

STATE OF MONTANA,
DEPARTMENT OF REVENUE,

Appellant,

v.

MERCANTILE PROPERTIES, INC., J.
BACON AND SONS, AND
MERCANTILE REAL ESTATE CO.,

Respondent.

CASE No: PT-2019-28
(Dillard's Men's Store)

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

STATEMENT OF THE CASE

This is an appeal of a decision by the Yellowstone County Tax Appeal Board (YCTAB) granting Mercantile Properties, INC. J. Bacon and Sons' (Taxpayer) request for a property value reduction on their property in Billings known as Dillard's Men's Department Store at Rimrock Mall. We affirm in part YCTAB's decision concerning valuation of the property.

ISSUE TO BE DECIDED

Whether the Yellowstone County Tax Appeal Board erred in granting the Taxpayer's request to reduce the appraised value of the Department Store from \$5,389,300 to \$2,250,000.

PROPERTY DESCRIPTION

The physical address of this property is 300 South 24th Street West, Billings. The property Geocode is 03-0926-12-1-04-01-0000 and the Legal description is S12, T01 S, R25 E, C.O.S. 1136, Parcel A2, 2nd AMND. The assessment code is D005250 and the property is in Department of Revenue (DOR) neighborhood 203.800C. The subject property improvements were built in 1978 and have a total area of 59,958 square feet.

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EXHIBIT LIST

1. The following Exhibits were submitted by the DOR:
 - a. MDOR Exhibit A- Confidentiality Agreement;
 - b. Exhibit B-CTAB Appeal Documents;
 - c. Exhibit C-MDOR CTAB Exhibits;
 - d. Exhibit D-Taxpayer CTAB Exhibits;
 - e. Exhibit E-CTAB Decision;
 - f. Exhibit F-Billings Gazette Article;
 - g. Exhibit G-NFK Capital Release of mall sale;
 - h. Exhibit H-Capitalization Rate template;
 - i. Exhibit I-Income Model Development;
 - j. Exhibit J-Retail 2019;
 - k. Exhibit K-2019 Cost Calculation;
 - l. Exhibit L-Land Sale Packet;
 - m. Exhibit M-Transfers;
 - n. Exhibit N-2018 Commercial Base Costs;
 - o. Exhibit O-2019 Commercial Cost Tables;
 - p. Exhibit P-2019 Retail Expense and Rent Data;
 - q. Exhibit Q-Ownership Histories;
 - r. Exhibit R-Excerpts of Appraisal of Real Estate, 14th Edition (CH. 11);
 - s. Exhibit S-Billings New Construction Retail 2017;
 - t. Exhibit T-Billings MT Retail Market Trend Analysis 2017;
 - u. Exhibit U-Dillard's Billings MT Sales Data; and
 - v. Exhibit V-2019 Retail Rent Billings.

The following Exhibits were submitted by the Taxpayer:

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1. TXPR Exhibit 1-2019 Property Record Card, Women's Store;
2. Exhibit 2- 2019 PRC, Men's Store;
3. Exhibit's 3-Yellowstone CTAB packet, Women's Store;
4. Exhibit 4-Yellowstone CTAB packet, Men's Store;
5. Exhibit 5-Appraisal Report of Dillard's Dept. Stores, Rimrock Mall by Thomas Appraisal Services, Inc.; and
6. Exhibit 6-Zoom Deposition of Mike Oriet.

PROCEDURAL HISTORY

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 materials submitted by the parties for the Montana Tax Appeal Board (MTAB) hearing.

1. Taxpayer representative Mr. Barker filed a motion in limine to exclude the testimony of Mike Oriet and exhibits R through V. *MTAB Dkt. 18*. The Board held a status conference on October 13, 2020, where both parties gave oral arguments regarding the motion in limine. Mr. Barker renewed his objection at the hearing. *MTAB Hrg. Transcr. 6:3-7:18*. Mr. Beatty argued for the DOR that the Oriet exhibits were demonstrative of evidence already in the record and his anticipated testimony was substantially in rebuttal to the Taxpayer's case. *MTAB Hrg. Transcr. 7:20-8:25*. The Board denied the motion, reasoning that the Board wanted as much information as possible concerning this case in the record and will judge the credibility of the exhibits and testimony individually.
2. Mr. Barker argues the DOR failed to disclose Mr. Oriet's opinions during discovery, and Mr. Oriet is a retained expert that requires full disclosure under Mont. R. Civ. P. 26(b)(4). *MTAB Hrg. Transcr. 6:03-7:18*. He reasoned Mr. Oriet is not a hybrid witness because he

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did not participate in the underlying appraisal. *Id.* If Mr. Oriet is a hybrid witness, he should be considered a retained hybrid witness that is subject to the same disclosure as a retained expert. *Id.*

3. Mr. Barker also claims Exhibits R through V were not provided during discovery and must be excluded under Mont. R. Civ. P. 37. *MTAB Dkt. 18.* The exhibits in question include eight sales that were never produced in discovery and opinions of Mr. Oriet that were required to be disclosed during discovery. *Id.* Because the additional sales and opinions were not provided in discovery, Mr. Barker had no opportunity to verify the sales or rebut the opinion testimony included in the exhibits or testimony. *Id.* Mr. Barker feels this has impaired the Taxpayer's ability to have a fair hearing and violates the Taxpayer's due process rights. *MTAB Hrg. Transcr. 7:16-18.*

4. DOR's attorney, Mr. Beatty, argued that Mr. Oriet was disclosed as a hybrid witness and disclosed information he might testify to at the hearing. *MTAB Dkt. 17.* Mr. Beatty contends that all disclosures required by *Faulconbridge v. State*, were made, and he did not know exactly what Mr. Oriet would testify about until after Mr. Thomas submitted his appraisal report and was subsequently deposed. 2006 MT 198 ¶ 40-44, 333 Mont. 186, 142 P.3d777, *MTAB Hrg. Transcr. 7:20-8:25; 165:3-8.* Mr. Oriet was deposed and answered every question to the best of his ability with the information that was known. *Id.* As to the exhibits, most of the information used to create exhibits R through V was disclosed in earlier disclosures. *Id.* Further, Mr. Beatty did disclose exhibits he intended to use as demonstrative and rebuttal exhibits, even though they are not required to be disclosed. *Id.*

5. The Board ruled that Mr. Oriet's testimony would be allowed as the Board typically allows broad testimony to parties to provide a wide range of rebuttal testimony. The Board allowed

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Taxpayer to conduct voir dire on the contested exhibits and allowed Taxpayer additional time at the end of the hearing for rebuttal.

6. The Board conducted a hearing, in Helena, on October 20, 2020, at which the following were present:

Brendan Beatty, DOR Counsel; Mark Kindsfather, DOR Commercial Appraiser, via Zoom; and Mike Oriet, DOR Commercial Appraiser, via Zoom, and

D. Wiley Barker & Kristen Meredith, Counsel for Taxpayer; Greg Marwitz for Dillard's; and David Thomas, Licensed Fee Appraiser, via Zoom.

FINDINGS OF FACT

7. To whatever extent the foregoing findings of fact may be construed as conclusions of law, they are incorporated accordingly.
8. By agreement of the parties in the interest of time and to avoid repetition of testimony and exhibits, both PT-2019-28 (Dillard's women's store) and PT-2019-30 (Dillard's men's store) were heard simultaneously. All parties agreed that the substance of testimony for both Dillard's store appeals was substantially the same.
9. The DOR valued the land at \$2,447,286 and improvements at \$2,942,014 for a total market value of \$5,389,300, representing \$89.89 per square foot, for the 2019/2020 tax cycle. *Dept Ex. C*. DOR used the income method to value the property improvements based on the value as of the January 1, 2018 lien date. *Id.* The Taxpayer did not distinguish between land and improvements values during the appeal and sought a total overall value of \$2,250,000 or \$37.53 per square foot. *MTAB Hrg Transcr. 4:4-8.*

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10. Dillard's did not submit a DOR AB-26 Request for Informal Review to the DOR prior to appealing directly to the YCTAB. *MTAB Hrg Transcr. 115:15-17.*
11. The Taxpayer filed a county tax appeal in Yellowstone County on July 17, 2009, and the Yellowstone County Tax Appeal Board heard the appeal on October 18, 2019. *MTAB Dkt. 1.* At the conclusion of the one hour and forty-five-minute hearing, YCTAB granted the Taxpayer's requested value of \$2,250,000. *Id.*
12. The DOR appealed to the Montana Tax Appeal Board on November 18, 2019, and after discovery by the parties, a MTAB hearing was held on October 20, 2020. *MTAB Dkt. 1.* DOR's appeal stated the YCTAB's decision is not supported by evidence in the record and does not reflect the property's market value. *Id.*
13. The subject property is what is known in the commercial real estate industry as an anchor store and is attached to the Rimrock Mall in Billings. Dillard's is a large single-tenant owner-occupied retail space sharing a wall with the Rimrock Mall. The subject property is owned in fee ownership by Dillard's companies. *Taxpayer. Ex. 4, MTAB Hrg Transcr. 14:14,15; 26:10.* The Taxpayer bought the property in 2001, for a price of \$2,000,000 or \$33.36 per square foot. *Taxpayer Ex. 5.* The store was constructed in 1978 and is one of two anchor stores to the Rimrock Mall in Billings. *Id.* The Rimrock Mall is a large regional shopping mall, drawing on customers from the Dakotas, Wyoming, and Central and Eastern Montana. *Id.*
14. The Taxpayer's primary argument is the DOR overvalued the property by failing to fully account for the trends in the department store retail industry, which is facing unprecedented challenges that have negatively affected their profitability, and by association their property value. *MTAB Hrg Transcr. 10:13-25.* Dillard's argued that the in-person retail market has

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been in decline due to competition from online shopping and changes in customer preferences. *MTAB Hrg Transcr. 15:10-21*. Dillard's witnesses testified there are not many single-tenant retailers who can occupy large retail space over 50,000 square feet. *Id.*

15. Taxpayer representative Greg Marwitz presented an income analysis model exhibiting a decline in retail sales for the subject property. *Taxpayer Ex. 4*.

16. In his Pro-forma income analysis, Mr. Marwitz used a capitalization rate of 9%, expenses of 5%, and 5% for vacancy and loss rate. *Id.* Mr. Marwitz estimated the subject property's value at \$35.10 per square foot, for a total value of \$2,104,359. *Id.* Further, Mr. Marwitz presented a nationwide Anchor Department Store Comparable Sales Analysis from 2010 to the present; the analysis shows an average price per square foot of \$28.07. *Id.*

17. Mr. Marwitz developed his capitalization rate by surveying capitalization rates specific to the retail market from CBRE Rates, Reality Rates Investor Survey, Viewpoint Integra Reality Resources, and PWC Real Estate. *MTAB Hrg Transcr. 28:15-25, Txpayer Ex. 4*. Mr. Marwitz added, his information was from surveys and not actual capitalization rates; he also provided several years of capitalization rates from several different publications to show the published range of capitalization rates. *Taxpayer Ex. 4*. Dillard's owns most of its stores, and very few have sold, making it difficult to calculate a precise capitalization rate for anchor stores. *MTAB Hrg Transcr. 40:21-23*. His capitalization rate of 9% was determined for a large anchor store and would change for a smaller retail space that is freestanding. *MTAB Hrg Transcr. 38:20-24*.

18. Mr. Marwitz calculated a rental rate for the subject using information based on JC Penney's stores in Montana. *MTAB Hrg Transcr. 43:17*. Mr. Marwitz also provided national rental information for Dillard's and JC Penney's locations in Utah to show the rent rate used in his

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analysis is consistent and that anchor department stores are a national market. *MTAB Hrg Transcr. 24:14-26:22*. Mr. Marwitz testified this information was provided to him by a J.C. Penney's representative. *MTAB Hrg Transcr. 43:10-14*.

19. Dillard's witness Mr. Marwitz testified, in Missoula, the Taxpayer purchased a 28,000 square foot retail store in Southgate Mall in 2019. *Taxpayer Ex. 4*. The agreed upon consideration was \$1,000,000 or \$35.71 per square foot. *Id.* The sale occurred after the January 1, 2018 lien date and was not considered by the DOR.

20. Mr. Marwitz contends that the in-person retail decline should be factored into the appraisal because it started before the January 1, 2018 lien date and maybe even before 2013. *MTAB Hrg Transcr. 32:3-12. Taxpayer Ex. 4*.

21. The Taxpayer hired licensed Montana Appraiser Mr. Dave Thomas, of Billings, to conduct an independent fee appraisal of the subject property using the same lien date as the DOR. *MTAB Hrg Transcr. 52:3, Taxpayers Ex. 5*. Mr. Thomas relied on the income approach to find value and considered the sales comparison approach to value the property when he valued the Dillard's Men store at \$2,300,000. *Taxpayers Ex. 5*. Mr. Thomas testified that his appraisals conform to a Uniform Standards of Professional Appraisal Practice. *MTAB Hrg Transcr. 54:3-5*.

22. During his appraisal, Mr. Thomas determined that the highest and best use for the subject property would be for its continued use as an anchor department store. *MTAB Hrg Transcr. 55:11-12*. He reasoned that large retail spaces are not in demand and there is not a single user that could create a higher value in use than the Dillard's use as an anchor retail department store. *MTAB Hrg Transcr. 55:18-22*. To support that large retail is not in

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demand, Mr. Thomas analyzed five large retail locations in Billings that have gone “dark,” only one of which has been reoccupied. *MTAB Hrg Transcr. 56:16-58:24.*

23. Mr. Thomas determined there were not enough local sales of similar property for comparison and expanded his search to any sales of national anchor stores in a regional mall. *MTAB Hrg Transcr. 62:11-17.* Mr. Thomas obtained his comparable sales from Cushman Wakefield’s brokerage division in Portland, Oregon. *MTAB Hrg Transcr. 63:10-64:10.* They provided several comparable properties and Mr. Thomas picked the properties he thought were most comparable to the subject property. *Id.* Out of five comparable properties used, three are anchor stores in regional malls and two are big box stores located in power centers. *Id.* Mr. Thomas did not numerically adjust the comparable properties to make them equal with the subject property and instead used qualitative analysis to account for the differences between the properties. *MTAB Hrg Transcr. 65:2-66:7, 77:21.* Mr. Thomas found a value range of \$24.18 to \$49.73 per square foot and concluded \$40 per square foot for the subject property. *Id.* The Dillard’s Men’s store is smaller in square foot space and would be easier to reoccupy, but the location is not as desirable as the Women’s store. *MTAB Hrg Transcr. 77:15-22.* Mr. Thomas believes this makes the Dillard’s Men’s and Women’s store equal in value. *Id.*

24. Using the comparable sales approach Mr. Thomas valued the property at \$2,300,000. *Taxpayer Ex. 5, MTAB Hrg Transcr. 77:3-8.*

25. Mr. Thomas did not consider the Dillard’s Missoula purchase a comparable sale for valuation purposes because it was after the lien date. *MTAB Hrg Transcr. 63:1-5.* Additionally, Mr. Thomas did not use the JC Penny’s sale in Missoula because it occurred in 2015 well before the lien date in 2018, and he was not able to validate the sale as

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comparable because “it’s so far out of the range that there is no way to make sense of it.”
MTAB Hrg Transcr. 88:18-22.

26. Mr. Thomas also used the income approach to value when he conducted his appraisal, establishing a rent rate of \$4.50, using comparable properties, with triple net leases, in the western United States, including one property from Billings, and adjusted using qualitative analysis. *MTAB Hrg Transcr. 69:14-70:25.* Mr. Thomas estimated the gross revenue by multiplying the \$4.50 by the square feet of the subject property. *MTAB Hrg Transcr. 71:21.*
27. Mr. Thomas applied a vacancy rate of 7.5%, based on the Billing comparable properties used in his appraisal. *MTAB Hrg Transcr. 78:14-20.* Mr. Thomas believes the 7.5% vacancy rate is generous and should be closer to 20% because of the availability of similar unoccupied properties in Billings. *71:24-73:9.*
28. With 10% of expenses allowed for repairs and management fees, Mr. Thomas calculated the Dillard’s Men’s store’s net operating income at \$224,617. *Taxpayers Ex. 5.*
29. To find a final value, Mr. Thomas divided the net income by a capitalization rate of 10% to arrive at a value of \$2,245,000. *MTAB Hrg. Transcr. 74:13-75:23, Taxpayers Ex. 5.* The capitalization rate was derived by dividing the income by the sales price of a comparable sale, meaning the higher the risk associated with a property, the higher the capitalization rate will be. *Id.* Mr. Thomas obtained his capitalization rate from published data provided by realityrates.com and interviews with Montana brokers. *Id.*
30. Mr. Thomas reviewed both methods and decided the income approach had the best supporting information and was the most defensible method to use in valuing the subject property. *MTAB Hrg. Transcr. 78:23-25.*

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31. DOR Attorney Brendan Beatty contends the YCTAB erred in using a document that is not an actual appraisal to set the value of the subject property, and if the documents are considered an appraisal, it only valued the business and not the property. *MTAB Hrg. Transcr. 93:17-94:10*. DOR's mass appraisal value of the subject is based on information gathered from taxpayers and sales of comparable properties. *Id.*
32. DOR Appraiser Mark Kindsfather appraised the Men's store relying on the income approach and considered the cost approach. *MTAB Hrg. Transcr. 100:14-23*. DOR's preferred method is the income approach because it better illustrates the market value than the cost approach. *Id.* Mr. Kindsfather used a square foot income model to value the property using the income approach. *MTAB Hrg. Transcr. 102:6*. In his appraisal, Mr. Kindsfather and DOR modelers used actual commercial rents and other market information from Montana to establish rent rates. *MTAB Hrg. Transcr. 116:23-117:7*.
33. The DOR appraisers did not perform a comparable sales approach analysis for the subject properties. *MTAB Hrg. Transcr. 123:15-125:24*. Mr. Kindsfather set a value for the subject property and reviewed sales that are time trended to the lien date, to validate his preferred income method and decide if he has undervalued or overvalued the subject property. *Id.*, 126:16-18.
34. Mr. Kindsfather assigned the building a rent rating of three, or average, out of seven possible retail rent values in the Billings area. *MTAB Hrg. Transcr. 102:2-7, 103:23*. Rent rating three represented \$11.00 a square foot value. *Id.* Further, Mr. Kindsfather assigned a vacancy and collection percentage of 14.3% to the property. *MTAB Hrg. Transcr. 104:14-16*. Rental rating and vacancy rates are developed using a model of all retail properties, and information that is provided to the DOR by taxpayers and appraisers on-site reviews. *MTAB*

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Hrg. Transcr. 102:15-103:11, 104:18-19. These values are consistently applied to similar taxpayers throughout Montana.

35. The subject property was assigned a capitalization rate by the DOR of 7.38%, representing statewide urban retail in average condition. *Dept. Ex. H, MTAB Hrg. Transcr. 114:20-115:25.* The capitalization rate is then added to the effective tax rate of 1.22% to get the effective capitalization rate of 8.6%. *Id.* Mr. Kindsfather reviewed available data, looked at sales in retail in the area, and reviewed information Dillard's supplied him to validate his model. *Id.* Mr. Kindsfather acknowledged his model was general because he is bound by law to apply the model to various properties similarly and the model did not have specific categories for anchor stores. *MTAB Hrg. Transcr. 115:18-118:19.* Further, the DOR's model includes convenience stores, beauty shops, and laundromats, but Mr. Kindsfather could not positively say that the model included any anchor department stores. *Id.*
36. Mr. Kindsfather acknowledged the DOR does not have a model specifically for large retail and the DOR retail model includes everything from a thousand square feet to a hundred thousand square feet buildings, such as the subject. *MTAB Hrg. Transcr. 117:18-24.*
37. Mr. Kindsfather recognizes that larger retail is more difficult to rent than a smaller retail space. *MTAB Hrg. Transcr. 109:4-15.* Additionally, Mr. Kindsfather values anchor stores similarly to the non-anchor stores in power centers. *MTAB Hrg. Transcr. 113:1-4.*
38. DOR analyst Mike Oriet presented sales that were similar, to show the Board the range of sale price and size among Montana retail properties. *Dep. Ex. U, MTAB Hrg. Transcr. 146:15-147:12.* Mr. Oriet examined sales from the DOR's Ex. P & T, information gained from realtors, and personal knowledge. *DOR Ex. U, MTAB Hrg. Transcr. 142:16-143:9.* Mr. Oriet time trended the properties to the lien date. *MTAB Hrg. Transcr. 147:5-8.* Using

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the sales prices, Mr. Oriet calculated an average price, less outliers, of \$108.00 per square foot, and concluded that Montana's market is relatively stable. *MTAB Hrg. Transcr. 155:9-156:22*. The intent of Mr. Oriet's analysis was to convey to the Board that the trend in retail across Montana is more positive than negative. *MTAB Hrg. Transcr. 165:19-167:6*.

39. Mr. Oriet testified the sales considered indicate there is still demand for large retail space in Billings because large retail space is still being constructed; buyers choose to build because they were unable to find anything acceptable in the local market. Dept Ex. S, T, *MTAB Hrg. Transcr. 167:7-168:2*. Mr. Oriet reasons that if construction is exceeding the number of pre-improved sales, demand exceeds supply. *Id.* Mr. Oriet obtained the building permit data for the new construction and calculated \$88.54 per square foot cost of construction; Mr. Oriet did not consider depreciation and obsolescence in all forms. *MTAB Hrg. Transcr. 173:2-174:5, 192:16-22*.

40. Mr. Oriet indicated that the Taxpayer was using a net rent rating in its income analysis while the DOR used a gross rent rating. *MTAB Hrg. Transcr. 156:23-157:9*. Mr. Oriet indicated that the DOR's gross rental rating of \$11.00 per square foot would be equivalent to a net rental rating of \$7.73 per square foot. *Id.*

41. Mr. Oriet testified that Billings demographics are different from the regional shopping centers used by Mr. Thomas in his appraisal. *MTAB Hrg. Transcr. 178:10-180:23*. For example, Mr. Oriet points out there is only one mall in Billings and the surrounding area compared to eleven malls in the Sacramento area for a sale used by Mr. Thomas. *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. *Id.* Mr. Oriet found the opposite for malls in a larger market; he reasons this is because more shoppers come from out of town to shop at the mall in Billings. *Id.* Mr. Oriet believes if you are going to reach outside

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of the geographical location for comparable properties, it is important to study the demographics, and if there is a difference between sales inside Montana and sales outside of Montana, an appraiser needs to know why for their appraisal to be reliable. *MTAB Hrg. Transcr. 183:11-184:24.*

JURISDICTION AND STANDARD OF REVIEW

42. The Montana Tax Appeal Board (Board) is an independent agency not affiliated with the Montana Department of Revenue (DOR). Mont. Code Ann. § 15-2-301.
43. The DOR filed a timely appeal of the YCTAB decision to the MTAB. Therefore, this Board maintains jurisdiction to hear and decide this matter. Mont. Code Ann. §15-2-301(1)(b).
44. This Board hears CTAB appeals de novo. *CHS Inc. v DOR*, 2013 MT 100, 299 P.3d 813 (2013). “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 merit to the YCTAB hearing and subsequent decision. *Id.*
45. The Board has jurisdiction over this case and its order is final and binding upon all parties unless changed by judicial review. Mont. Code Ann. § 15-2-301.

CONCLUSIONS OF LAW

46. To whatever extent the following conclusions of law may be construed as findings of fact, they are incorporated accordingly.
47. 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

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otherwise unlawful.” *Dep't of Revenue v. Burlington N. Inc.*, 169 Mont. 202, 214, 545 P.2d 1083, 1090 (1976). However, DOR cannot rely entirely on the presumption in its favor and must present a modicum of evidence showing the propriety of their action. *Western Air Lines, Inc. v. Michunovich*, 149 Mont. 347, 353, 428 P.2d 3, 7 (1967).

48. 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.

49. “All taxable property must be appraised at 100% of its market value....” Mont. Code Ann. § 15-8-111.

50. “[T]he Legislature intended the Department to utilize both the cost approach and the market data approach, depending upon the available market data, when it assesses property and estimates market value.” *Albright v. State By & Through State*, 281 Mont. 196, 208, 933 P.2d 815, 823 (1997).

51. “‘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).

52. “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

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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).

53. In the first test of whether the DOR provided a modicum of evidence to support a presumption of correctness, we find it did. The DOR used a valid income methodology to estimate market value of the subject. The rents in the DOR model were based on actual data self-reported by other Montana taxpayers. DOR did consider the comparable sales method and the replacement cost new less depreciation or cost method which both supported the value indicated by the income method. In Montana’s system of mass appraisal of property, we find that while less specific than a fee appraisal, the method selected was appropriate and it was reasonably executed to find a defensible value for the subject property.

54. Moving on to whether the value sought by the Taxpayer of \$3,735,000 is accurate, we find the evidence lacking to support that value. However, the Taxpayer submitted credible testimony and evidence for the Board to conclude that the effects of on-line shopping trends were not fully considered by the DOR when appraising the subject. Dillard’s expert witness Mr. Marwitz provided unrefuted evidence of a steady decline of sales per square foot over the last decade. This evidence supports the notion that the subject property has lost relative value in the National market as well as in the Montana market. Even though Dillard’s continues to be a profitable enterprise and there is no indication the subject property will fail in its business model, we agree with the Taxpayer that online shopping has had an adverse effect on the value of Dillard’s bricks and mortar stores. That reality, as demonstrated through evidence of a steady decline in sales in the last decade, must have a consequence when determining market value.

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55. These conclusions leave the Board in the quandary of deciding that the property is less valuable than estimated by the DOR and more valuable than estimated by the Taxpayer; and still with the duty to make a rational and defensible decision determining the market value of Dillard's on January 1, 2018. Testimony and evidence presented indicate the DOR has the discretion to adjust two factors without a risk of unequal treatment to other similar taxpayers. Those are the rent rating and the capitalization rate, so we will similarly determine market value by evaluating these factors.
56. The rent rate chosen comes from an income analysis model developed by DOR modelers, constructed with actual Montana income and expenses as reported to the DOR by commercial retail taxpayers in Montana. In this case the DOR submitted Ex. J as testament to the various gradients of rent rates in different market areas for different classifications of business types. The subject was deemed by the DOR to best qualify as Billings market rent rating three, quantified as \$11.00 per square foot. This rating was the third lowest of five ratings in Billings ranging from \$4.50 to \$24.00 per foot. This \$11.00 per square foot represents gross rent and compares to the Taxpayer's estimate of a rent value of \$3.50 per square foot and the Taxpayer's expert's estimate of a rent value of \$4.50 based on a triple net lease. When considering the evidence presented the Board finds the Taxpayer's evidence was derived mostly from inferior retail participants, such as JC Penney, and in markets less comparable to Billings, Montana. We find the evidence and testimony presented support a rent rating of \$11.00 for the subject and uphold the DOR's assigned rent rating.
57. The capitalization rates between 9% and 10% argued by the Taxpayer's witnesses seemed to the Board to have more foundation in the evidence presented as indicative of market value. Experts gave credible testimony that the risk, which is another definition of

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capitalization rates, for anchor store retail department stores is rising, driven by well-documented downward trends of in-person sales. The Board understands through mass appraisal the DOR is bound by law to treat taxpayers equally, restrictions not shared by fee appraisers and property owners. Regardless of that, DOR has to estimate a defensible capitalization rate to execute the income method. Like the YCTAB we find that the more industry-specific evidence presented about the department store retail risks is more convincing as to the accurate capitalization rate for this property. The evidence and testimony presented was specific to this type of property and more reliable than the general methods employed by the DOR to estimate capitalization rates. The evidence and testimony presented support a capitalization rate of 10% for the Dillard's store.

58. We find the equalization arguments posed by the DOR convincing as well and so except for the finding for a new capitalization rate, direct the DOR to continue to use all other variables that are common for all similar taxpayers in their model to maintain an equalized method of comparison for taxpayers.

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ORDER

59. State of Montana, Department of Revenue's appeal and complaint is denied in part.
60. DOR is ordered to recalculate the value of the Dillard's Men's store using a rent rate of \$11.00 and a capitalization rate of 10%. That resulting value will be set as the market value for the property for the tax cycle of calendar years 2019 and 2020.

Ordered February 17, 2021



David L. McAlpin, Chairman
MONTANA TAX APPEAL BOARD



Amie Zendron, 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. MCA §15-2-303 (2).

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Certificate of Service

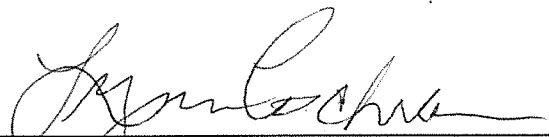
I certify that I caused a true and correct copy of the foregoing Findings of Fact, Conclusions of Law, Order, and Opportunity for Judicial Review to be sent by United States Mail via Print, Email and Mail Services Bureau of the State of Montana on February 17, 2021 to:

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

Michael Green
D. Wiley Barker
Crowley Fleck PLLP
P.O. Box 797
Helena, MT 59624-0797

Yellowstone County Tax Appeal Board
PO Box 35000
Billings MT, 59107

Kory Hofland, PAD
Montana Department of Revenue
P.O. Box 7701
Helena, MT 59604-7701



Lynn Cochran, Legal Secretary
MONTANA TAX APPEAL BOARD