

FILED

Before The Montana Tax Appeal Board

DEC 17 2020

Montana Tax Appeal Board

**WHITEFISH INVESTMENT GROUP,
LTD.,**

CASE №: PT-2020-24

Appellant,

v.

**STATE OF MONTANA,
DEPARTMENT OF REVENUE,**

Respondent.

**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 Investment Group 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. We affirm the FCTAB's decision.

ISSUE TO BE DECIDED

Whether the Department of Revenue erred in arriving at an appraised value of \$1,429,686 for the improvements.

PROPERTY DESCRIPTION

The property is physically located at 445 Wisconsin Ave., Whitefish. The property geocode is 07-4292-25-4-04-32-0000, and the legal description is Whitefish Townsite CO 5-acre tract, Resub L2 Block 6, Section 25, Township 31 North, Range 22 West, Lot 2A, Acres 2.79. The assessment code is 360550, and the subject property is in neighborhood 207.246C. The apartment complex was built in 1985 to provide low-income housing and consists of 36 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 B: FC-2019-040 Appeal Packet (confidential);
- c. DOR Exhibit C: Sales Grid (confidential);
- d. DOR Exhibit D: Land Sales Map (confidential);
- e. DOR Exhibit E: Land Sales Packet (confidential);
- f. DOR Exhibit F: Sales Comparison (confidential);
- g. DOR Exhibit G: Income Valuation (confidential);
- h. DOR Exhibit H: Appeal Packet; and
- i. DOR Exhibit I: Subsidized Housing Analysis (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: USDA RD – Loan Agreement;
- f. TXPR Exhibit V: USDA RD – Promissory Note;
- g. TXPR Exhibit VI: Warranty Deed;
- h. TXPR Exhibit VII: Audited Financial Statements (2016-2019);
- i. TXPR Exhibits VIII: Indication Value Summary – Utilizing Income Approach;
- j. TXPR Exhibit IX: Authorized Representative's Resume & Professional Experience.

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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 after the appeal was filed at the Montana Tax Appeal Board.

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 Investment Group 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. *MTAB Hrg. Transcr. 1:02:12.* 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. IX.*
3. The Taxpayer did not contest the land value, and the only issue on appeal is the value of the buildings and improvements. *MTAB Hrg. Transcr. 10:12.*
4. The subject property consists in total of four buildings with twenty-eight, two-bedroom/one-bath apartments, four one-bedroom/one-bath apartments, and four three-bathroom/one-bath apartments. *Dept. Ex. A.*
5. The Department of Revenue assessed the subject at \$1,882,700, including \$453,014 for the land and \$1,429,686 for the buildings and other improvements. The appraisal date was January 1, 2018 and was for tax years 2019-2020. *Dep Ex. A.*

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6. Mr. Pace submitted a DOR Request for Informal Classification and Appraisal Review, AB-26, on June 14, 2019. *Dep Ex. B.* In response, the DOR made an adjustment based on the appraiser's review of the property. The number of rentable units was corrected from 46 to 36, and a reduction in the rental rate was applied in the income valuation model to account for the federal subsidized housing program responsible for this development. *Dep Ex. B.* These changes to the property record reduced its value from \$2,949,200 to \$1,960,600. *Id.* Sometime before the FCTAB hearing the property was further reduced to a value of 1,882,700. *Dep Ex. A.*
7. The Taxpayer appealed to 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, affirming the DOR's value, noting that the value had already been reduced during the AB-26 review process to account for the fact that this property participates in the USDA Rural Development Section 515 affordable housing program. *Taxpayers Ex. I.*
8. 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.
9. 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 2035. *Id.*

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10. Mr. Pace claims that because the property is encumbered by public use restrictions, 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 in its appraisal. *MTAB Hrg. Transcr. 17:10.*
11. Parties agree that the income method is the best method to use when 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. 24:00.*
12. This project has been in existence since 1985 and has a stable history of income and expenses to use, to determine the market value of the property using the income method. *MTAB Hrg. Transcr. 24:45.*
13. Mr. Pace introduced an income capitalization report marked as *Taxpayer Ex. VIII.* When calculating the report, Mr. Pace used audited income and expense information specific to this property. *Id., MTAB Hrg. Transcr. 30:34.* These financial statements indicated the subject property has generated a three-year stabilized gross income of \$223,230 with \$151,806 of expenses, representing a 68% expense ratio. *Id.*
14. Using the income method of appraisal, the DOR has determined the subject property had an annual gross income of \$244,745 and expenses of \$97,898, representing a 40% expense ratio. *MTAB Hrg. Transcr. 1:05:20; Dep Ex. F.*

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15. This property produces three streams of income: rent paid by the tenants; the government subsidy to supplement the rent; and other revenue from tenants including income from laundry and vending machines. *MTAB Hrg. Transcr. 34:01.*
16. Mr. Pace did not include property taxes in the income capitalization model he presented to the Board. *MTAB Hrg. Transcr. 2:51:06.*
17. Mr. Pace calculated gross income using rents received, which includes a government subsidy to supplement the low rent paid by tenants. *MTAB Hrg. Transcr. 30:34.* Mr. Pace contends the gross income he calculated captured the maximum benefit/income this property will receive. *Id.* Mr. Pace feels the actual income and expense averages from the project are accurate because the income and expenses have been relatively stable since its inception. *MTAB Hrg. Transcr. 1:08:15.*
18. Mr. Pace testified that the subject property's expenses are higher than a normal for-profit apartment complex because the cost of complying with federal low-income housing reporting requirements. *MTAB Hrg. Transcr. 1:06:17.*
19. Mr. Pace testified that the specific level of government subsidy can change year to year. *MTAB Hrg. Transcr. 35.14.*
20. The Taxpayer also received a government subsidy for the mortgage to help develop the apartment complex and has received rental assistance subsidies ever since the apartment complex began operating. *MTAB Hrg. Transcr. 36:05.*
21. The mortgage subsidy typically consists of a below-market-rate loan. In this case, the Taxpayer received a fifty-year section 515 rural development loan with an interest

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rate of 1%. *MTAB Hrg. Transcr. 40:15*; *MTAB Hrg. Transcr. 43:20*. A Section 515 rural development loan is considered a non-recourse loan. *Id.* The loan recorded on the property includes restrictive incumbrances that dictate the property must be used for low-income housing with rents that must be set at a certain below market rates. *Id.*

22. The loan will be retired in 2035, at which time the Taxpayer will own the property with no encumbrances. *MTAB Hrg. Transcr. 51:30*.
23. Income tax credits were not issued to the Taxpayer for development of this project. *MTAB Hrg. Transcr. 44:55*.
24. The rental assistance subsidy is paid as a percentage of the rental amount collected from the tenants. *MTAB Hrg. Transcr. 38:22*. Rent is 30% of the tenant's income, if a renter can only afford a portion of the market rent, the federal government pays the balance of the rent. *Id.*
25. DOR used a gross revenue of \$244,745 in their income model for the property. *MTAB Hrg. Transcr. 32:01*. Mr. Pace testified that this is an overestimation by \$21,000 and at no point has the subject property received \$244,745 in income for a year. *Id.* Further, the DOR's model estimated typical expenses of \$97,898, compared to Mr. Pace's claimed actual expenses of \$151,806. *Id.*
26. The maximum amount of income that can be distributed from the property to the owner/developer is \$5,140 a year, under the terms of the Section 515 program. *MTAB Hrg. Transcr. 56:22*; *MTAB Hrg. Transcr. 1:08:55*; *Taxpayer Ex. VII*.

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27. Mr. Pace contends that the DOR overvalued the gross income and undervalued the expenses of the property. *MTAB Hrg. Transcr. 1:06:30*. Because of DOR's overestimating the income and underestimating the expenses, the DOR income formula has increased the property's estimated value by over 105%. *MTAB Hrg. Transcr. 1:07:15*. According to the testimony of Mr. Pace, DOR's overestimate equates to over a million dollars more in value for the subject property. *Id.*
28. Mr. Pace contends the DOR should have used the actual income and expense numbers when calculating the subject property's market value. *MTAB Hrg. Transcr. 1:07:40*. DOR witness Dawn Cordone testified that using actual data for each property is impossible when conducting statewide mass appraisal of approximately one million properties in Montana. *MTAB Hrg. Transcr. 2:13:00*. Instead, DOR uses averages of the information provided by other federally subsidized housing projects to build an income and expense model to establish market value for subsidized housing projects. Mr. Pace provided information to the DOR regarding the subject property income and expenses, which was incorporated as some of the data used to build the income model which valued the subject property. In addition, the DOR considered the actual income and expense data provided by Mr. Pace when reviewing the valuation of the subject during the AB-26 review. *MTAB Hrg. Transcr. 1:41:30*.
29. DOR Flathead-area appraiser Dana Morgan testified she 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. 1:19:11*. She testified that 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

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DOT's income models for commercial rentals to estimate market values and then uses the models to appraise properties. *Id.*

30. In the previous 2017/2018 tax cycle, Ms. Morgan used data from for-profit apartment complexes to value the subject property, as the DOT records did not indicate the subject was a subsidized housing project. *MTAB Hrg. Transcr. 1:29:20.* In the 2019/2020 tax cycle, this error was corrected, and property records were corrected. In the 2019/2020 cycle there was sufficient data from other low-income housing projects to build a low-income commercial residential rental model to value the subject property. *MTAB Hrg. Transcr. 1:30:45.* From this model, the value of the subject property was substantially lowered from \$2,949,200 to \$1,960,600. *Id. Dept. Ex. B.*
31. To value the property, the DOT model computed the average gross income using market data and subtracted the averaged expenses to find the net operating income. *MTAB Hrg. Transcr. 1:33:20.* Ms. Morgan then divided the net operating income by a capitalization rate of 7.8% to establish the property's market value of \$1,960,600. *Id.* To account for its status as a low-income rental project the rent rating factor was lowered from 4 to 3 (on a scale of 1-7). This adjustment was to account for the low-income housing subsidized rents. *MTAB Hrg. Transcr. 1:33:20.* The amount allowed for expenses was also increased from 29% to 40% for the same reason. *Id.*
32. Capitalization rates and expense percentage models are developed on a statewide basis in ten market areas, and rent rates are individualized for a market area. *MTAB Hrg. Transcr. 2:42:15.* All ten models are developed through voluntary information submitted by owners, information produced during the AB-26 process, and recent market sales. *Id.*

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33. Ms. Morgan questioned the project's administration expenses for 2016 because it was double what was reported in 2017 and 2018. *MTAB Hrg. Transcr. 1:40:52.* Because the maintenance and repairs costs were much higher than in other years, Ms. Morgan believes they included capital improvement projects in their calculation of expenses. *Id.*
34. While the Taxpayer income and expenses were factored into build the income model, Ms. Morgan did not exclusively use the actual taxpayer expenses when valuing the subject property because of equalization statutes. *MTAB Hrg. Transcr. 1:41:30.* She believes the DOR can best equalize values as required by law by using the averages of incomes and expenses for similar properties.
35. Ms. Morgan did adjust the Taxpayer's expenses when entering them into its income model. *MTAB Hrg. Transcr. 1:50.00.* She subtracted distributions to owner/developers and payments of property taxes because they were nonallowable expenses within the model. *Id.*
36. Ms. Morgan testified the value found using the cost approach was very similar to the income approach, thus validating her model. *MTAB Hrg. Transcr. 1:44:18.* Ms. Morgan chose to use the income method because it is the most reliable and happened to produce the lowest market value. *Id.*
37. DOR area manager Dawn Cordone testified that even though the DOR is required to value a property at 100% of its market value, the DOR does consider restrictions on use. *MTAB Hrg. Transcr. 2:10:40.*

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38. Because the DOR uses the mass appraisal system, they cannot determine and adjust for additional tax benefits and subsidies gained by participating in a low-income project. *MTAB Hrg. Transcr. 2:24:15*. Additionally, the DOR does not value those additional benefits because that would be valuing the business and not the property itself. *Id.*
39. The DOR Appraiser Dana Morgan testified the DOR is fairly valuing the subject property. The Taxpayer has chosen to maximize the income tax and low-interest financing benefits provided by the low-income housing project. Ms. Morgan felt the property had been thoroughly reviewed with considerations for equalization among all taxpayers as required by Montana Law, and that DOR did account for rent restrictions by reducing rent rates for low-income housing projects. She believes this process is the same for every rent-subsidized property.
40. The Taxpayer has not provided any market data to support the requested values.

JURISDICTION AND STANDARD OF REVIEW

41. The Montana Tax Appeal Board is an independent agency not affiliated with the Montana Department of Revenue. Under the authority of Mont. Code Ann. § 15-2-301.
42. 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).
43. 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

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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

44. To whatever extent the following conclusions of law may be construed as findings of fact, they are incorporated accordingly.
45. 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).
46. 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 value was the most accurate method.
47. 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.
48. 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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49. 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.
50. “‘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).
51. In *Voegele’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 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.
52. Other jurisdictions have examined this very question 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

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participation with low-interest mortgages and rent subsidies from the federal government, to financially incentivize their owners to provide affordable housing in rural communities. *The Harbours v. Townsite of Saugatuck*, 1996 Mich. Tax Lexis 32.

53. Finally, in *Happy Valley Storage LLC. v. Department of Revenue*, another case where the Taxpayer wanted the DOR to 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. The Board finds and concludes that the DOR met its burden by considering actual data and was reasonable in adjusting the subject expenses up to 40%, the equivalent of adjustments made for the other taxpayers in the model. The DOR also was reasonable in using averaged incomes within the model even though they were not identical to those of the Taxpayer. *Id.*

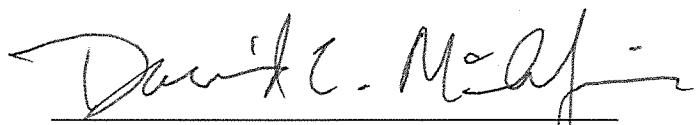
54. The DOR's witnesses that appeared for the hearing in this case provided credible evidence and testimony to support their methods. The DOR convinced this Board that they had carefully considered the information provided within the financial statements submitted by the Taxpayer in making the appraisal. Their duty to equalize values is not lost on this board. Their job is to generate market values from the actual data 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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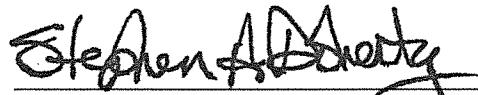
ORDER

57. Whitefish Investment Group, LTD.'s appeal and complaint are denied.
58. DOR is ordered to set the property's value at \$1,882,700 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

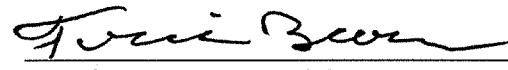
I certify that I caused a true and correct copy of the foregoing Findings of Fact, Conclusions of Law, Order and Opportunity for Judicial Review to be sent by email and by United States Mail via Print & Mail Services Bureau of the State of Montana on December 17, 2020 to:

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MONTANA TAX APPEAL BOARD