

BOZEMAN COTTONWOOD MISC
RE2, LLC,

Appellant,

v.

STATE OF MONTANA,
DEPARTMENT OF REVENUE,

Respondent.

CASE №: PT-2022-18

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

STATEMENT OF THE CASE

This is an appeal of a final decision by the Gallatin County Tax Appeal Board (CTAB) denying Bozeman Cottonwood MISC RE2, LLC (Taxpayer) a reduction in value on the subject property located at 5200 Cottonwood Road, Bozeman, Montana. The Taxpayer appealed that outcome to the Montana Tax Appeal Board (MTAB) on April 8, 2022. We affirm CTAB’s determination.

ISSUE TO BE DECIDED

Whether CTAB erred in affirming the Department of Revenue’s (DOR or Department) commercial classification and appraised value of \$2,925,873 for this property.

EXHIBIT LIST

The following evidence was submitted at the hearing:

Taxpayer Exhibits:

1. Subject Property 2021 Cadastral Information and Property Record Card
2. Taxpayer’s Comparable Property 1 Huffine Property 2021 Cadastral Information and Property Record Card
3. Taxpayer’s Comparable Property 2 Cottonwood Property 2021 Cadastral Information and Property Record Card

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4. Taxpayer Comparable Properties 3-5 Baxter Lane Properties 2021
Cadastral Information and Property Record Card
5. Photographs of Subject Property
6. Photographs of Taxpayer's Comparable Property 1 Huffine Property
7. Photographs of Taxpayer's Comparable Property 2 Cottonwood
Property
8. Photographs of Taxpayer's Comparable Property 3-5 Baxter Lane
Properties
9. Bozeman Cottonwood CTAB Exhibits
10. Bozeman City Limits Map
11. Bozeman City Zoning Map
12. Exhibit 12 not introduced
13. Exhibit 13 not introduced
14. Exhibit 14 not introduced
15. CV of Seth J. Krupar
16. Exhibit 16 not introduced
17. Exhibit 17 not introduced
18. Exhibit 18 not introduced
19. Exhibit 19 not introduced
20. Exhibit 20 not introduced
21. CTAB Hearing Recording
22. Exhibit 22 not introduced
23. Huffine Property Information
24. Exhibit 24 not introduced
25. Demonstrative PowerPoint
26. 2020 DOR Land Model-Bozeman North-Huffine (Residential)
27. Exhibit 27 not introduced
28. Exhibit 28 not introduced
29. Tables of Property Values (Subject Property and Taxpayer's
Comparable Properties)
30. Transcript of November 15, 2022, Deposition of Tim Skop

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- 31. Transcript of November 15, 2022, Deposition of Pam Moor
- 32. Transcript of January 12, 2023, Deposition of Pam Moor

DOR Exhibits:

- A. Tim Skop's CV
- B. 2020 DOR Land Model-Bozeman Commercial
- C. AB-26 and Response Letter
- D. Subject Property Record Card
- E. Pam Moor's CV
- F. Certificate of Survey 2/10/15
- G. Mutual Access Easement 12/31/14
- H. 2015 RTC for Subject Property (Confidential)
- I. Photos of Subject Property
- J. Kurt Swimley's CV
- K. Transcript of November 22, 2022, Deposition of Seth Krupar

PROCEDURAL HISTORY

The DOR valued the subject property land at \$2,925,873 for the 2021/2022 appraisal cycle. *Ex. 1.* The Taxpayer filed an AB-26, Request for Informal Classification and Appraisal Review, with the DOR on August 16, 2021, requesting a value of \$352,000. *Ex. 18; Ex. C.* The DOR sent a Form AB-26 Determination Letter to the Taxpayer dated November 17, 2021, denying the Taxpayer's request. *Id.* The Taxpayer appealed the DOR's valuation to the CTAB on December 16, 2021, requesting a value of \$325,000. *MTAB Dkt. 3.* The CTAB heard the appeal and issued its decision denying the Taxpayer's application for reduction on March 9, 2022. *Id.* The Taxpayer appealed to MTAB on April 8, 2022, per Mont. Code Ann § 15-2-301, requesting a value of \$366,799. *MTAB Dkt. 1.* The MTAB hearing was conducted in Helena on February 27, 2023, at which the Taxpayer requested a value of \$352,484. *MTAB Tr. 3:1-3, 5:12-14, 12:11-20.* The following were present at the MTAB hearing:

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- a. D. Wiley Barker, Taxpayer Counsel; Lucas Forcella, Taxpayer Counsel; Seth Krupar, Taxpayer’s Representative and Property Tax Consultant; Michael Basile, Real Estate Broker; and
- b. Dave Burleigh, DOR Counsel; Tim Skop, DOR Appraiser at the time of appraisal (Modeler at the time of the hearing); Pam Moor, DOR Area Manager; and Kurt Swimley, DOR Modeler.

During the hearing, the Taxpayer lodged objections while the DOR was presenting their closing arguments. The Board stated that it would consider a motion by either party filed within 10 days of the hearing date requesting leave to file proposed findings of fact and conclusions of law. On March 7, 2023, the Taxpayer filed a Motion for Leave to File Proposed Findings of Fact and Conclusions of Law and Brief in Support, disclosing that the DOR was opposed to the motion. The Board issued an order allowing the DOR until March 22, 2023, to file a response with any arguments in opposition to the Taxpayer’s motion. On March 22, 2023, the DOR filed its Objection to Appellant’s Motion for Leave to File Proposed Findings of Fact and Conclusions of Law and Brief in Support. On March 24, 2023, the Taxpayer filed its Reply in Support of Motion for Leave to File Proposed Findings of Fact and Conclusions of Law and Brief in Support. On March 31, 2023, the Board issued an order allowing the parties to file proposed findings of fact and conclusions of law by May 5, 2023. On May 5, 2023, the DOR filed its Unopposed Motion to Continue Deadline to File Proposed Findings of Fact and Conclusions of Law to May 19, 2023, which the Board granted. Both parties submitted proposed findings of fact and conclusions of law on May 19, 2023.

The record includes all materials submitted to CTAB, a recording of the CTAB hearing, all materials submitted to MTAB with the appeal, additional exhibits submitted by the parties prior to, during, and after the MTAB hearing, and a transcript of the MTAB hearing.

FINDINGS OF FACT

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

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2. The subject property is a 6.94-acre parcel of land located in Bozeman at 5200 Cottonwood Road with an assigned geocode of 06-0798-15-2-02-10-0000 (Subject Property). It is classified as class four commercial property and is owned by the Taxpayer, which is related to certain Town Pump entities (Town Pump). *Ex. 1; Ex. D; MTAB Tr. 11:16-18.*

3. The DOR classified the Subject Property as commercial and appraised its land value at \$2,925,873 for tax years 2021/2022 using the comparable sales method and based on sales of other commercial land in the area. *Ex. B, D.*

4. Town Pump owns the adjacent parcel, along with the gas station and convenience store located thereon (Gas Station), identified by geocode 06-0798-15-2-02-01-0000 (Gas Station Property) through another entity, Bozeman 8 RE, LLC. *Ex. C; MTAB Tr. 11:16-18, 65:16-18.* The DOR assessed the value of the improvements on the Subject Property to the Gas Station Property for the 2021/2022 valuation cycle. *MTAB Tr. 179:5-16.*

5. The Subject Property is adjacent to the neighboring Gas Station Property, with the Subject Property to the south and east of the Gas Station Property. The Gas Station is located at a major intersection, with Huffine Lane to the north and Cottonwood Road to the west. The Gas Station Property and the Subject Property share paved driveways for public access pursuant to a mutual access easement. *Ex. G.* The Gas Station Property is a commercial property used to produce income. *MTAB Tr. 66:19-25.* Vehicles cannot access the Gas Station Property from either Cottonwood Drive or Huffine Lane without driving on one of the improvements (asphalt driveways) that cross the Subject Property. *MTAB Tr. 11:16-18, 73:16-22.* Thus, the Gas Station uses the easements to produce income. *MTAB Tr. 67:1-4.*

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6. The area the asphalt driveways on the Subject Property that the public travels over to access the Gas Station totals approximately 8,000 square feet, which is 2.6% of the Subject Property's total square footage. *MTAB Tr. 176:20-177:6.*
7. The Subject Property also partially contains an improved gravel parking lot used by the Gas Station employees for parking. *MTAB Tr. 43:12-13, 70:21-71:1, 7-13, 143:9-16, 166:3.* Measurements of the employee parking lot were not entered into evidence.
8. The DOR contended that it is possible the Gas Station's underground gasoline storage tanks may be partially located underneath the Subject Property but did not produce convincing evidence. *MTAB Tr. 166:3-6, 176:13-19.*
9. The Subject Property is surrounded by commercial and residential properties. The Gas Station Property immediately northwest and the Republic Services parcel to the east are classified as commercial properties. *Ex. 1; Ex. 32 at 38:11-19.* The DOR classified other undeveloped lots around the Subject Property as residential property. *Ex. 31 at 60:10-14.*
10. On August 3, 2021, Taxpayer's representative, Seth Krupar, filed a Form AB-26 with the DOR requesting an informal review of the DOR's appraisal of the Subject Property and adjacent Gas Station Property for the 2021/2022 valuation cycle. *Ex. 18; Ex. C.*
11. Mr. Krupar filed one AB-26 form to appeal the appraised values of both the Subject Property and Gas Station Property on behalf of Town Pump. *MTAB Tr. 60:22-61:8.* Mr. Krupar asserted the market value of the Subject Property was inaccurate and requested a value of \$325,000 for the Subject Property. The informal review resulted in no change to the value of the Subject Property. *MTAB Tr. 140:1-7; Ex. C.*

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12. The Taxpayer filed an appeal of the DOR's informal review determination to the CTAB on December 16, 2021. *MTAB Dkt. 3.*
13. The CTAB held the hearing on March 9, 2022. On behalf of the Taxpayer, Mr. Krupar requested a value of \$367,000 for the Subject Property. *Ex. 21 at 1:10-1:33.* Mr. Krupar argued the Subject Property should be valued using the DOR's Residential Land Model 206.010.B rather than the Commercial Land Model 206.101. *Ex. 9; Ex. 21 at 10:20-30; Ex. 26; Ex. B; MTAB Tr. 28:12-15.*
14. After hearing arguments from the Taxpayer and the DOR, the CTAB upheld the DOR's valuation and denied the Taxpayer's requested value. *MTAB Dkt. 3.*
15. Taxpayer timely appealed the CTAB decision to the MTAB on April 8, 2022. *MTAB Dkt. 1.*
16. The MTAB hearing was held on February 27, 2023. Chairman Dave McAlpin and Board Member Zendron heard and decided the matter.
17. At the hearing, the Taxpayer argued that the DOR's appraisal of the Subject Property violated three legal standards: Montana Constitution Article 8, section 3; Montana Code Annotated § 15-9-101(1); and the Montana Supreme Court's holding in *Department of Revenue v. State Tax Appeal Bd.*, 188 Mont 244, 250, 613 P.2d 691 (1980). *Ex. 9; MTAB Tr. 5:15-6:7.* The Taxpayer requested the Subject Property be reclassified as residential and be valued using Residential Land Model 206.010.B for a value of \$352,484. *MTAB Tr. 5:12-13.*
18. The Taxpayer argued that the Subject Property is treated inequitably compared to five other vacant land properties in the area that the DOR assessed values

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between \$323,276 and \$455,819 (Taxpayer's Comparable Properties). *Ex. 1-4, 25, 29; MTAB Tr. 6:18-22, 7:8-25, 9:15-10:11.*

19. The Taxpayer argued that if the Taxpayer's Comparable Properties had been valued using the commercial land model, rather than the residential land model, the values would range from \$2,407,597 to \$3,474,666. *Ex. 29.*

20. The Taxpayer's Comparable Properties are all undeveloped parcels with no residential or commercial improvements on them. *MTAB Tr. 182:24-183:1.* All the properties, including the subject, are located in the City of Bozeman. *MTAB Tr. 29:5-7.* They were all valued using a residential land value model. *MTAB Tr. 125:23-126:1.*

21. Throughout the course of discovery, the DOR determined that one of the Taxpayer's Comparable Properties, referred to as the Huffine Property, was incorrectly classified and valued as residential land, when it should have been classified and valued as commercial property. *MTAB Tr. 160:19-23.* Zoning restrictions prevent the Huffine Property from being used as a residential property, so the DOR changed its classification to commercial and will apply that classification in the next valuation cycle. *Id.*

22. The Taxpayer argued that the values the DOR assessed on the Taxpayer's Comparable Properties support the contention that the Subject Property is treated inequitably. *Ex. 1-5, 9, 25, 29; MTAB Tr. 27:1-38:2.* The Taxpayer argued that the Subject Property and the Taxpayer's Comparable Properties are similarly situated and subject to similar zoning requirements, thus the use of different land models to value the properties is evidence of inequity. *Id.*

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23. The Taxpayer presented two witnesses who testified regarding the Subject Property and the Taxpayer's Comparable Properties: Seth Krupar and Michael Basile.
24. Mr. Krupar testified that in his opinion as an appraiser, the Subject Property and the Taxpayer's Comparable Properties are similar due to their similar zoning, similar highest and best use, similar possible uses, similar access, similar traffic counts, similar sizes, and the potential for similar use and development. *MTAB Tr. 52:1-15*. Mr. Krupar further testified that similar trends and factors such as social, economic, governmental, and environmental factors affect both the Subject Property and the Taxpayer's Comparable Properties equally. *MTAB Tr. 52:16-53:6*.
25. Mr. Krupar testified that the mutual access easement between the Subject Property and the Gas Station Property burdens the Subject Property and therefore reflects a negative influence on its value. *MTAB Tr. 54:3-4*. He testified that the mutual access easement is a burden because it takes away a bundle of rights from the owner of the Subject Property, preventing the Subject Property from being developed, leased, sold, mortgaged, given away, or occupied. *MTAB Tr. 25:13-26:5*. The mutual access agreement requires the Subject Property to share that portion of the land with the Gas Station Property. *Id.* He also testified that the Subject Property has its own access to Huffine Lane and Cottonwood Road and does not need the easement to access Huffine Lane. *Id.*
26. Mr. Basile testified that in his opinion as a real estate broker in Bozeman, it is not appropriate to value the Subject Property at more than \$2.9 million while valuing the Taxpayer's Comparable Properties at approximately \$323,000 to \$455,000 because buyers or sellers in the market would consider them to be similar. *MTAB Tr. 94:15-95:13*. Mr. Basile based this on their similarities such

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as zoning, relative size, commercial characteristics, potential commercial uses, and quality of the Taxpayer's Comparable Properties. *Id.*

27. Mr. Basile further testified that four of the Taxpayer's Comparable Properties would sell for the same amount as the Subject Property or more, and that one of the Taxpayer's Comparable Properties would likely sell for slightly less than the Subject Property, but not to the extent of the \$2.6 million difference in the assessed value. *MTAB Tr. 95:19-23, 97:3-18, 99:9-100:7.* Mr. Basile explained that in the real estate industry, the term "comparable properties" does not require the properties to have the same use. *MTAB Tr. 103:21-25.*
28. The DOR responded that it correctly classified the Subject Property based on its commercial use and that the \$2,925,873 value was based on valid sales of other commercial land. *MTAB Tr. 2:25, 17:24-18:1, 160:3-14.*
29. The DOR asserted that Taxpayer's equalization and equal protection claims are actually complaints about classification and taxable value. *MTAB Tr. 16:1-15.* The DOR also asserted that under Montana law, comparable properties must have similar use, and for this reason, the Subject Property is not comparable or similarly situated to the Taxpayer's Comparable Properties for tax purposes. *MTAB Tr. 16:1-15, 17:11-20, 18:12-17.*
30. The DOR argued the Taxpayer's Comparable Properties have no commercial use, their values are not arm's length sales transactions, they are not classified as commercial, they were not appraised using commercial land sales models, and therefore their assessed values are not persuasive to further an equalization argument regarding the value of commercial property. *MTAB Tr. 18:3-7.*

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31. The DOR argued that it correctly classified and appraised the Subject Property in compliance with Montana law. *MTAB Tr. 18:12-17, 135:20-136:22; 157:9-23; 165:17-23; 167:1-2.*
32. The DOR presented three witnesses who testified regarding the Subject Property and Taxpayer's Comparable Properties: Kurt Swimley, Tim Skop, and Pam Moor.
33. Mr. Swimley testified that the compilation and use of the Commercial Land Model 206.101 to appraise the Subject Property complies with Montana state law, administrative rules, and industry standards for mass appraisal. *MTAB Tr. 113:5-118:22.* Mr. Swimley further testified that Montana law requires property to be classified based on its use, which the DOR uniformly applies by assigning classification at the time of review and keeping that classification consistent until it receives information of a change in use. *MTAB Tr. 120:17-121:3.* Mr. Swimley testified that the DOR's Commercial Land Model 206.101 for the Bozeman area is reliable because the metrics from measuring the accuracy of the models are within expected industry parameters for mass appraisal. *MTAB Tr. 117:11-118:22.* Residential models are used to value property classified as residential, and commercial models are used to value property classified as commercial. *MTAB Tr. 129:7-8.*
34. Mr. Skop testified that the Subject Property is commercial because it contains improvements that contribute to commercial use. *MTAB Tr. 137:11-15.* Mr. Skop also testified that the Taxpayer's Comparable Properties should not be used to appraise the Subject Property because the Taxpayer's Comparable Properties do not have the same use as the Subject Property. *MTAB Tr. 137:4-10.* Additionally, Mr. Skop explained that the Taxpayer's Comparable Properties' values were not true comparables because they were not values based on the sale of that property, but rather the DOR's mass appraised values. *Id.* Mr. Skop testified that the Taxpayer's Comparable Properties are classified

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as residential, rather than commercial, because they have no improvements or commercial use. *MTAB Tr. 138:16-139:2.*

35. Mr. Skop testified the value of the Subject Property increased from about \$357,000 to about \$2.9 million in one tax cycle because the DOR incorrectly assigned the Subject Property to a residential neighborhood in a previous valuation cycle, rather than in a commercial neighborhood as it should have been assigned. *Ex. 1; Ex. D; MTAB Tr. 141:17-142:1.* Ms. Moor testified that the DOR had correctly classified the Subject Property as commercial property but did not assign the property to the correct neighborhood after the Subject Property was annexed to the City of Bozeman in 2014 or 2015. *MTAB Tr. 161:6-11.* This resulted in the previous assessments being completed using the incorrect model for tax years 2015-2020. *Id.*
36. Mr. Skop testified that use controls classification. *MTAB Tr. 146:6-7, 147:1-3.* Mr. Skop testified the commercial uses of the Subject Property are the driveways partly on the Subject Property that provide vehicle access to the Gas Station from Huffine Lane and Cottonwood Road, and possibly a portion of a gravel employee parking lot. *MTAB Tr. 148:4-6, 142:24-143:16.*
37. Ms. Moor testified that the square footage of the portion of the paved driveway that appears to be on the Subject Property was measured at 8,000 square feet, which would be approximately 2.6 percent of the total square footage of the Subject Property. *MTAB Tr. 176:20-177:6.*
38. Ms. Moor testified that in classifying vacant land in areas of changing use, the DOR assumes a residential use until another use is in place. *MTAB Tr. 160:3-7.*
39. Ms. Moor testified that the decision to classify the Subject Property as commercial is based on the portion of the paved driveways on the Subject

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Property, the portion of the gravel employee parking lot on the Subject Property, and the possibility that the underground gas storage tanks are partially on the Subject Property, which indicates a commercial use. *MTAB Tr. 166:3-8.*

40. Ms. Moor testified that the Subject Property is subject to only one classification or the other: commercial or residential. *MTAB Tr. 177:11-13.* Ms. Moor further testified that since the Subject Property has a commercial use, and no residential use, it must be, by definition, classified as commercial. *Id*

JURISDICTION AND STANDARD OF REVIEW

41. The Montana Tax Appeal Board is an independent agency not affiliated with the Montana Department of Revenue. *Mont. Const., Art. VIII § 7; Mont. Code Ann. § 15-2-101.* The Taxpayer filed a timely appeal of the DOR's decision to the MTAB. Therefore, this Board maintains jurisdiction to hear and decide this matter. *Mont. Code Ann. § 15-2-301.*
42. This Board may hear appeals de novo. *Dept. of Revenue v. Burlington N.*, 169 Mont. 202, 213-14, 545 P.2d 1083 (1976). "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, ¶ 22, 370 Mont. 270, 275, 303 P.3d 1279, 1282.
43. The Board's order is final and binding upon all parties unless changed by judicial review. *Mont. Code Ann. § 15-2-301(6).*

CONCLUSIONS OF LAW

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

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

46. “[I]n connection with any appeal under [Mont. Code Ann. § 15-2-301], the Montana 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.” *Mont. Code Ann. § 15-2-301(5)*.

47. 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.*, 169 Mont. at 214, 545 P.2d at 1090. 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 v. Michunovich*, 149 Mont. 347, 353, 428 P.2d 3, 7 (1967).

48. The Taxpayer bears the burden of proving the error of DOR’s decision. *Farmers Union Cent. Exch. v. Dep’t of Revenue*, 272 Mont. 471, 476, 901 P.2d 561, 564 (1995); *Western Air Lines*, 149 Mont. at 353, 428 P.2d at 7.

49. “‘Assessment formulations’ by [the Montana Tax Appeal Board] should be upheld unless there is a clear showing of an abuse of discretion.” *Peretti v. 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. 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*, 263 Mont. 100, 866 P.2d 228 (1993)).

50. When construing a statute, it is the Board’s role to “determine what in terms or substance is contained in it, and not to insert what has been omitted or to omit

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what has been inserted.” *State v. Minett*, 2014 MT 225, ¶ 12, 376 Mont. 260, 263, 332 P.3d 235, 238; *Mont. Code Ann. § 1-2-101*.

51. In the construction of a statute, the intention of the legislature is to be pursued if possible. When a general and particular provision are inconsistent, the latter is paramount to the former, so a particular intent will control a general one that is inconsistent with it.” *Mont. Code Ann. § 1-2-102*.

52. “When faced with a problem of statutory construction great deference must be shown to the interpretation given the statute by the officers or agency charged with its administration.” *Dep’t of Revenue v. Puget Sound Power & Light Co.*, 179 Mont. 255, 262, 587 P.2d 1282, 1286 (1978) (citing *Udall v. Tallman*, 380 U.S. 1, 16 (1965)).

53. “[T]ax statutes are to be strictly construed against the taxing authority and in favor of the taxpayer.” *Western Energy Co. v. Dep’t of Revenue*, 1999 MT 289, ¶ 10, 297 Mont. 55, 58, 990 P.2d 767, 769.

54. “Administrative agencies enjoy only those powers specifically conferred upon them by the legislature. Administrative rules must be strictly confined within the applicable legislative guidelines. Indeed, it is axiomatic in Montana law that a statute cannot be changed by administrative regulation. We look to the statutes to determine whether there is a legislative grant of authority.” *Bick v. State Dep’t of Justice, Div. of Motor Vehicles*, 224 Mont. 455, 457, 730 P.2d 418, 420 (1986).

55. “[A]dministrative regulations interpreting the statute made by agencies charged with the execution of the statute are entitled to respectful consideration.” *Puget Sound Power & Light Co.*, 179 Mont. 255, 266, 587 P.2d 1282, 1288 (1978).

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56. 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(5)*.
57. The term “improvements” includes all buildings, structures, fences, and improvements situated upon, erected upon, or affixed to land. *Mont. Code Ann. § 15-1-101(1)(i)*.
58. The DOR must classify all taxable lands by providing “a general and uniform method of classifying lands in the state for the purpose of securing an equitable and uniform basis of assessment of lands for taxation purposes.” *Mont. Code Ann. § 15-7-103(1)(a)*.
59. “All lands must be classified according to their use or uses.” *Mont. Code Ann. § 15-7-103(2)*.
60. “The term ‘comparable property’ means property that:
- (i) has similar use, function, and utility;
 - (ii) is influenced by the same set of economic trends and physical, governmental, and social factors; and
 - (iii) has the potential of a similar highest and best use.”
- Mont. Code Ann. § 15-1-101(1)(e)*.
61. “The department shall adopt rules specifying which types of property within the several classes are considered comparable property as defined in 15-1-101 [MCA].” *Mont. Code Ann. § 15-1-201(e)*.
62. “‘Comparable properties’ means properties that have similar utility, use, function, and are of a similar type as the subject property. Comparable properties must be influenced by the same set of economic trends, and physical, economic, governmental, and social factors as the subject property.

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Comparable properties must have the potential of a similar use as the subject property. For any property that does not fit into this definition, the department will rely on the definition of comparable property contained in 15-1-101, MCA.

(a) Within the definition of comparable property, the following types of property are considered comparable:

...(iv) residential city and town lots are comparable to other residential city and town lots;

(v) commercial city and town lots are comparable to other commercial city and town lots...”

ARM 42.20.106(5)(a)(iv), (v).

63. The DOR has a duty to classify all taxable lands. *Mont. Code Ann. § 15-7-101(1).*
64. “The legislature finds that the rapid commercial and industrial growth in many Montana cities and towns is engulfing homes. Owners of these homes are often forced to pay higher property taxes upon these homes because their property is appraised on its industrial or commercial use. The legislature intends that houses and lots in these areas of changing use shall be appraised on their value as residential property.” *Mont. Code Ann. § 15-7-401.*
65. “The state shall appraise, assess, and equalize the valuation of all property which is to be taxed in the manner provided by law.” *Mont. Const. Art. VIII § 3.*
66. “The department shall adjust and equalize the valuation of taxable property among the several counties, between the different classes of taxable property in any county and in the several counties, and between individual taxpayers and shall do all things necessary to secure a fair, just, and equitable valuation of all

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taxable property among counties, between the different classes of property, and between individual taxpayers...” *Mont. Code Ann. § 15-9-101(1)*.

67. For purposes of property valuation and classification, class four property includes both residential and commercial property. *Mont. Code Ann. § 15-6-134(1)(b), (e)*. Class four residential property is taxed at a rate of 1.35% of value whereas class four commercial is taxed at 1.89%. *Mont. Code Ann. § 15-6-134(3)(a), (c)*.
68. “...If a property includes both residential and commercial uses, the property is classified and appraised as follows: (a) the land use with the highest percentage of total value is the use that is assigned to the property; and (b) the improvements are apportioned according to the use of the improvements...” *Mont. Code Ann. § 15-6-134(2)*.

DISCUSSION

69. The issue presented in this case is straightforward and hinges on whether there was commercial use on this property. While the Taxpayer argued that equalization and equal protection require the Subject Property to be valued similarly to other nearby properties which are classified as residential properties, the issue the Board must decide is if the Subject Property is properly classified and valued according to Montana law and industry standards.
70. In areas where property may be used for either commercial or residential purposes, the DOR defaults to classifying property as residential until there is an actual use for the property, whether residential or commercial. If property is used both as residential and commercial, the DOR determines the classification based on the land use with the highest percentage of total value, while the improvements are apportioned according to the use of the improvements. Here, the land is not actually used for residential purposes. It had previously been

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classified as residential and valued using a residential land model in accordance with § 15-7-401, MCA, because the property was not actually being used for residential or commercial purposes at the time. The subsequent improvements on the Subject Property include a portion of the asphalt driveways that provide access from Huffine Lane and Cottonwood Road to the adjacent Gas Station Property, as well as a portion of the gravel parking lot for the Gas Station Property that appears to cross over onto the Subject Property.¹ The Gas Station Property is only accessible via a mutual access easement over the driveways partially located on the Subject Property. The improvements on the property serve a commercial purpose and contribute to the production of income for the Gas Station Property but do not currently contribute to the production of income for the benefit of the Subject Property. However, because there is no actual residential use of the Subject Property, but there is a current commercial use, even though it is for the benefit of the neighboring parcel, the DOR classified the Subject Property as commercial.

71. This Board understands that the portion of the commercial improvements located on the Subject Property are somewhat minimal and that the Gas Station Property is the only parcel that benefits economically from them. However, our determination must be confined to the plain language of Montana Code Annotated §§ 15-7-401 and 15-6-134(2).
72. Montana Code Annotated § 15-7-401 directs the DOR to classify class four properties with no residential or commercial use as residential until the property has an actual use, whether that is commercial or residential. Where the property has both a commercial and residential use, Montana Code Annotated § 15-6-134(2) requires the DOR to then classify the *land* according to the use

¹ This Board notes that the DOR argued a portion of the underground storage tanks for the Gas Station may also be partially located on the Subject Property. However, the DOR did not provide convincing evidence to persuade the Board of such, so we decline to consider them as commercial improvements on the Subject Property for purposes of this opinion.

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with the highest percentage of the total value, while the *improvements* are apportioned according to their use. Unless a property includes both residential and commercial uses, Montana law does not specify what percentage of commercial use results in commercial classification.

73. In this case, there is no residential use, but there is some commercial use, thus the DOR classified the land as commercial. We agree that the DOR accurately classified the Subject Property under existing law. If the Subject Property had both a residential and commercial use, the DOR, and this Board, would be required to analyze which use had the highest value and the Subject Property would be classified accordingly. At that point, the DOR, or this Board on appeal, would determine which of the improvements on the property were commercial and which were residential, and the improvements would be classified accordingly. Unfortunately for the Taxpayer in this instance, the Subject Property has a commercial use and no residential use, and thus must be classified as commercial. The residential classification the Subject Property enjoyed in the past was based on § 15-7-401, MCA, because there was no commercial or residential use. Essentially, § 15-7-401, MCA provides a benefit for those properties that have no current use to enjoy a residential classification at the lower tax rate, which results in a lower value for property tax purposes. However, once there is a commercial use, the DOR must classify the property as commercial. Here, the commercial improvements on the Subject Property prevent it from enjoying the same legislative grace granted to those properties with no current use or with primarily residential use.
74. The Taxpayer argued that equalization and equal protection require the DOR to value the Subject Property similarly to those Taxpayer's Comparable Properties that appear similar to the Subject Property. However, the DOR pointed out that most of those properties have no current use, whether commercial or residential, thus were classified as residential pursuant to § 15-7-401, MCA, until such time as there is a more definitive use to base the

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classification of the property. The DOR noted that one of the Taxpayer's Comparable Properties, the Huffine Property, was actually incorrectly classified as residential when it should have been classified as commercial. The DOR testified the classification of that property has since been changed within the DOR's system and the property owner will be notified of that change in the next valuation cycle. While the owner of that property benefitted from the DOR's error in the current and previous valuation cycles, we find that error has no bearing on whether the Subject Property was properly classified and assessed.

75. The Taxpayer stated at the outset of the hearing that this was not a valuation case. However, the Taxpayer introduced Exhibit 29 which showed what the Taxpayer's Comparable Properties and the Subject Property would be valued at if they were all valued using the residential land model and if they were all valued using the commercial model to demonstrate that the Subject Property was not treated fairly and equitably. According to Exhibit 29, the values for the Taxpayer's Comparable Properties and the Subject Property as residential ranged from \$323,276 to \$455,819, while the values of the Taxpayer's Comparable Properties and the Subject Property as commercial ranged from \$2,407,597 to 3,474,666. The purpose of the exhibit was to show that the Subject Property, valued as commercial property, had a significantly higher value than the Taxpayer's Comparable Properties, which were valued as residential. However, we believe this would more likely demonstrate that the properties would have all been valued similarly if they were all similarly situated. Should one or more of the Taxpayer's Comparable Properties include commercial improvements in the future, such property is likely to receive similar valuation treatment as the Subject Property.
76. We find the Taxpayer's Comparable Properties (other than the Huffine Property) are not similarly situated to the Subject Property because the Taxpayer's Comparable Properties do not include improvements, commercial

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or otherwise, and are not used to produce income. In contrast, the Subject Property includes some commercial improvements which are used by the neighboring parcel in the production of income. Due to the different use of the Subject Property, we find the Taxpayer's Comparable Properties are not comparable to the Subject Property for tax purposes. We find the DOR's decision to classify the Subject Property as commercial while classifying the Taxpayer's Comparable Properties (other than the Huffine Property) as residential to be reasonable under § 15-7-401, MCA.

77. The Taxpayer cited *Department of Revenue v. State Tax Appeal Bd.*, 188 Mont. 244 to argue that equalization requires the DOR to value the Subject Property similarly to the Taxpayer's Comparable Properties. We note the issue in that case involved the DOR using 1971 replacement cost data to value residential property improvements while using 1976 replacement cost data to value commercial property improvements when utilizing a cost approach to valuation. Here, the DOR used the sales comparison method to value land, rather than improvements. The DOR developed its residential land model and its commercial land model based on actual sales data collected for residential land sales and for commercial land sales, respectively. The difference in the Subject Property's value when applying a commercial land model versus a residential land model is not a function of the value added by the commercial improvements. The existence of the commercial improvements requires the DOR to classify the property as commercial and value it using the commercial land model. As previously stated, the commercial land model was created using the actual sales prices of commercial land in the Subject Property's tax neighborhood. The Taxpayer's Comparable Properties were valued using the residential land model, which was created using the actual sales prices of residential land in Taxpayer's Comparable Properties' neighborhood. We agree with the DOR's use of separate land models to value the properties based on use.

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78. We believe the DOR has properly classified the Subject Property as commercial and properly valued it using a commercial land model. This Board believes the DOR has met its obligation to equalize the property with other commercial properties pursuant to § 15-9-101(1). As such, we do not find it necessary to reach a decision regarding the Constitutional arguments raised by the Taxpayer.
79. This Board recognizes that while the DOR changed the classification of the Subject Property from residential to commercial sometime in 2014 or 2015, it failed to assign the Subject Property to a commercial neighborhood, but instead continued to value it with a residential land model. This resulted in a benefit to the Taxpayer for several years while the Subject Property was assigned a lower value based on the use of an incorrect model. The Board notes that the change in value this cycle was significant, but it was due to the DOR's correction of their records.
80. As stated above, this Board's decision is based on the plain language of law presented by the parties. If there were no commercial improvements on the Subject Property, or if there were residential improvements on the Subject Property, this Board may have a different analysis. However, based on the testimony and evidence presented, this Board must rule in favor of the DOR on this issue.

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ORDER

81. The Taxpayer's appeal is denied.
82. DOR is ordered to maintain the Subject Property classification as commercial and the value of \$2,925,873.

Dated this 16th day of August 2023.




David L. McAlpin, Chairman


Amie Zendron, Member

Notice: You are entitled to judicial review of this Order by filing a petition in district court within 60 days of the service of this Order. 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. *Mont. Code Ann. §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 Facts and Conclusions of Law to be sent by email and/or United States Mail via Print & Mail Services Bureau of the State of Montana on August 16, 2023, to:

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