

BEFORE THE MONTANA TAX APPEAL BOARD

FILED

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Montana Tax Appeal Board

EVAN DANNO REVOCABLE
LIVING TRUST,

Appellant,

v.

STATE OF MONTANA,
DEPARTMENT OF REVENUE,

Respondent.

CASE №: PT-2021-42

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

STATEMENT OF THE CASE

This is an appeal of a final decision by the Flathead County Tax Appeal Board (CTAB) granting the Evan Danno Revocable Living Trust, represented by Evan Danno, (Taxpayer) a partial reduction in value on the subject property located at 144 Highland Ridge Drive, Kalispell, Montana. The Taxpayer timely appealed that outcome to the Montana Tax Appeal Board (MTAB) on December 28, 2021. We affirm the CTAB's determination.

ISSUE TO BE DECIDED

Whether the CTAB erred in arriving at a building and improvements value of \$647,630 and whether the DOR's one acre land value of \$80,750 is correct.

EXHIBIT LIST

The following evidence was submitted at the hearing:

Taxpayer Exhibits:

1. AB-26 Request for Information Classification and Appraisal Review
2. 2021 Revised Classification and Appraisal Notice
 - a) Appeal to the CTAB
 - b) CTAB Decision
3. Mont. Code Ann. § 15-8-111

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- a) Mont. Code Ann. § 15-2-301
- 4. Property Owner's Comparable Sales
- 5. Pictures of Known Material Defects
- 6. Land Comparable Sales
- 7. Fee Appraisal by Travis Peterson

DOR Exhibits:

- A. Property Record Card of subject
- B. 8 color photos of subject property
- C. Aerial photo of subject property area
- D. Land Value Comparables
- E. VRBO Listing
- F. AB-26 Determination Letter

PROCEDURAL HISTORY

The Taxpayer received his notice of valuation assessment from the DOR setting the property value for 2021/22 at \$799,030 with a home and garage value of \$717,630, a one-acre homesite land value of \$80,750, and the remaining acreage of 11.75 acres which is classified as non-qualified agricultural land value of \$650. *Ex. 2.* The Taxpayer filed an AB-26 request for an informal classification and appraisal review which resulted in a land value reduction to the one-acre homesite. *MTAB Hrg. Tr. 47:12-24; Ex. F.* On November 2, 2021, the Taxpayer filed another AB-26 request for an informal classification and appraisal review. *Ex. 1.*

The Taxpayer then appealed to the CTAB on November 4, 2021, and a hearing was held by the CTAB on December 8, 2021. The CTAB granted a partial reduction in value for the improvements to \$657,630 to reflect discoloration of the metal roofing and fading of some of the siding of the home and garage. *MTAB Dkt. 1.*

The Taxpayer timely appealed to the MTAB on December 28, 2021, per Mont. Code Ann. § 15-2-301. *Id.* During the exchange of information phase of the appeal, the parties had two discovery disputes. The first was regarding the disclosure of a fee appraisal of the subject property the Taxpayer requested from a licensed Montana appraiser. *MTAB Dkt. 8.* The DOR objected that the fee appraisal was not disclosed

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until the deadline for disclosure of witnesses and exhibits, despite DOR having requested any information regarding a fee appraisal during discovery. *MTAB Dkt. 8*. During the hearing the DOR did not object to introduction of the fee appraisal and the Board accepted it into evidence. *MTAB Hrg. Tr. 14:20-23*. The second discovery dispute was regarding the DOR's disclosure of two hybrid witnesses. Prior to the hearing, the Taxpayer filed a motion with the Board to exclude the DOR's only witnesses based on lack of disclosure of what those witness would testify to during the hearing. *MTAB Dkt. 9*. After receiving the response from the DOR and the Taxpayer's reply, the Board ruled that the DOR fulfilled the witness disclosure requirements and allowed the witnesses to testify as hybrid witnesses. *MTAB Dkt. 10-12*. The MTAB hearing was conducted in Helena on May 17, 2022, at which the following were present:

- a. Evan Danno, Taxpayer Representative (via zoom); Travis Peterson, Fee Appraiser (via zoom).
- b. Kristina Warren, DOR Counsel; Dawn Cordone, DOR Area Manager (via zoom); and Doug Wilkinson, Commercial Appraiser (via zoom).

The record includes all materials submitted to CTAB, a recording of the CTAB hearing, all materials submitted to MTAB with the appeal, exhibits submitted by the parties prior to and at the MTAB hearing, and a transcript of the MTAB hearing.

FINDINGS OF FACT

1. To whatever extent the following findings of fact may be construed as conclusions of law, they are incorporated accordingly.
2. By disclosing three potential witnesses during the initial phase of discovery, naming them as hybrid witnesses, and disclosing them according to the scheduling order on May 5, 2022, the DOR complied with the scheduling order. MTAB procedures are less formal than District Court and the Board is reliant on the testimony of the DOR appraisers and managers who typically

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serve as hybrid witnesses. The Board's practice is to thoroughly question the witnesses and allow taxpayers adequate time to cross examine witnesses.

3. The 11.75 acres of non-qualified agricultural land are included in the property geocode but are not in controversy in this valuation dispute. The land value disputed is a one-acre homesite which is required to be valued at market value. *MTAB Hrg. Tr. 4:8-11; Mont. Code Ann. § 15-6-134(1)(c); Mont. Admin. R. 42.20.655(2).*
4. The subject property is approximately 15 miles east of Kalispell, not in a subdivision, with a gravel road that the homeowner must maintain. *MTAB Hrg. Tr. 13:14-24; Ex. 7, at 8.*
5. The Taxpayer's witness is Travis Peterson, a real estate appraiser and real estate agent who has been a licensed appraiser in Montana since December of 2004 and a real estate agent since 1994. *MTAB Hrg. Tr. 8:4-11, Taxpayers Ex. 7.*
6. Mr. Peterson appraises approximately 350 to 400 residences a year and has conducted approximately 5,000 to 6,000 residential appraisals. *MTAB Hrg. Tr. 9:1-5.*
7. Mr. Peterson was first contacted about conducting an appraisal by the Taxpayer between January and March of 2022. *MTAB Hrg. Tr. 18:24-19:6.* He was paid \$600 to conduct the appraisal, which is his normal fee. *MTAB Hrg. Tr. 19:7-14.*
8. Mr. Peterson visited the property on April 15, 2022, but did not visit the property in 2020, the effective year of appraisal, though he had visited the property in either 2012 or 2014. *MTAB Hrg. Tr. 21:12-16.*

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9. Mr. Peterson conducted a residential appraisal and created an appraisal report for the one-acre homesite, and all improvements located on that one acre of the Danno Trust Property, dated April 15, 2022. The appraisal effective date was January 1, 2020, to match the same date used by DOR statewide for the 2021/2022 valuation cycle. Peterson testified he utilized the Montana Board of Real Estate Appraisers standards. *MTAB Hrg. Tr. 9:6-25; Ex. 7, at 5.*
10. The cover letter in the appraisal report states that the appraisal is only for use by Mr. Danno and “[n]o third parties are authorized to rely upon this report without [Mr. Peterson’s] express written consent.” *MTAB Hrg. Tr. 19:21-20:3; Ex. 7, at 3.* Mr. Peterson said that he could change that to include the DOR and MTAB. *Id.*
11. One special condition accepted by the appraiser and disclosed in his appraisal notes states: “At the clients (sic) request the property was valued on 1 acre which includes all the improvements.” *Ex. 7, at 3.* This was presumably so the fee appraisal was comparing the same land as the DOR appraisal in that the value arrived at by both parties for purposes of the tax appeal did not include the entire 12.75 acres of the geocode.
12. Mr. Peterson included 14 photographs of the property in his appraisal report that he took on April 15, 2022. *MTAB Hrg. Tr. 12:10-13:11; Ex. 7, at 15-18.*
13. Relying upon the comparable sales approach to appraise the property, Mr. Peterson arrived at a total value for the improvements and the one-acre homesite of \$550,000 as of January 1, 2020. *MTAB Hrg. Tr. 10:5-11; Ex. 7, at 4.* To arrive at this value, Mr. Peterson searched for comparable property sales that he felt were like the subject property, of which he included four within his report. *MTAB Hrg. Tr. 10:14-18; Ex. 7, at 7, 12.* He based his comparable search on room count, square footage, and site size, which he then adjusted to the subject property. *Id.*

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14. Mr. Peterson selected the four comparable sales he used through the MLS database. *MTAB Hrg. Tr. 14:17-19; Ex. 7, at 7, 12.* Mr. Peterson initially pulled 18 property sales with sale prices between \$500,000 and \$850,000, from within the subject neighborhood that sold within the 12 months preceding the January 1, 2020, effective date. *MTAB Hrg. Tr. 22:16-23:6; Ex. 7, at 7, 12.* Mr. Peterson chose four comparables from those 18 that he argued were most like the subject property. *Id. MTAB Hrg. Tr. 22:16-23:6; Ex. 7, at 8.*
15. None of the four comparables had sold in the 12 months preceding the January 1, 2020, statewide lien date. *MTAB Hrg. Tr. 23:20-24; Ex. 7, at 7.*
16. Mr. Peterson chose comparables that were older than the subject property with the intent of compensating for the six-year effective age of the subject property. *MTAB Hrg. Tr. 23:7-19; Ex. 7, at 6-7, 12.*
17. Mr. Peterson testified that land values are similar on both the west and east sides of Kalispell. *MTAB Hrg. Tr. 18:8-21.*
18. Using the cost approach as an acceptable alternative method of valuation to the comparable sale method, Mr. Peterson found a cost value of \$598,250 for the subject property. *MTAB Hrg. Tr. 10:19-21; Ex. 7, at 8.*
19. Mr. Peterson argued that the sales approach is the best approach to value this property as it is market driven, and therefore the most reliable. *MTAB Hrg. Tr. 10:22-25.*
20. Mr. Peterson testified that he felt that the DOR's value of \$799,030 using the cost approach for the improvements was too high as of January 1, 2020. *MTAB Hrg. Tr. 11:1-5.*

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21. The Taxpayer argued several material defects affecting the home, totaling \$115,000 in reduced value: 1) faded touch up paint on his metal roof, \$40,000; 2) a ceiling ventilation problem that causes interior condensation in the ceiling and leaking, \$10,000; 3) high radon gas levels which required remediation \$5,000, 4) sun faded siding on south facing sides of the home and garage, \$20,000; 5) faded and rotting pine decking, \$10,000; 6) an unfinished laundry area, \$10,000; and 7) some defective windows on the home, which have developed condensation between the panes of glass over time allegedly due to defective seals, \$20,000. *MTAB Hrg. Tr. 26:9-28:17, 29:14-18; Ex. 5; MTAB Dkt. 4, at 25-26.*

22. He claimed these problems had not been taken into consideration by the DOR when determining the value of his property. *MTAB Hrg. Tr. 26:6-9; Ex. 5. MTAB Hrg. Tr. 26:9-28:17, 29:14-18; Ex. 5.* The Taxpayer argues that he would be legally bound to disclose all these defects to a potential buyer. *MTAB Hrg. Tr. 27:17-28:2.*

23. The Taxpayer stated that despite having installed a radon mitigation system in the home, the home is still subject to higher-than-normal levels of radon. *MTAB Hrg. Tr. 34:21-25.*

24. The Taxpayer testified he has not requested that the window provider replace all 93 of the defective windows because they are no longer under warranty and the window manufacturer is replacing them without charge as the windows fail. *MTAB Hrg. Tr. 35:1-13.*

25. The Taxpayer did not introduce receipts, invoices, or bids for the cost to cure the material defects he alleges and determined the requested discount based on his personal experience as a homeowner. *MTAB Hrg. Tr. 34:16-20.*

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26. Mr. Wilkinson contends that if the Taxpayer had provided estimates for a cost to cure the defects he alleges, the DOR would have evaluated them and may have reduced his value to reflect the estimate. *MTAB Hrg. Tr. 52:7-18.*
27. Ms. Cordone testified that typically, if a Taxpayer can provide documentation regarding defects that support a value reduction, the DOR will reduce the value. *MTAB Hrg. Tr. 68:1-5.*
28. Mr. Peterson testified that though he is not a home inspector, he would possibly be able to notice material defects in the roof or siding that was on the exterior but not on the interior. *MTAB Hrg. Tr. 20:4-7; Ex. 7, at 3.*
29. Mr. Petersen testified that he accounted for the material defects the Taxpayer alleges through the overall condition determination and the effective age he selected, not through line-item adjustments in his appraisal. *MTAB Hrg. Tr. 11:8-24; Ex. 7, at 6.* However, he also posited that a formal property inspection could reveal material defects that could further affect the value of the property. *Id.*
30. In the appraisal report, Mr. Peterson determined 2010 as the year built and testified at the hearing that he set an effective age of six years for the subject property. *MTAB Hrg. Tr. 20:16-21:5; Ex. 7, at 6-7.* He noted that the physical depreciation is slightly higher than typical. *Id.* Mr. Peterson testified that a few things throughout the house needed repair, including the siding, which was faded more than an average 10-year-old house. He estimated that a typically maintained 10-year-old home would have an effective age around three to four years. *Id.*
31. The appraisal report states that the improvements are in average condition and that they have been adequately maintained. *MTAB Hrg. Tr. 21:6-11; Ex. 7, at*

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6. Mr. Peterson testified that most houses in the price range of the subject property have been well maintained rather than adequately maintained. *Id.*
32. Mr. Peterson testified that when discussing adequately maintained versus well maintained wood siding, he would consider well maintained wood siding in similar conditions to the subject property to be re-stained every three to four years while the subject property has not been re-stained since being built. *MTAB Hrg. Tr. 24:1-18.*
33. The home includes a full bathroom on the basement level, and one and a half baths on the main level. *MTAB Hrg. Tr. 15:8-11; Ex. 7, at 7.* The accessory unit also has a bathroom. *MTAB Hrg. Tr. 15:11-24; Ex. A, at 18.* Peterson testified the value added by the accessory unit is accounted for in the appraisal under additional improvements because the grids are not set up to break out accessory units to account for their value. *Id.* Mr. Peterson testified that he assigned a value for all the bathrooms in the subject property. *Id.* The fee appraisal does not include any data to support the testimony that the accessory apartment bathroom was included in the value of the improvements.
34. Mr. Peterson testified that he did measure and account for the living space in the accessory apartment, though he did not grid the accessory apartment nor was he aware of what size the DOR had measured the accessory apartment. *MTAB Hrg. Tr. 16:11-20.* The fee appraisal does not include an accounting for the square footage of the accessory apartment.
35. The square footage of living space utilized by Mr. Peterson for the home is different than the square footage used by the DOR. *MTAB Hrg. Tr. 16:5-10; Ex. 7, at 7.* Mr. Peterson testified that it is common for appraisers and the DOR to have different square foot values because the DOR often does not measure inside the homes. *Id.* He contends that he measured the property and that his

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- measurements reflect 2,563 square feet above grade level and 1,588 square feet below grade level. *Id.*
36. The Q ratings used by Mr. Peterson rate quality and are based on quality of construction. *MTAB Hrg. Tr. 17:14-18:6; Ex. 7, at 7, 12.* The Q ratings give a starting value, but adjustments can be made within the same Q ratings. *Id.* For example, though comparables one and four had the same Q rating as the subject property, comparable one's value was increased by ten dollars¹ per square foot because Mr. Peterson felt that comparable one was inferior to the subject property, while comparable four's value was decreased because he felt it was superior to the subject property. *Id.*
37. In the appraisal report, Mr. Peterson noted that the subject home had not been updated in the last 15 years, even though the house was built less than 15 years ago. *MTAB Hrg. Tr. 21:17-22:2; Ex. 7, at 6.* He testified that the timeframes are part of the standard form which asks if the home has been updated in less than one year, one to five years, five to 10 years, or 10 to 15 years. *Id.*
38. Mr. Peterson has a work file for this appraisal. *MTAB Hrg. Tr. 19:15-20.* He testified that the Taxpayer did not request the work file nor was he aware that the DOR had requested the work file through discovery. *Id.*
39. The Taxpayer argued that he does not have to disclose that he ordered an appraisal and that he only must provide it if he intends to use it at the hearing. *MTAB Hrg. Tr. 33:19-34:15.*
40. Mr. Peterson testified that if this appraisal was produced for a bank, the conclusions and valuations would remain the same. *MTAB Hrg. Tr. 20:8-15.*

¹ The appraisal report states that comparable one's value was increased by \$20 per square foot but Mr. Peterson testified that was a typo and the actual adjustment to comparable one was an increase of \$10 per square foot.

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The only difference would be whether it was a purchase or refinance transaction. *Id.*

41. The Taxpayer argued that under Mont. Code Ann. § 15-8-111, market value is defined as “the value between a willing seller and a willing buyer, both having knowledge of relevant facts including known material defects,” and real estate agents must disclose all material defects, therefore a buyer makes his decision based on the disclosure of the material defects. *MTAB Hrg. Tr. 25:7-16; Ex. 3.* The same statute requires that comparable properties used in the sales comparison approach must be within “acceptable proximity” of the subject property. *Id.*
42. The Taxpayer also testified to the content of Mont. Code Ann. § 15-2-301 which states that the taxpayer provided appraisals of residential property are “presumed to establish assessed value in the state board proceeding” if Montana Board of Real Estate Appraisers’ standards are complied with. *MTAB Hrg. Tr. 25:19-23; Ex. 3a.*
43. Mr. Wilkinson testified he last visited the subject property on October 1, 2019, when he met with the Taxpayer in the main living area of the home and discussed the characteristics of the house with Mr. Danno. *MTAB Hrg. Tr. 37:4-12.*
44. The one-acre parcel of land under the improvements is valued separately from non-qualified agricultural land per ARM 42.20.655. *MTAB Hrg. Tr. 38:11-15.*
45. The DOR’s witness, Mr. Wilkinson, valued the improvements using the cost approach and stated that all improvements that are on non-qualified agricultural land must be valued using the cost approach. *MTAB Hrg. Tr. 36:20-37:3.*

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46. Mr. Wilkinson testified that it is ARM 42.20.655 that requires the DOR to utilize the cost approach when valuing improvements on non-qualified agricultural land. *MTAB Hrg. Tr. 52:20-23*. However, he did not know of any statutory authority that requires the use of the cost approach to value the improvements on the non-qualified agricultural land. *MTAB Hrg. Tr. 55:22-24*.
47. Ms. Cordone testified all improvements on non-qualified agricultural land statewide are valued using the cost method. *MTAB Hrg. Tr. 72:19-20*.
48. The Taxpayer argued that the DOR and the CTAB erred by using the cost method without evidence of market conditions. *MTAB Hrg. Tr. 28:18-20*. The Taxpayer contends that *DeVoe v. Department of Revenue* is applicable in this case because the Montana Supreme Court held “that evidence of construction costs alone, without consideration of any market factors, does not satisfy the requirement of § 15-8-111(1), MCA, that the assessed value equal market value.” 263 Mont. 100, 112, 866 P.2d 228, 235 (1993). He argues that the DOR only used the cost method without considering any market factors. *MTAB Hrg. Tr. 28:25-29:1*.
49. According to Ms. Cordone, the DOR performs a market sales analysis to identify comparable sales even when utilizing the cost approach to create a defensible and reasonable value. *MTAB Hrg. Tr. 61:17-62:6*.
50. Ms. Cordone testified that MCA § 15-8-111 requires that the DOR defend the cost approach conclusion of value as a market value. To do this, the DOR makes market adjustments in the cost calculations. *MTAB Hrg. Tr. 70:17-71:19*. The DOR also reconciles the cost method with the comparable sales method to ensure the cost method is not overvaluing the subject by a percentage that is too high. *MTAB Hrg. Tr. 72:7-9*.

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51. The Taxpayer contends that the DOR is incorrect in their assertion that they must use the cost approach for non-qualified agricultural land and improvements. *MTAB Hrg. Tr. 29:1-9*. He also contends that because he introduced comparable sales at the CTAB level, but the DOR did not, his evidence was uncontroverted. *Id.*
52. Ms. Cordone testified that the cost approach is used in situations with discounted land prices such as non-qualified agricultural land because there are fewer sales of similar properties to consider. Further, she testified that unique properties such as the subject fall outside normal market analysis, and in these cases the cost approach is appropriate. She cited to Mont. Code Ann. § 15-7-102 and § 15-8-111 for this argument. *MTAB Hrg. Tr. 60:5-61:3*.
53. Ms. Cordone testified that Mont. Code Ann. § 15-8-111 does not require use of the cost method but instead, indicates what the DOR's responsibilities are if they use the cost method. *MTAB Hrg. Tr. 75:9-12*.
54. Ms. Cordone explained that the cost approach to value is based on replacing the subject with something of similar quality of construction. The replacement cost new (RCN) considers all the information that would be needed to replace the subject including square footage, room count, quality of construction, and age. The depreciation and/or appreciation is then either added or subtracted to arrive at estimated market value. *MTAB Hrg. Tr. 61:6-16*.
55. The construction costs used to estimate the value are from a combination of the Marshall and Swift residential cost handbook and the DOR's own cost collection that is collected from local sources. *MTAB Hrg. Tr. 38:24-39:10*. Marshall and Swift is a nationally accepted residential cost handbook. *MTAB Hrg. Tr. 52:24-53:4*. To collect the local data, the DOR calls builders and retailers to get material and labor costs. *Id.*

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56. The DOR calculates the RCN less depreciation by taking the RCN multiplied by the local cost index, then multiplied by the economic condition factor, and lastly multiplied by the percent good, which represents depreciation. *MTAB Hrg. Tr. 39:11-24*. The local cost index indicates what percent of the national average living costs it estimates to live in a certain area. *Id.* The economic condition factor is a “market adjustment uniformly applied across all properties in a given market area” that reflects the growth of an area in Montana. *MTAB Hrg. Tr. 53:5-19*. In this case, that calculation would look like \$559,837 times 94% which equals \$526,246.78 times 1.23, which equals \$647,283.54, times 0.9 which equals \$582,555.19, which rounded equates to \$582,560. *Ex. A, at 15*.
57. A typical single-family residence has a life of 60 years. The DOR estimated a 10% depreciation for the subject, which considers material defects in this residence, resulting in a percent good of 90%. *MTAB Hrg. Tr. 40:1-7*.
58. The other buildings and yard improvements (OBY) include a detached garage with a living area above it and a second-floor deck coming off that living area, two lean-tos off the garage, and a concrete slab under the deck. *MTAB Hrg. Tr. 40:8-18; Ex. A, at 18*. The garage and living area have a percent good of 81% and 88% respectively, which, the DOR stated, considers the deteriorated siding issue on that part of the accessory apartment/garage. *Id.*
59. The OBY values plus the RCN less depreciation value of the home is added together to come to an improvement value of \$717,630. *MTAB Hrg. Tr. 40:19-23; Ex. A, at 14*.
60. The DOR took pictures of the outside of the home but not the inside on October 1, 2019, because, Mr. Wilkinson testified, it is very rare that DOR appraisers get inside houses. *MTAB Hrg. Tr. 41:13-22; Ex. B*. Mr. Wilkinson stated, with the caveat that he is not a home inspector, that, from the pictures,

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he would say the house was in typical condition, with what he would call some deferred maintenance. *MTAB Hrg. Tr. 41:23-42:14*. The percent good, Mr. Wilkinson testified, is based on the overall condition of the home. *Id.* He did not put an effective age on the home, but instead left the age of the home as the actual age of 12 years with a build date of 2008 since there had been no updates and there was limited maintenance. *MTAB Hrg. Tr. 42:14-16; Ex. A, 15*. Mr. Wilkinson testified that, by doing this, he gave the Taxpayer about a 5% discount to account for the defects the Taxpayer alleges. If the effective age were to be changed to five or six years as would be typical, Mr. Wilkinson testified, the percent good would increase by 5% to 95%. *MTAB Hrg. Tr. 51:15-25*.

61. Depreciation, or percent good, acts as an estimated cost to cure in the cost approach, which in this case gave a \$65,000 reduction, however, there was no additional consideration based on visual inspection or information that was provided. *MTAB Hrg. Tr. 76:6-10; Ex. A, 000015*.
62. The Taxpayer asserts that the cost approach is “fictitious and residential properties don’t sell based on that estimate of value.” *MTAB Hrg. Tr. 31:11-12*. The average listing price of the comparable properties that Taxpayer presented is \$538,762, which includes the land value. *MTAB Hrg. Tr. 31:13-14*. The Taxpayer stated that these comparable properties are “way higher-end than the Danno Trust property,” and they contain more than the one-acre parcel being valued in this case. *MTAB Hrg. Tr. 31:14-23; Ex. 4, at 1*.
63. The Taxpayer introduced evidence of comparable properties by listing price but was not privy to the sale prices. *MTAB Hrg. Tr. 30:1-21; Ex. 4*. The Taxpayer argued that sale prices would certainly be less than the listed prices because in an ordinary market, which he maintains we were in on the lien date of January 1, 2020, houses sell for less than the asking price. *MTAB Hrg. Tr. 30:22-31:4*.

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64. Mr. Wilkinson testified that the DOR would not consider Taxpayer's comparable one truly comparable to the subject because the house is older than the subject property, the location is considered inferior, there is less land, the house is smaller, and the garage and garage living area are inferior. *MTAB Hrg. Tr. 48:24-49:6; Ex. 4, at 1-8*. Ms. Cordone testified that the sale of comp one was the consequence of the death of the owner and considered a forced sale thus invalid as a reflection of a willing seller willing buyer transaction. *MTAB Hrg. Tr. 68:16-20*.
65. Mr. Wilkinson also testified that the DOR would not use the Taxpayer's comparable two because the lot is half the size of the entire subject property, the house is older without updates, the house is smaller than the subject home, there are no outbuildings besides a detached shed with no value, and there are HOA fees. *MTAB Hrg. Tr. 49:13-22; Ex. 4, at 1, 9-16*.

Land Value

66. The Taxpayer also provided land comparables with an average listing price per acre of \$18,878. *MTAB Hrg. Tr. 32:1-7; Ex. 6, at 1*.
67. The Taxpayer argues that if listing the one-acre land parcel, all material defects of that parcel would have to be disclosed. *MTAB Hrg. Tr. 32:8-16*. He contends that the fact that his one-acre is not surveyed out of the rest of his property, and therefore cannot be sold, would be a material defect requiring disclosure. *Id.* Therefore, the land comparables do not represent actual market value of the one-acre parcel of the subject property. *Id.*
68. The DOR also introduced comparable land sales to illustrate the market value of the land if the larger tract was being used and it was not being valued as non-qualified agricultural land. The sale prices ranged in value from \$79,365 to

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\$88,149 per acre. These land sales were demonstrative and were not used in valuing the subject property. *MTAB Hrg. Tr. 45:12-22; Ex. D, at 23.*

69. Mr. Wilkinson chose the four land comparables used by the DOR in its land model from the sales in the market area because they were most comparable to the subject property and because the four comparables were vacant land sales, close to one-acre in size, in acceptable proximity to rural areas, outside of town, and had a sale within the cycle. *MTAB Hrg. Tr. 44:10-45:6; Ex. D.*
70. Ms. Cordone testified that land sales that occurred within the required timeframe of two years before the lien date would be included within the market model. However, large acre land sales cannot be valued at a per acre price and then used to value a single acre as suggested by the taxpayer. *MTAB Hrg. Tr. 63:6-17.*

Fee Appraisal

71. Ms. Cordone also testified the DOR does consider fee appraisals prepared on the Taxpayer's behalf and will adjust the value if the fee appraisal offers a defensible reason to make an adjustment. Often, fee appraisals have up to date information which is why an adjustment is made. *MTAB Hrg. Tr. 64:5-22.*
72. A fee appraisal differs from a DOR mass appraisal in a few ways. One way is that fee appraisers normally can measure the interior while the DOR does not always have the opportunity to do so. *MTAB Hrg. Tr. 65:4-11.* The DOR normally develops inside measurements from estimates based on external measurements. *Id.* Fee appraisals also typically have more pictures which gives a more thorough review of the property characteristics making the quality of construction and condition determinations easier. *MTAB Hrg. Tr. 65:14-20.*

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73. Square footage, quality of construction, and condition affect the valuation of properties the most. *MTAB Hrg. Tr. 65:11-13.*
74. The DOR rarely disregards fee appraisals provided to them. *MTAB Hrg. Tr. 65:21-23.* However, in this case, Ms. Cordone testified that she would not adjust the DOR's value based on this fee appraisal. *MTAB Hrg. Tr. 65:24-66:1.* She testified that the information in this fee appraisal was unusually limited compared to other fee appraisals the DOR receives. Therefore, the DOR could not support or defend the valuation from either method that the fee appraisal provided based on the information within the fee appraisal. *MTAB Hrg. Tr. 66:3-7.*
75. Ms. Cordone testified that this fee appraisal was inconsistent with other fee appraisals because a Fanny Mae mortgage form was used, which restricts some of the options an appraiser has. These types of appraisals are usually only received when the appraisal was done for the purposes of a bank loan. Normally, the fee appraisals the DOR receives are on a generic form. *MTAB Hrg. Tr. 66:8-20.*
76. Ms. Cordone contends that it was also unusual for the fee appraiser to only value the one-acre parcel because most fee appraisers, even when dealing with unique situations like non-qualified agricultural land, value the property as a whole and then use the appropriate method of abstraction to determine how much land value is associated with each sale. *MTAB Hrg. Tr. 66:21-67:3; Ex. 7, at 1, 4.* Ms. Cordone also contends that the interior photos are extremely limited in a way that she has never received. *MTAB Hrg. Tr. 67:3-8; Ex. 7, at 15-18.* She testified that there is not a single picture of the bathrooms or the interior of the garage, there is only one kitchen photo, and the pictures of the deck are inferior. *MTAB Hrg. Tr. 67:11-15; Ex. 7, at 15-18.*

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77. Ms. Cordone pointed to conflicting statements within the appraisal, including the age and when the septic was done. The DOR records have the house built in 2008 but the fee appraisal has the house built in 2010 based on information from the Taxpayer. *MTAB Hrg. Tr. 67:19-25; Ex. 7, at 4.*
78. In reviewing the comparables offered by the fee appraiser, the DOR, and the fee appraiser arrived at similar quality and condition/grade for the subject property. *MTAB Hrg. Tr. 68:6-16; Ex. 7, at 7, 12.*
79. The other comparables used within the fee appraisal were included within the sales information used to build the model but the DOR was concerned with the number of adjustments that were made, which the DOR would consider excessive adjustments. *MTAB Hrg. Tr. 68:21-69:2; Ex. 7, at 7, 12.*
80. Ms. Cordone testified that the price per square foot the appraiser used does not comport with the market standards for the quality of construction. *MTAB Hrg. Tr. 69:19-70:2.* The DOR's overall valuation is \$154 per square foot while the fee appraisers is approximately \$120 per square foot. *MTAB Hrg. Tr. 70:3-16.*
81. Ms. Cordone testified that she has never received a fee appraisal that is 30 to 40% less than the DOR's valuation. *MTAB Hrg. Tr. 73:23-25.* Further, she testified that usually the DOR can reconcile valuation differences because of data or condition differences, but that is not the case here. *MTAB Hrg. Tr. 72:25-73:2.*
82. Ms. Cordone testified that without the fee appraiser's work file, it was difficult to reconcile the cost information. For example, the square footage the fee appraisal listed is higher than the DOR's, yet the value is lower than the DOR's and the square footage of the garage is lower than the square footage of the garage the DOR has recorded. Comparable two did not make an adjustment for the accessory unit even though comparable two's accessory unit was only a

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studio with no improvements. Further, there were sales available that required less adjustments than the comparables the fee appraiser selected. Ms. Cordone argued there was also a lack of information in the report regarding why other sales were not used. *MTAB Hrg. Tr. 74:3-75:2; Ex. 7, at 7, 12; Ex. A, at 15, 18.*

83. Due to the confidential information contained in them, the DOR is allowed to provide Realty Transfer Certificates (RTC) for properties used in the DOR's valuation when a taxpayer has signed a confidentiality agreement but is not allowed to provide RTCs for properties they did not use. *MTAB Hrg. Tr. 77:14-78:2; Mont. Code Ann. § 15-7-308.*

JURISDICTION AND STANDARD OF REVIEW

84. The Montana Tax Appeal Board is an independent agency not affiliated with the Montana Department of Revenue. *Mont. Const., Art. VIII § 7; Mont. Code Ann. § 15-2-101.* The Taxpayer filed a timely appeal of the DOR's decision to the MTAB. Therefore, this Board maintains jurisdiction to hear and decide this matter, an appeal of a County Tax Appeal Board decision. *Mont. Code Ann. § 15-2-301.*
85. This Board may hear appeals de novo. *Dept. of Revenue v. Burlington N.*, 169 Mont. 202, 213-14, 545 P.2d 1083 (1976). "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, ¶ 22, 303 P.3d 1279, ¶ 22.
86. The Board's order is final and binding upon all parties unless changed by judicial review. *Mont. Code Ann. § 15-2-301(6).*

CONCLUSIONS OF LAW

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

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88. "All taxable property must be appraised at 100% of its market value...." *Mont. Code Ann. § 15-8-111*.
89. Except as otherwise provided in *Mont. 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 *Mont. Code Ann. § 15-2-301*. To the extent *Mont. Code Ann. § 15-2-301* conflicts with the Montana Administrative Procedure Act, *§ 15-2-301* supersedes that act. *Mont. Code Ann. § 15-2-301(5)*.
90. 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 v. Michunovich*, 149 Mont. 347, 353, 428 P.2d 3, 7 (1967).
91. The Taxpayer bears the burden of proving the error of DOR's decision. *Farmers Union Cent. Exch. v. Dep't of Revenue*, 272 Mont. 471, 476, 901 P.2d 561, 564 (1995); *Western Air Lines*, 149 Mont. at 353, 428 P.2d at 7.
92. "Assessment formulations' by [the Montana Tax Appeal Board] should be upheld unless there is a clear showing of an abuse of discretion." *Peretti v. 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. 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*, 263 Mont. 100, 866 P.2d 228 (1993)).
93. When construing a statute, it is the Board's role to "determine what in terms or substance is contained in it, and not to insert what has been omitted or to omit

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what has been inserted.” *State v. Minett*, 2014 MT 225, ¶ 12, 376 Mont. 260, 332 P.3d 235; *Mont. Code Ann. § 1-2-101*.

94. In the construction of a statute, the intention of the legislature is to be pursued if possible. When a general and particular provision are inconsistent, the latter is paramount to the former, so a particular intent will control a general one that is inconsistent with it.” *Mont. Code Ann. § 1-2-102*.
95. “When faced with a problem of statutory construction great deference must be shown to the interpretation given the statute by the officers or agency charged with its administration.” *Dep’t of Revenue v. Puget Sound Power & Light Co.*, 179 Mont. 255, 262, 587 P.2d 1282, 1286 (1978) (citing *Udall v. Tallman*, 380 U.S. 1, 16 (1965)).
96. “[T]ax statutes are to be strictly construed against the taxing authority and in favor of the taxpayer.” *Western Energy Co. v. Dep’t of Revenue*, 1999 MT 289, ¶ 10, 297 Mont. 55, 990 P.2d 767.
97. “Administrative agencies enjoy only those powers specifically conferred upon them by the legislature. Administrative rules must be strictly confined within the applicable legislative guidelines. Indeed, it is axiomatic in Montana law that a statute cannot be changed by administrative regulation. We look to the statutes to determine whether there is a legislative grant of authority.” *Bick v. State, Dep’t of Justice, Div. of Motor Vehicles*, 224 Mont. 455, 457, 730 P.2d 418, 420 (1986).
98. “[A]dministrative regulations interpreting the statute made by agencies charged with the execution of the statute are entitled to respectful consideration.” *Puget Sound Power & Light Co.*, 179 Mont. at 266, 587 P.2d at 1288.

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99. The Board “may not amend or repeal any administrative rule of the department,” but may enjoin its application if the Board concludes the rule is “arbitrary, capricious, or otherwise unlawful.” *Mont. Code Ann. § 15-2-301*.
100. The term “improvements” includes all buildings, structures, fences, and improvements situated upon, erected upon, or affixed to land. *Mont. Code Ann. § 15-1-101(1)(i)*.
101. *Mont. Code Ann. § 15-2-301* creates the presumption that when a valid fee appraisal is submitted, the appraisal should be considered correct unless the DOR introduces sufficient evidence to rebut the presumption.

DISCUSSION

Improvement Defects

102. The Board does not find the alleged defects themselves to be in dispute but rather whether the DOR’s valuation method took them into full account. Whether the alleged defects are material and must be disclosed to future buyers is not in dispute either.
103. The Board confines our analysis to whether these conditions, be they deferred maintenance or material defects, are considered within the DOR analysis which yielded the value assigned. No property is perfect, the stock and trade of this Board’s opinions in most property tax appeals is to weigh, from the evidence and testimony presented, whether the DOR adequately reduced value to account for the condition of the property.
104. Taxpayer’s central argument for error by the DOR revolved around the DOR failing to account for defects in his home. The DOR witnesses argued in the first instance that had evidence of the defect and the cost to cure them been presented and documented, the DOR would have undergone a more thorough review to determine whether an adjustment should be made. In the second

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instance the DOR witnesses argued by increasing the depreciation, whether problems with the home were due to deferred maintenance, contractor error, or inferior building materials, they had fully captured the effect of the home's flaws with the information available to them. With the grant of an additional 5% depreciation beyond what similarly constructed homes were allowed, DOR witnesses testified that this 5% of additional depreciation fully compensated for the problems with the home.

105. Regarding the Taxpayer's maintenance of the home, it is surprising that a home of this quality and age has not had the siding re-stained nor the decking repaired or treated where it has failed in the last 10 years. It is also surprising that the warranty on all the windows was not claimed when some began to fail. Neither the CTAB nor this Board received any estimates of cost to cure the defects. We do not consider an unfished laundry room or limited photos of minor deterioration to untreated pine decking to be material defects.

106. This Board finds the testimony and evidence from both sides unconvincing as to whether the problems described have already been mitigated as in the case of the radon by a radon collection system, or fully litigated by the homeowner as in the case of the windows and damage to the second metal roof. It is inexplicable that if a roof design causes condensation to drip into the living room of the home that a homeowner would simply be resigned to his fate. Without more testimony and evidence on the issue, we decline to make further reductions and defer to the local knowledge and judgment of the Flathead County CTAB members who partially reduced the value of the improvements by \$60,000 to reflect depreciation they believed the DOR had not captured in their analysis.

107. The Taxpayer's request for reduction to account for these numerous defects totaled \$115,000. We agree that if this was disclosed to a future buyer, it would likely reduce the value of the home, so accordingly uphold the CTAB reduction

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of \$60,000 to acknowledge the defects were more impactful on value than the 5% increase in depreciation applied by the DOR. We would restate that the DOR testified that had the Taxpayer provided documentation of the cost to cure these defects the DOR may have been more thorough in their review which could have resulted in further reductions. This information, if presented, could be a factor in future valuation cycles, but we are bound to consider only the 2021/2022 cycle.

Use of Cost Method

108. The Taxpayer challenged the DOR's authority and legal basis for using the cost method to estimate the value of his improvements. The DOR's witnesses testified that they are not only permitted but required to default to the cost method of valuation for improvements when the property includes non-qualified agricultural land. While their citation to Mont. Code Ann. 15-8-111 does not explicitly require the use of cost, we agree that it allows the DOR to use cost as the most reliable method of finding the value of the improvements when non-qualified ag land is part of the property. The DOR's rationale for that approach is that through public policy the legislature has deemed certain land meeting agricultural definitions receives a classification which is irrespective of true market value. We agree that comparable sales of similarly sized parcels with similarly classified non-qualified agricultural land would be so rare as to make building a statistically significant comparable sales model extremely unreliable. Within the confines of mass appraisal theory and the DOR appraisal manual the DOR is allowed to use cost as the best indication of market value for these improvements. We would note that the Taxpayer did not provide any examples of sales including non-qualified agricultural land he believes the DOR should have used to disprove use of the cost method.
109. We find the DOR arguments convincing that the most defensible way for them to find market value of the improvements as part of a unique land classification such as the subject is to use the cost method for the improvements. We do not

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believe the DOR could have found truly comparable sales of enough parcels like the subject to be able to defend a comparable sales method for this property, and no evidence was presented to the contrary. The Montana Supreme Court in *Albright* authorized the DOR to use more than one appraisal method to set value. The DOR must use a mass appraisal method to find value unlike a fee appraisal and must treat all Taxpayers equally in so doing.

110. We find that *DeVoe* does not preclude the use of the cost method if market considerations are applied and by using the market sales approach to valuing the land DOR did consider and use more than the cost method to find value. The DOR witnesses gave credible testimony the Economic Condition Factor used in calculation of the property value add additional evidence that market considerations were applied, further satisfying the *DeVoe* requirements.

Fee appraisal

111. Mont. Code Ann. § 15-2-301 was recently amended to set a new standard for valuation when a fee appraisal is introduced into the analysis. It creates a presumption that the appraisal should be considered correct unless the DOR introduces *sufficient* evidence to rebut the presumption of correctness of the fee appraisal.
112. The new law does apply in this case and the fee appraisal introduced into evidence meets the standard set for us to consider. This Board has fully considered the Taxpayer's arguments that the fee appraisal can be relied on, as well as the DOR's arguments that it is unreliable and does not adhere to IAAO appraisal standards.
113. The Board welcomes the admission of an independent fee appraisal into evidence for this or any other dispute because they give us additional useful information in our deliberations we would not have otherwise had. That said we find the DOR's critique of the appraisal raised enough doubts to dissuade us

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that the fee appraisal was sufficient to find market value. We question the selection of the four lowest sale prices of a pool of 18 sales as credible basis for framing a reliable market sales analysis. We concur with the DOR that the ages of the four comps are not like the age of the subject or in the alternative are not adjusted to the subject. Nor were the comps similar in character and amenities, for example the only comp with an accessory dwelling unit was a comp with an apartment above the garage. In theory that sounds comparable to the subject with its accessory dwelling unit, but DOR witness Mr. Wilkinson testified he had been in that garage room of the comp, which was inferior in finish and amenities to the subject apartment with a kitchen, wood stove, private bathroom and bedroom as described and pictured in Taxpayer's Exhibits 7 and 4 and DOR Ex E. From the limited photographic evidence and testimony, the quality of the comparables seem inferior to the subject. The DOR's witness, Ms. Cordone, credibly testified that it was very unusual to receive a fee appraisal with no photos of bathrooms or a finished basement, and that the number of adjustments made to the comparables selected was uncharacteristically high when many other comparable sales were available. The Board received conflicting testimony from the fee appraiser as to the date range of the comparable sales chosen, which could have a bearing on value. Finally, despite testimony to the contrary, there is no evidence proving that all the bathrooms in the subject were correctly valued and accounted for in the fee appraisal, namely the bathrooms in the garage apartment and basement of the home. Not accounting for these amenities would artificially reduce the appraised value of the subject. These errors or omissions did not give the Board confidence the fee appraisal could be relied on as the best indication of market value.

One-Acre Value

114. We find the DOR did have the authority to use market sales analysis to estimate the value of one acre of land associated with the improvements. That

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value of \$80,000 is not substantially higher than the fee appraisers estimate of \$70,000 for that acre.

115. We find it was required, in the performance of mass appraisal, for the DOR to separately value the one acre of land from the 11.75 acres which meet the statutory definition of non-qualified land. The law sets this non-qualified agricultural land's value at \$650, without regard to what a willing buyer would pay.
116. The Taxpayer's evidence of real estate listing prices was unconvincing as evidence of land value. The DOR's use of actual land sales adjusted for location and date of sale was more credible in finding market value for the one-acre in dispute.
117. We thereby uphold the one-acre land value of the subject and determine the DOR met their burden to be presumed correct in valuing the one-acre homesite.

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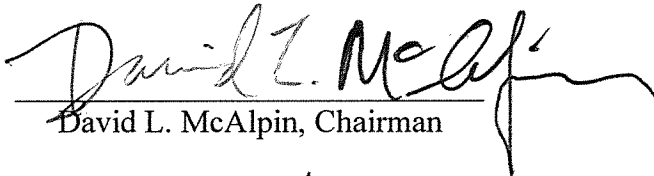
ORDER

- 118. The one-acre parcel under the improvements shall remain at the DOR value of \$80,750.

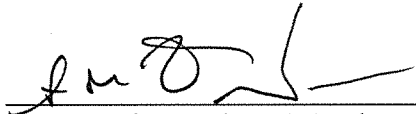
- 119. The improvements value set by CTAB at \$647,630 is affirmed.

- 120. Total value of this property shall be recorded at \$729,030 for tax years 2021 and 2022.

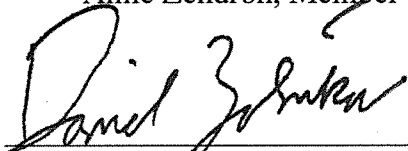
Dated this 15th day of August 2022.



David L. McAlpin, Chairman



Amie Zendron, Member



Daniel Zolnikov, Member



Notice: You are entitled to judicial review of this Order by filing a petition in district court within 60 days of the service of this Order. 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

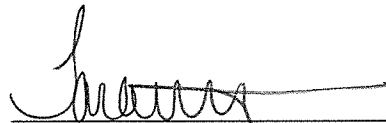
I certify that I caused a true and correct copy of the foregoing Findings of Facts and Conclusions of Law to be sent by email and United States Mail via Print & Mail Services Bureau of the State of Montana on August 15, 2022, to:

Evan Danno
144 Highland Ridge Dr.
Kalispell, MT 59901

Kristina Warren
State of Montana, Department of Revenue
Legal Services Office
P.O. Box 7701
Helena, MT 59604-7701

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

Dori Magar, Secretary
Flathead County Tax Appeal Board
800 S. Main, Rm. 302
Kalispell, MT 59901



Tara M. Green, Legal Secretary