

MERCANTILE PROPERTIES, INC.,

CASE No: PT-2020-17

*Appellant,*

v.

**FINDINGS OF FACT, CONCLUSIONS  
OF LAW, ORDER, AND OPPORTUNITY  
FOR JUDICIAL REVIEW**

STATE OF MONTANA,  
DEPARTMENT OF REVENUE,

*Respondent.*

**STATEMENT OF THE CASE**

This is an appeal of a decision by the Missoula County Tax Appeal Board (MCTAB) which denied Mercantile Properties, Inc.’s (Taxpayer) request for a property value reduction on the Missoula Dillard’s Department Store in Southgate Mall. We deny in part Dillard’s request for a reduction in the value of the property and modify the MCTAB decision.

**ISSUE TO BE DECIDED**

Whether the Missoula County Tax Appeal Board erred in upholding the Department of Revenue (DOR) appraised value of \$8,100,000 as market value for this property.

**PROPERTY DESCRIPTION**

The physical address of this property is 2901 Brooks Street, Missoula. The property Geocode is 04-2200-32-1-21-28-0000 and the Legal description is Southgate Mall #1, S32, T13 N, R19 W, Tract 2 less .08AC to HWY. The assessment code is 5124621 and the property is in DOR neighborhood 204.810. The subject property improvements are a department store, built in 1978 with a total area of 104,202 square feet, including a mezzanine of 23,283 square feet. It is presently a Dillard’s department store, one of three anchor stores in Southgate Mall, sharing

**Before The Montana Tax Appeal Board**  
***MERCANTILE PROPERTIES, INC. v. STATE OF MONTANA,***  
***DEPARTMENT OF REVENUE***

one wall with the mall. Dillard's is located on the northern end of the Mall, adjoining South Avenue across its parking lot.

**EXHIBIT LIST**

The following evidence was submitted at the hearing:

Mercantile Properties exhibits:

1. MPM Taxpayer Exhibit 1 - 2019 Property Record Card;
2. MPM Exhibit 2 - Appellant's Missoula County Tax Appeal Board Packet;
3. MPM Exhibit 3 - Appraisal Report of Dillard's Dept. Stores at Southgate Mall, by Thomas Appraisal Services, Inc; and
4. MPM Exhibit 4 - Excerpts of Mike Oriet's deposition.

Department of Revenue exhibits:

5. MDOR Exhibit A – MercProp MSL-DOR 1-11, packet of information;
6. MDOR Exhibit B - AB-26 Letter;
7. MDOR Exhibit C - CTAB Appeal and Decision;
8. MDOR Exhibit D – Realty Transfer Certificates of introduced comparable sales;
9. MDOR Exhibit E - Retail 2019 Income Model Output;
10. MDOR Exhibit F - 2019 Statewide Retail Expense and Rent Data;
11. MDOR Exhibit G - Traffic Counts;
12. MDOR Exhibit H - 2019 Rental Rates;
13. MDOR Exhibit I - Missoula Retail Market Trend Analysis;
14. MDOR Exhibit J - Similarities Study; and
15. MDOR Exhibit K - 2019 Dillard's Missoula Reappraisal Sales Analysis.

The Montana Tax Appeal Board (MTAB) hearing was conducted in Helena on January 26, 2021 and the following were present:

**Before The Montana Tax Appeal Board**  
***MERCANTILE PROPERTIES, INC. v. STATE OF MONTANA,***  
***DEPARTMENT OF REVENUE***

- a. D. Wiley Barker & Kristen Meredith, Counsel for Taxpayer; Greg Marwitz, as Taxpayer Representative, via Zoom; and David Thomas, MAI, Montana Licensed Fee Appraiser, via Zoom; and
- b. Dave Burleigh, DOR Counsel; Michelle Staples, DOR Missoula Area Manager, Robin Hatfield, DOR Commercial Appraiser for Missoula; and Mike Oriet, DOR Commercial Appraiser, via Zoom.

The record includes all materials submitted to the county tax appeal board, the transcript of the hearing at the county tax appeal board, and additional exhibits submitted by the parties for the MTAB hearing.

**FINDINGS OF FACT**

1. To whatever extent the foregoing findings of fact may be construed as conclusions of law, they are incorporated accordingly.
2. Taxpayer disputed the original value of \$9,324,000 assigned by DOR for the 2019-2020 appraisal cycle so submitted a DOR AB-26 Request for Informal Review. The DOR reviewed its information and responded in a final determination letter dated October 17, 2019. *Dept Ex. A.* Upon AB-26 review, the DOR lowered the value of the subject property from \$9,324,000 to \$8,100,000. *Id.* To justify the reduction from its initial valuation, the DOR reviewed the 2017 CTAB tax appeal decision for the subject property and reduced the rent rating in the DOR's income approach model to category four or \$12.25 per square foot, reduced the investment class to average thereby raising the effective capitalization rate to 8.6%, and continued to place no value on the mezzanine structure in the store thereby reducing the taxable square feet from 104,202 square feet to 80,919 square feet. *Id.*

**Before The Montana Tax Appeal Board**  
***MERCANTILE PROPERTIES, INC. v. STATE OF MONTANA,***  
***DEPARTMENT OF REVENUE***

3. Seeking a further reduction in value, the Taxpayer filed a county appeal in Missoula County on November 4, 2019, and MCTAB heard the appeal on January 2, 2020. *Dept Ex C.* MCTAB upheld the DOR's revised value of \$8,100,000 but reallocated the values assigned for land and improvements. *Id.* MCTAB stated the land value was too high compared to nearby land values and lowered the land value to \$4,055,616, which without an overall change in value increased the improvements to \$4,044,384 to maintain the total DOR value of \$8,100,000. *Id.*
  
4. The Taxpayers appealed the CTAB decision to the Montana Tax Appeal Board (MTAB) on February 3, 2020, seeking a value of \$2,832,000, and after discovery by the parties, an eight-hour hearing was held on January 26, 2021. *MTAB Dkt. 1.* At the beginning of the hearing, Taxpayer's counsel, Mr. Barker, amended the Taxpayer's requested value from \$2,832,000 to \$3,750,000. *MTAB Hrg. Transcr. 3:4-6.* The DOR, represented by Mr. Burleigh, requested a value of \$8,100,000. *MTAB Hrg. Transcr. 3:7-10.* Both parties relied on the income approach to find value, thereby negating any need to allocate value between land and improvements. *Taxpayers Ex. 3, Dept Ex. A.* At the MTAB hearing, Mr. Barker asked for time at the end of the hearing for rebuttal, and the Board granted that motion. *MTAB Hrg. Transcr. 5:6-17.*
  
5. The subject property is known in the commercial real estate industry as an anchor department store and is attached to the Southgate Mall in Missoula. Dillard's store is a large single-tenant owner-occupied retail space. *Taxpayers Ex. 3.* The store was constructed in 1978 and is one of three anchor stores in the Southgate Mall in Missoula. *Id., Taxpayers Ex. 3.* The subject property is owned in fee simple by Dillard's Companies. *Id.* The Taxpayer bought the property in 1998 for an undisclosed price. *Id.* Southgate Mall is in central Missoula on the Brooks Street/U.S. Highway 93 commercial corridor. The South Gate Mall is the largest regional shopping mall in Western Montana, drawing customers from rural

**Before The Montana Tax Appeal Board**  
***MERCANTILE PROPERTIES, INC. v. STATE OF MONTANA,***  
***DEPARTMENT OF REVENUE***

areas and small cities in central and western Montana as well as business and vacation travelers in and around Missoula. *Taxpayer Ex. 3.*

6. The Taxpayer's primary argument is that the DOR overvalued the property by failing to fully account for the trends in the department store retail industry, which faces unprecedented challenges that have negatively affected its profitability and by association, its property value. *MTAB Hrg. Transcr. 7:10-8:11.* Additionally, Taxpayer argued that few single-tenant retailers remain in business who would occupy a large retail space that is 100,000 square feet in size in the present internet-driven retail economy. *Id.* Dillard's argued that the in-person retail market has declined due to competition from online shopping and changes in customer preferences. *MTAB Hrg Transcr. 13:7-12.* Taxpayer counsel stated that the DOR could not overcome this evidence, especially when DOR relied upon an income approach to find value based on inaccurately high rent ratings and low capitalization rates, creating an overall value that exceeds market value. *MTAB Hrg. Transcr. 9:3-15.* Dillard's secondary argument was that recent sales of comparable properties, namely its purchase of the former Herberger's department store space in Southgate Mall, indicate a value far lower than the value placed on the subject property by DOR. *MTAB Hrg. Transcr. 33:10-24.*
  
7. DOR counsel contends the DOR's appraisal accurately reflects market value because the income approach is the best approach for this appraisal, and within its income approach, the DOR uses empirical data gathered from Montana taxpayers to build its valuation models. *MTAB Hrg. Transcr. 9:21-10:21.* Using these income models, DOR has estimated a market value for the property that equalizes the fair market values among similarly situated taxpayers in Montana as required by law. *Id.* DOR counsel stated that Dillard's effort to find value does not share the statutory burden borne by the DOR to equalize values among

**Before The Montana Tax Appeal Board**  
**MERCANTILE PROPERTIES, INC. v. STATE OF MONTANA,**  
**DEPARTMENT OF REVENUE**

similarly situated Montana taxpayers and in addition relies on data almost entirely from out-of-state examples. *Id.*

8. Greg Marwitz, property tax director for the Taxpayer, critiqued the DOR's appraisal methods and testified that he found the rent rating of \$12.25 per square foot used by the DOR to be too high. *MTAB Hrg. Transcr. 15:22-16:23*. In its income model, DOR began with the \$12.25 rent rating and multiplied it by the subject property's square footage to arrive at a potential gross income (PGI) of \$991,258. *Id., Taxpayers Ex. 3*. Mr. Marwitz contends this \$12.25 represents a gross lease value while the Dillard's store uses a triple net lease value and should be closer to the \$3.50 range. *Id.* He testified that if DOR used a gross lease calculation, it should have been adjusted to accurately represent the additional expenses in a triple net lease. *MTAB Hrg. Transcr. 44:12-17*.
  
9. While he did not perform an appraisal of the subject property, Mr. Marwitz performed his own pro-forma income analysis using a capitalization rate of 9%, a rental rate of \$3.50 per square foot, expenses of 5%, and 5% for vacancy and loss. *Taxpayer Ex. 2*. Using those inputs, Mr. Marwitz estimated the subject property's value at \$35.10 per square foot for a total market value of \$2,840,032. *Id.* Mr. Marwitz also presented a nationwide Department Store Comparable Sales Analysis from 2010 to the present, showing an average sales price per square foot of \$30.91 for comparable large retail space. *Id., MTAB Hrg. Transcr. 28:17-30:01*.
  
10. Mr. Marwitz calculated his rental rate for the subject property using information from JC Penney's stores in Montana. *MTAB Hrg. Transcr. 22:14-26:3*. Mr. Marwitz also provided national rental information for JC Penney's locations in Utah and Dillard's stores nationwide in support of his argument that the rent rate used in his analysis is consistent with anchor department stores in the national market. *Id.* Mr. Marwitz testified this

**Before The Montana Tax Appeal Board**  
***MERCANTILE PROPERTIES, INC. v. STATE OF MONTANA,***  
***DEPARTMENT OF REVENUE***

information was provided to him by an unnamed JC Penney's representative and by his employer, Dillard's. *Id.*

11. Mr. Marwitz developed his proposed capitalization rate of 9% by surveying capitalization rate ranges specific to the retail market from CBRE Rates, Reality Rates Investor Survey, Viewpoint Integra Realty Resources, and PWC Real Estate. *MTAB Hrg. Transcr. 27:12-28:14, Taxpayer Ex. 2.* Mr. Marwitz testified his information was derived from surveys providing ranges of capitalization rates and not actual capitalization rates; he also provided several years of capitalization rates from the same publications to show the published range of capitalization rates. *Id.*
  
12. Equally central to the Taxpayer's argument was the contract to purchase a 28,000 square foot retail store in Southgate Mall in 2019, more than a year after the statewide lien date for valuation of January 1, 2018. *Taxpayer Ex. 2, MTAB Hrg. Transcr. 33:10-34:25.* This purchase allowed Dillard's Men's store to occupy a separate space in Southgate Mall vacated by Herberger's upon its parent company's nationwide Chapter 11 bankruptcy. The terms of the agreement are confidential but indicated a price and payment terms very favorable to the Taxpayer. Because the sale occurred after the January 1, 2018 lien date, it could not be considered by the DOR for the 2019/2020 valuation cycle. Mr. Marwitz testified this transaction demonstrates the trends for anchor department stores. *Id.*
  
13. Mr. Marwitz contends that to be accurate for valuation, the only sales of properties to the subject property truly comparable are sales of other anchor department stores. *MTAB Hrg. Transcr. 41:20-42:18.* He suggests that sales of anchor department stores are a national market and that only large retailers can backfill a space of a department store. *Id.* Mr. Marwitz testified that when looking for a new store location, Dillard's is not as concerned with the geographic market as much as they are concerned with store location in a city;

**Before The Montana Tax Appeal Board**  
***MERCANTILE PROPERTIES, INC. v. STATE OF MONTANA,***  
***DEPARTMENT OF REVENUE***

Dillard's looks for anchor spaces available that will fit its company model. *Id.* Further, Mr. Marwitz testified that the larger the space, the price per foot goes down because of the theory of economies of scale. *MTAB Hrg. Transcr. 34:23-35:11.*

14. On cross-examination, DOR attorney Mr. Burleigh questioned Mr. Marwitz about some of the news articles produced in Taxpayer's Exhibit 2 showing a weak and declining retail marketplace. Mr. Burleigh pointed out the news articles do not consider the healthy Missoula retail market, and several of the articles show evidence of a positive trend in the retail market. *MTAB Hrg. Transcr. 79:12-86:11.* Further, Mr. Burleigh points out a quote in one article, unidentified article on Bates page 000137, where retailers have the upper hand in lease negotiations with mall owners. *Id.* Mr. Marwitz countered by saying while mall owners are trying to keep the anchors stores filled, the retail department store market is national, and one cannot just look at retail in Montana to gauge the retail market value. *Id.*, *MTAB Hrg Transcr. 91:7-25.*

15. The Taxpayer hired Montana Licensed Appraiser, Mr. Dave Thomas of Billings, to conduct an independent fee appraisal of the subject property using the same lien date as the DOR, January 1, 2018. *Taxpayers Ex. 3, MTAB Hrg. Transcr. 98:5-6.* Mr. Thomas relied on the income approach but also conducted a sales comparison approach for comparison when he valued the Missoula Dillard's store at \$3,750,000. *Taxpayers Ex. 3.* Mr. Thomas testified that his appraisal conforms to the Uniform Standards of Professional Appraisal Practice. *MTAB Hrg. Transcr. 98:13-15.* Mr. Thomas' appraisal did include value for the mezzanine in the Dillard's store, valuing all 104,202 square feet of the property's improvements. *Taxpayer Ex. 3.*

16. During his appraisal, Mr. Thomas first determined that the highest and best use for the subject property would be for its continued use as an anchor department store. *MTAB Hrg.*



**Before The Montana Tax Appeal Board**  
***MERCANTILE PROPERTIES, INC. v. STATE OF MONTANA,***  
***DEPARTMENT OF REVENUE***

*Transcr. 99:4-17.* He reasoned retail business has struggled since 2009 due to the recession and has continued to struggle into 2018. *Id.* Additionally, he suggested large retail spaces are not in demand, and there is no single user that could generate a higher value than Dillard's continued use as an anchor retail department store. *Taxpayer Ex. 3.*

17. Mr. Thomas determined there were not enough local or Montana sales of similar properties for a valid market sales approach, so he expanded his search to any sale of an anchor store in a regional mall in the United States. *MTAB Hrg. Transcr. 100:12-18.* Mr. Thomas testified that he obtained nineteen comparable sales from Cushman & Wakefield's brokerage division in Portland, Oregon. He testified that he chose six properties that he considered most comparable to the subject, all sales of anchor department stores in regional malls. *MTAB Hrg. Transcr. 97:22-98:4, 105:8-106:4, 134:16.* Mr. Thomas testified that he did not make any quantitative adjustments to the comparable properties to compare them to the subject. *MTAB Hrg. Transcr. 106:11-107:15.* Using his comparable sales approach, Mr. Thomas opined to a \$35 per square foot value or \$3,645,000 total value for the subject property. *MTAB Hrg. Transcr. 107:24-108:17.*

18. When questioned about the comparable sales he selected, Mr. Thomas admitted that most were from companies that had gone bankrupt, and he had not or could not investigate the other sellers' motivation in the sales. *MTAB Hrg. Transcr. 137:5-138:25.* When questioned further, Mr. Thomas agreed that most of the comparable sales he selected are also in markets that are not similar to Missoula's retail market. *MTAB Hrg. Transcr. 139:1-140:23.*

19. When considering Montana sales, Mr. Thomas stated he did not use the 2015 Sears store comparable sale in Southgate Mall in his sales comparison approach because it occurred more than two years before the lien date in January 2018. *MTAB Hrg. Transcr. 101:3-103:14.* Mr. Thomas testified that he was unable to confirm the Sears sales price because

**Before The Montana Tax Appeal Board**  
***MERCANTILE PROPERTIES, INC. v. STATE OF MONTANA,***  
***DEPARTMENT OF REVENUE***

the store was dark for so long after the sale and further testified that his unconfirmed information regarding the sales price went against all the other comparable sales he had gathered. *Id.* He further testified that the Missoula Sears store was demised into two smaller spaces before it was reoccupied, making it less comparable to the subject property, and the larger the retail space, it becomes harder to reoccupy once vacant. *MTAB Hrg. Transcr. 103:21-105:3.* Mr. Thomas did not consider the Billings Shopko sale in his analysis because it was sold subject to a twenty-year lease, compared to Dillard's being valued as an unoccupied fee simple estate. *MTAB Hrg. Transcr. 119:24-120:9, 136:1-6.* Additionally, Mr. Thomas stated that he did not select any multi-tenant properties in his Montana comparable sales analysis because the loss of income is split between multiple tenants, thereby lowering risk. *MTAB Hrg. Transcr. 119:5-10.* Mr. Thomas testified that he did not consider the sale of the JC Penney's store in Southgate Mall, which was after the lien date, but he stated that it was a non-comprehensible sale. *MTAB Hrg. Transcr. 132:15-133:12.*

20. Like the DOR, and Mr. Marwitz in his pro-forma analysis, Mr. Thomas also relied upon the income approach to value when he estimated market value in concluding his appraisal. Through his income method analysis, Mr. Thomas established a rent rate of \$4.50, using comparable properties over 80,000 square feet, with triple net leases, in the western United States, and adjusted using quantitative analysis. *MTAB Hrg. Transcr. 109:12-110:22.* Mr. Thomas estimated the gross revenue by multiplying the \$4.50 rent rate by the subject property's total square feet of 104,202. *MTAB Hrg. Transcr. 111:4-11.*

21. Mr. Thomas applied a vacancy rate of 10%, based on an interview with Mr. Tim Winger, the Southgate Mall manager. *MTAB Hrg. Transcr. 111:14-112:14.* Mr. Thomas believes the 10% vacancy rate he applied is generous and could be closer to 30% because the space, if vacated, would have to be re-purposed due to the difficulty of finding a tenant for 100,000 square feet of retail space in a mall. *Id.*

**Before The Montana Tax Appeal Board**  
***MERCANTILE PROPERTIES, INC. v. STATE OF MONTANA,***  
***DEPARTMENT OF REVENUE***

22. Mr. Thomas selected 5% of expenses deducted for reserves and repairs and 5% for professional fees and management fees, calculating the Dillard's Missoula store's net operating income at \$379,816. *MTAB Hrg. Transcr. 112:15-114:3, Taxpayers Ex. 3.*
23. Mr. Thomas selected his capitalization rate of 10% for the subject by reviewing published data provided by realtyrates.com and interviews with a Montana broker. *Id., MTAB Hrg Transcr. 117:8-25.* Mr. Thomas testified that he used the capitalization rate provided for malls and outlet malls because realtyrates.com did not have a category specifically for anchor department stores. *MTAB Hrg Transcr. 148:23-149:17.*
24. After weighing the sales comparison approach and the income approach, Mr. Thomas decided the income approach had the best-supported information and was the most defensible method to value the subject property. *MTAB Hrg. Transcr. 118:7-11.* Mr. Thomas valued the subject property at \$3,750,000. *Id., Taxpayer Ex. 3.*
25. DOR Missoula Area Manager, Michelle Staples, testified that during the AB-26 review, the DOR lowered the Taxpayer's investment class from good to average, which in turn increased its effective capitalization rate from 7.6% to 8.6%. *MTAB Hrg. Transcr. 154:20-156:2.* A higher capitalization rate equates to a lower value. Ms. Staples testified that the DOR made that adjustment to lower the subject property's value so that it would be closer to the 2018 MCTAB decision value of \$8,087,000. *Id.* Although the adjustment was made to align more closely with the prior MCTAB decision, Ms. Staples testified that it created some inequity, in favor of the Taxpayer, in the way the subject property was valued as compared to the way similar retail properties in central Missoula near the Dillard's store were valued. *Id.* Ms. Staples testified that, while it is discouraged, a DOR appraiser can

**Before The Montana Tax Appeal Board**  
***MERCANTILE PROPERTIES, INC. v. STATE OF MONTANA,***  
***DEPARTMENT OF REVENUE***

override the model-generated rent rating and investment class/capitalization rate when using the income approach. *MTAB Hrg. Transcr. 161:12-162:18.*

26. DOR appraiser Robin Hatfield testified at the hearing that she used the income approach and cost approach to value the subject property. *MTAB Hrg. Transcr. 168:1-169:25.* Ms. Hatfield testified that she relied on the income approach because it is the method preferred by appraisers for this type of property. *Id.* Ms. Hatfield testified that she originally appraised the Dillard's store at \$9,300,000 using the income approach and \$11,297,734 using the cost approach. *Id.*

27. Ms. Hatfield offered additional testimony regarding the AB-26 process relating to the subject property. She testified that after reviewing all the information relating to the AB-26, she and her supervisor, Ms. Staples, reduced Dillard's value to be closer to the 2018 MCTAB decision. *MTAB Hrg. Transcr. 168:1-8.* At the 2019 MCTAB hearing, Ms. Hatfield testified that to reduce the value of the subject property, the DOR initially reduced the rent rating and placed no income value on the mezzanine, or 23,283 square feet. *MCTAB Hrg. Transcr. 22:11-27:9.* When that adjustment did not reduce the value to one more in line with the 2018 MCTAB decision, the DOR decided to lower the investment class to average to raise the effective capitalization rate and bring the value down further. *Id., MTAB Hrg. Transcr. 170:8-172:8.* The difference in value between the income approach and cost approach is attributable to the cost approach considering the mezzanine square feet in the total value, whereas the income approach did not. *MTAB Hrg. Transcr. 171:7-9.*

28. Ms. Hatfield determined the potential gross income (PGI) by multiplying the rent rate by the property's total square feet. *MTAB Hrg. Transcr. 173:3-176:6.* After determining the PGI, Ms. Hatfield added other income and deducted 14.3% for vacancies and collection to get the effective gross income (EGI). *Id.* Ms. Hatfield then subtracted expenses of 18%, a

**Before The Montana Tax Appeal Board**  
***MERCANTILE PROPERTIES, INC. v. STATE OF MONTANA,***  
***DEPARTMENT OF REVENUE***

value used for all commercial retail taxpayers, from the EGI to get the net operating income (NOI) and divided the NOI by the effective capitalization rate of 8.6% to get the market value. *Id.* Using the lower rent rating, higher effective capitalization rate, and the reduced square feet, Ms. Hatfield valued the property at \$8,100,000. *Dept. Ex. A.*

29. Ms. Hatfield testified about several large retail sales that have occurred around the Southgate Mall. *Dept. Ex. A.* She contends these sales indicate that contrary of the Taxpayer's arguments, large properties are selling, and the Missoula market is not in decline. *MTAB Hrg. Transcr. 178:3-25.* On cross-examination, Ms. Hatfield admitted some sales presented benefit from leases already in place, and some of the sales occurred outside the lien date. *MTAB Hrg. Transcr. 185:24- 188:17.*

30. Ms. Hatfield testified that based on her conversation with the mall real estate manager, if a business were to open a 10,000 square foot in-line retail store in Southgate Mall, the cost would be approximately: \$12 to \$13 a square foot, \$8 to \$9 square foot for common area maintenance, \$2 a square foot for taxes, and \$1 a square foot for insurance, totaling \$23 per square foot for rent. *MTAB Hrg. Transcr. 180:20-181:7.*

31. DOR commercial appraiser Mike Oriet testified in rebuttal to Mr. Thomas' appraisal and in support of the DOR value. Mr. Oriet stated that the DOR rental ratings are developed on a regional rather than statewide basis, which is important because rents differ within Montana. *Dept Ex. E, MTAB Hrg. Transcr. 195:19-196:3, 209:14-210:2.* He testified that capitalization rates are developed in a statewide model using actual vetted commercial sales in Montana. *Dept Ex. F, MTAB Hrg. Transcr. 197:17-198:3.*

32. Mr. Oriet prepared a market trend analysis relating to the Missoula market where he examined building sales, net rents, and traffic counts versus price paid per square foot and

**Before The Montana Tax Appeal Board**  
**MERCANTILE PROPERTIES, INC. v. STATE OF MONTANA,**  
**DEPARTMENT OF REVENUE**

concluded that Missoula's retail market is healthy. *Dept Ex. I, MTAB Hrg. Transcr. 215:18-216:10*. On cross-examination, Mr. Oriet testified that he used net rents in Department Exhibit I and did not factor property taxes and expenses into his analysis. *MTAB Hrg. Transcr. 226:24-228:25*. Additionally, in DOR Exhibit I, Mr. Oriet used sales he selected from DOR Exhibit K and excluded other smaller sales in Montana, noting that DOR Exhibit K was solely presented to show the Board what price similarly sized properties were selling for in Montana. *Id., MTAB Hrg. Transcr. 228:15-17, 240:6-23*.

33. Mr. Oriet testified that Missoula's demographics are different from the regional shopping centers used by Mr. Thomas in his appraisal. *Dept Ex. J, MTAB Hrg. Transcr. 216:12-217:16*. He testified that according to his simple internet searches, there are up to a dozen mall locations in some of the markets used in Mr. Thomas's appraisal. *Id.* Mr. Oriet correlated income per capita and retail sales per capita and found these numbers line up when more out of area customers frequent the market as is the case in Missoula. *Id.* Mr. Oriet found the opposite for malls in larger markets; he reasons this difference is because more shoppers come from out of town to shop at the mall in Missoula. *Id.* Further, he testified the markets used by Mr. Thomas have a more robust real estate market as compared to the Montana market, and if there are a dozen malls in an area, there will be many more retail real estate options for buyers than a western Montana market with only one mall. *Id.* On cross-examination, Mr. Oriet testified he found his information on the internet and discussions with an unnamed source. *MTAB Hrg. Transcr. 230:22-233:14*.

**JURISDICTION AND STANDARD OF REVIEW**

34. The Montana Tax Appeal Board (Board) is an independent agency not affiliated with the Montana Department of Revenue (DOR). Mont. Const., Art. VIII § 7; Mont. Code Ann. § 15-2-101.

**Before The Montana Tax Appeal Board**  
***MERCANTILE PROPERTIES, INC. v. STATE OF MONTANA,***  
***DEPARTMENT OF REVENUE***

35. The Taxpayers filed a timely appeal of the MCTAB decision to the MTAB. Therefore, this Board maintains jurisdiction to hear and decide this matter. Mont. Code Ann. §15-2-301(1)(b).
36. This Board has discretion to determine an appeal on the record or it may hear further testimony. Mont. Code Ann. §15-2-301(2)(b).
37. This Board may hear appeals de novo. *Department of Revenue v. Burlington N.*, 169 Mont. 202, 545 P.2d 1083 (1975). “A trial de novo means trying the matter anew, the same as if it had not been heard before and as if no decision had been previously rendered.” *McDunn v. Arnold*, 2013 MT 138, 303 P.3d 1279 (2013). As such, this matter will be reviewed without deference to the MCTAB hearing and subsequent decision.
38. The Board’s order is final and binding upon all parties unless changed by judicial review. Mont. Code Ann. § 15-2-301.

**CONCLUSIONS OF LAW**

39. To whatever extent the following conclusions of law may be construed as findings of fact, they are incorporated according.
40. “All taxable property must be appraised at 100% of its market value....” Mont. Code Ann. § 15-8-111.
41. Except as otherwise provided in Montana Code Ann. § 15-2-301(2)(c), the Board is not bound by common law and statutory rules of evidence or rules of discovery and may affirm, reverse, or modify any decision in connection with any appeal under Montana Code Ann. § 15-2-301. To the extent Mont. Code Ann. § 15-2-301 conflicts with the Montana

**Before The Montana Tax Appeal Board**  
***MERCANTILE PROPERTIES, INC. v. STATE OF MONTANA,***  
***DEPARTMENT OF REVENUE***

Administrative Procedure Act, § 15-2-301 supersedes that act. Mont. Code Ann. § 15-2-301(5).

42. DOR is entitled to a “presumption of correctness if its decisions are pursuant to an administrative rule or regulation, and the rule or regulation is not arbitrary, capricious or otherwise unlawful.” *Burlington N. Inc.*, 169 Mont. at 214, 545 P.2d at 1090. However, DOR cannot rely entirely on the presumption in its favor and must show the propriety of their action. *Western Air Lines, Inc. v. Michunovich*, 149 Mont. 347, 353, 428 P.2d 3, 7 (1967).
43. The Taxpayer bears the burden of proving the error of DOR’s decision. *Farmers Union Cent. Exch., Inc. v. Dep’t of Revenue of State of Mont.*, 272 Mont. 471, 476, 901 P.2d 561, 564 (1995); *Western Air Lines*, 149 Mont. at 353, 428 P.2d at 7.
44. The Legislature intended the Department to utilize a number of different approaches or combination of approaches, including the income approach, sales comparison approach, and cost less depreciation approach, depending on the market where the appraisals take place, when it assesses property and estimates market value. *Albright v. State By & Through State*, 281 Mont. 196, 208,-209, 933 P.2d 815, 823 (1997).
45. “‘Assessment formulations’ by [the Montana Tax Appeal Board] should be upheld unless there is a clear showing of an abuse of discretion.” *Peretti v. State, Dep’t of Revenue*, 2016 MT 105, ¶ 15, 383 Mont. 340, 344, 372 P.3d 447, 450 (citing *O’Neill v. Dep’t of Revenue*, 2002 MT 130, ¶ 23, 310 Mont. 148, 155, 49 P.3d 43, 47); see *Northwest Land & Dev. of Montana, Inc. v. State Tax Appeal Bd.*, 203 Mont. 313, 317, 661 P.2d 44, 47 (1983) overruled on other grounds by *DeVoe v. Dep’t of Revenue of State of Mont.*, 263 Mont. 100, 866 P.2d 228 (1993).



**Before The Montana Tax Appeal Board**  
***MERCANTILE PROPERTIES, INC. v. STATE OF MONTANA,***  
***DEPARTMENT OF REVENUE***

46. “The state tax appeal board must consider an independent appraisal provided by the taxpayer if the appraisal meets standards set by the Montana board of real estate appraisers and the appraisal was conducted within 6 months of the valuation date. If the state board does not use the appraisal provided by the taxpayer in conducting the appeal, the state board must provide to the taxpayer the reason for not using the appraisal.” Mont. Code Ann. § 15-2-301(3).
47. We find that the DOR met its burden to be given a presumption of correctness for its efforts to find a valid value for this property. The DOR considered the income approach and the cost approach to determine value and concluded that an income approach was most reliable. Its execution of the income approach was based on actual rents reported and treated other similar taxpayers uniformly. The evidence and testimony presented upholds the DOR in securing a preliminary presumption of correctness for its value.
48. The Board also observes that the DOR made several very significant concessions in value during their AB-26 review. It adjusted two factors in its income approach, reconsidering both the rent rate and capitalization rate after disregarding any value for the mezzanine structure in the store. This resulted in a several million-dollar reduction in value.
49. Taxpayer did present a reasonable case to support its theory of the ills of the national retail market on the lien date. However, we were not presented with specific evidence of that trend in the Missoula market area. Evidence that this store has declined in its sales was limited. Evidence was presented that the health of brick-and-mortar department stores are in decline in many parts of the nation, and that nationwide the sale of anchor stores in regional malls has suffered from several new downward trends in retail. But scant evidence of these trends was presented for the subject property or the Missoula Market.

**Before The Montana Tax Appeal Board**  
***MERCANTILE PROPERTIES, INC. v. STATE OF MONTANA,***  
***DEPARTMENT OF REVENUE***

50. We did not find the Taxpayer's 2019 purchase of the former Herberger's space in the Southgate Mall indicative of the subject property's market value. The mall owner had considerable incentive to keep the Herberger's space occupied when the fate of the JC Penny's and Sears Southgate Mall locations were in limbo. The terms of the former Herberger's sale indicated a price and payment favorable to the tenant and detract from credibility of the sale as the best indication of market value. Similarly, the sales offered as comparable sales in both Mr. Marwitz's pro-forma analysis and Mr. Thomas's appraisal contained many bankrupt sellers presumably under duress, in markets with locations economically weaker than evidence presented for the Missoula commercial real estate market. Evidence and testimony presented did not convince us to further reduce value by more than 50% as the Taxpayer requested. For these reasons, we decline to accept the Taxpayer's request for further reduction.

51. We recognize the DOR does have a duty to equalize valuation among similar taxpayers. Testimony and evidence regarding the retail peers of Dillard's in the Missoula market do not support the reduction sought by Dillard's as a matter of equity.

52. During their AB-26 review, DOR lowered the investment class to average, thereby raising the capitalization rate, solely to achieve a value close to the value achieved when the MCTAB set the rent rate at \$11.00 per square foot, and not due to risk or other factors. We were not persuaded by the testimony and evidence presented to further increase the capitalization rate above other retail peers in the Missoula market. Without specific evidence to the contrary, we find an effective capitalization rate of 7.6% is the most appropriate capitalization rate for this subject property in this market.

**Before The Montana Tax Appeal Board**  
***MERCANTILE PROPERTIES, INC. v. STATE OF MONTANA,***  
***DEPARTMENT OF REVENUE***

53. In the final analysis the Taxpayer failed to persuade this Board we should grant that full reduction of value. However, we will find for a lower rent rate for Dillard's in consideration of the age and condition of its store as compared to its peers. Evidence and testimony indicated the physical condition of the space is dated and has had minimal improvement since 1978. Considering those facts, we are convinced that the record supports a lower rent rate for the subject of \$11.00 per square foot. We base that reduction on the evidence presented about the quality of space for the subject as compared to its peers in the rent rate four category established by the DOR.

54. We uphold the other methodology used in the DOR income approach to preserve equalization among taxpayers.

55. In lieu of MTAB selecting a value or attempting to replicate the calculations and income models used by DOR to conclude to a value, this Board directs the DOR to make appropriate adjustments from this opinion and orders the DOR to recalculate the value with the modifications described herein.

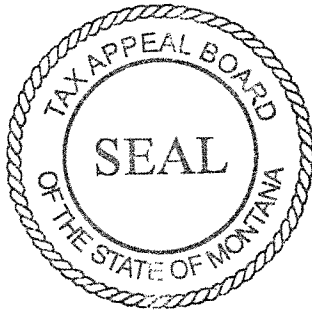
**Before The Montana Tax Appeal Board**  
***MERCANTILE PROPERTIES, INC. v. STATE OF MONTANA,***  
***DEPARTMENT OF REVENUE***

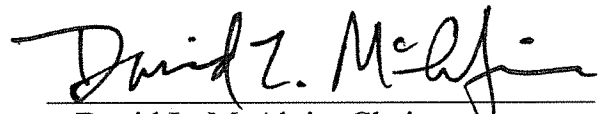
**ORDER**

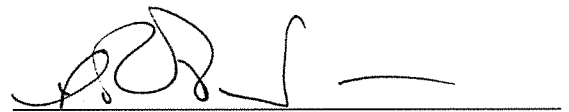
56. Mercantile Properties, INC., appeal and complaint is denied in part.

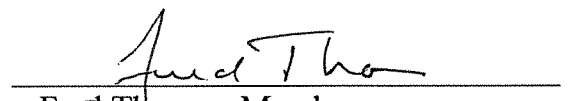
57. DOR is ordered to recalculate the value of the Dillard's Women's store using a rent rate of \$11.00 and an effective capitalization rate of 7.6%. That resulting value will be set as the market value for the property for the tax cycle of calendar years 2019 and 2020.

Ordered April 23, 2021



  
\_\_\_\_\_  
David L. McAlpin, Chairman  
MONTANA TAX APPEAL BOARD

  
\_\_\_\_\_  
Amie Zendron, Member  
MONTANA TAX APPEAL BOARD

  
\_\_\_\_\_  
Fred Thomas, Member  
MONTANA TAX APPEAL BOARD

**Notice:** You may be entitled to judicial review of this Order by filing a petition in district court within 60 days of the service of this Order. Mont. Code Ann. § 15-2-303(2). The Department of Revenue shall promptly notify this Board of any judicial review to facilitate the timely transmission of the record to the reviewing court. Mont. Code Ann. § 15-2-303(2).

**Before The Montana Tax Appeal Board**  
**MERCANTILE PROPERTIES, INC. v. STATE OF MONTANA,**  
**DEPARTMENT OF REVENUE**

**Certificate of Service**

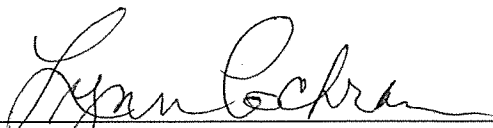
I certify that I caused a true and correct copy of the foregoing Findings of Fact Conclusions of Law, Order, and Opportunity for Judicial Review to be sent by email and by United States Mail via Print & Mail Services Bureau of the State of Montana on April 23, 2021 to:

**Michael Green**  
**D. Wiley Barker**  
**Kristen Meredith**  
**Crowley Fleck PLLP**  
900 N. Last Chance Gulch, Suite 200  
PO Box 797  
Helena, MT 59624-0797

**Dave Burleigh**  
**Montana Department of Revenue**  
P.O. Box 7701  
Helena, MT 59604-7701

**Missoula County Tax Appeal Board**  
**c/o Cynthia Aplin**  
1015 Washburn Street  
Missoula, MT, 59801

**Kory Hofland, Property Assessment Division**  
**Montana Department of Revenue**  
P.O. Box 7701  
Helena, MT 59604-7701

  
\_\_\_\_\_  
Lynn Cochran, Legal Secretary  
MONTANA TAX APPEAL BOARD