drops below 50% vacancy, the Taxpayer testified he will move the tenants to one of his other apartment rentals and abandon the high vacancy apartments to tax foreclosure to avoid the cost property tax and addressing the deferred maintenance of the property. *Id.*
15. DOR introduced the Property Record Card for 4 Larkspur as Exhibit C. The Property Record Card showed the property's appraisal value had decreased by \$27,900 since the last tax cycle of 2017-2018. *Dept Ex. C.*

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16. DOR appraiser Maureen Celander used the income approach to value the subject properties. *MTAB Hrg. Transcr. 99:15-103:11*. Ms. Celander testified that she chose the income approach as the most reliable method of valuation because the apartments are still producing income and, if maintained, would continue to bring in additional income into the future. *MTAB Hrg. Transcr. 109:13-110:7*. Additionally, Ms. Celander testified that she believes the income approach captured the amount of depreciation better than using the cost approach. *Id.* She further testified that if the property were uninhabited with no renter present, the DOR would most likely use the replacement cost new less depreciation or “cost” approach to value the property. *MTAB Hrg. Transcr. 112:17-113:17*.
17. Ms. Celander testified that to find market value using the income approach, the DOR gathers rental data from various similar properties in Montana regions and stratifies the data by location to create a model to calculate the projected gross income for any given property, which is then applied to a property based on the unit size. *MTAB Hrg. Transcr. 99:20-104:6*. She further testified that additional income from the property is added to the projected gross income, then standardized vacancy and collection losses are subtracted, giving the properties’ effective gross income. *Id.* Typical property expenses are then deducted from the effective gross income to yield a likely net operating income for the property. *Id.* The net operating expense is then divided by a modeled effective capitalization rate of 10.3% to get the property's market value. *Id.*
18. Ms. Celander inspected the subject property on November 25, 2020. *MTAB Hrg. Transcr. 92:1-2*. She testified the condition of the properties was depreciated to a point that the properties would not command the same amount of rent as other similar apartments in Colstrip. *MTAB Hrg. Transcr. 92:18-23, 94:6-21*. Ms. Celander testified that the apartment walkways were unstable, and the foundations of the apartment were settling. *Id.* Ms. Celander testified that she accounted for these factors by adjusting the rent rating downward

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from three to two, making the DOR's rent estimates closer to the property's actual rents. *Id.* *MTAB Hrg. Transcr. 93:8-18*. Rent ratings are developed using a model, with nine being the highest and one being the lowest. *MTAB Hrg. Transcr. 95:6-96:19*. Additionally, the models are developed using rents that are voluntarily reported to the DOR. Ms. Celander confirmed the information used in the model is from DOR region three but when questioned by the Board could not confirm if any rents from the Colstrip area were used in the model. *Id.*

19. Ms. Celander testified that decreasing the rent rating lowers the net operating income used in the income approach formula and reduces the property's market value. *MTAB Hrg. Transcr. 96:22-97:4*. Additionally, the lower rent rating is also considered when calculating the vacancy and collection loss. *Id.*
20. DOR area manager Liz Franz testified the DOR acknowledges Colstrip's economics in its income model by looking at similar properties that rent for the exact amount as subject properties and comparing their income and expenses. *MTAB Hrg. Transcr. 116:19-117:13*. Ms. Franz testified that as the income levels decrease, the expense percentages rise, and in an income model, reduced income and higher expenses are captured in the model and equate to a lower market value. *Id.*

JURISDICTION AND STANDARD OF REVIEW

21. The Montana Tax Appeal Board (Board) is an independent agency not affiliated with the Montana Department of Revenue (DOR). Mont. Const., Art. VIII § 7; Mont. Code Ann. § 15-2-101.
22. The Taxpayers filed a timely appeal of the RCTAB decision to the MTAB. Therefore, this Board maintains jurisdiction to hear and decide this matter. Mont. Code Ann. §15-2-301(1)(b).

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23. This Board has discretion to determine an appeal on the record or it may hear further testimony. Mont. Code Ann. §15-2-301(2)(b).

24. This Board may hear appeals de novo. *Department of Revenue v. Burlington N.*, 169 Mont. 202, 545 P.2d 1083 (1975). “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 deference to the RCTAB hearing and subsequent decision.

25. The Board’s order is final and binding upon all parties unless changed by judicial review. Mont. Code Ann. § 15-2-301.

CONCLUSIONS OF LAW

26. To whatever extent the following conclusions of law may be construed as findings of fact, they are incorporated accordingly.

27. “All taxable property must be appraised at 100% of its market value....” Mont. Code Ann. § 15-8-111.

28. Except as otherwise provided in Montana Code Ann. § 15-2-301(2)(c), the Board is not bound by common law and statutory rules of evidence or rules of discovery and may affirm, reverse, or modify any decision in connection with any appeal under Montana Code Ann. § 15-2-301. To the extent Mont. Code Ann. § 15-2-301 conflicts with the Montana Administrative Procedure Act, § 15-2-301 supersedes that act. Mont. Code Ann. § 15-2-301(5).

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29. 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.” *Burlington N. Inc.*, 169 Mont. at 214, 545 P.2d at 1090. However, DOR cannot rely entirely on the presumption in its favor and must show the propriety of their action. *Western Air Lines, Inc. v. Michunovich*, 149 Mont. 347, 353, 428 P.2d 3, 7 (1967).
30. 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*, 149 Mont. at 353, 428 P.2d at 7.
31. The Legislature intended the Department to utilize a number of different approaches or combination of approaches, including the income approach, sales comparison approach, and cost less depreciation approach, depending on the market where the appraisals take place, when it assesses property and estimates market value. *Albright v. State By & Through State*, 281 Mont. 196, 208-209, 933 P.2d 815, 823 (1997).
32. “‘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).
33. “The state tax appeal board must consider an independent appraisal provided by the taxpayer if the appraisal meets standards set by the Montana board of real estate appraisers

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and the appraisal was conducted within 6 months of the valuation date. If the state board does not use the appraisal provided by the taxpayer in conducting the appeal, the state board must provide to the taxpayer the reason for not using the appraisal.” Mont. Code Ann. § 15-2-301(3).

34. The Board “may not amend or repeal any administrative rule of the department,” but may enjoin its application if the Board concludes the rule is “arbitrary, capricious, or otherwise unlawful.” Mont. Code Ann. § 15-2-301.

35. The Legislature sets the appraisal cycle and lien date and confines the DOR to make their valuations premised upon the single statewide lien date, in this case for the lien date of January 1, 2018, to reflect value for the 2019/2020 appraisal cycle. Mont. Code Ann. § 15-7-111.

36. In this case and his other appeals, the Taxpayer relied exclusively upon evidence and testimony that the economic obsolescence of the Colstrip coal-fired power plants, and by association the community of Colstrip where his properties are located, are subject to an unknown economic future. He earnestly testified to the Board that any reasonable person can see that the Department failed to account for that economic obsolescence by overestimating the market value assigned to his apartments.

37. However, the DOR witnesses did provide credible testimony and evidence that the appraisal methods they used to value his property did consider depreciation which they further argued, largely captured both the changing economy in Colstrip and the lack of upkeep to his properties the Taxpayer admitted. DOR witness testified the Taxpayer’s value was reduced from the previous appraisal cycle, albeit not as much as was requested by the Taxpayer.

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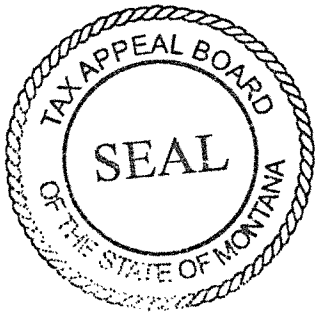
38. Taxpayer testified he did not maintain separate business accounting for his apartment rental business, nor for his motel or mobile home park. He provided no evidence or specific testimony of market sales in Colstrip to refute the DOR value or methodology. Without more than anecdotal and general opinion testimony this Board is not able to overturn the presumption of correctness granted to the DOR in tax appeals.
39. The DOR did listen to the Taxpayer's arguments and did physically inspect his properties. DOR did account for unexpected defects in the properties by reducing the rent rating which lowered the value of the properties. We find the DOR did pursue due diligence in considering the Taxpayer's arguments and did properly reduce value in good faith to reflect the lower rents achieved by these apartments. These are the tangible measures of property values in Colstrip, and the DOR convinced this Board they did account for them within the time constraints of state law determined by the State Legislature.
40. We are bound by law to consider the present appraisal cycle based on the lien date of January 1, 2018. The futuristic argument that the coming years guarantee a downturn is to a certain degree just as speculative as accounting for the Montana housing market being top in the country in 2021 by concluding the value of a 4-unit multifamily property in Colstrip must increase. We believe, especially considering the lack of concrete tangible evidence and testimony presented by the Taxpayer, that the DOR met their burden of estimating market value of these apartments on January 1, 2018.

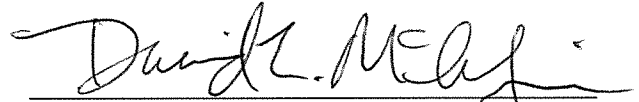
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ORDER


41. Taxpayer's appeal is denied, and the RCTAB decision upholding the State of Montana, Department of Revenue's valuation is affirmed.

Ordered August 13, 2021






David L. McAlpin, Chairman
MONTANA TAX APPEAL BOARD



Amie Zendron, Member
MONTANA TAX APPEAL BOARD



Daniel Zolnikov, 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 Montana Dept. 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 August 13, 2021 to:

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