

## IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0030

WILLIAM M. SOLEM and ELLEN G. SOLEM

Plaintiffs and Appellees,

v.

STATE OF MONTANA, DEPARTMENT OF REVENUE

Defendant and Appellant.

## APPELLANT'S RESPONSE TO PETITION FOR REHEARING

On Appeal From the Montana Eleventh Judicial District Court, Flathead County,

Cause No. DV 10-073 (D)

The Honorable Dan Wilson, Presiding

## APPEARANCES:

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## INTRODUCTION

Solems have petitioned for rehearing under Mont. R. App. P. 20. The State of Montana, Department of Revenue (“Department”) objects to Solems’ petition.

## ARGUMENT

The Court should decline to consider Solems’ Petition for Rehearing because the Petition does not meet any grounds that justify a rehearing.<sup>1</sup> This Court will consider a petition for rehearing only on the following grounds:

- (i) That it overlooked some fact material to the decision;
- (ii) That it overlooked some question presented by counsel that would have proven decisive to the case; or
- (iii) That its decision conflicts with a statute or controlling decision not addressed by the supreme court.

Mont. R. App. P. 20(1)(a).

**I. *Peretti* was already addressed by this Court and Solems fail to present a controlling decision not addressed by this Court.**

Solems petition for rehearing under section (iii), claiming that this Court’s decision conflicts with *Peretti v. Dept. of Revenue*, 2016 MT 105, 383 Mont. 340, 372 P.3d 447. Solems argue that this Court misinterpreted *Peretti* and “inadvertently

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<sup>1</sup> The Petition also appears to request that the Court rehear this matter *en banc*. The Rules of Appellate Procedure do not allow for this relief either.

expands *Peretti* far beyond what was intended and what the law allows.” Appellees’ Petition for Rehearing at 3.

A party’s disagreement with this Court’s interpretation of case law, however, is not one of the limited situations that justify rehearing. Solems do not claim that this Court’s decision “conflicts with a statute or controlling decision *not addressed by the supreme court.*” Mont. R. App. P. 20(1)(a)(iii) (emphasis added). Rather, Solems disagree specifically with the manner in which this Court did address *Peretti*.

In *Solem*, this Court specifically addressed *Peretti*. *William M. and Ellen G. Solem v. State of Montana, Dept. of Revenue*, 2024 MT 217, ¶¶ 19-21. Though Solems disagree with the outcome of this Court’s analysis, the purpose of a petition for rehearing is not to provide a method for a party to express disagreement with this Court’s analysis or attempt to change one justice’s mind in an effort to obtain a different outcome. Rather, a petition for rehearing provides a way for parties to inform this Court of a possible error in the event that a published opinion fails to address conflicting controlling authority. What the Solems effectively request is another level of appellate review of this Court’s opinions, which is not provided for by Montana rule or statute. As such, this Court should decline to consider Solems’ petition for rehearing.

Even if this Court considers Solems’ argument on *Peretti*, the Court should decline to rehear this matter because this Court’s determination that the district court

may not “engage in a ‘wholesale substitution’ of its opinion for the opinion of the agency” squares with principles of Montana property tax law. *Solem*, ¶¶ 17, 23-24. This Court has long held that Department appraisals are presumed correct with the burden resting on taxpayers to disprove them. *W. Airlines v. Michunovich*, 149 Mont. 347, 353, 428 P.2d 3, 7 (1967). Further, it is a longstanding well-established rule that “[t]he value of a property is a matter of opinion, and there must necessarily be left a wide room for the exercise of this opinion.” *Danforth v. Livingston*, 23 Mont. 558, 563, 59 P. 916, 917 (1900). This Court has cautioned that “it is not a judicial function to act as an authority on taxation matters.” *Dept. of Revenue v. Grouse Mountain Dev.*, 218 Mont. 353, 355, 707 P.2d 1113, 1115 (1985). Here, the district court waded into appraisal opinion by selecting the R squared value when none of the testifying experts did so. *Solem*, ¶¶ 23-24.

This Court’s analysis of *Peretti* does not “nullify” § 15-1-406, MCA. Taxpayers may bring a declaratory judgment action “seeking a declaration that . . . an administrative rule or method or procedure of assessment or imposition of tax adopted or used by the department is illegal or improper.” Section 15-1-406(1)(a), MCA. However, Department appraisals are presumed correct and to prevail taxpayers bear “a substantial burden to disprove it.” *Peretti*, ¶¶ 19. Here, Solems did not fail only because the district court “erred by substituting its judgment for that of

DOR,” they also failed to meet their substantial burden to overcome the presumption of correctness. *Solem*, ¶¶ 21-22, 24.

Finally, this Court already rejected Solems’ argument that “*Peretti* is distinguishable because the Perettis challenged DOR’s appraisal based on individually flawed assessments, not defects in DOR’s overall methodology.” *Solem*, ¶ 20. *Peretti* “explicitly addressed the district court’s finding that ‘the methodology of the DOR’ was flawed.” *Id.*; see also *Peretti*, ¶ 12 (“The District Court determined that the methodology of the DOR ‘resulted in a severely skewed assessment’ of the value of the property.”). The methodology at issue here is the same model at issue in *Peretti*. *Solem*, ¶ 21. This Court has now reviewed the Department’s methodology twice and found that it “was adequate and not arbitrary.” *Solem*, ¶ 24.

In short, Solems simply disagree with this Court’s analysis of *Peretti*. Their disagreement is not one of the limited grounds for rehearing and this Court must decline Solems’ petition.

## **II. This Court considered all material facts.**

Solems further petition for rehearing under section (i), claiming that this Court did not consider their experts’ opinion that “the DOR’s methodology failed to adequately account for all relevant land features, resulting in inaccurate and

improper valuations,” including topography, slope, and access to utilities. Appellees’ Petition for Rehearing at 10-11.

This Court’s opinion includes the material facts Solems allege were overlooked in the Court’s consideration of the Solems’ expert witnesses. *See Solem*, ¶¶ 10-13. For example, this Court noted that Cynthia Smith-Page “agreed that the Department’s decision to use a qualitative variable was appropriate, but that the decision not to include a negative value in the variable reduced the model’s ‘credibility.’” *Solem*, ¶ 12. Smith-Page “asserted that the fifth step in the process, adjusting for unique influence characteristics, would not correct for this reduction in credibility.” *Id.* Further, this Court noted that David Lennhoff “asserted it was inappropriate to use a binary as a stand in for qualitative sales characteristics but acknowledged he was ‘not a model builder’ and did not know which other variables he would have added.” *Id.* at ¶ 13. In this Court’s discussion, Solems’ experts concerns were considered: “Smith-Paige and Lennhoff both identified the qualitative variable as a source of concern, but while Smith-Paige would have only added one more dimension to it, Lennhoff was unsure what to swap it out for.” *Id.* at 22.

In addition to considering Solems’ experts’ opinions, this Court summarized the Department’s mass appraisal process, which addressed the land features of a property. *Id.* at ¶ 5. The Department’s process included a verification process that noted the characteristics that influenced the purchase price of a property, including

topography, location, and surroundings. *Id.* The Department also compares “the unique ‘influence factors’ of each property, such as topography, restricted view, or access problems, and staff appraisers adjust each individual valuation based on their judgment and market data.” *Id.* Finally, this Court had Scott Williams’ testimony before it, in which he explained “that he opted not to include a negative price adjustment in the qualitative variable at step four because that made the model less accurate, but that lots with negative characteristics were readjusted downward at step six.” *Id.* at ¶ 9.

This Court did not overlook any facts material to the decision. Instead, it considered Solems’ experts’ claim that the Department’s methodology failed to adequately account for all relevant land features and ultimately determined that the Department “employed a consistent, accepted process for arriving at market value.” *Id.* at ¶ 24. Solems use their petition to express disagreement with this Court’s analysis and attempt to obtain a different outcome. This adds another level to the appellate process and this Court should decline to consider Solems’ petition for rehearing.

### **CONCLUSION**

The Department respectfully requests this Court deny Solems’ petition for rehearing.

Respectfully submitted this 23rd day of October, 2024.

/s/ Nicholas J. Gochis

NICHOLAS J. GOCHIS

Attorney for Montana Dep't of Revenue



## **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this response is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 1,329 words, excluding certificate of service and certificate of compliance.

/s/ Nicholas J. Gochis

NICHOLAS J. GOCHIS

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## **CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and accurate copy of the foregoing Appellant's Response to Petition for Rehearing to be served via eService on the Montana Courts E-Filing system as follows:

Dated this 23rd day of October, 2024.

/s/ Nicholas J. Gochis

NICHOLAS J. GOCHIS

Attorney for Montana Dep't of Revenue

## **CERTIFICATE OF SERVICE**

I, Nicholas James Gochis, hereby certify that I have served true and accurate copies of the foregoing Response/Objection - Objection to Petition for Rehearing to the following on 10-22-2024:

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