

STATE OF MONTANA,  
DEPARTMENT OF REVENUE,

Appellant,

v.

WHITE SWAN PROPERTIES, LLC,

Respondent.

CASE №: PT-2024-46  
128 1<sup>st</sup> Ave W, Kalispell

**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) partially granting White Swan Properties, LLC (Taxpayer) a reduction in value on the subject property located at 128 1<sup>st</sup> Ave W, Kalispell, Montana (“Subject Property” or “Unit 128”). The Department of Revenue (DOR) appealed that outcome to the Montana Tax Appeal Board (MTAB) on May 6, 2024. We reverse the CTAB’s determination.

**ISSUE TO BE DECIDED**

Whether CTAB erred in granting Taxpayer’s request for a reduction in value of the Subject Property.

**EXHIBIT LIST**

The following evidence was submitted at the hearing:

Taxpayer Exhibits:

1. Undated Plaza West Condo Memorandum by Taxpayer Representative;
2. Copy of Mont. Code Ann. § 15-8-11;
3. Copy of Mont. Admin. R. 42.20.108 and 42.20.109;
4. (No Exhibit 4 offered for admission)
5. (No Exhibit 5 offered for admission)

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6. Pages 3 and 4 (of 6) of Subject Property Classification and Appraisal Notice;
  - a. Copy of Original and Amended Property Record Cards;
  - b. AB-26 Request for Informal Classification and Appraisal Review with Attached Exhibits A and B;
  - c. DOR Determination Letter with Page 3 of 6 of Revised Classification and Appraisal Notice;
  - d. Copy of Form 401 Appeal to CTAB;
7. (No Exhibit 7 offered for admission)
8. (No Exhibit 8 offered for admission)
9. Report and Appraisal by Jeff O'Brien dated October 27, 2023, with Attachment B; Letter from Jeff O'Brien to Taxpayer re: Plaza West Condominium Appraisals dated November 22, 2023;
10. Letter from Taxpayer Representative to DOR dated November 8, 2023;
11. Memo by Taxpayer Representative dated October 28, 2023;
12. Dennis Green Affidavit;
13. Letter from John Dudis to Dennis Green dated December 14, 2023;
14. List of DOR's Basement Values; and
15. Taxpayer's Appraisals and Supplemental Memorandum.

DOR Exhibits:

- A. Subject Property Photographs;
- B. Comparable Sales Grid;
- C. Comparable Sales Map;
- D. Comparable 1 Information;
- E. Comparable 2 Information;
- F. 4<sup>th</sup> Street East Listing;
- G. South Main Listing;
- H. East Idaho Listing;
- I. Meridian Road Listing;
- J. Income Comparison of Sold Units;

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- K. Land Model;
- L. Land Sales Grid;
- M. Commercial Cost Calculations of Subject Property;
- N. Report and Appraisal by Jeff O'Brien dated October 27, 2023, with Attachment B; Letter from Jeff O'Brien to Taxpayer re: Plaza West Condominium Appraisals dated November 22, 2023;
- O. Taxpayer Supplemental Memorandum with Taxpayer Appraisals;
- P. Original Assessment Notice of Subject Property;
- Q. Original Property Record Card of Subject Property;
- R. Taxpayer's AB-26 Request;
- S. AB-26 Final Determination; and
- T. Updated Property Record Card of Subject Property.

**PROCEDURAL HISTORY**

The DOR valued the Subject Property at \$125,100 for the 2023/2024 appraisal cycle, with the land valued at \$13,608 and the improvements valued at \$111,492. *Ex. Q.* The Taxpayer filed a Form AB-26, Request for Informal Classification and Appraisal Review, with the DOR on July 28, 2023, requesting a total value for land and improvements of \$61,501. *Ex. R.* The DOR sent a Form AB-26 Determination Letter to the Taxpayer dated January 17, 2024, partially granting the Taxpayer's request by lowering the Subject Property's value from \$125,100 to \$103,400. *Ex. S, T.* The Taxpayer appealed the DOR's valuation to the CTAB on February 7, 2024, requesting a total valuation of \$61,500 for the land value and improvements. *MTAB Dkt 3.* The Taxpayer introduced an appraisal prepared by Jeff O'Brien at the CTAB hearing, which valued the Subject Property at \$67,962. *Id.* After a hearing on April 4, 2024, the CTAB partially granted the Taxpayer's request and reduced the value of the Subject Property to \$67,962. *Id.* The CTAB issued its decision on April 5, 2024. *Id.* The DOR appealed to MTAB on May 6, 2024, per Mont. Code Ann. § 15-2-301. *MTAB Dkt 1.* The Taxpayer filed a Motion for Summary Judgment and Brief and Affidavit in Support on September 9, 2024. *MTAB Dkt. 8.* The DOR filed its Response in Opposition to Respondents' Motion for Summary Judgment on

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September 30, 2024, arguing that there were genuine issues of material fact that must be resolved by the Board. *MTAB Dkt. 10*. The Taxpayer filed a Verified Reply Brief on October 11, 2024, and a correction to the Reply Brief on October 17, 2024. *MTAB Dkt. 11, 12*. After considering the Motion for Summary Judgment and all related submissions, the Board denied the Taxpayer's Motion on October 21, 2024. *MTAB Dkt. 13*. The MTAB hearing was conducted in Helena on November 14, 2024. The DOR requested a land value of \$15,100 and an improvement value of \$88,300, for a total value of \$103,400, and the Taxpayer requested the Board uphold the CTAB's determination of value of \$67,962. *MTAB Hr'g Tr. 132:7-13*. The following were present at the MTAB hearing:

- a. Kenneth O'Brien, Representative/Witness; Jeff O'Brien, Witness.
- b. Nicholas Gochis, DOR Counsel; Danielle Pease, DOR Counsel; Dawn Cordone, Area Manager; Andrew Pritchard, Lead Appraiser; and Jake Thiessen, Modeler.

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

The Plaza West Commercial Condominium Complex (Plaza West Complex) consists of five separate condominium units. *MTAB Hr'g Tr. 11:12-15*. The valuations of all five of the units were appealed together, and Mr. Ken O'Brien represented the owners of all five of the units at the MTAB hearing for the 2023/2024 valuation cycle. Although each unit has a separate geocode and separate owners in most instances, MTAB heard all five appeals together for the convenience of the parties and ease of administration. The five units that comprise the Plaza West Complex are as follows:

- a. 136 1<sup>st</sup> Ave. W, geocode 07-3966-18-1-53-06-7136, owned by Hash Revocable Trust, C. Mark and Therese F. Hash, and Anne Biby (Unit 136);
- b. 130 1<sup>st</sup> Ave. W, geocode 07-3966-18-1-53-06-7130, owned by Maxine O'Brien (Unit 130);

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- c. 132 1<sup>st</sup> Ave. W, geocode 07-3966-18-1-53-06-7132, owned by Maxine O'Brien (Unit 134);<sup>1</sup>
- d. 128 1<sup>st</sup> Ave. W, geocode 07-3966-18-1-53-06-7128, owned by White Swan Properties LLC (referred to in this opinion as "Subject Property" or "Unit 128"); and
- e. 126 1<sup>st</sup> Ave. W, geocode 07-3966-18-1-53-06-7126, owned by Wicked Weasel LLC (Unit 126).

Because all of the appeals were heard at the same hearing, there is one transcript for all of the units. Much of the testimony and several of the exhibits submitted by both the Taxpayer and the DOR apply to all of the units. Because each property has a separate geocode and separate owners, each unit was separately appealed, and MTAB is issuing separate opinions for each unit.

### FINDINGS OF FACT

1. To whatever extent the following findings of fact may be construed as conclusions of law, they are incorporated accordingly.
2. The Subject Property is a commercial property owned by White Swan Properties, LLC. *Ex. T.* The Subject Property is located at 128 1<sup>st</sup> Ave. W, Kalispell, Montana and is also identified by its geocode 07-3966-18-1-53-06-7128. *Id.* The Subject Property is part of the Plaza West Complex and is sometimes referred to as Unit 128. *Ex. I.*
3. The DOR valued the Subject Property at \$125,100 for the 2023/2024 appraisal cycle, allocating \$13,608 to the land and \$111,492 to the improvements. *Ex. Q.* The Taxpayer filed an AB-26, Request for Informal Classification and Appraisal Review, requesting a total value for land and improvements of \$61,501. *Ex. R.* The DOR partially granted the Taxpayer's request by lowering

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<sup>1</sup> Mr. Ken O'Brien testified that there is not an actual unit 132 in the building and that what has been called Unit 132 actually refers to unit 134 within the building. For this reason, there are references to both unit 132 and unit 134 in the record; however, both references refer to the above described Unit 134.

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the Subject Property's value from \$125,100 to \$103,400. *Ex. S, T.* The Taxpayer appealed the DOR's valuation to the CTAB on February 7, 2024, requesting a total valuation of \$61,500 for the land value and improvements. *MTAB Dkt 3.* The Taxpayer introduced an appraisal prepared by Jeff O'Brien at the CTAB hearing, which valued the Subject Property at \$67,962. *Id.* The CTAB partially granted the Taxpayer's request and reduced the value of the Subject Property to \$67,962. *Id.* The DOR appealed the CTAB decision to MTAB, requesting a land value of \$15,100 and an improvement value of \$88,300, for a total value of \$103,400. *MTAB Hr'g Tr. 13:7-13.* The Taxpayer requested the Board uphold the CTAB's determination of value of \$67,962. *Id.*

4. Taxpayer Representative, Ken O'Brien, testified that the Subject Property had been valued using the income approach for the last ten years, and that the basement had not been included in the DOR's value because it was not in compliance with the fire code. *MTAB Hr'g Tr. 11:1-21.* He testified that the building next door (Neighboring Building) was built using the same plans, construction materials, and contractor. *Id.* The Plaza West Complex and the Neighboring Building are similar and appear to be one complex but are separate. *Id.* The Plaza West Complex, which houses the Subject Property, has five offices, while the Neighboring Building has seven offices. *Id.* Mr. Ken O'Brien testified that the DOR valued both buildings at \$697,000 in the 2021/2022 valuation cycle. *Id.* He further testified that the building owners condominiumized the Plaza West Complex, which means the units must be appraised separately and independently of each other. *Id.*
5. Mr. Ken O'Brien used Unit 130 in his testimony by way of example because it is the largest unit but stated that his testimony for that unit applied equally to all five of the units, including the Subject Property. *MTAB Hr'g Tr. 11:22-12:6.* Mr. Ken O'Brien further testified that the condominiumization of the units triggered a mid-cycle DOR reappraisal of the units, which resulted in Unit 130 being valued at \$401,000 using the income approach, using a Potential

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Gross Income (PGI) of \$20.50 per square foot for 2022. *MTAB Hr'g Tr. 11:17-12:6*. Mr. Ken O'Brien testified that the owner of Unit 130 requested an informal review of that property, which resulted in the DOR reducing the PGI from \$20.50 to \$15.50 per square foot. *MTAB Hr'g Tr. 12:24-13:12*. Mr. Ken O'Brien further testified that during that informal review, the DOR valued the basement for the first time in the building's history. *Id.* The basement was valued at \$8.75 per square foot, which, when combined with the first-floor value, came to a total of \$474,000 for Unit 130, which was greater than the initial value. *Id.* The owner of Unit 130 appealed that decision to the CTAB, and after a hearing, the CTAB reduced the value of that property to approximately \$145,000 for 2022. *MTAB Hr'g Tr. 14:2-24.*<sup>2</sup> The DOR had valued the Subject Property at \$96,500, and the owner of the property did not appeal that decision. The DOR did not appeal the CTAB's decision for any of the Plaza West Complex appeals for the 2021/2022 valuation cycle. *MTAB Hr'g Tr. 14:2-24*.

6. For the 2023/2024 valuation cycle, the DOR originally valued the Subject Property at \$125,100 using the income method. *Ex. Q*. The DOR used a PGI rate of \$23.75 per square foot, which consisted of \$14.75 per square foot for the top floor and \$9.00 per square foot for the basement. *Ex. 10, Q; MTAB Hr'g Tr. 15:13-17*. After an informal review, the DOR changed the valuation method from the income method to the cost method, which reduced the overall value of the Subject Property from \$125,100 to \$103,400. *Ex. Q, T*.
7. At the CTAB hearing, Mr. Ken O'Brien argued that the DOR should be equitably estopped from using the cost method to value the Subject Property because the law does not permit the DOR to change appraisal methods, and the Taxpayer did not have time to get a cost appraisal of their own. *MTAB Hr'g Tr.*

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<sup>2</sup> This opinion includes some discussion of Unit 130 by way of example to illustrate how the value of all 5 of the units in the Plaza West Complex were adjusted throughout the last two cycles. Mr. Ken O'Brien used Unit 130 as an example and did not provide specific figures for each unit, although the same changes were applied to all units throughout the appeal process.

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16:15-17:23. He also argued that because the CTAB ruled that the DOR could not value the basement at the CTAB hearing for the previous cycle and because the DOR did not appeal that decision, that decision was binding in future years based on the doctrines of collateral estoppel and res judicata. *Id.*

8. Mr. Ken O'Brien argued that Mont. Code Ann. § 15-8-111 requires all commercial condo properties to be valued using the income approach. *MTAB Hr'g Tr. 28:7-20*. He further argued that comparable sales may not be used in any way because nothing in the statute permits the use of comparable sales in valuing commercial condos. *Id.* Additionally, he contended that the statute states that if there is insufficient information to use the income approach, then the DOR must use the cost approach to value such property. *Id.*
9. Mr. Ken O'Brien argued that the Board's prior decision in *Beaudette*, which stated that the doctrine of collateral estoppel was inapplicable in that case, is distinguishable from this case because the facts are completely different. *Edward G. Beaudette v. State of Montana, Department of Revenue, PT-2017-35; MTAB Hr'g Tr. 28:20-29:5*. He also disagreed with the DOR's argument that a new appraisal negated the CTAB's decision in the prior cycle. *MTAB Hr'g Tr. 29:6-19*. Mr. Ken O'Brien argued that the *Beaudette* decision applied to the value, whereas the Taxpayer in this case was arguing that the DOR could not appraise the basement in the first place. *Id.*
10. Mr. Ken O'Brien further argued that the DOR's interpretation leads to an absurd result and that no state agency can pass a regulation that nullifies a statute or rule of law. *MTAB Hr'g Tr. 29:18-25*. He argued that the portions of Mont. Admin. R. 42.20.108 and 42.20.109, which require an appraiser to consider past, present, and future rentals of a property, only apply when there has been a request for review or appeal. *Id.*



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11. Mr. Ken O'Brien argued that the law mandates that the Taxpayer's appraisal be used and that the DOR had an obligation to get the information needed to value the Subject Property using the income method. *MTAB Hr'g Tr. 30:12-31:13*. He also argued that the sole issue that may be determined in this appeal is whether the PGI of \$12.59 per square foot used in the Taxpayer's valuation is justifiable. *Ex. 9, N; MTAB Hr'g Tr. 30:12-31:13*. Mr. Ken O'Brien used the PGI of \$12.59 per square foot because the Plaza West Complex units and the Neighboring Building units rented for \$10 to \$11 per square foot. *MTAB Hr'g Tr. 20:5-22*. Mr. Ken O'Brien testified that one of the units was renting for \$12.59 per square foot, which included \$2.00 per square foot for utilities, so he felt that was a justifiable rental amount. *Id.*
  
12. Mr. Jeff O'Brien, a Certified Public Accountant, performed the appraisals for the owners of each of the five units of the Plaza West Complex. *Ex. 9, N*. Mr. Jeff O'Brien is the son of Mr. Ken O'Brien and Maxine O'Brien, the owner of two units in the Plaza West Complex. *MTAB Hr'g Tr. 12:8-20*. Mr. Jeff O'Brien's business rents one of the units owned by Maxine O'Brien. *Id.* His firm collects the rents for the Plaza West Complex and does the bookkeeping for the condominium association. *MTAB Hr'g Tr. 34:17-35:2*.
  
13. In performing the appraisals, Mr. Jeff O'Brien reviewed Mont. Code Ann. § 15-8-111 and Mont. Admin. R. 42.20.108 and 42.20.109. *MTAB Hr'g Tr. 35:12-36:14*. He used the computation sheet the Taxpayer received from the DOR to ensure his calculation mirrored that of the DOR. *Id.* He used the PGI supplied to him by Mr. Ken O'Brien of \$12.59 per square foot. *MTAB Hr'g Tr. 36:19-37:5*. Mr. Jeff O'Brien analyzed the rents from the Neighboring Building, which were provided by the owner of that building, as comparable properties. *MTAB Hr'g Tr. 37:19-23*. Mr. Jeff O'Brien originally used the actual expenses of the units in his appraisal but changed it to use the DOR's expenses when presenting the appraisal to the CTAB. *Ex. 15; MTAB Hr'g Tr. 38:24-39:13*.

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14. Mr. Jeff O'Brien testified that he did not include the value of the basement in his appraisal because a discussion with the fire marshal, as well as a letter from an attorney regarding the adjoining building, left him with the impression that several changes would need to be made for the basement to be occupied. *MTAB Hr'g Tr. 40:4-41:13*. He further testified that the only way to access the basement is through the main office space of the first floor, so there would be no way to rent the basement separately from the upstairs office space. *Id.*
15. Mr. Jeff O'Brien argued that the statute requires the appraisal to be performed using the income approach if the information is available, and because he had the income information from the Plaza West Complex properties, he did not conduct a cost appraisal. *MTAB Hr'g Tr. 44:14-22*.
16. DOR Lead Appraiser, Andrew Pritchard, stated that his testimony applied to all five of the units in the Plaza West Complex. *MTAB Hr'g Tr. 54:6-8*.
17. Mr. Pritchard testified that the DOR appraises commercial properties every two years. *MTAB Hr'g Tr. 52:24-53:12*. The lien date for the 2023/2024 valuation cycle is January 1, 2022. *Id.* The DOR values all properties statewide as of the lien date each valuation cycle. *Id.*
18. The DOR conducted an interior field review of the units within the Plaza West Complex in July of 2022. *MTAB Hr'g Tr. 53:13-25*. Mr. Pritchard testified that some of the units had workspaces and storage in the basement, and Unit 136 had a conference room in the basement. *Id.*
19. When valuing commercial condominiums, the DOR is required to use either the income approach or the cost approach. *MTAB Hr'g Tr. 54:14-55:22*. If the DOR has sufficient relevant income data, they will use the income approach when valuing such properties. *Id.* The DOR develops its income models using data provided voluntarily by property owners. *MTAB 57:15-19*.

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20. If the DOR does not have sufficient relevant income data, they must use the cost approach. *MTAB Hr'g Tr. 54:14-55:22*. The DOR's commercial office model for Flathead County was developed based on income information voluntarily provided by 49 commercial property owners from 2018 to 2021. *MTAB Hr'g Tr. 61:13-23*. Mr. Pritchard testified that the DOR used the cost approach to value the Subject Property because only one of those properties reporting income and expense information for 2020 and 2021 was a commercial condominium. *Id.* Mr. Pritchard further testified that particular property was in an inferior location as compared to the Subject Property, and it did not have a basement. *MTAB Hr'g Tr. 54:14-55:22, 61:6-23*.
21. The DOR initially valued the Subject Property at \$125,100 using the income approach to valuation. *Ex. Q*. During the informal review, the Taxpayer requested a value of \$61,501 based on an income approach analysis the Taxpayer conducted using their own rent rating with the remainder of the DOR's income model information. *Ex. 9, R; MTAB Hr'g Tr. 58:3-59:10*. The Taxpayer argued that the DOR's valuation under the income approach was overvaluing the basement and that the basement should not be valued. *MTAB Hr'g Tr. 58:3-59:10*. The DOR determined that the market data did not support the Taxpayer's valuation and was too low compared to market sales, which include the sales of the Subject Property and Unit 126 of the Plaza West Complex in 2021. *Id.*
22. Mr. Pritchard testified that after the informal review, the DOR decided to adjust the value of the property based partly on the Taxpayer's concern that the basement was being overvalued on the income approach and because the DOR did not receive sufficient income information to use the income approach. *MTAB Hr'g Tr. 59:11-25*. In addition, Mr. Pritchard testified that when the DOR performed a sales ratio analysis on their cost approach values, the valuations of the Plaza West Complex units were in line with the 2021 sales

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prices of the Subject Property and Unit 126. *Id.* The DOR performs sales ratio analyses by comparing DOR valuations of properties to the sales prices of those properties that sold during the requisite timeframe to determine if their valuations are consistent with market activity. *Id.*

23. According to Mr. Pritchard, in addition to changing the valuation method from the income approach to the cost approach, the DOR changed the use type of the basement from office to storage and increased the depreciation attributed to the building. *MTAB Hr'g Tr. 60:1-25.* The DOR's determination letter, dated January 17, 2024, stated that the reason for the change was due to a change in the property information, but it did not specifically state that the valuation method had changed. *Ex. 8c, S; MTAB Hr'g Tr. 60:1-25.* Mr. Pritchard testified that the exclusion of that information was an error. *MTAB Hr'g Tr. 60:1-25.* He further testified that on February 9, 2024, the DOR provided the updated property record card to the Taxpayer, which showed all of the changes the DOR made to the property, including the change in valuation method. *Ex. T; MTAB Hr'g Tr. 61:24-62:11.*
24. Although the DOR used the cost approach to value the Subject Property, the updated property record also included the updated rent rating for the income valuation, even though the DOR did not ultimately use the income approach to value the property. *MTAB Hr'g Tr. 62:12-63:11.*
25. The cost approach values the property at what it would cost to replace the building with like quality and utility and then takes into consideration a loss in value over time. *MTAB Hr'g Tr. 63:12-65:11.* This is referred to as replacement cost new less depreciation (RCNLD). *Id.* The information the DOR uses to value a property using the cost approach comes from Marshall & Swift and RSMMeans. *Id.*

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26. Mr. Pritchard testified that the cost method analyzes the exterior and the interior wall costs, adjusting for building characteristics and applying a rate of approximately \$165 per square foot.<sup>3</sup> *Ex. M; MTAB Hr'g Tr. 64:1-24*. That figure was multiplied by the square footage of the first level for a value of \$105,720 rounded. *Id.* Then, the DOR analyzed the basement's interior and exterior wall costs, adjusting for the building characteristics. *Id.* These adjustments include a reduced interior finish, as well as the removal of heating, air conditioning, and plumbing from the calculation. *Id.* This change resulted in a rate of \$60.82, which was multiplied by the square footage of the basement for a total valuation of \$38,920 rounded. *Id.* Next, depreciation was calculated to reduce the total value by multiplying the total value by 47%, which is the remaining percent good to arrive at the unadjusted RCNLD. *Id.* The RCNLD is then multiplied by the county index, or location factor, and the economic condition factor, which recognizes the market on the cost approach to come to a total of \$85,350 rounded. *Id.* Then, the outbuildings and features, in this case the value of pavement at \$2,950, were added to the total, in addition to the land value of \$15,100, to come to a total cost of \$103,400. *Id.*
27. When the DOR values improvements using the cost approach, they use the sales comparison approach, also known as the market approach, to value land. *MTAB Hr'g Tr. 65:1-18*. The DOR valued the Subject Property's land using the model it developed based on sales in the Subject Property's neighborhood in 2020 and 2021. *Ex. K; MTAB Hr'g Tr. 65:1-18*. Mr. Pritchard testified that they verified the land value of the Subject Property with an abstraction of the sales prices of the Subject Property and Unit 126, the two units that sold in late 2021. *Id.* Mr. Pritchard explained that an abstraction involves subtracting the improvement value from the overall sales price for each of the units to reach a value for the land, which is used to compare the land valuation assigned to the Subject Property using the DOR's land model. *Id.*

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<sup>3</sup> Mr. Pritchard's testimony used Unit 130 as an example. The values presented in this paragraph are for the Subject Property and are taken from Exhibit M.

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28. Mr. Ken O'Brien stipulated that the DOR's model was done in conformity with DOR's modeling procedures. *MTAB Hr'g Tr. 86:24-87:10.*
29. Although the DOR does not use the sales comparison approach to value commercial property improvements, the DOR analyzes comparable sales in the area to validate and support the DOR's valuation under the cost approach. *Ex. B; MTAB Hr'g Tr. 66:8-69:21.* The DOR analyzed the sales prices of six comparable properties to support their valuation of the Subject Property under the cost approach. *Id.* The sales of the Subject Property and Unit 126 in late 2021 were included as comparable sales. *Id.*
30. When the Taxpayer submitted their appraisal for the Subject Property, they also submitted income and some expense information to the DOR. *MTAB Hr'g Tr. 72:6-74:5.* The Taxpayer's appraisal included some of the DOR's income and expense data from the model. *Id.* The Taxpayer did not provide any tax returns, lease agreements, management agreements, or other underlying documentation to support the income information they provided. *Id.*
31. Mr. Pritchard testified that the Taxpayer's income information was not in line with market data based on information other property owners voluntarily provided to the DOR. *MTAB Hr'g Tr. 72:6-74:5.* He further testified that he did not agree with the Taxpayer's appraisal because it was dated October 27, 2023, rather than January 1, 2022. *Id.* Additionally, the Taxpayer's appraisal reduced for vacancy when the Taxpayer did not have an actual vacancy. *Id.* Mr. Pritchard testified that the mixture of actual property information with DOR's market data produced an unreliable income valuation, which was less than half of the sales price data the DOR gathered from comparable sales. *Id.*
32. The DOR prepared an income comparison to compare the DOR's income approach valuation with the Taxpayer's appraisal, which, according to Mr. Pritchard, indicated that the Taxpayer's income information was not supported

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by the market. *Ex. J; MTAB Hr'g Tr. 74:15-75:7*. He testified that the indicated capitalization rate is developed by net operating income divided by sales price.

*Id.* Mr. Pritchard further testified that when they divided the Taxpayer's income information for the Subject Property and Unit 126 by the sales prices of those units in late 2021, the resulting capitalization rate was approximately 4%.

*Id.* The DOR used a capitalization rate of 7.5%, and the higher the capitalization rate, the lower the value. *Id.* Mr. Pritchard testified that nothing supported a capitalization rate of 4% when the DOR reviewed various models.

*Id.* According to Mr. Pritchard, this demonstrated that the information provided by the Taxpayer was below market. *Id.*

33. DOR Area Manager, Dawn Cordone, testified that when the DOR receives an AB-26 Request for Informal Review, they review the property owner's concerns and any documentation the property owners provide to support their request for reduction. *MTAB Hr'g Tr. 92:18-21*. She further testified that she disagreed with the Taxpayer's position that the basement has no inherent value because it is usable and is being used for storage and includes an informal conference room. *MTAB Hr'g Tr. 93:7-16*. To address the Taxpayer's concerns, the DOR reduced the utility of the basement area and reviewed the income model and cost information. *MTAB Hr'g Tr. 93:20-94:7*. Because there was insufficient income data to use the income approach to valuation, the DOR switched to the cost approach to value the property. *Id.*

34. Ms. Cordone testified that the Taxpayer did not submit income and expense information to the DOR for use in its models. *MTAB Hr'g Tr. 92:4-17*. Submission of income and expense data for use in DOR's models is optional. *Id.* Mr. Pritchard testified that the Taxpayer provided income and expense information for the Neighboring Building. *MTAB Hr'g Tr. 123:15-18*. He further testified that during an appeal for the Neighboring Building, the DOR requested income and expense information from that property owner but did not receive it. *MTAB Hr'g Tr. 73:1-3*.

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35. Ms. Cordone testified that the income valuation the Taxpayer submitted is not an actual appraisal. *Ex. N; MTAB Hr'g Tr. 95:11-96:21*. Ms. Cordone testified that the Taxpayer blended information specific to the Subject Property with information from the DOR's model to calculate the value of the Subject Property. *Id.* In addition, the appraisal refers to the PGI as projected gross income rather than potential gross income, but removes the vacancy percentage, which is actually what the DOR refers to as effective gross income (EGI). *Id.* She argued that using the blended Taxpayer specific information with the DOR's income model information would create inequity among taxpayers. *Id.* For that reason, this is not how the DOR adjusts taxpayers' values. *Id.*
36. Ms. Cordone testified that the Neighboring Building is not identical to the Plaza West Complex because although they are close in age and similarly constructed, the Plaza West Complex has been condominiumized. *MTAB Hr'g Tr. 96:22-97:25*. She testified that they are not identical because "the sum of the parts is always worth more than the sum of the whole." *Id.* She compared it to land sales in that selling one twenty-acre parcel of land would yield a lesser dollar amount than selling four five-acre parcels of land. *Id.* She argued that filing condominium declarations can increase the value of the property due to the desirability in the market for businesses to own their units rather than rent them. *Id.* She testified that this is supported by the sales of the Subject Property and Unit 126 in 2021. *MTAB Hr'g Tr. 98:1-3*.
37. Ms. Cordone testified that it is typical for appraisers to look at sales in an area when valuing a property using the cost approach. *MTAB Hr'g Tr. 98:11-13*. She stated this is because the DOR is required to value properties at one hundred percent of market value. *MTAB Hr'g Tr. 98:15-99:15*. She testified that a good appraiser will always look at all three approaches to valuation: the cost approach, the income approach, and the sales comparison (or market) approach. *Id.* Although the DOR does not use the sales comparison approach to



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value commercial properties, rent ratings are developed based on market data and capitalization rates are developed based on commercial property sales. *Id.* Additionally, depreciation and economic condition factors are market adjustments. *Id.* Ms. Cordone testified that the 2021 sales prices of the Subject Property and Unit 126 supported the DOR's adjustments to the Subject Property during the informal review. *Id.*

38. When asked about the valuation of the Neighboring Building, Ms. Cordone stated that although office spaces in that building and the Subject Property may be able to charge the same market rent, the capitalization rates would be different. *MTAB Hr'g Tr. 101:7-102:8*. She testified that focusing on the rent rate alone is focusing on one part of a multiple part equation, and the DOR must look at what the market will support when valuing properties. *Id.* She stated that the DOR must value property at one hundred percent of market value. *Id.* She further stated that the Neighboring Building did not sell, but two units in the Plaza West Complex did, and those sales support the DOR's value of the Subject Property. *Id.*

### JURISDICTION AND STANDARD OF REVIEW

39. 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. Mont. Code Ann. § 15-2-301.
40. 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, 370 Mont. 270, 275, 303 P.3d 1279, 1282.

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41. 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**

42. To whatever extent the following conclusions of law may be construed as findings of fact, they are incorporated accordingly.
43. "With respect to taxable real property and improvements thereon, the decision of a county tax appeal board shall be final and binding unless reversed or modified upon review by the Montana tax appeal board. If the decision of the county tax appeal board is not reviewed by the Montana tax appeal board, it shall be final and binding on all interested parties for all subsequent tax years unless there is a change in the property itself or circumstances surrounding the property which affect its value. Statutory reappraisal by the department of revenue pursuant to 15-7-111, MCA, is a circumstance affecting the value of real property and improvements thereon." Mont. Admin. R. 2.51.307(4).
44. "All taxable property must be appraised at 100% of its market value...." Mont. Code Ann. § 15-8-111(1).
45. "Subject to subsection (5)(c), if sufficient, relevant information on income is made available to the department, the department shall use the income approach to appraise commercial condominium units. Because the undivided interest in common elements contributes directly to the income-producing capability of the individual units, the department is not required to separately allocate the value of the common elements to the individual units being valued." Mont. Code Ann. § 15-8-111(5)(b).
46. "...[I]f sufficient, relevant information on income is not made available for commercial condominium units, the department shall value condominiums using the cost approach. When using the cost approach, the department shall

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value the units individually and allocate only the common area elements to the units based on the percentage of undivided interest in the condominium declaration.” Mont. Code Ann. § 15-8-111(5)(c).

47. “[I]n connection with any appeal under [Mont. Code Ann. § 15-2-301], the Montana board is not bound by common law and statutory rules of evidence or rules of discovery and may affirm, reverse, or modify any decision. To the extent that this section is in conflict with the Montana Administrative Procedure Act, this section supersedes that act.” Mont. Code Ann. § 15-2-301(5).
48. 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.*, 169 Mont. at 214, 545 P.2d at 1090. 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 v. Michunovich*, 149 Mont. 347, 353, 428 P.2d 3, 7 (1967).
49. 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.
50. “‘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)).

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51. 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 what has been inserted." *State v. Minett*, 2014 MT 225, ¶ 12, 376 Mont. 260, 263, 332 P.3d 235, 238; Mont. Code Ann. § 1-2-101.
52. 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.
53. "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)).
54. "[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, 58, 990 P.2d 767, 769.
55. "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).
56. "[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. 255, 266, 587 P.2d 1282, 1288 (1978).

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57. 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(5).
58. 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).
59. “Except as provided in subsection (3)(b) [relating to residential property], the Montana tax appeal board shall 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 Montana board does not use the appraisal provided by the taxpayer in conducting the appeal, the Montana board shall provide to the taxpayer the reason for not using the appraisal.” Mont. Code Ann. § 15-2-301(3)(a).
60. 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*, 281 Mont. 196, 208-09, 933 P.2d 815, 823 (1997).
61. “The department will apply an appraisal method for condominiums or townhomes, as defined in 70-23-102, MCA, in accordance with 15-8-111 and 15-8-511, MCA, which must provide for a separate assessment of each condominium or townhome unit.” Mont. Admin. R. 42.20.105(1).
62. “The income approach is used to value commercial condominium units when reliable income and expense data is available and the common elements of

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commercial condominiums are included in the individual unit values. When reliable income and expense data is not available, the cost or sales comparison approach may be used.” Mont. Admin. R. 42.20.105(3).

63. “When the cost approach is used to value residential and commercial condominiums, the department will value each unit individually and allocate the value of common area elements to the units based on the percentage of undivided interest in the condominium declaration, as required by 15-8-111(5)(c), MCA.” Mont. Admin. R. 42.20.105(4).
64. “When the department determines that the appropriate valuation method for appraisal of a commercial property is the income method, pursuant to ARM 42.20.107, then the department will estimate the market value of the property through application of an income approach to value formula,  $V = I/R$ , where: (a) "V" is the market value of the property to be determined by the department; (b) "I" is the property's net operating income (NOI) which shall reflect market rents defined in (2); and (c) "R" is the overall capitalization rate determined by the department as described in (6).” Mont. Admin. R. 42.20.108(1).
65. “For purposes of this rule, "market rent" means an amount of rent justified for a property in an area which is based on the department's analysis of comparable rental properties, and upon past, present, and projected future rent of the subject property. Additionally, the amount of rent paid by a tenant under a lease agreement is not solely determinative of market rent.” Mont. Admin. R. 42.20.108(2).
66. “The department develops income models each valuation cycle based on its analysis of income and expense information voluntarily submitted from commercial property owners. Collected income and expense information is reviewed and analyzed to determine typical market conditions and an accurate

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estimation of gross rents, vacancy and collection losses, and operating expenses.” Mont. Admin. R. 42.20.108(1).

67. “Additional sources for income and expense information may include commercial property tenants, lending officials, brokers, fee appraisers, publications, informal reviews and formal appeals with property owners, or from any other source deemed appropriate and reliable in the appraiser's professional judgment.” Mont. Admin. R. 42.20.108(1)(a).
68. “The department develops an overall capitalization rate for determining market value of a commercial property.” Mont. Admin. R. 42.20.108(6).
69. “Commercial properties that are sold under valid, arms-length transactions are used to calculate an overall capitalization rate by dividing each property's net income by its adjusted sales price.” Mont. Admin. R. 42.20.108(6)(a).
70. “The overall capitalization rate includes an effective tax rate (ETR). An ETR is calculated by multiplying a property's millage by its nominal tax rate to estimate the portion of the overall capitalization rate allocable to property taxes.” Mont. Admin. R. 42.20.108(6)(b).
71. “In mass appraisal, property taxes are treated as a component of the overall capitalization rate rather than as an allowable expense.” Mont. Admin. R. 42.20.108(6)(b)(i).
72. “Since market value is a component of calculating property taxes, utilizing ETR eliminates estimating property taxes before assessment is complete.” Mont. Admin. R. 42.20.108(6)(b)(ii).
73. “Upon available data, overall capitalization rates and ETR are developed by primary building type, property location, or a grouping of property locations.” Mont. Admin. R. 42.20.108(6)(c).

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74. “When using the income approach, the department will develop overall capitalization rates which may be according to use type, location, and age of improvements. Rates will be determined by dividing the net income of each property in the group by its corresponding valid sale price. The overall rate chosen for each group is the median of the rates in that group. The final overall rate must include an effective tax rate.” Mont. Admin. R. 42.20.109(1).

**DISCUSSION**

75. The DOR argued that the CTAB erred in granting the Taxpayer’s request for a reduction in value. For the reasons stated below, we reverse the CTAB’s determination and affirm the DOR’s valuation of the Subject Property.
76. The Taxpayer argued that the only issue to be decided in this appeal is whether the PGI of \$12.59 per square foot used in the Taxpayer’s valuation is justifiable. We disagree. The Board’s purpose in property valuation cases such as this is to resolve disputes between the taxpayer and DOR and determine the valuation of properties on appeal. Under Montana law, the Board may hear cases de novo and may affirm, reverse, or modify a CTAB decision.
77. The Taxpayer submitted a valuation prepared by their CPA witness, Mr. Jeff O’Brien. Under Montana law, the Board is required to consider an appraisal provided by a taxpayer if the appraisal meets the statutory requirements, but the Board is not required to adopt such an appraisal. We do not believe the valuation the Taxpayer presented constitutes an appraisal pursuant to Mont. Code Ann. § 15-2-301(3)(a) because it was performed more than six months after the valuation date and because it mixed actual Subject Property information with DOR model information in arriving at its value. However, the Board still considers all information submitted to determine if it represents credible evidence of value. After carefully considering the Taxpayer’s valuation, we decline to adopt it for the reasons stated herein.



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78. The Board agrees with the DOR that the Taxpayer's use of actual income and DOR expense information results in an unreliable value. Because the DOR performs mass appraisals, they cannot use a property's actual income and expense data to value that property. If they did, the DOR would be performing a separate appraisal for each commercial property based on that property's specific data. This is not feasible when the DOR is tasked with performing valuations for each property in the State of Montana. For that reason, the DOR uses mass appraisal methods as directed by Montana law, the International Association of Assessing Officers, and the Uniform Standards of Professional Appraisal Practice. Because we agree with the DOR that using a combination of the Taxpayer's actual data mixed with the DOR's income model data produced an unreliable value in the valuation submitted by the Taxpayer, we decline to adopt the Taxpayer's valuation.
79. In general, the DOR develops models based on income and expense information voluntarily submitted by property owners. The data they collect is used to determine market variables, including rent ratings, expenses, and vacancy and collections. The information is then used to determine market value for all commercial properties in that neighborhood under the income approach. The DOR follows this procedure statewide. If the DOR does not receive sufficient information to value a particular commercial property using the income approach, which can happen when there are not enough voluntary submissions of data to develop a model, the DOR must value the property using the cost approach.
80. The Taxpayer argued that when the DOR does not have sufficient information to value a property using the income model, they have an obligation to obtain it. The issue with this argument is that the DOR is only authorized to collect and use information submitted voluntarily by commercial property owners. The DOR cannot compel commercial property owners to submit their income and expense information for use in their models, nor can they obtain information

through methods other than voluntary submissions for the purpose of inclusion in the models. The DOR must work with the information property owners voluntarily provide. Because the DOR only received income information from one commercial condominium during the 2023/2024 valuation cycle, we believe the DOR correctly valued the property using the cost approach.

81. The Taxpayer argued that the DOR should not have valued the basement of the Subject Property. We disagree. We believe the basement has value regardless of the method used the DOR used to value the Subject Property. The question the Board must answer is how much value should be assigned to the basement. The DOR must value class four commercial property at 100% of its market value. The Taxpayer presented credible evidence that the basement spaces likely could not be rented separately from the main floor units. However, that does not prevent the Plaza West Complex unit owners from using the space for storage or other purposes, including as an informal conference room in the case of Unit 136. Under the cost approach, the basement is valued based on the cost to rebuild it as of the lien date, less depreciation. To address the Taxpayer's concerns over the restrictions for the basement's use, the DOR made certain changes to the property information. These changes include changing the basement use from office to storage, increasing the depreciation, reducing the interior finish, and removing the heating, air conditioning, and plumbing from the calculation of the basement's value. Additionally, the DOR also assigned a lower rent rating for the basement to account for its reduced utility, although the DOR ultimately did not use the income method to value the Subject Property.
82. The Taxpayer also argued that the DOR cannot use comparable sales in commercial valuations. However, the Board acknowledges that the DOR could not develop capitalization rates, calculate depreciation, and determine economic condition factors to use in valuing properties without reviewing comparable sales. Although the DOR does not value commercial properties

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using the comparable sales approach, they analyze comparable sales once they have valued commercial properties using other methods as verification that the valuations they are arriving at align with the market. For this reason, we believe the DOR correctly used comparable sales, including the sales of the Subject Property and Unit 126 in late 2021, to confirm the accuracy of their valuation of the Subject Property. We believe the sales prices of the Subject Property and Unit 126 in late 2021 represent good evidence of the market value of all of the Plaza West Complex units as of the statewide lien date of January 1, 2022.

83. The Taxpayer argued that the Neighboring Building, which appears to be identical, was valued much lower than the Subject Property. Because the Plaza West Complex was condominiumized, the DOR must value the units in it differently than it values the Neighboring Building under Montana law. The DOR argued that the individual units of the Plaza West Complex would collectively sell for more than the Neighboring Building would sell for due to the economies of scale. We agree with the DOR. The condominiumization of the Plaza West Complex means that the individual units can be owner occupied and can also be sold by their respective owners. In contrast, the Neighboring Building would likely sell to a different pool of buyers because it would sell as a single property with seven rentable units. For this reason, the factors used to calculate the value of the Neighboring Building using the income approach may be different than those used to calculate the Subject Property. The comparable properties used in confirming the value of the Neighboring Building would be different than the comparable properties used in confirming the value of the individual units of the Plaza West Complex. Thus, although the properties may look identical, there are enough significant differences that they must be valued differently under Montana law.
84. The Taxpayer argued that the DOR was prohibited from changing the method used to value the Subject Property under the doctrine of equitable estoppel. We

disagree. The DOR is tasked with valuing class four commercial properties at 100% of market value. If the DOR discovers errors or other issues during an informal review or appeal, the DOR must address those errors or issues in some way. Here, the DOR determined it did not have sufficient information to use the income approach to value the Subject Property because only one of the voluntary submissions of income information they received was from a commercial condominium. Additionally, that commercial condominium was in an inferior location and lacked a basement. Thus, the DOR switched to the cost method to value the Subject Property. If the DOR receives sufficient income information from voluntary submissions in a future cycle, the DOR may value the Subject Property using the income method. We understand the Taxpayer's frustration that the DOR's AB-26 Determination Letter dated January 17, 2024, did not specify that the method of valuation had changed from the income approach to the cost approach. However, the DOR provided a revised copy of the Property Record Card for the Subject Property on February 9, 2024, indicating that the property was valued using the cost method.

85. Additionally, the Taxpayer argued the DOR was prohibited from valuing the basement of the Subject Property under the doctrines of collateral estoppel and res judicata because the DOR did not appeal the CTAB decision from the prior valuation cycle wherein the CTAB rejected the DOR's valuation of the basement. We disagree. Montana Administrative Rule 2.51.307(4) states that a CTAB decision that is not appealed to MTAB is final and binding on all interest parties for subsequent tax years unless there is a change in the property or circumstances surrounding the property which affect its value. It goes on to clarify that statutory reappraisal is a circumstance that affects the value of a property. In other words, each valuation cycle stands on its own, and the DOR must value each class four commercial property at 100% of its market value each valuation cycle. For these reasons, we disagree that the DOR may not value the basement of the Subject Property.

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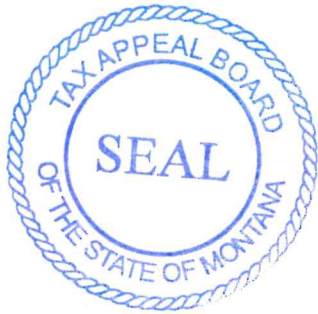
86. For the reasons stated herein, we reverse the CTAB's determination of value for the Subject Property and affirm the DOR's assigned value under the cost approach.

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**ORDER**

87. The DOR's appeal is granted, and the CTAB's decision is reversed.
88. The DOR is ordered to set the value of the Subject Property at \$15,100 for the land and \$88,300 for the improvements, for a total value of \$103,400 for the 2023/2024 valuation cycle.

Dated this 5th day of February 2025.



A handwritten signature in blue ink, appearing to read "Travis Brown", written over a horizontal line.

Travis Brown, Chairman

A handwritten signature in blue ink, appearing to read "Amie Zendron", written over a horizontal line.

Amie Zendron, 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. Mont. Code Ann. §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 February 5, 2025, to:

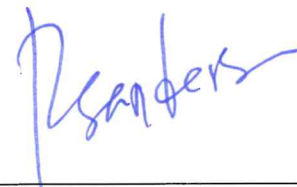
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