

BEFORE THE STATE TAX APPEAL BOARD
OF THE STATE OF MONTANA

DANIEL C. VON BERGEN,)	DOCKET NOS.: PT-2009-4 & 5
)	
Appellant,)	
)	FACTUAL BACKGROUND,
-vs-)	CONCLUSIONS OF LAW,
)	ORDER and OPPORTUNITY
DEPARTMENT OF REVENUE)	FOR JUDICIAL REVIEW
OF THE STATE OF MONTANA,)	
)	
Respondent.)	

Daniel C. Von Bergen (Taxpayer) appealed a decision of the Lewis and Clark County Tax Appeal Board (CTAB) relating to the Department of Revenue’s (DOR’s) valuation of his property identified as Tracts 5 and 6 of the Frank Tracts, Section 10, Township 15N, Range 03W, of Lewis and Clark County, Montana. Taxpayer claims that the DOR overvalued his property for tax purposes and seeks a reduction in the value assigned by the DOR. At a hearing held in Helena on January 25, 2010, Von Bergen presented evidence and testimony in support of his appeal. The DOR was represented by Michele R. Crepeau, Special Assistant Attorney General.

The Board having fully considered the testimony, exhibits, post-hearing submissions and all matters presented, finds and concludes the following:

Issue

The issue before this Board is did the Department of Revenue determine an appropriate market value for the subject properties for tax year 2009?

Summary

Von Bergen is the Taxpayer in this action and therefore bears the burden of proof. Based on a preponderance of the evidence, the Board modifies the value set by the Department.

Findings of Fact

1. Due, proper and sufficient notice was given of this matter and of the time and place of the hearing. All parties were afforded opportunity to present verbal and documentary evidence.
2. The property is described as Tracts 5 and 6 of the Frank Tracts, Section 10, Township 15N, Range 03W, Lewis and Clark County, Montana. (DOR Exh. A and B.) Each lot is 8,276 square feet, with 50 feet of Missouri river frontage and approximately 165 feet deep. (DOR Exh. A and B.) The Taxpayer does not contest the value of a mobile home located on Tract 6. (VonBergen test.).
3. For tax year 2009, the DOR, using a site valuation model, valued each lot at \$200,000 (a nearly ten-fold increase over the 2008 valuation of \$20,204) by determining that any riverfront property less than one acre would be valued at \$200,000. (DOR Exh. A and B.)
4. The Taxpayer is asking for a value of \$65,753.42 for each lot. (Appeal Form.)
5. The Taxpayer filed an appeal with the Lewis and Clark County Tax Appeal Board (CTAB) on October 2, 2009, stating that according to the “Environmental Health Department the property cannot be occupied more than 120 days per year. Also an 890% increase is unheard of and [it] cannot be sold for that amount.” (Appeal Form).

6. A hearing was held on November 24, 2009 and the CTAB upheld the DOR's valuation.
7. An appeal to this Board was taken on December 22, 2009.

Von Bergen Appeal

8. Von Bergen brought significant evidence contradicting the DOR valuation to the hearing before this Board. (Exh. 1, numbered 1-20.)

Challenging the DOR Comparables

9. Von Bergen presented evidence that the properties used by the DOR to value his property were not comparable in value. Von Bergen testified that the comparable properties used by the DOR border state lands, which is likely to increase the value of the comparable land. (VonBergen test.)
10. Von Bergen's property is in the floodplain and has significant building and occupancy restrictions on it. Von Bergen testified certain comparables used by the DOR had permanent residences on the land. He determined this because the taxpayer address was the same as the property address. (Von Bergen test.)
11. The fact those properties have permanent residences indicate they are either not subject to the 120 day use restriction, may not be in the floodplain, or are grandfathered properties. (Von Bergen test.)
12. Analysis by Von Bergen indicated the average square foot value of the comparable properties used by the DOR was between \$4.99 and \$11.03 for a square-foot, which was significantly lower than the \$24.17 per square foot for Von Bergen's property. (Von Bergen test., Ex 1, 6. Ex 1, 8, DOR Exh. A.) The difference in those values is because any lot less than an acre,

regardless of size, is valued at \$200,000. Thus, the square footage amount varies for each lot.

13. In contrast, Von Bergen demonstrated the DOR valued waterfront lots of one acre in neighboring Cascade County at \$108,994 per base acre, which is \$2.50 per square foot for a full acre of land. The residual value is \$18,863 per acre. (Exh. 1, 30 and 31. See also DOR post hearing brief, Exh. B.)
14. The Taxpayer brought evidence related to several subdivisions which exist within four miles of the subject property. Those subdivisions are located in Cascade County and are referred to as Mid Canon Estates, Cooper Estates, Missouri River Tracts and Island Tracts. (Exh. 1, 20.)
15. Three riverfront lots just under a half-acre on the Missouri River in Island Estates are valued at just under \$50,000. (Exh. 1, 21). These lots have no improvements. (Exh. 1, 21.)
16. Three riverfront lots, all less than an acre, in the Missouri River tracts have land values ranging from just over \$98,000 to just over \$100,000. Two of these lots have large dwellings. Exh. 1, 22. Values for three lots under a half acre of riverfront property in Cooper Estates were set at just under \$98,000 for the land on each lot. Exh. 1, 23. Three one acre lots in SRB tract are valued just over \$108,000 for the land (Exh. 1, 24), while three lots that were approximately a half acre were assigned values between \$98,000 and \$101,000. (Exh. 1, 25.)
17. Most significant in demonstrating the differences in valuation of lots in Lewis and Clark versus Cascade County was shown with lots that border each other but are in different counties. (Von Bergen test., Exh. 1, 30 and 31.)

18. The Taxpayer brought evidence relating to the Cooper Estates subdivision which encompasses lots in both Lewis and Clark and Cascade Counties. Two waterfront lots in Lewis and Clark County, which border Cascade County, are valued with \$200,000 land values. The lots are 7,568 and 20,542 square feet each. Both have taxable improvements. (Exh. 1, 30.) The larger adjacent Cascade County waterfront lots are valued at \$107,350 for .96 acres, and \$109,788 for 1.09 acres. (Exh. 1, 31.)
19. Both Von Bergen and the Department agree Cascade County, similar to Lewis and Clark County, has a floodplain zone. (Von Bergen test., Swope test.) This factor indicates that the existence of floodplain, alone, does not necessarily affect valuation in comparing values between the two counties.
20. The valuation date for the property in question is July 1, 2008.
21. The Taxpayer argues the current value of the lots is currently less than \$100,000 per lot and that the property has been for sale since March 2009.

DOR Evidence

22. The DOR brought evidence of six sales the DOR considers to be comparable sales for valuation, as well as an additional sale after the appraisal date. (Swope test., DOR Exh. C.)
23. Swope testified he used “appraisal judgment” to determine a site valuation of \$200,000 for waterfront lots of one acre or less. He also testified that he believed sale prices were high because of proximity to the water.
24. After the hearing, the DOR submitted CALP forms for two neighborhoods. (DOR post-hearing submission, Exh. A & B). A CALP is a computer

assisted land pricing model that analyzes past sales of land to predict an accurate value for land.

25. The “R2” or “R squared” is the coefficient of determination in each of the CALP models. The R2 is a measure of the predictive accuracy of the model. R2 values during the last cycle ranged from 0 to 1. The closer the value is to 1, the more reliable the model’s estimate of value. (*Manicke v. DOR*, PT-2005-5, 08/31/06, page 14.) This same measure of predictive accuracy is often referenced as a percentage. The closer the value is to 100%, the more reliable to model’s estimate of value. (DOR post-hearing Exh. A & B.)
26. The CALP for Lewis and Clark County indicated a value of \$297,250 for a 25,000 square foot lot but was not used to value the riverfront properties. Instead, the Department used the \$200,000 site value. (Swope test.)
27. The CALP for Cascade County has 69 properties for the adjacent neighborhood, which includes the areas with the comparables Von Bergen brought to the Board. (DOR post-hearing Exh. B.)
28. The Cascade CALP valued the Cascade County properties at \$108,994 for a base lot size of 1 acre, and a residual value of \$18,863 per acre. The residual value is used to adjust values of properties larger or smaller than the base lot size. (DOR post- hearing Exh. B.)¹

¹ The Cascade CALP also shows an “influence value” of \$140,600. For properties with unique advantages, such as river frontage, an influence value or influence factor may be used to adjust a valuation of certain higher value property or properties within a neighborhood. (DOR post- hearing Exh. B.)DOR submitted briefing indicating that the influence value was determined to add value to riverfront property, but was not actually applied to the properties in Cascade County. (DOR post-hearing submission.)

29. The R squared value, or the predictive accuracy, of the Lewis and Clark County CALP is 4.76% while it is 45.44% for the Cascade County CALP. Thus, the Cascade County CALP is significantly more reliable than the Lewis and Clark CALP for predicting the accuracy of the value.
30. The Department of Revenue routinely provides CALP information to the county and state tax appeal board to demonstrate the predictive accuracy of DOR valuations. *See, e.g. DOR v. Wadsworth, PT -2006-9, DOR v. Bengala, PT-2006-10, Manicke v. DOR, PT 2005-5, Bauman v. DOR, PT- 2003-127, DOR v. Forney, PT-1997-125, Kohl v. DOR, PT-1993-385.*
31. Swope, on behalf of the DOR, testified he did not know why there was such a substantial difference between the valuation of lots in Lewis and Clark County and Cascade County. Swope admitted he did not know how Cascade County valued the land and he did not look at the Cascade County land valuations. Swope also denied that the CALP is a useful tool for valuation of land, but did not explain why.
32. For purposes of this appeal, Swope also developed an income analysis in an attempt to validate the value placed on the subject property. (Swope test. Exh. E, F.) The Department used a per-night cost for recreational property near or on the Missouri River. The DOR used an expense cost and capitalization rate derived from urban apartment rentals. The Department determined, on a per-square-foot basis, a value of \$91,725 for the building derived a land value of \$298,449. The Department argued that this confirmed their \$200,000 valuation. (Swope test.)
33. Several errors became apparent in the DOR information. For example, in Exh. D, the third sale listed has an error in the calculations. The time

trending indicates the value is lower when trended for time rather than higher. (Exh. D (confidential)).

34. The floodplain map provided by the DOR indicates that while one of the six properties used by DOR as comparables is partially in the floodplain, four of the comparables are not in the floodplain, and one appears to be adjacent to a floodplain area. (Exh. C.) This contradicts DOR's claims that all comparable properties are in the floodplain.
35. This Board requested parcel details from the DOR on the comparables brought to the Board by the Taxpayer. The DOR failed to submit any additional information to the Board for the Cascade County comparables.
36. In post-hearing submission, the Taxpayer noted he did not receive the confidentiality statement that the DOR informed him he would receive. The Taxpayer also noted the DOR did not provide this Board with the materials requested. (Post- Hearing Response to DOR materials dated February 15, 2010.)

Inconsistency between CTAB and STAB

37. During the county tax appeal hearing, the DOR first informed the Board and Taxpayer that a square foot model was used to value Von Bergen's property. (CTAB Tran. 19.)
38. DOR then informed the county board that a site value was used to value the Taxpayer's property. (CTAB Tran. 23.) The DOR presented five comparable properties to the Board, two of which were sold after the lien date. Thus, the DOR testified only three sales were used to value the subject properties. (CTAB Tran. 24, 29. *See also*, CTAB Exh. B and C.)

The DOR consistently testified at the county hearing that these three sales were the only comparable sales. (CTAB Tran. 31.)

39. At the CTAB hearing, the DOR agreed the valuation was “arbitrary” (CTAB Tran. 27) and the CALP did not work in this instance. (CTAB Tran. 30.)
40. The Taxpayer repeatedly requested all the documentation used by the DOR to value his property. (CTAB Tran. 33, 35, 36.) The County Board also directed any information used to value Von Bergen’s property be sent to the Taxpayer. (CTAB Tran. 35, 36.) The Department agreed to provide any material not already provided. (CTAB Tran. 35.)
41. After the county tax appeal board hearing, Terry Swope, the regional manager, sent the Taxpayer a letter stating “Any and all documentation supporting the valuation of Lot 5 7Lot 6 of Frank tracts was previously submitted in the appeal on November 24, 2009.” (Exh. 1, 5.)
42. At the state tax appeal board hearing, the Department brought in six sales they determined to be comparable. (See FOF 22 above.) Swope specifically testified he used these six sales to value the Missouri riverfront property and those properties were in his files. (Swope Test.)
43. This is in direct contradiction to the letter he sent to the Taxpayer dated December 1, 2009. (Exh. 1, 5.)
44. When questioned by the Taxpayer as to why there were an additional three properties, Swope testified the six properties were in his notes, and he did not know why it had not been submitted at the county hearing. (Swope test.)

Conclusions of Law

The State Tax Appeal Board has jurisdiction over this matter. Section 15-2-301, MCA. The Board determines whether the Department has set the proper market value for the subject properties. Market value is 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. Section 15-8-111(2) (a), MCA. In addition, all taxable property must be assessed at 100% of its market value except as otherwise provided. Section 15-8-111, MCA.

This case is problematic for a variety of reasons. Von Bergen's property was assessed using a site value developed by Lewis and Clark County DOR. Not only did the Lewis and Clark County DOR fail to determine an accurate market value for the subject property, the DOR also failed to determine whether neighboring properties were equally valued across county lines.

First, by statutory and Constitutional requirements, valuation must be equalized across Montana. Under §15-7-112, MCA, the same method of appraisal and assessment shall be used in each county of the state to the end that comparable properties with similar fair market values and subject to taxation in Montana shall have substantially equal taxable values at the end of each cyclical revaluation program.

In *Larson v. State*, 166 Mont. 449, 534 P.2d 854, the Montana Supreme Court ruled that it is improper for the taxpayers in one county to bear a disproportionate tax burden from those in another county. *See also Roosevelt v. DOR*, 1999 MT 30, 293 Mont. 240, 975 P.2d 295. In discussing the Constitutional and statutory requirements for uniformity of taxation, the Montana Supreme Court has noted "if different valuation statistics are applied

to different pieces of property in the same legal classification, an illegal valuation is likely to result.” *DOR v. STAB*, 188 Mont. 244, 249, 613 P.2d 691,693. In this instance, the evidence demonstrates such a case of improper valuation.

The property in Lewis and Clark County is valued at \$200,000 per acre or portion of an acre. The Lewis and Clark DOR used only six sales, and developed the site value by appraisal judgment and not from the CALP or other calculation. In neighboring Cascade County, the base rate for property in this neighborhood is \$108,994 per acre with a residual value of \$18,863². The Cascade County DOR calculations used 69 sales to determine land values. There is no indication in the evidence that the Cascade County riverfront properties and the Lewis and Clark riverfront properties are different in any manner, and we find no justification or evidentiary basis for the differences in valuation.

Further, not only did the DOR fail to investigate why the counties had different valuations, but informed the Board that the differences between counties were not relevant. The Department argues Von Bergen’s property is valued correctly, and thus no adjustment is needed. The Department cites *Schoonover v. Stewart* (1931), 89 Mont. 257, 274-75, 297 P. 476, 481 “in no proceeding is one to be heard who complains of a valuation, which, however erroneous it may be, charges him only with a just proportion of the tax.” The DOR claims Von Bergen has not been taxed at a greater rate than similarly situated property within the “taxing jurisdiction.”

² Testimony and post-hearing filings from the DOR indicate that Cascade Count developed an “influence” value of \$140,600 for river-front property in the neighborhood. That influence value was not, however, applied to any of the riverfront property in the neighborhood. DOR post-hearing brief, 3.

The Department's argument fails on two fronts. Von Bergen's property is being valued differently than similarly situated property on the Missouri river. The mere fact that his property is in Lewis and Clark County, instead of Cascade County, should not trigger an increased valuation for like-property. *See* §15-7-112, MCA and case law set forth above. In fact, evidence in this matter demonstrates that Lewis and Clark County may have more restrictive building codes which would typically lead to property being less valuable than areas with less restrictive building codes.

Additionally, the DOR failed to determine whether the riverfront properties used to develop comparables within Lewis and Clark County are truly comparable properties. The Taxpayer brought proof to the Board of significant building restrictions for his bare land due to the fact that the properties are in the floodplain and Lewis and Clark County has restrictions on building within the floodplain. *See* Exh. 1,4. At the hearing, all six "comparable properties" were represented by the DOR as being floodplain properties used to value the Von Bergen property, although reviewing DOR's own floodplain map makes it clear that the majority of the properties are not in the floodplain. *See* Exh. C. Only one of the six properties is clearly in the floodplain (sale 1), one is partially in the floodplain (sale 6), and four are clearly not in the floodplain (sales 2, 3, 4, and 5).

Because of the building restrictions, it could be difficult for the Taxpayer to develop the land. The Department failed to account for those restrictions in reviewing the property, as well as analyzing whether other properties were actually comparable. In terms of development possibilities, all but one of the "comparable properties" has a residence already built and at least three of those have septic systems. The sanitary systems on the remainder of the properties

are not known, but they clearly have established sanitary systems. This is demonstrated by the value of the improvements listed for the properties.

The difference between raw land and improved land is not just the present cost of replacing the buildings because of the floodplain regulations. On properties which are in the floodplain, the existence of a residence is a considerable advantage in saving a potential purchaser the uncertainty and expense of obtaining a permit to build a residence and install a septic system.

Further, three of the “comparable” properties abut public land, which could substantially affect the site value of scenic recreational land. Knowing that adjacent land will not be developed into subdivisions adds considerably to the desirability of the land, especially when considering desirable riverfront property.

Finally, Von Bergen’s properties are significantly smaller than the size of the lot used to set the site value. There is no indication that the subject lots, which are smaller lots within Craig, on a busy road, and with building restrictions, have the same market value as a one-acre riverfront home-site.

We are not denying the DOR’s contention that site valuation is a useful tool for valuing properties that have a unique and marketable advantage, such as river or lake front access, but the property at issue is substantially different from the other properties used to set that site value. Additionally, there is no justification or evidentiary basis for a site valuation methodology in one county and a market approach for nearly identical property in the neighboring county.

Income Approach

The income method developed by the Department failed as a realistic indication of value. *See* FOF 35. The Department significantly overestimated

income, underestimated expenses, and failed to explore the difficulties in building on the subject property.

The DOR failed to recognize expenses cannot properly be derived from a percentage of income derived from a part-time rental. Expenses would properly be calculated from the full cost of the structure and land because maintenance, taxes, insurance and other costs are full-year expenses. Building costs in a floodplain will also be greater than for other sites.

Additionally, the DOR did not calculate a vacancy rate or a realistic capitalization rate for this type of property. The capitalization rate and the expense rate used for an apartment building are much different from luxury vacation rentals which are much riskier, with lower investment potentials and higher maintenance fees.

The Department also failed to consider that the subject lots are in the heart of Craig, and next to a very busy public boat launch and pull-out site, which significantly lessens the desirability of the property for luxury recreational rental property compared to lots which abut undeveloped public lands.

Disclosure to Taxpayer

It is also problematic the Department failed to provide the Taxpayer with the materials used to value his property. During an appeal, the Taxpayer has a right to review all material used in valuation of his or her property. *See DeVoe v. Missoula Co.*, 233 Mont. 190, 759 P.2d 991, 995 (1988). *See also O'Neill v. DOR*, 227 Mont. 226, 739 P.2d 456, 461 (1987). In this instance, the Taxpayer requested all material used to value his property, yet at no time before the hearing was he provided with the materials requested. While this Board

recognizes the County Tax Appeal Board hearing is designed to be more informal than the state hearing, it is not proper for the DOR to fail to provide to the Taxpayer to information used to value his property. Mr. VonBergen did a great deal of research in preparation for his appeal to this Board but his efforts were hampered by the failure of the DOR to give him all of the material in advance, as requested.

Further, we note the DOR failed to provide many of the documents requested by this Board. *See* FOF 34. No post-hearing submission from the DOR was received to explain the difference from county to county. There were also problems with some of the data (two different sale dates on one property) not resolved by DOR.

We recognize the Department is tasked with mass appraisal of a large number of parcels in a short period of time. That does not, however, excuse the Department from providing the materials requested by a Taxpayer during the appeal process, materials which, according to Mr. Swope, were in the file at all times.

Conclusion

The Board concludes that the subject properties shall be valued in the same method as Cascade County properties with a base rate of \$108,994 per acre and a residual value of \$18,863 per acre.

Order

IT IS THEREFORE ORDERED by the State Tax Appeal Board of the State of Montana that the subject properties' values shall be entered on the tax rolls of Lewis and Clark County at a 2009 tax year value consistent with the application of the methodology employed by Cascade County which determined a base rate of \$108,994 per acre and a residual value of \$18,863 per acre. The decision of the Lewis and Clark County Tax Appeal Board decision is modified.

Dated this 17th day of March, 2010.

BY ORDER OF THE
STATE TAX APPEAL BOARD

/s/ _____
KAREN E. POWELL, Chairwoman

/s/ _____
DOUGLAS A. KAERCHER, Member

/s/ _____
SAMANTHA SANCHEZ, Member

Notice: You are entitled to judicial review of this Order in accordance with Section 15- 2-303(2), MCA. Judicial review may be obtained by filing a petition in district court within 60 days following the service of this Order.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 17th day of March, 2010, the foregoing Order of the Board was served on the parties hereto by depositing a copy thereof in the U.S. Mails, postage prepaid, addressed to the parties as follows:

Daniel C. VonBergen	<input checked="" type="checkbox"/> U.S. Mail, Postage Prepaid
22575 Wallace Creek Road	<input type="checkbox"/> Hand Delivered
Clinton, Montana 59825	<input type="checkbox"/> E-mail

Rocky Haralson	<input checked="" type="checkbox"/> U.S. Mail, Postage Prepaid
Terry Swope	<input type="checkbox"/> Hand Delivered
L & C County Appraisal Office	<input type="checkbox"/> E-mail
P.O. Box 1722	<input type="checkbox"/> Interoffice
Helena, MT. 59624-1722	

Michele Crepeau	<input type="checkbox"/> U.S. Mail, Postage Prepaid
Office of Legal Affairs	<input type="checkbox"/> Hand Delivered
Department of Revenue	<input type="checkbox"/> E-mail
Mitchell Building	<input checked="" type="checkbox"/> Interoffice
Helena, Montana 59620	

/s/ _____
DONNA EUBANK
Paralegal

