

BEFORE THE MONTANA TAX APPEAL BOARD

**State of Montana,
Department of Revenue,**

Appellant;

v.

Paul and Margaret Gierach,

Respondent.

CASE No: PT-2016-19

**Findings of Fact,
Conclusions of Law,
Order, and
Opportunity for Judicial Review**

1. Before the Board is Appellant State of Montana, Department of Revenue's (DOR) appeal from the Missoula County Tax Appeal Board's (CTAB) decision to reduce the DOR's assessed value for two commercial properties owned by Paul T. and Margaret Gierach (Taxpayers). The properties are designated as townhomes and referred to as Units 1 and 2, a duplex and a fourplex respectively, located at 2241 S. 3rd St. W, Missoula; geocodes 04-2200-20-3-16-12-5001 and 04-2200-20-3-16-12-5002; with the following legal descriptions Paradise Townhomes Lot 12A S20 T13 R19.

ISSUE

2. The issue before the Board is whether the DOR correctly determined the market value of two multiplex townhomes using the same method the DOR uses to value condominiums.

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3. DOR argues that they must value the properties in accordance with their legal status, multiplex townhomes, which while unusual is similar to condominiums.
4. The Gierachs argue that the DOR should ignore the fact that the property was legally split into two separate townhome sites and ask this Board to value the properties as one single sixplex apartment building.

FINDINGS OF FACT

5. The Board conducted a hearing at 600 N. Park Ave., Helena at 1:00 p.m. on July 7, 2016, at which the following were present:
 - a. Paul Gierach, Taxpayer;
 - b. Michele Crepeau, counsel representing DOR;
 - c. Helen Greenberg, DOR appraiser for Missoula County, as witness for DOR;
6. The record includes all materials submitted to the CTAB, the transcript of the hearing at the CTAB, and additional materials submitted by the parties along with the transcript of the hearing before this Board.
7. The following exhibits were submitted at the hearing:
 - a. DOR exhibits;
 - i. A – Taxpayers' AB-26 forms,

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- ii. C – excerpts from the Taxpayers’ Declaration of Townhome recorded on 10/23/2014 (6 pages),
- iii. D – the DOR’s master record and individual property record cards for townhome units one and two,
- iv. E – not introduced
- v. F (**sealed**) – spreadsheet labeled “Land Valuation Model”,
- vi. G (**sealed**) – spreadsheet labeled “Land Sales Comparison”,
- vii. H – map labeled “Land Sales Comparison CTAB 15-04 A-B”,

DOR did not introduce exhibit B.

b. Taxpayers exhibits;

- i. 1 – Taxpayer’s Discovery Requests to DOR,
- ii. 2 – property record card for the properties printed on 3/7/2016,
- iii. 3 – excerpts from a fee appraisal prepared by Tom Gress on 07/07/2014 and an appraisal update prepared by Tom Gress on 01/25/2015 (9 pages),
- iv. 4 – settlement statements for each of the two loans corresponding to Units 1 and 2 (2 pages),
- v. 5 – Taxpayer’s prepared statement titled “MDOR Appraisal Method Comparisons”,

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vi. 6 – Taxpayers 2015 Classification and Appraisal Notice dated 7/22/2015.

8. Taxpayer testified that he and his wife built the improvements as a sixplex in 2014. (MTAB Hrg. Transcr. 5:17.) During the building process they discovered that, for purposes of financing, banks would only offer commercial loans for a sixplex. (Id. at 18-21.) At the time, commercial interest rates were at least two points higher than residential loans and, depending on the bank, would only lock interest rates for three to five years after which time the loans would be renegotiated. (Id. at 21-25.) Taxpayer testified credibly that while he wanted to pay less interest, his main concern with the commercial loan terms was the uncertainty associated with the adjusting interest rate which made it difficult to know whether the rentals would be a good investment or not. (Id. 6:1-6.)

9. Taxpayer testified that while they were building the improvements, they learned banks would offer conventional financing on multiplex dwellings up to a fourplex. (Id. 19-21.) The Gierachs decided to convert the single sixplex apartment building into two multiplex townhomes, a duplex and a fourplex, in order to secure conventional financing. (Id. 18-25.) The Gierachs, with the assistance of an architect and an attorney, drafted comprehensive townhome plans and declarations which identified, among other items, easements for traffic and each unit's access, a shared easement to use the well for irrigation, and where to place the mailboxes. (Id. 12-17.) To secure financing terms for the townhomes, the Gierach's lender First Interstate Bank, ordered an appraisal. (Ex.3.) Tom Gress appraised the fourplex (Unit 2), as "an

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attached new construction 4-Plex” and reached a conclusion of value of \$420,000 as of July 7, 2014. (Ex. 3.) Mr. Gierach testified credibly that the lender accepted the Gress appraisal, extrapolating that each unit appraised for \$105,000 (all units are identical) and thus the six units would have a value of \$630,000. (MTAB Hrg. Transcr. 7:2-6.) The appraisal satisfied the lender’s requirements which meant the Gierachs would be able to obtain conventional residential loans for the two multiplex townhomes, at two percentage points lower than those offered on commercial loans and with a fixed 15 or 20-year term. (Id. 6:19-25.)

10. The Gierachs decided to proceed with the townhome structure and recorded a Declaration of Townhome Covenants, Conditions and Restrictions for Paradise Townhomes with the Missoula County Clerk and Recorder on October 23, 2014. (Id. 7:1; Ex. C.) Mr. Gierach introduced two separate HUD settlement statements showing that on March 25, 2015, the Gierachs closed on two separate loans, one for each legally distinct townhome unit. (Ex. 4.)
11. Mr. Gierach testified that sometime towards the end of 2014, but before the building was completed, the DOR appraised the property as a sixplex at \$554,000. (Id. at 7-9.) On July 7, 2015, the DOR issued a 2015 Classification and Appraisal Notice to notify the Gierachs that the DOR had reappraised the properties due to the change in legal ownership and increased the value to \$796,000. (Id. 9-13.)
12. Mr. Gierach testified that when the property was assessed as one sixplex the land was valued at \$185,600 but after the reappraisal, the

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DOR assessed the land under the two townhome parcels at \$97,294 and \$160,306, for a total combined value of \$257,600, a \$72,000 increase. (Id. at 19:11-16; Ex. 5, 6.) Mr. Gierach testified that as a sixplex the DOR valued the improvements at \$368,400, but the two townhomes were assessed at \$173,820 and \$364,750, for a total combined value of \$538,570, a \$170,470 increase. (Id. at 16-24; Ex. 5,6.)

13. The Gierachs filed the current appeal on July 18, 2015, to challenge this \$250,000 increase in value between the DOR's first assessment as a sixplex and second assessment as two multiplex townhomes arguing that there were no physical changes in either the land or the building between the two assessments. (Id. at 19-25.)
14. Mr. Gierach testified that they paid off the two loans in full and on February 4, 2016, removed the townhome designation, but that they had to pay all property taxes in full (including the not due until May 31, 2016) in order to record the removal with the County. (Id. at 20:21-21:2.) Mr. Gierach argued that they only designated the property as townhomes in order to secure favorable financing and they took immediate action to remove the townhome designation as soon as the financing terminated but suffered an unexpected and unfair tax consequence as a result. (Id. at 21:2-5.)
15. During discovery the DOR could not produce any records of any other multiplex townhomes that it has valued using the same methods DOR used to value the Gierachs property. (Id. at 7:13-18.) Mr. Gierach argues that because the DOR did not have any experience valuing multiplex townhomes he has no confidence that they used an

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appropriate formula to determine the value of the property. (Id. at 7:13-18.)

16. Upon questioning from the Board, Mr. Gierach admitted that he had not received any legal advice on what property tax consequences might arise as a result of the property's conversion from a single lot into two multiplex townhome parcels. (Id. 9:1-5.)
17. Helen Greenberg, the lead appraiser in the DOR's Missoula office, testified that she appraised the Gierachs property for the DOR. (Id. at 25:24-25.) Ms. Greenberg testified that the DOR values townhomes and condominiums similarly, whereby they allocate the land value assigned to the common area proportionally to each individual unit. (Id. at 28:9-12.)
18. Ms. Greenberg, using the property record card (PRC), offered the following explanation for how the DOR had determined the individual values for each townhome. (Id., Ex. D.) Ms. Greenberg explained that the first page of the PRC is designated "Master" and is used to determine a land value for the common area that will be apportioned to the individual units. (Id.) Ms. Greenberg valued the common area using the DOR's commercial multifamily class code for land such that the common area consisting of 13,934 square feet is valued as a primary site at \$158,619. (Id. at 18-20.) Ms. Greenberg determined the size of the common area using the map attached to the Declaration of Townhomes, attached as Exhibit A. (Id. at 23-25, Ex. C.) Unit 1, the duplex, is designated as 1,017 sq. ft. and Unit 2, the fourplex, as 2,049 sq.ft., which when subtracted from the total parcel size of 17,000 sq. ft.

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leaves 13,934 sq. ft. of common area. (Id. at 29:1-3, Ex. C.) Ms. Greenberg testified that no improvements were included in the value of the common area. (Id at 29:19-22.)

19. The following pages of the PRC show how Ms. Greenberg valued Units 1 and 2. (Id. at 22-23.) Ms. Greenberg calculated a primary site value of \$44,950 for the 1,107 sq. ft. footprint of Unit 1 and \$54,031 for the 2,049 sq. ft. footprint of Unit 2. (Id. at 30:18-21, Ex. D.) She then allocated the land value of the common area proportionally to Units 1 and 2, based on the language in the Declaration of Townhome regarding how to allocate common area, and as such 33% of the total common area land value of \$158,619 was added to Unit 1 and 67% to Unit 2. (Id. at 10-21, Ex. C, D.) Unit 1's land value was calculated as follows: $\$44,950 + (0.33 \times \$158,619)$ totaling \$97,294. (Ex. D.) Unit 2's land value was calculated as follows: $\$54,031 + (0.67 \times \$158,619)$ totaling \$160,306. (Ex. D.)

20. Ms. Greenberg explained that when the DOR determines land values it calculates a value for a primary site which includes things like the value of site excavation and utilities that are necessary to service any improvements located on the land. (Id. at 30:24-25.) Ms. Greenberg testified that in this neighborhood, the DOR's computer assisted land model (CALP) calculated a primary site base size of 10,000 sq. ft. valued at \$12.40 a square foot. (Id. at 35:1-15, Ex. F.) Ms. Greenberg explained that if a lot is over 10,000 sq. ft., the DOR values the first 10,000 sq. ft. using the base rate and then determines the value for the remainder of the lot using an adjustment rate of \$8.80 per sq. ft. (Id. at 17-18, Ex. F.) If a lot is under 10,000 sq. ft., the DOR calculates its

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value by multiplying the residual rate by the difference between the lot size and the base size and subtracting that from \$124,000 (\$12.40 x 10,000 sq. ft.). (Id at 22-3:2.)

21. Upon questioning from the Board, Ms. Greenberg testified that she had developed the CALP model for this neighborhood and she believes it is a very accurate picture of the Missoula commercial market during the applicable reappraisal cycle of July 1, 2008 through December 31, 2013. (Id. at 37:15-25.)
22. Ms. Greenberg testified that as of January 1, 2015 the property was designated as townhomes and as such she valued the property as two townhomes and not as one sixplex. (Id. at 43:3-44:11.) The property was still designated as two townhomes on January 1, 2016, and thus the values did not change in 2016. (Id.) Ms. Greenberg testified that in February of 2016 the DOR received notice that Mr. Gierach had removed the property from the Unit Ownership Act and explained that the DOR will value the property as one sixplex for 2017. (Id.)
23. Ms. Greenberg explained that when the DOR valued the property as a sixplex, the land value was calculated as one primary site on 10,000 sq. ft. with an adjustment rate of \$8.80 for the remaining 7,000 sq. ft. (Id. 44:15-16.) When the DOR valued the property as townhomes, each townhome unit was valued as a primary site adjusted down from the 10,000 sq. ft. base size, and the common area was also valued as a primary site, which Ms. Greenberg testified is the method the DOR uses for all condominiums and townhomes. (Id. at 17-25.) Ms. Greenberg explained that the land under each unit is valued as a

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primary site because each townhome is considered a stand-alone entity. (Id. 45:1-7.) Ms. Greenberg explained that this is why the value of the land increased, because instead of valuing one building on a 17,000 sq. ft. lot, the DOR had to value two units and the site value based on the language in the Declaration [of Townhomes]. (Id. at 8-12.)

24. Ms. Greenberg testified that she reviewed the Gress appraisal which appraised the property as if it was one fourplex. (Id. 46:8-16, Ex. 3.) She noted that the appraisal determined a site value of \$80,000 which was derived from comparable sales of fourplexes located on 5,000 sq. ft. lots. (Id. 47:10-13, Ex. 3 p.7.) The comparable lots were all significantly smaller than the 17,000 sq. ft. size of the Gierachs' lot and the appraisal did not make any adjustment or otherwise include any value for the common area associated with the Gierachs fourplex. (Id. at 46:24-25, 47:1-17, Ex. 3.) Ms. Greenberg testified that the Gress appraisal's site value of \$80,000 is not consistent with the market value for lots of the Gierachs' property's size in this neighborhood. (Id.)

25. Ms. Greenberg testified that while the Gress appraisal valued the property as if it was one fourplex using comparable sales of fourplexes, a comparable sales approach is not an option she can use to value commercial property for the DOR. (Id. at 55:15-22.) She testified that unlike individual fee appraisers, the DOR conducts mass appraisals and for commercially designated property she has two options for methodology, cost or income. (Id. 55:24-56:2.) Ms. Greenberg testified that she used the cost method to value the improvements because the DOR's income model derived a much higher value that was not

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appropriate or equitable because it was trying to accommodate for the allocated common area. (Id. 31:9-32:11.)

26. Ms. Greenberg testified that she personally inspected the building site while the townhomes were under construction and based on her personal knowledge of the builder and her inspection of the quality of the materials used and the craftsmanship she determined the grade of construction as good. (Id. 51:12-52:25.) Ms. Greenberg testified that she valued the improvements by taking the square footage of the building and the grade and pulling data from the cost tables that DOR uses statewide, such that a fourplex on the other side of Missoula with the same footprint and grade, would have the same cost value. (Id. 54:21-15, Ex. D.)

CONCLUSIONS OF LAW

27. The Board has jurisdiction over this case and its order is final and binding upon all parties unless changed by judicial review. Mont. Code Ann. § 15-2-301.

Burden of Proof

28. 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.)

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29. 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.

Assessment

30. “All taxable property must be appraised at 100% of its market value:...”
Mont. Code Ann. § 15-8-111(1.)
31. “The department may not adopt a lower or different standard of value from market value in making the official assessment and appraisal of the value of property, except: . . . (c)(ii) for a townhome or townhouse, as defined in 70-23-102, the department shall determine the value in a manner established by the department by rule.” Mont. Code Ann. § 15-8-111(4.)
32. Condominiums and townhomes will be valued consistently, using the same methodology, the preferred approach is the income approach if there is reliable income and expense data, otherwise the cost approach must be used. Mont. Admin. R. 42.20.105.
33. Allocation of value for each condominium/townhome unit will be determined by multiplying the percentage, expressed as a decimal, by the appraised value of the entire condominium/townhome project. The common elements are deemed to be inherent in the individual unit's declaration percentage when the cost approach to value is determined and allocated as specified in this subsection. Mont. Admin. R. 42.20.105(1.)

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34. “[F]or the taxable years from (c) January 1, 2015, through December 31, 2016, all property classified in 15-6-134, MCA, (class four) must be appraised at its market value as of January 1, 2014.” Mont. Admin. R. 48.18.124.
35. “General assessment day... (2) The department shall assess property to: (a) the person by whom it was owned or claimed or in whose possession or control it was at midnight of the preceding January 1....” Mont. Code Ann. §15-8-201.
36. “Assessment formulations are within the expertise of the State Tax Appeal Board and [courts] will not overturn their decisions unless there is a clear showing of an abuse of discretion.” *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.)
37. “‘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.)

Appraisals

38. “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 and the appraisal was conducted within 6 months of the valuation date. If the state board

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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.)

* * *

39. The Taxpayers in this case ask the Board to disregard the legal consequences that followed from their decision to change the legal description of the property from a single commercial lot into two townhomes.
40. The townhome designation is not a legal fiction as evidenced by the fact that the banks offered far more favorable financing terms for two multiplex townhomes than they would for a single sixplex. The Gierachs went through the County’s process to legally change the property into townhomes. The change created distinct legal property units and DOR appropriately valued them as such.
41. It is axiomatic that the creation of multiple townhome units out of one lot would result in an increase in the property’s taxable value. DOR establishes a base lot size and a per square foot value for the base lot size. A second value (the “residual” per square foot value) is established for each square foot that a lot varies from the base size. If a lot is larger than the base size, the additional square footage is multiplied by the “residual” rate and that amount is added to the value of the base lot. If a lot is smaller than the base size, the additional square footage is multiplied by the “residual” rate and that amount is subtracted from the value of the base lot. This method causes smaller lots to have a

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higher value per square foot than larger lots. See, for example, *Manicke v. Dep't of Revenue*, 2006 WL 27774381 (Mont. Tax App. Bd.)

42. The DOR's witness testified credibly that she valued the property in conformity with Montana law, regulations and using the same method DOR uses to value other townhomes and condominiums. She explained how each unit was valued as a primary site and then allocated a proportional amount of the common area. She explained why she valued the improvements using the cost method and why she assigned a grade of 'good' to the improvements. DOR satisfied its burden of presenting evidence to support their valuation.
43. The Gierachs failed to meet their burden to prove alleged errors by DOR. The Board finds that the Gress appraisal did not determine a credible value for the property under appeal. Mr. Gress appraised the property as if it was a single lot with one fourplex building, which is not. The Board finds Mr. Gierach's testimony credible that the bank used the appraisal in its financing decisions, but finds the appraisal of little use to this Board which is charged with determining whether the DOR appropriately valued the property's taxable value as multiplex townhomes.
44. While the Board acknowledges that the physical attributes of the property did not change, the Declaration of Townhome changed the legal attributes which came with the benefit of more favorable financing, but also came with the consequence that the property has to be valued for property tax purposes in a way that reflects its division into separate property units.

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45. The Board, while sensitive to Mr. Gierach's argument that the properties were only townhomes for the first 5 weeks of 2016 and yet they were taxed as such for the entire year, cannot provide any relief. The DOR must assess every parcel of property across the state of Montana to the owner of record as of midnight on January 1st of each year. This is a statutory mandate imposed on the DOR and this Board has no authority to override that law. The property was designated as multiplex townhomes at midnight on January 1, 2016, and as such the property will be taxed as multiplex townhomes until January 1, 2017.

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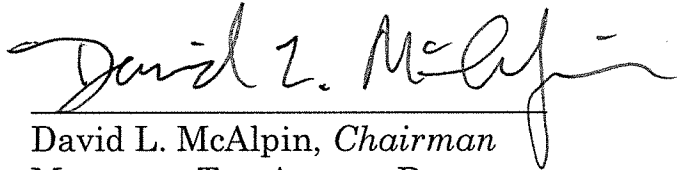
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ORDER

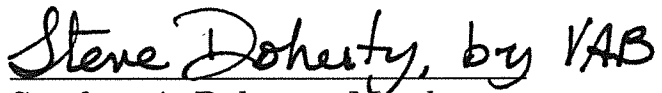
46. The Department of Revenue's appeal and complaint is **granted**
47. DOR is **ordered** to set the value of Unit 1 at \$97,294 for the land and \$173,820 for the improvements and to set the value of Unit 2 at \$160,306 for the land and \$364,750 for the improvements.

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.)

Ordered December 23, 2016.



David L. McAlpin, *Chairman*
MONTANA TAX APPEAL BOARD



Stephen A. Doherty, *Member*
MONTANA TAX APPEAL BOARD



Valerie A. Balukas, *Member*
MONTANA TAX APPEAL BOARD

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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 United States Mail via Print and Mail Services Bureau of the State of Montana on December 23, 2016 to:

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