

BEFORE THE STATE TAX APPEAL BOARD
OF THE STATE OF MONTANA

THE LODGE AT WHITEFISH
LAKE, LLC,

Appellant,

-vs-

THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA,

Respondent.

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)
) DOCKET NOS.: PT-2009-163
) through PT-2009-174
)
) FACTUAL BACKGROUND,
) CONCLUSIONS OF LAW,
) ORDER and OPPORTUNITY
) FOR JUDICIAL REVIEW
)
)
)

The Lodge at Whitefish Lake, LLC, (Taxpayer) appealed decisions of the Flathead County Tax Appeal Board (CTAB) relating to the Department of Revenue's (DOR) valuation of 12 commercial condominium units at the Lodge at Whitefish Lake, Flathead County, State of Montana. The Taxpayer argues the DOR overvalued the properties for tax purposes, and it seeks a reduction in values assigned by the DOR. At the State Tax Appeal Board (Board) hearing held on November 27, 2012, the Taxpayer was represented by Brian Averill, owner, and Don E. McBurney, consultant, providing testimony and evidence in support of the appeal. Dan Averill, owner, provided telephonic testimony. The DOR was represented by Michele Crepeau, Tax Counsel. The Department's Regional Manager Scott Williams, Management Analyst Ross Halvorson and Appraiser Dawn Cordone, presented testimony and evidence in opposition to the appeal.

Issue Presented

The issue before this Board is whether the Department of Revenue erred in valuing the subject properties for tax purposes for tax year 2009.

Summary

The Lodge at Whitefish Lake is the Taxpayer in this proceeding and, therefore, has the burden of proof. Based on a preponderance of the evidence, the Board upholds the decisions of the Flathead County Tax Appeal Board.

Evidence Presented

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 evidence, verbal and documentary.
2. The subject properties are 12 commercial condominium units within the Lodge at Whitefish Lake, described as follows:

PT-2009-163: Unit C-1, Assessor No. 209415, Geocode 07-4292-24-3-02-01-7301
(multi-use administrative office space at 4,739 square feet)
PT-2009-164: Unit C-2, Assessor No. 8872, Geocode 07-4292-24-3-02-01-7302
(multi-use office space/spa at 2,768 square feet)
PT-2009-165: Unit C-3, Assessor No. 8873, Geocode 07-4292-24-3-02-01-7303
(support area/spa at 741 square feet)
PT-2009-166: Unit C-4, Assessor No. 8874, Geocode 07-4292-24-3-02-01-7304
(multi-use office space/accounting at 101 square feet)
PT-2009-167: Unit C-6, Assessor No. 8876, Geocode 07-4292-24-3-02-01-7306
(Boat Club Restaurant at 7,849 square feet)
PT-2009-168: Unit C-9, Assessor No. 8879, Geocode 07-4292-24-3-02-01-7309
(multi-use office space/executive office at 480 square feet)
PT-2009-169: Unit C-10, Assessor No. 8880, Geocode 07-4292-24-3-02-01-7310
(part of restaurant area/Coffee Dock at 784 square feet)
PT-2009-170: Unit C-11, Assessor No. 8881, Geocode 07-4292-24-3-02-01-7311
(multi-use office space/administrative sales at 572 square feet)
PT-2009-171: Unit C-12, Assessor No. 8882, Geocode 07-4292-24-3-02-01-7312
(support area/Viking Conference Room at 1,289 square feet)
PT-2009-172: Unit C-13, Assessor No. 8883, Geocode 07-4292-24-3-02-01-7313
(ballroom/conference area/Stumptown Conference Room at 2,278 square feet)
PT-2009-173: Unit C-14, Assessor No. 8884, Geocode 07-4292-24-3-02-01-7314
(ballroom/conference area/Ramsey Conference Room at 2,958 square feet)

PT-2009-174: Unit C-15, Assessor No. 8885, Geocode 07-4292-24-3-02-01-7315
(support area/broom closet at 120 square feet)
Section 24, Township 31 North, Range 22 West, Flathead County, State of Montana.
(Appeal Form Attachments.)

3. For tax year 2009, the DOR appraised the subject land and improvements using a cost-approach methodology, for a total value of \$7,257,866, with the values for individual units as follows:

PT-2009-163: Unit C-1: \$1,727,646
PT-2009-164: Unit C-2: \$698,888
PT-2009-165: Unit C-3: \$166,975
PT-2009-166: Unit C-4: \$28,651
PT-2009-167: Unit C-6: \$2,554,565
PT-2009-168: Unit C-9: \$123,878
PT-2009-169: Unit C-10: \$263,422
PT-2009-170: Unit C-11: \$156,970
PT-2009-171: Unit C-12: \$270,918
PT-2009-172: Unit C-13: \$538,901
PT-2009-173: Unit C-14: \$699,502
PT-2009-174: Unit C-15: \$27,550

(CTAB Tr., Appeal Forms.)

4. The Taxpayer filed a Request for Informal Review (AB-26) on September 30, 2009, asking for an informal review meeting due to dissatisfaction with the DOR appraisal.

5. After review, the DOR made no adjustment on September 9, 2011:

Values based on reappraisal date of July 1, 2008. (AB26 forms,
CTAB Tr.)

6. The Taxpayer filed appeals with the Flathead CTAB on November 8, 2011 asking for a total value of \$1,821,962, with the following amended values for the land and improvements:

PT-2009-163: Unit C-1: \$441,911
PT-2009-164: Unit C-2: \$174,722
PT-2009-165: Unit C-3: \$41,743
PT-2009-166: Unit C-4: \$7,162
PT-2009-167: Unit C-6: \$636,141
PT-2009-168: Unit C-9: \$30,970
PT-2009-169: Unit C-10: \$65,855
PT-2009-170: Unit C-11: \$39,242
PT-2009-171: Unit C-12: \$67,729
PT-2009-172: Unit C-13: \$134,725
PT-2009-173: Unit C-14: \$174,875
PT-2009-174: Unit C-15: \$6,887

(Appeal forms, CTAB tr.)

7. The appeals were heard on February 29 and March 1, 2012. At the CTAB hearing, the DOR recommended adjusted valuations for several of the properties due to modifications by DOR in the percentages of the condominium's common elements that are assigned to each legal unit at issue. (CTAB Tr.)

8. After a hearing, the CTAB accepted the total proposed DOR value of \$6,349,636 and set the following values for the subject land and improvements:

PT-2009-163: Unit C-1: \$1,333,846	(adjusted "as recommended by DOR")
PT-2009-164: Unit C-2: \$698,888	(upheld DOR value)
PT-2009-165: Unit C-3: \$166,975	(upheld DOR value)
PT-2009-166: Unit C-4: \$28,651	(upheld DOR value)
PT-2009-167: Unit C-6: \$2,312,985	(adjusted "as recommended by DOR")
PT-2009-168: Unit C-9: \$123,878	(upheld DOR value)
PT-2009-169: Unit C-10: \$195,942	(adjusted "as recommended by DOR")
PT-2009-170: Unit C-11: \$156,970	(upheld DOR value)
PT-2009-171: Unit C-12: \$270,918	(upheld DOR value)
PT-2009-172: Unit C-13: \$451,481	(adjusted "as recommended by DOR")
PT-2009-173: Unit C-14: \$585,982	(adjusted "as recommended by DOR")
PT-2009-174: Unit C-15: \$23,120	(adjusted "as recommended by DOR")

(Appeal Forms.)

9. The Taxpayer appealed to this Board on March 29, 2012, stating:

Based on the data presented to the County Tax Appeal Board, the Board erred in their decision. (Appeal Forms.)

10. The State Tax Appeal Board accepted the appeal, and set a hearing in the matter.

Property Description

11. The condominiums in question are a part of the luxury resort property entitled the Lodge at Whitefish Lake. It is the only resort in Montana to receive a "Four Diamond" rating by AAA. (Testimony Brian Averill.) The property consists of residential style condominium units (not under appeal) and the commercial condominium units, all part of a mixed use condominium association.

12. The resort condominium units are the only commercial properties on Whitefish Lake. Whitefish Lake has the highest lake frontage land values in Montana. (Testimony Williams.)

13. The condominiums at issue are each legally separate commercial units.

14. The Lodge at Whitefish Lake has control and ownership of over 400 feet of lakefront, ownership of which is proportionally divided as a common element amongst the property owners, along with the other common elements such as parking, as set out in the condominium declaration. (Testimony Averill.)

15. The lake frontage, parking and other common elements are assessed to each individual residential and commercial unit for tax purposes on the percentage basis set out in the condominium declarations. (Testimony Cordone.)

16. Under the condominium declarations, the commercial condominiums are legally responsible for additional "limited common elements." Those limited common elements include the pool and other amenities. Taxpayer's testimony indicated that the commercial entities were responsible for the "limited common entities" for management purposes, such as leasing or closing the pool for private events.

(Testimony Averill.)

Taxpayer's Requested Valuation

17. The Taxpayer provided an updated valuation sheet at the State Tax Appeal Board hearing listing the requested total value of the condominiums at \$3,026,085, and the following to each unit:

C-1	Administration	\$581,590
C-2	Spa	\$339,261
C-3	Spa	\$ 90,875
C-4	Accounting	\$ 12,116
C-6	Boat Club	\$963,259
C-9	Executive Offices	\$ 57,553
C-10	Coffee Dock	\$ 96,931
C-11	Administration	\$ 69,669
C-12	Viking Room	\$157,514
C-13	Stumptown Room	\$278,678
C-14	Ramsey Room	\$363,494
C-15	Bell	\$ 15,145

18. At the hearings before the County and the State Tax Appeal Boards, the Taxpayer challenged the Department's use of the cost approach for valuation purposes, and argued that the Department of Revenue should use an income methodology calculation to determine the value of the commercial units. The Taxpayer contends that the values should be much lower based on its reported income for the commercial units.

19. The Taxpayer provided a portion of its tax returns, and a summary single page income and expense sheet. The Taxpayer did not provide any of the tax return schedules, any underlying income and expense information for the individual properties, nor did it provide lease information for any of the units. All of the income and expenses provided were aggregated for multiple units owned by the Taxpayer.

20. Taxpayer's testimony indicated that one of the commercial condominiums, Unit C-1 or "Administration," has a contractual relationship with the residential units in

the same condominium association to manage the rental of those residential condominium units, and retain approximately 50% of the rental income. (CTAB Tr. 8.)

21. Additionally, Unit C-1 and related units also contractually manage condominiums in a separate, neighboring, condominium association. (CTAB Tr. 8.) The income and expense information provided did not demonstrate whether that additional income from the separate entity condominiums was included in the income materials provided. (CTAB Tr. 22.) The Taxpayer's testimony indicated that the other commercial units, such as the restaurant, marina and spa, are also leased for income purposes. The leases were not included, so the specifics of the leasing agreements are unclear.

22. At the CTAB hearing, testimony indicated that the Boat Club has a graduated triple net lease based on gross income, and that other entities had "standard leases." There was also testimony relating to a "master lease." (CTAB Tr. 37-38.) No leases were submitted as evidence during the appeals.

23. In addition, testimony indicates that the Boat Club is 42% owned by the Taxpayer in this matter, with 58% owned by other owners. There is no indication as to whether the limited income statements provided include all income of the Boat Club or only the percentage owned by the Taxpayer. Portions of the transcript also indicate that the Boat Club may manage and lease a ballroom, ostensibly one of the separate properties on appeal. (CTAB Tr. 40.) It is unclear how that income is accounted for on the Taxpayer's income summary.

24. The Taxpayer testified that the properties at issue, along with additional property, sold from the developer of the condominiums to the current Lodge at Whitefish owners, all related parties, for about \$6.5 million in 2006. (Testimony Dan Averill.)

25. The DOR indicated that the \$6.5 million sale price was an indicator of value that negated the lower valuation requested by the Taxpayer. In a post-hearing submission, the Taxpayer indicated that that sale price included property, fixtures, and furnishing which was unrelated to the subject properties, and thus the sale price was not relevant to the appeal.

26. Don McBurney, listed as a tax consultant at the CTAB hearing, testified on behalf of the Taxpayer and urged the Board to use the income and expenses provided to value the subject property. Though licensed as an appraiser, Mr. McBurney did not provide an appraisal value or appraisal report for the subject properties.

Department of Revenue's Valuation

27. Because the subject properties are specialized properties, the DOR appraiser testified that she did not have sufficient comparable properties to develop a sales or income method for valuation, so the DOR used the cost approach for valuation, as required by statute. (Testimony Cordone.)

28. By statute, the DOR is directed to use the cost approach for valuation, if income and sales information is insufficient. Ms. Cordone indicated that the property was valued on a cost basis, and the common elements and limited common elements were apportioned to the commercial units based on the condominium declarations. (§15-8-111, MCA.)

29. The DOR did not receive income and expense information from the Taxpayer prior to the CTAB hearing. Dawn Cordone testified that the Taxpayer's income information that she received at the CTAB hearing was insufficient to perform an income approach to valuation, and further, the DOR had not developed a standard income valuation model for commercial condominiums. (CTAB Tr. 62.)

Principles of Law

1. The State Tax Appeal Board has jurisdiction over this matter. (§15-2-301, MCA.)
2. All taxable property must be assessed at 100 percent of its market value except as otherwise provided. (§15-8-111, MCA.)
3. 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.)
4. If sufficient, relevant information on comparable sales is not available for residential condominium units or if sufficient, relevant information on income is not made available for commercial condominium units, the department shall value condominiums using the construction-cost method. When using the construction-cost method, the department shall determine the value of the entire condominium project and allocate a percentage of the total value to each individual unit. The allocation is equal to the percentage of undivided interest in the common elements for the unit as expressed in the declaration made pursuant to 70-23-403, regardless of whether the percentage expressed in the declaration conforms to market value. (§15-8-111(5)(c), 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. The state tax appeal board must give an administrative rule full effect unless the board finds a rule arbitrary, capricious, or otherwise unlawful. (§15-2-301(4), MCA.)

Findings of Fact, Conclusions of Law and Board Discussion

The Board must determine, based on a preponderance of the evidence, whether the DOR set an appropriate valuation for the subject land for tax year 2009. In this instance, we reviewed whether the DOR properly valued Taxpayer's property for tax purposes.

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).

We reviewed the matter to determine whether the CTAB properly adjusted the subject properties' valuation, in accordance with the valuation recommended by the DOR. The DOR is charged with appraising the property at full market value pursuant to §15-8-111, MCA.

We find that the evidence in this matter demonstrates that the subject condominiums are located on a highly valuable lakefront location, with access to a stable income potential. We find that the Taxpayer's request for a significant valuation reduction not supported by the evidence.

We agree with the DOR that the income and expense information was insufficient to develop an income-based valuation of the subject properties. Both parties attested to the unique nature of the resort which makes it impossible to find the comparable properties needed for a market analysis. Because of this, the DOR testified that it valued the subject property by using the construction-cost method, as required by §15-8-111(5)(c), MCA. Taxpayer offered no evidence of errors by the DOR in its cost-method valuation of the subject property. Further, the DOR did

request build-out cost information and appraisal information from the Taxpayer, but it was not provided to them.

We find the income data provided to this Board by the Taxpayer was too generalized, and does not allow for an accurate income methodology to be calculated. The tax returns were incomplete and did not include the schedules, and the single sheet of income and expense data was summary in its presentation. Further, there is no method to determine the accuracy of the income data without a thorough analysis.

Additionally, the DOR did not receive any income information at the informal review when their appraisers could have examined it in detail.

For the DOR to be able to use the Taxpayer's income and expense information to determine an income approach valuation, the Taxpayer would have to provide a sufficient level of income information, including full income and expense information, leases (as applicable), or other financial data. This Board would also require such information to find that a valuation adjustment is appropriate. The Taxpayer failed to provide sufficient information for any adjustment to valuation, both prior to the hearings at the informal review, and also at the hearings before the tax appeal boards.

Further, we find Mr. McBurney's testimony to be largely irrelevant. As at the CTAB hearing, he argued for the use of the income approach but, again, Taxpayer's failure to supply the detailed income information precludes the use of that process. He also argued for an income shortfall/obsolescence adjustment to the cost approach, which has previously been discredited by this Board. Mr. McBurney did not testify as an appraiser (only as a consultant) and he did not provide an appraisal, nor any detailed report to this Board, but merely urged that the Board use an income methodology for valuation using the Taxpayer's limited figures to request a 75% reduction in value. He argued that a 15% capitalization rate was sufficient, or possibly too low, yet lacked any legitimate factual information to support his claim. Mr. McBurney argued for a lower income valuation, with a high capitalization rate, in part

because he claims hotels typically use a 15% capitalization rate. As we do not have sufficient data to consider a valuation based on income, we give little weight to his testimony.

To further support its request for a lower value, the Taxpayer argues that the typical hotel owns all of its property, which is dissimilar to the properties at issue. The Taxpayer neglects to address the fact that while the Lodge at Whitefish Lake does not own the residential properties, there is no indication that it is required to maintain those properties. Instead, it appears that a separate Homeowners' Association assesses fees and maintains the properties. Further, we find no indication that the capitalization rate for a typical hotel/motel would be similar for a high-end, Four Diamond property, with a unique business model. We find little evidence to support Taxpayer's claim.

At the county tax appeal board hearing, Dan Averill testified that the land was a "loss leader" for the remainder of the Lodge and similar properties on Whitefish Lake, i.e., it was only developed to showcase the general Whitefish area and does not actually make a profit. At the state tax appeal board hearing, he again indicted that several of the properties at issue have no value or negative value, and that the properties operated at a loss at the time of valuation, once again relying on the one-page income summary prepared by Taxpayer. There is no issue, however, that each of the units is a legally separate entity, and appears to be under lease and earning income as of the lien date. There is no indication that those entities have a cloud on their title, or that a willing buyer would not be interested in purchasing the properties. The business opinion of a particular owner, unsupported by evidence, is not relevant to the fair market valuation of a property, and we decline to value the property based on its hypothetical negative income.

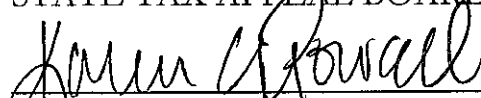
Thus, it is the opinion of this Board that the decisions of the Flathead County Tax Appeal Board are upheld.

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 Flathead County at the value set by the County Tax Appeal Board.

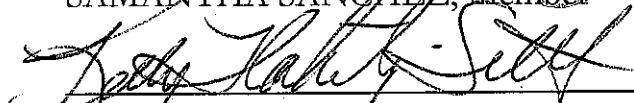
DATED this 8th day of January, 2013.

BY ORDER OF THE
STATE TAX APPEAL BOARD


KAREN E. POWELL, Chairwoman

(SEAL)


SAMANTHA SANCHEZ, Member


KELLY FLAHERTY-SETTLE, 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 8th day of January, 2013, 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:

The Lodge at Whitefish Lake
1380 Wisconsin Avenue
Whitefish, Montana 59937

U.S. Mail, Postage Prepaid
 Hand Delivered
 E-mail

Flathead County Appraisal Office
100 Financial Drive Suite 210
Kalispell, MT 59901

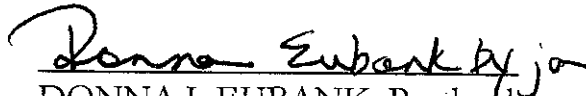
U.S. Mail, Postage Prepaid
 Hand Delivered
 E-Mail
 Interoffice

Michelle R. Crepeau
Office of Legal Affairs
Department of Revenue
Mitchell Building
Helena, MT 596702

U.S. Mail, Postage Prepaid
 Hand Delivered
 E-Mail
 Interoffice

Danene Thornton, Secretary
Flathead County Tax Appeal Board
800 South Main
Kalispell, MT 59901

U.S. Mail, Postage Prepaid
 Hand Delivered
 E-Mail


DONNA J. EUBANK, Paralegal