

BEFORE THE STATE TAX APPEAL BOARD
OF THE STATE OF MONTANA

THE DEPARTMENT OF REVENUE)	DOCKET NO.: PT-2005-15
OF THE STATE OF MONTANA,)	
)	
Appellant,)	
)	
-vs-)	
)	FACTUAL BACKGROUND,
BRADLEY & DEBBIE NAY,)	CONCLUSIONS OF LAW
)	ORDER and OPPORTUNITY
Respondents.)	FOR JUDICIAL REVIEW
)	

The above-entitled appeal was heard telephonically on December 4, 2006, in accordance with an order of the State Tax Appeal Board of the State of Montana (Board). The notice of the hearing was given as required by law.

The Department of Revenue (DOR), represented telephonically by Appraiser Laura Vandekop, and Scott Williams, regional supervisor, presented evidence and testimony in support of the appeal. The appellants, Bradley and Debbie Nay, appearing telephonically, presented evidence and testimony in opposition to the appeal. The Board allowed the record to remain open for a period of time in order to allow the Department of Natural Resources to provide a statement and to allow the Nays a period of time in which to comment on DNRC statements.

The duty of this Board is to determine the appropriate market value for the property based on a preponderance of the evidence.

FACTUAL BACKGROUND

1. Due, proper, and sufficient notice was given of this matter, of the hearing, and of the time and place of the hearing. All parties were afforded opportunity to present evidence, oral and documentary.

2. The property which is the subject of this appeal is leased from the State of Montana and is described as follows:

Lot 1, Echo Lake Summer Home Lots, Section 5, Township 27 North, Range 19 West, comprised of approximately 1.49 acres, County of Flathead, State of Montana (State Lease Number 3053286). (Appeal Form).

3. The DOR appraised the subject leased lot at a value of \$151,000 for tax year 2005. Appeal form.

4. As a result of the March 8, 2005 filing of an AB 26 form for property review by the Appellants, that value was reduced to \$123,378 on July 21, 2005 for the following reasons. Taxpayer's Exhibit 1, page two.

Lot depth adjusted due to lot shape. Road access a condition of your lease and is not reflected in the market value. No evidence that you've been denied permission to build dock (DNRC and the county zoning office have no record & indicate you would be able to get one)."

5. The Appellants appealed that decision, requesting a value of \$75,000, to the Flathead County Tax Appeal Board on November 19, 2005, citing the following reasons for appeal. Appeal form.

Attached documents verifying denial of dock construction. Verbally discussed with DNRC and they said to reapply for dock. Original denial was because of layout of lot and there has been no changes to this so how can we get approval.

6. In its June 12, 2006 decision, the Flathead County Tax Appeal Board ruled as follows:

Jurisdiction:

The records presented to the Flathead County Tax Appeal Board (FCTAB) the Nay's received form AB-26 from the Department of Revenue on August 15, 2005. A copy of Form AB-26 submitted by the Nay's denying the request is dated July 21, 2005.

The Nay's telephoned the Flathead County Tax appeal Board (FCTAB) for the tax appeal forms on August 25, 2005. The FCTAB does not have a full time staff so when the voice mail of the FCTAB was retrieved (date unknown) the tax appeal forms were mailed to the Nay's in Cardston, Alberta, Canada. Members of the FCTAB have personal experience sending mail to Cardston and that an extended time for delivery is typical (sometimes over 3 weeks). The Nay's state they received the tax appeal forms in October 2005.

The Property Tax Appeal Form submitted by the Nay's is dated November 19, 2005. This form is dated 19 days (at least) from the October (day unknown) 2005 when the Nay's say they received the Form.

- (1) Because the FCTAB does not have a full time staff and we are uncertain of the

date we retrieved the Nays telephone request and we are not certain the date we mailed the Property Tax Appeal Form to the Nay's and

- (2) Because the Nay's requested the Tax appeal Form from FCTAB on August 24, only 2 days beyond the 30 days from the mailing of the Form AB 26 by DOR and
- (3) Because of the known delay time in sending mail to Cardston, Alberta, Canada

FCTAB determined the Nay's have made a good faith effort to meet the time requirements of the statutes and the DOR, thus FCTAB determined it appropriate for the hearing to go forward as scheduled.

Property Value:

The Nay's claim the value of the property (a parcel of State Leased Land on Echo Lake in Section 5, Township 27N, Range 19W in Flathead County) is lower than typical properties on Echo Lake, because they have been prohibited from erecting boat/swimming dock on the property. The Nay's submitted documents showing the denial of a request to erect a boat dock from the Flathead County Commissioners dated July 26, 1994 (Lakeshore Permit #FLP-94-65).

The Nay's previously appealed the value placed on this property by the DOR. That appeal was heard by the State Tax Appeal Board (STAB) on July 12, 2000 (Docket No. PT-1999-16). The Nay's appeared before STAB by telephone. At that hearing, STAB reduced the property value by 10% from \$73,678 to \$66,310.

Currently, DOR has placed a value on the property of \$123,378 while the Nays believe the value should be \$75,000.

There is also a disagreement on the size of the land parcel with the DOR claiming there to be 1.49 acres of land and the Nays claim it had formerly been declared to be only 1.1 acres.

The DOR states that there have been no sales on Echo Lake of any land parcels with a prohibition on erection of boat docks. The DOR's position is that (a) absent market data to demonstrate a lower value because of the prohibition of docks they cannot give a value lower on the Nays' property and (b) the Nays have not gone through the entire process to apply for a boat dock and been again denied, therefore they have no proof that they cannot now have a boat dock.

The secretary for the FCTAB had requested DOR and the Nays to fax all exhibits to each other on Thursday May 25. The DOR did not advise the Nays that they could see the comparable sales used in estimating the market value of the subject site. Consequently the Nays had no opportunity to compare their property with the sales used by DOR to estimate the value of the subject land.

At the FCTAB hearing DOR did not have redacted data on comparable sales, which were discussed orally with the Nays. It is the opinion of this board that the Nays were denied needed and available information to evaluate and dispute DOR's value.

It is the contention of FCTAB that there can be a real difference in property values that cannot be proven by "direct comparison" with other properties. In such cases there is a "reasonable test" that can and should be applied. It is the contention of FCTAB that STAB made such a reasonable decision when it made the 10% reduction in its decision dated July 21, 2000. FCTAB agrees that a 10% reduction is in order at this time following the pattern established by STAB.

Therefore FCTAB directs the subject land be entered on the tax rolls of Flathead County by the Assessor of that county for the year 2005 at a value of \$111,000, as determined by this board.

7. The DOR then appealed that decision to this Board on June 26, 2006, stating:

Due to the fact the nature of the proof adduced at the hearing was insufficient, from a factual and a legal standpoint to support the Board's decision, the Department of Revenue wishes to file an appeal of this decision with STAB.

8. This property was the subject of a prior appeal under STAB docket number PT-1999-16. In its July 12, 2000 decision, this Board reduced the subject appraisal by ten percent in recognition of the negative effect of the prohibition of dock placement upon the lot's market appeal.

Department of Revenue's Contentions

On behalf of the DOR, Ms. Vandekop first raised the issue of timeliness of filing of the appeal before the Flathead County Tax Appeal Board. An AB 26 form for property review was timely filed on March 8, 2005. After a DOR review of the subject property, the lot depth was adjusted to lot shape and road access issues. The AB 26 results were mailed to the Nays on July 22, 2005. Pursuant to Sections 15-7-102(6) and 15-15-102, MCA, the Nays must appeal to the county tax appeal board within 30 days of receipt of the final DOR determination, or approximately August 22, 2005. The appeal to the Flathead County Tax Appeal Board was received on November 28, 2005, or 98 days late. Even allowing for mail delays, the DOR contends that this

appeal was untimely filed and, therefore, the CTAB did not have jurisdiction to hear this appeal and render a decision. The DOR therefore requested that the CTAB decision be summarily overturned and that no further testimony be given.

In response, Mrs. Nay stated that, while the AB 26 results were dated July 22, 2005, the postmark on its envelope was July 25, 2005. Also, the Nays were on holiday during this time period, until August 10, so they didn't receive this mailing until sometime after August 10. Mrs. Nay provided copies of her telephone bills to demonstrate that she was in contact with the Flathead County Appraisal Office in an attempt to reach some agreement on the subject appraisal. Respondent's Exhibit 1, 2-5. When settlement attempts failed, Mrs. Nay repeatedly attempted to contact the Flathead County Tax Appeal Board for an appeal form. The CTAB office is not staffed full time, but Mrs. Nay's voice mail message was eventually answered by the secretary for the CTAB and an appeal form was mailed. The form is a carbonless triplicate so the form may not be sent via fax. Mail service between the United States and Canada can take up to three weeks for delivery and the various postmarks on the correspondence from the CTAB does show that the mail was directed and re-directed several times. Mrs. Nay testified that she did not receive the appeal form until mid-October of 2005. The appeal was finally received by the CTAB on November 28, 2005.

This Board finds, given the extenuating circumstance of mail delays beyond the control of the Respondents, that the appeal was timely filed with the Flathead County Tax Appeal Board and that it properly assumed jurisdiction in this matter.

Ms. Vandekop testified that the DOR appealed the CTAB decision to this Board because no substantive evidence was presented by the Nays in support of their requested value, nor did the Nays satisfactorily demonstrate that that DOR appraisal did not meet the market value standard prescribed in §15-8-111, MCA. DOR Exhibit A.

DOR Exhibit B contains a copy of the 2005 appraised value of the subject property, the property record card, a land valuation breakdown, and a map and photographs of the subject property.

DOR Exhibit C contains sales information pertinent to three vacant land sales that were used to value the subject property. The subject property, with 134 feet of Echo Lake frontage located in DOR Neighborhood 891, has been appraised at \$921 per front foot. The comparable sales data is summarized below:

	Comp #1	Comp #2	Comp #3
Neighborhood	891	891	891
Total Lake Frontage	145	150	100

Appraised value/Unit FF	\$890	\$621	\$1,208
Appraised Value	\$129,008	\$93,075	\$120,750
Sales Date	09/25/00	09/09/99	04/14/00
Sales Price	\$135,000	\$127,000	\$85,000
Time Adjusted Sale Price	\$142,182	\$139,327	\$91,119
Time Adjusted Sale Price/Unit FF	\$981	\$929	\$911

Ms. Vandekop emphasized that the value assigned to the subject property, \$921 per lake front foot, is in line with the sales information above.

Exhibit C also contains a map showing the location of the three comparable sales in relation to the subject. Each of the comparables, except for comparable number one, is on Echo Lake. Comp #1 is on Abbott Lake, a small lake to the southwest of Echo Lake.

This exhibit also contains photographs of the comparables. Comparable number one is described as "quite a bit steeper" than the subject property. Ms. Vandekop described comparable number two as being much more level and more similar to the subject lot. Comparable number three is described as being "somewhere in between comparables one and two" in terms of terrain.

DOR Exhibit C also contains the land value regression analysis for frontage and depth for Neighborhood 891. The analysis contains the three sales referenced above as well as six other sales of unimproved water-fronting land. The regression analysis determined a base lot size, for this neighborhood, of 100 square feet; a standard depth of 300 feet and a base rate of \$1,067 per front foot.

Regarding the issue of the inability to place a dock on the subject Lot 1, Ms. Vandekop noted that the Department of Natural Resources (DNRC) resurveyed the subject lot in 2002. The size of the lot was changed from 1.1 to 1.49 acres as a result of this resurvey. DNRC notified the lot lessees that, in many cases, the lot sizes were affected and that "These changes will be come part of the lease agreement upon renewal which is sometime during the next five years for virtually all of the leases." (December 16, 2002 letter from Steve Lorch to Bradley and Debbie Nay.) The Nay's lease for Lot 1 was renewed in 2005. (CTAB transcript, 36.) A change in county commission makeup has occurred since the Commission denied the Nay's 1994 application for a dock permit. The Nays have not made a recent effort towards an official determination concerning whether or not a dock can be constructed. Ms. Vandekop stated that she spoke with a representative of the Flathead Regional Development Office and "they saw no reason to indicate why they [the Nays]

wouldn't be able to build a dock." Ms. Vandekop asserts that the Nays should re-apply for permission to build. If they are denied, Ms. Vandekop stated that the DOR would consider an acknowledgement of that prohibition in its assessment of this lot. Further, Ms. Vandekop stated that the DOR has undertaken some market analysis and hasn't found any market justification for any reduction based on inability to build a dock.

Upon questioning by the Board as to why the DOR did not apply this Board's ten percent reduction in appraised value for the current cycle, Ms. Vandekop stated that the DOR felt that the STAB reduction was arbitrary and without foundation. Ms. Vandekop acknowledged that the physical characteristics of the lot's water front have not changed since the previous Nay appeal.

At the request of the DOR, the Board allowed the record to remain open for the purpose of obtaining a statement from a representative of the Department of Natural Resources. By letter dated December 15, 2006, Greg Poncin, a unit manager in the Kalispell Unit, speculated that it would be reasonable to assume that the Nays could be successful in obtaining a permit to place a dock on the subject lot. The DNRC did not support the 1994 dock permit due to impacts to the adjoining leased Lot 2. The Nays later leased Lot 2, as well as Lot 1. Also, the dock permit was denied based upon the plan originally submitted

by the Nays. There is nothing in the record to suggest that alternative plans might not be approved, according to Mr. Poncin.

Respondent's Contentions

Mrs. Nay stated that the reason for appeal is their inability to place a dock on the subject Lot 1. They also lease the adjacent Lot 2, upon which they were able to place a dock. Lot 2 was leased for the purpose of gaining a dock. The absence of a dock on Lot 1 lessens its market value and desirability because water-fronting property needs a dock for optimum enjoyment of its recreational use. Mrs. Nay observed that there are no developed lots surrounding Echo Lake that do not have a dock.

Respondent's Exhibit 1 contains a February 4, 1994 letter from the Department of State Lands (at that time, the lessor for Lot 1) which stated that "the boat dock cannot be placed where you requested as it will extend in front of the Lot 2 shoreline. . . Permission to construct a dock will not be granted until a good solution to the problem has been found." The Flathead County Regional Development Office, however, recommended approval of the floating dock application in its letter dated July 19, 1994. The Flathead County Commission, by letter dated July 26, 1994, ultimately disapproved the floating dock

application because of "safety factors due to the contour of the land" and "variance is not allowed, based upon Flathead Lake & Lakeshore Regulations, Section 4.2.H2."

Respondent's Exhibit 1 also contains a June 11, 1998, letter from the Department of Natural Resources and Conservation stating that the Nays' request to relocate the lot lines on Lots 1, 2 and 21 would be denied.

In summary, Mrs. Nay stated that, since the physical circumstances of the subject Lot 1 have not changed since the time of the 1999 appeal, this Board's previous ten percent reduction and the Flathead County Tax Appeal Board's decision to reduce the current appraisal by ten percent should be upheld. In response to questioning by the DOR, Mrs. Nay stated that their requested value of \$75,000 was not supported by current sales data and that the \$75,000 is based upon prior cycle values. Mrs. Nay offered her opinion that lot values on Echo Lake have possibly increased one and a half times since the prior appraisal cycle.

In response to the DNRC post-hearing submission, the Nays again stated, by letter dated January 1, 2007, that they agree with both the DNRC and Flathead County's 1994 decision to disallow dock placement on the subject Lot 1. In fact, the Nays assert that the original spot which they chose for dock placement has been underwater 3-4 years out of the last ten.

They have solved their "dock problem" by leasing adjoining Lot 2, which can and does have a dock, because "all other options were exhausted." They have tried unsuccessfully to sell their right to lease Lot #1 and may try again in the future. In response to the DNRC's suggestions that the Nays submit alternative dock plans for consideration, the Nays replied that the original plan was just a basic dock and that the design is not the issue. The issue is that that the physical configuration of Lot 1 renders it unsuitable for dock placement.

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BOARD DISCUSSION

The State Tax Appeal Board has jurisdiction over this matter pursuant to § 15-2-301, MCA. The duty of this Board is to determine the appropriate market value for the property based on a preponderance of the evidence.

All taxable property must be assessed at 100% of its market value unless otherwise provided. Section 15-8-111(1), MCA. 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. Property used for comparison must have similar true market values. Section 15-7-112, MCA.

At its root, the issue in this appeal is whether or not the ability to build a dock on lakefront property affects the value of the subject property. Although the Nays questioned the overall increase in the value DOR placed on the subject property at reappraisal, they did not offer any evidence to demonstrate that the increase was disproportionate to the increase in reappraisal values for other lakefront properties. The evidence offered by DOR indicates that the value placed on the Nays' property falls within the range of sales prices for other lakefront property. However, DOR disagrees with the Nays' assertion that being denied a permit to build a dock on Lot 1

had reduced the value of that property. Instead, the Department dismissed this concern, saying that they could not find any lakefront property where a dock could not be built, so did not have any market data that would support a reduction in value based on the inability to build a dock. In addition, DOR stated that they did not see why the Nays could not get approval to build a dock. The DOR asserts that the Nays should re-apply for a permit.

The Nays originally applied for a dock permit in 1994. The Department of State Lands, then the lessor for the subject property, specified that the dock could not be placed where requested because of its impact on the Lot 2 shoreline. State Lands was not prepared to give permission to build a dock until "a good solution to this problem has been found." That Department recommended that the Nays contact the Flathead Regional Development Office to discuss the issue. (February 4, 1994, letter to Mr. Brad Nay from William F. Wright, Kalispell Unit Manager, Department of State Lands.) The Flathead Regional Development Office noted "some unusual topographic features playing a role in locating the site" but ultimately recommended approval of a requested variance and of the dock application. (Flathead Regional Development Office, Lakeshore Application, Permit #FLP-94-65, dated July 19, 1994.) In the end, however, the permit application was denied by the Flathead County

Commissioners based on the contour of the land and the prohibition on variances in the Flathead Lake & Lakeshore Regulations. (Letter from Flathead County Commissioners to Bradley Nay, dated July 26, 1994.)

In a submission after the hearing, the DNRC, current lessor of the subject property, maintained that "it is reasonable to assume that the Nays could be successful in obtaining a permit to place a dock on this property". The DNRC did not support the 1994 dock permit application due to the impacts to adjoining lot 2 but the Nays now also lease lot 2 but DNRC now claims to support a permit application because the Nays now also lease Lot 2. The DNRC has also repeatedly invited the Nays "to discuss amending the configuration of their two leased lots to mutual advantage to no avail."

The Nays' application for a dock permit for Lot 1 was denied due to the topography of the lot, the lake, and the adjoining lot, and with the Flathead Lake & Lakeshore Regulations, and not with the composition of the Flathead County Board of Commissioners nor with the consideration raised by the DNRC in their amicus curiae.

In their post-hearing submission, the Nays stated that they had taken a lease on an adjoining lot (Lot 2) "to have water front property with a normal boat dock. It was quite a financial strain at that time to do so but we felt that we had

no other options." Since that time, the Nays have attempted to sell their right to lease the subject property, without success. Mrs. Nay also testified that all developed properties have docks on them and that it is hard to find a comparable property without a dock. Similarly, Ms. Vandekop testified that she was unable to locate a property where a dock would not be allowed.

Regardless of the fact that DOR could not find a comparable property without lake access, it is the responsibility of the DOR to consider the impact of the legal restrictions placed on the subject property.

In the Order to Remand in the matter of Bauman v. DOR (Cause No. DV-05-25), the District Court in the Seventeenth Judicial District stated that "[u]nder Montana's statutory scheme . . . , the obligation rests with DOR to establish a 'market value' reappraisal based on reasonable knowledge of relevant facts by a willing buyer and willing seller. §§15-8-101, 15-8-111, 15-8-112, MCA. The law also requires property used for comparison to have 'similar true market values.' §15-7-112. The scheme requires DOR consider facts reasonably expected to be known by a willing buyer and willing seller to the extent those facts impact market value."

The court noted that, in the Bauman case, Ms. Bauman raised factual issues that impacted market value but the record showed little consideration to those relevant facts. Consequently, the

STAB decision was reversed and the matter remanded "for proper consideration of all relevant facts in determining market value of the subject property." Id.

In the Nay appeal, the Board finds it relevant that the Nays had to lease a second lot in order to have a boat dock, the Nays have been unsuccessful in their efforts to market their leasehold interest in Lot 1 (the lot on which a boat dock cannot be built), neither the Nays nor DOR could locate a lot without a dock to provide a comparison to the subject property, a dock was built on each property the DOR used as a comparable property subsequent to the property sale, the physical characteristics of Lot 1 and its lakefront have not changed and, in fact, the dock proposed in 1994 would have been underwater about one-third of the past decade. In addition, the record contains no evidence of any change to the section of the Flathead Lake & Lakeshore Regulations on which the requested variance was denied. As a result, the preponderance of the evidence supports the Nays' contention that the legal restrictions on constructing a dock negatively impacts the value of the subject property.

The Board is also not convinced that the properties used by DOR for comparison have "similar true market values" as required by Section 15-7-112, MCA, since each of those properties, unlike the subject, now has a dock. The DOR is required to appraise the subject property as it is, and not as it might be. Whether

or not the Nays might be well-advised to submit another application for a dock permit is irrelevant to these proceedings and to the DOR's constitutional and statutory duty to appraise the subject property. As things stand, construction of a dock is not legally permissible for the Nays.

Finally, the Board must determine how much reduction in value is appropriate to recognize the negative influence of not being legally able to build a dock on the subject property. Mrs. Nay testified that this Board's previous ten percent reduction and the Flathead County Tax Appeal Board's decision to reduce the current appraisal by ten percent should be upheld. Ms. Vandekop simply dismissed the previous ten percent reduction granted by this Board as arbitrary and without foundation, but she offered no evidence to support this assertion. A ten percent reduction in the value of the subject property is still the legal precedent that stands in regard to this matter. "The decision of the state tax appeal board is final and binding upon all interested parties unless reversed or modified by judicial review." §15-2-302 (5), MCA. The DOR did not appeal the prior decision of this Board relating to the legal restrictions on the property or the ten percent reduction in value. Those legal restrictions and the prior decision by this Board still stand. It is improper for the DOR to discount the standing prohibitions

for development of the property as well as the prior legal precedent relating to a lessened value.

In keeping with this Board's findings in PT-1999-116, Brad and Debbie Nay v. Department of Revenue, it will uphold the county tax appeal board's reduction of ten percent, or \$110,000, concerning the subject lot. A prime motivator in either purchasing or leasing a waterfront property is the ability to access and use the lake. The lessees of Lot 1 do not currently enjoy that benefit. In effect, the same situation exists for the Nays as it did during the time of the previous appeal: in order to have a dock for water access, they must lease Lot 2 where they have been allowed to place a dock.

The appeal of the Department of Revenue is hereby denied and the decision of the Flathead County Tax Appeal Board is affirmed.

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ORDER

IT IS THEREFORE ORDERED by the State Tax Appeal Board of the State of Montana that the subject property shall be entered on the tax rolls of Flathead County by the local Department of Revenue office at the value \$110,000.

The decision of the Flathead County Tax Appeal Board is hereby affirmed.

Dated this 5th day of February, 2007.

BY ORDER OF THE
STATE TAX APPEAL BOARD

(S E A L)

/s/ _____
KAREN E. POWELL, Chairwoman

/s/ _____
SUE BARTLETT, 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 5th day of February, 2007, 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:

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