

BEFORE THE STATE TAX APPEAL BOARD  
OF THE STATE OF MONTANA

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JOSEPH EVE,	)	DOCKET NO.: PT-2010-8
	)	
Appellant,	)	<u>NUNC PRO TUNC</u>
-vs-	)	FACTUAL BACKGROUND,
	)	CONCLUSIONS OF LAW,
THE DEPARTMENT OF REVENUE	)	ORDER and OPPORTUNITY
OF THE STATE OF MONTANA,	)	FOR JUDICIAL REVIEW
	)	
Respondent.	)	

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The Taxpayers, Joseph Eve and Melanie VanKoten-Eve, bring this appeal from a decision of the Flathead County Tax Appeal Board (CTAB) claiming that their property has been overvalued by the Department of Revenue (DOR) because it failed to take certain restrictive city regulations into account in valuing their land. The case was heard on the record, with both parties submitting written evidence to be considered in addition to the material submitted at the CTAB hearing. We hereby incorporate the transcript and materials from that hearing into the matter before this Board.

**Issue**

The issue before this Board is whether the Department of Revenue determined an appropriate market value for the subject property for tax year 2009.

## Summary

The Taxpayers are the Appellants in this case and therefore bear the burden of proof. Based on the preponderance of the evidence, the board modifies the decision of the Flathead County Tax Appeal Board.

## Evidence Presented

Taxpayers are the owners of a parcel of vacant land at 1340 W. Lakeshore Drive in Whitefish, Geocode 07-4292-26-3-03-05-0000, consisting of .27 acres with the legal description TR 4BC in Lot 3, S26, T31N, R22W . The DOR appraised the property at \$1,326,096 and Taxpayers filed an AB-26 on Oct. 1, 2009 requesting an informal review by the DOR. Their appeal stated:

The Market/Productivity Value increased from \$256,120 to \$1,326,096, an increase of 418%. The market value of waterfront property in Flathead County has significantly decreased in value, based on recent sales. I feel that the Market/Productivity Value that the county has placed on my parcel of real estate is greatly overvalued.(AB26 Form.)

The Taxpayers claim that the passage of the Critical Areas Ordinance by the City of Whitefish in March of 2008 imposed improvement size restrictions as well as additional engineering studies, foundation and retaining wall requirements that make the building of a home more expensive and less valuable. The properties used by the DOR as comparable sales to value the subject lot were sold prior to the ordinance, so the sales were not affected by the new restrictions.

During the AB-26 process, the DOR reduced the value of the property by 10% to \$1,193,486 in recognition of the presence of active railroad tracks at the back of the property, according to the testimony of DOR appraiser Don

Leuty. (Transcript, p. 13.) The Eves filed an appeal with the CTAB (Appeal Form, April 21, 2010) stating

The appraisal value set by the DOR as of 7/1/08 is irrelevant as it was at the peak of the value of real estate in the Flathead Valley. Our property has decreased significantly since that time, and we will state our case at the hearing with the County Tax Appeal Board.

A CTAB hearing was held on November 16, 2010. At the hearing, testimony was presented by Joseph Eve for the Taxpayers and by Don Leuty for the DOR.

Mr. Eve presented a copy of the Whitefish Critical Areas Ordinance (CAO), adopted in March 2008 (Taxpayers' CTAB Exh. 2) and a study he commissioned by the engineering firm of Billmayer & Hafferman, Inc. of the impact of the CAO on his lot (Taxpayers' CTAB Exh. 3). Mr. Hafferman met with city officials and studied the property (Taxpayers' CTAB Exh. 1). A number of engineering studies of geological characteristics, site history, hydrology, re-vegetation plan, building site assessment, soil bearing capacity and impacts to the steep slope critical area would be required by the city, with a cost estimated by Mr. Hafferman of \$80,782. In addition, the ordinance would require additional foundation construction and storm water management requiring a retaining wall that would cost \$21,000 to \$25,000. Furthermore, the building footprint would be limited to 3,200 square-feet for any structure, while the property would have accommodated the 5,000 square-foot building Taxpayers had planned before the passage of the CAO. These regulations apply only to new construction. Further, the CAO has additional and more stringent requirements for properties with a slope of more than 40%. The more stringent requirements of the regulations apply to the subject lot because its slope is 46%. Billmayer & Hafferman estimated that the reduction in the footprint of the home reduced the home value by \$288,000. The Taxpayers

argue that the net change in the July 1, 2008 value of the lot due to the application of the CAO was, therefore, between \$390,000 and \$394,000. Taxpayers request that the DOR value be reduced by \$392,000 to \$801,483.

Mr. Leuty testified for the DOR presenting evidence of the comparable property sales that were used in setting the value of the property. Four properties were used that had been sold in the same neighborhood (#210) in 2006 and 2007, two of which were vacant land<sup>1</sup>. Mr. Leuty testified that the property had two negative influences that the DOR factored into the value. In the initial valuation, the shallow depth of the lot, 131 feet, was taken into account because the land was valued on a front-foot basis and the typical lot is 250 feet deep. (DOR Exh. C.) As a result of the AB-26 informal review, Mr. Leuty deducted an additional 10% for the presence of the railroad tracks at the back of the property in arriving at the adjusted value of \$1,193,486. No accommodation was made for steepness of the slope or for the Whitefish CAO impact on the lot.

Mr. Leuty testified all of the comparable property sales were prior to the passage of the CAO and the DOR had no choice given the proximity of the date of passage (February 2008 ) to the valuation date of July 1, 2008. He submitted one sale from September of 2008, which we cannot consider, but it had a house already on it, so it is also irrelevant to the question of the subject property as it is not subject to the CAO.

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<sup>1</sup> An additional post-valuation-date sale was discussed but the consideration of such data must be excluded from our consideration, as will a post-valuation-date offer to purchase the property and the current offered sale price of the land. (*PacificCorp v. Department of Revenue*, 2009 Mont. Dist. LEXIS 594 (1<sup>st</sup> Judicial District Court, 2010.))

## Principles of Law

1. The State Tax Appeal Board has jurisdiction over this matter. (§15-2-301, MCA.)
2. The Board must base its determination of the proper value for the subject property on information “known and knowable” as of the valuation date and cannot consider post-valuation date information. *PacifiCorp v. Department of Revenue*, 2009 Mont. Dist. LEXIS 594 (1<sup>st</sup> Judicial District Court, 2010.)
3. All taxable property must be assessed at 100% of its market value except as otherwise provided. (§15-8-111, MCA.)
4. 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. (§15-8-111(2)(a), MCA.)
5. The appraised value supported by the most defensible valuation information serves as the value for ad valorem tax purposes. (ARM 42.18.110(12).)
6. For the taxable years from January 1, 2009, through December 31, 2014, all class four properties must be appraised at its market value as of July 1, 2008. (ARM 42.18.124(b).)

## Findings of Fact, Board Discussion and Conclusions of Law

The Board must determine, based on a preponderance of the evidence, whether the DOR set an appropriate value for the subject property for tax year 2009. In this instance, we will review whether the DOR properly valued the subject property.

As a general rule, the appraisal of the Department of Revenue is presumed to be correct and the Taxpayer must overcome this presumption. The Department of Revenue should, however, bear a certain burden of providing documented evidence to support its assessed values. *Farmers Union Cent. Exch. v. Department of Revenue*, 272 Mont. 471, 901 P.2d 561, 564 (1995); *Western Airlines, Inc., v. Michunovich*, 149 Mont. 347, 353, 428, P. 2d 3, 7, *cert. denied* 389 U.S. 952, 19 L. Ed. 2d 363, 88 S. Ct. 336 (1967).

The DOR appraised the subject property using standard methodologies, including comparable sales to determine market value. The Department failed to review, however, what effect the Whitefish Critical Areas Ordinances had on the value of the property as of the lien date. The uncontroverted evidence in this case demonstrates that the subject property will require substantial additional expenditures due to the enactment of the Whitefish Critical Areas Ordinance. None of the properties used to value this lot were subject to its provisions, so the DOR evidence does not discount the Taxpayer's claims. We find the passage of the CAO significantly affects the valuation of the subject property as of the lien date in question.

We also note that the DOR did not make an adjustment for the steepness of the lot, here 46%, and the additional expenses incurred in developing such a steep lot. In past cases we have seen a routine 10% adjustment made for steepness (*Clark v. DOR*, 2010 Mont. Tax LEXIS 41) which would have reduced the value to \$1,074,137. The evidence in this case demonstrates that a reduction for steepness is warranted.

In addition, the City will require \$80,782 worth of engineering studies of the site, such as geological characteristics, re-vegetation plans, soil bearing capacities, above and beyond the additional remediation costs of extra foundation and retaining walls due to the CAO in effect. We find these

expenses were clearly relevant to the value as of July 1, 2008. Reducing the value by those expenses results in an appraisal value of \$993,355.

The engineering firm also estimated a loss of \$288,000 for the reduced value of the home that can be built on the lot under the new ordinance. This reduction is not, in fact, a measure of the reduction in value of the land, but rather of the house that might someday be built on the land. The Board does not consider that amount to be an appropriate offset to the land value. When a house is built, the DOR will value the land and improvements accordingly and at that time the size of the house may be a consideration in the appraisal.

This Board orders that the decision of the Flathead County Tax Appeal Board be modified to show an appraised value of \$993,355.

**Order**

IT IS THEREFORE ORDERED by the State Tax Appeal Board of the State of Montana that the subject property value shall be entered on the tax rolls of Flathead County at a 2009 tax year value of \$993,355 as determined by the State Tax Appeal Board.

Dated this 21<sup>st</sup> day of March, 2011.

BY ORDER OF THE  
STATE TAX APPEAL BOARD

/s/ \_\_\_\_\_  
KAREN E. POWELL, Chairwoman

( S E A L )

/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 t his Order.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 21<sup>st</sup> day of March, 2011, the foregoing Nunc Pro Tunc 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:

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Donna Eubank, paralegal



