

STATE OF MICHIGAN
DEPARTMENT OF LICENSING & REGULATORY AFFAIRS
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
MICHIGAN TAX TRIBUNAL

Lowe's Home Centers, Inc.,
Petitioner,

v

MTT Docket No. 385768

Township of Marquette,
Respondent.

Tribunal Judge Presiding
Victoria L. Enyart

OPINION AND JUDGMENT

Petitioner, Lowe's Home Centers Inc., appeals the ad valorem property tax assessment levied by Respondent, Township of Marquette, against the real property owned by Petitioner for the 2010, 2011, and 2012 tax years.

A hearing was held on November 15, 2012, to resolve the real property dispute.

Michael B. Shapiro, attorney at Honigman Miller Schwartz and Cohn, LLP, appeared on behalf of Petitioner. Stacey Hissong and Roger K. Bauer, attorneys at Fahey, Schultz, Burzych, Rhoades, PLC, appeared on behalf of Respondent. Laurence G. Allen, MAI, was Petitioner's valuation witness. Bruce M. Closser, MAI, was Respondent's valuation witness.

Summary of Judgment

The parties' contentions and the Tribunal's findings of the subject property's 2010, 2011, and 2012 True Cash Values (TCVs), Assessed Values (AVs) and Taxable Values (TVs) are set forth below:

Petitioner's value contentions are:

Parcel No. 52-08-018-019-00			
Year	TCV	SEV	TV
2010	\$4,120,000	\$2,060,000	\$2,060,000
2011	\$3,740,000	\$1,870,000	\$1,870,000
2012	\$3,510,000	\$1,755,000	\$1,755,000

Values as determined by Respondent are:

Parcel No. 52-08-018-019-00			
Year	TCV	SEV	TV
2010	\$10,344,600	\$5,172,300	\$5,098,259
2011	\$10,343,400	\$5,171,700	\$5,171,700
2012	\$10,390,400	\$5,195,200	\$5,195,200

Respondent also presented an appraisal contending the values are:

Parcel No. 52-08-018-019-00			
Year	TCV	SEV	TV
2010	\$9,550,000	\$4,775,000	\$2,387,500
2011	\$9,850,000	\$4,925,000	\$2,462,500

The Tribunal's conclusions are:

Parcel No. 52-08-018-019-00			
Year	TCV	SEV	TV
2010	\$4,120,000	\$2,060,000	\$2,060,000
2011	\$3,740,000	\$1,870,000	\$1,870,000
2012	\$3,510,000	\$1,755,000	\$1,755,000

GENERAL PROPERTY DESCRIPTION

The subject property is known as Lowe's Home Center, Inc., and is located at 3500 US-41 West, Marquette Township, Marquette County, Michigan. It contains 139,410 square feet on 14.75 acres. It is a typical big box construction "built to suit" the Lowe's business model.

SUMMARY OF PETITIONER'S CASE

Petitioner presented testimony from its appraiser, Laurence G. Allen, MAI. Based on his experience and training, the Tribunal accepted Allen as an expert appraiser.

In support of its value contentions, Petitioner offered the following exhibit, which was admitted into evidence:

P1: An Appraisal of the subject property, prepared by Laurence G. Allen, MAI.

Allen has appraised big box stores for Wal-Mart, Target, K-Mart, and Lowe's for the property owners, for tax appeals, and for the Michigan Department of Treasury. He prepared an appraisal that determined the market value of the fee simple interest of the subject property. The appraisal utilized all three approaches to value: cost, market, and the income approaches.

Allen determined that the highest and best use of the subject property was a retail use. The identity of the actual user was not considered as the value of the real estate is not dependent upon the user.

The big box stores are not concerned about the market value of the stores constructed, but instead, design and build a store that will maximize sales and profits. The big box stores are constructed for the single user's specific business mode. When sold, they are converted to another use, demolished, or an investor will spend a considerable amount to reconfigure the space. Allen gave examples of several big box stores that

were five years old that were purchased and razed for the new owner to construct a building that meets its specific business prototype.

Allen was familiar with the sales of existing big box stores and was not aware of one that was not razed or substantially changed by the new owner to fit its own business model.

Allen identified 25 sales and offerings. He used 8 sales and 17 listings, and 9 Minnesota and Wisconsin listings that he considered in determining the value of the subject property. They ranged in sale price per square foot from \$15.07 to \$58.78.

Allen explained the important factors to take into consideration when making adjustments for differences in the sale properties. He stated that the biggest factors were changing market conditions and locations. Age and conditions were less of a consideration because purchasers would either demolish the improvements or make significant renovations. The population, traffic count, and median income are part of the consideration for determining the adjustment for location.

Allen's market adjustment was minus ten percent in 2008, 2009, and 2010. Allen determined that Marquette was superior in location only to Denton Township, Sale No. 6. The remainder of the sales was adjusted based on value differences in location as of each respective valuation date. When explaining the consideration for location adjustment, Allen testified:

Prior – in some of the prior cases I was looking at the – at the market conditions for the subject property as being the same as the comparables,

when market conditions for some of the comparables were different over the years they were for the subject. The more correct way is to look at market conditions in the particular location of the comparables. TR Vol 1, p 219.

The eight sales were adjusted for each of the three years in contention. Allen also provided an analysis of the comparable listings indicating the square feet, tenant(s), listing price per square foot for the year(s) the property was listed. He does a summary indicating the range of 17 listing prices per square foot, as well as the average for each of the tax years at issue. The range of listings for 2009 is \$13.20 to \$49.75 with an average asking price of \$30.29 per square foot. The range of listings for 2010 is \$10.92 to \$49.75 with an average asking price of \$26.71 per square foot. The range of listings for 2011 is \$13.66 to \$40.97 with an average asking price of \$26.21.

After analyzing the comparable sales, and adjusting for differences in amenities, as well as reviewing the listings, Allen concluded to \$30.00 per square foot, or \$4,180,000 as of December 31, 2009; \$27.00 per square foot, \$3,760,000 as of December 31, 2010; and \$25.00 per square foot, \$3,490,000 as of December 31, 2011, for the market value via the sales comparison approach.

Allen explained his income approach, indicating that the market is studied to determine the appropriate rental rates, prevailing occupancy levels, and typical expenses to determine the net operating income ("NOI"). The NOI is divided by the appropriate capitalization rate to provide an estimate of market value for the subject property.

Allen searched for warehouse big box stores that leased with an area larger than 50,000 square feet. Both build-to-suit and existing leases were considered. Allen also included leases from Wisconsin and Minnesota. Thirteen existing or offerings of building leases were considered with the dates ranging from 2005 to 2009. Six of the thirteen leases were offerings; they averaged \$4.68 per square foot. The actual leases averaged \$5.16 per square foot. The Wisconsin and Minnesota leases averaged \$44.80 per square foot. Allen utilized eight build-to-suit leases from 1999 to 2005 that averaged \$7.26 per square foot. There was also a re-lease study of big box stores that went vacant and were re-leased in the open market. Allen used the average build-to-suit lease rate and the average market (re)lease rate, with the difference being 47.21% reduction in value. When using the build-to-suit leases as comparables, Allen discounted the rate 35%.

Allen indicated that the built-to-suit rents represent the rent for custom-built space for a particular user. The market rent represents existing property that is available for lease or as leased. This is the basis for lower rents per square foot for existing buildings and the higher rent for the proposed construction of the build-to-suit properties.

Allen's final determination of the triple net lease per square foot is \$4.50 for December 31, 2009; \$4.25 for December 31, 2010; and \$4.00 for December 31, 2011. Vacancy and loss was an issue as Marquette does not have a survey for the county's retail market. Allen considered Lansing and Grand Rapids, as well as CoStar (a report issued by CoStar Group, a "real estate information company") and discussions with real

estate brokers. Allen concluded to 15% vacancy and credit loss. Operating expenses that are reimbursable to the investor include common area maintenance (“CAM”), property taxes¹, and insurance expenses. This does not include the management fee or a reserve for capital expenditures.

Allen determined that the NOI for 2009 is \$430,873 (\$403,014 and \$374,629 for subsequent years). The next step is to determine the overall capitalization rate. Allen’s source for the band of investment technique was RealtyRates.com, Korpacz Real Estate Investor Survey, and Investor Survey. The overall capitalization rate (“OAR”) extracted from offerings and sales were 9.37%, 9.34%, and 8.39%. Allen, after considering the various sources, concluded to an OAR of 10.50% (10.50% and 10.00% for the subsequent years). Allen then capitalized the NOI and deducted the leasing commission of 6%, for a conclusion of true cash value of \$3,920,000 (\$28.11 per square foot) as of December 31, 2009; \$3,660,000 (\$26.25 per square foot) as of December 31, 2010; and \$3,580,000 (\$25.67 per square foot) as of December 31, 2011.

Allen also prepared a cost approach to value, but it was not used as a primary indication of value; rather, it served as a check to the sales comparison and income approaches. Allen testified that the sales comparison approach was the most applicable technique to determine the fee simple value of the subject property. When questioned why the fee simple assumes that the subject property is available for occupancy at the time of purchase, Allen testified that fee simple interest is “ownership of all the bundle of rights, of all the rights of ownership subject to governmental powers, including taxation,

¹ The owner pays property taxes when the property is vacant.

eminent domain, police power and escheat.” TR Vol 1, p 159. Leased fee interest was defined as “the value of a property subject to specific terms and conditions of a lease.”

TR Vol 1, p 160.

SUMMARY OF RESPONDENT’S CASE

Respondent presented testimony from its appraiser, Bruce M. Closser, MAI.

In support of its value contentions, Respondent offered the following exhibits, which were admitted into evidence:

R-1 Property Record for the subject property.

R2: An Appraisal by Bruce M. Closser, MAI.

Closser also did the cost, sales, and income approaches to value, but testified that he relied on the income approach. He found that the Upper Peninsula has a stronger economic linkage to Wisconsin with little in common with Southeast Michigan. Closser states that the house prices are higher than most cities in southern Michigan and comparable to Wisconsin. The local median residential prices are at an all-time high. Wisconsin is closer for retail shopping than Lansing and Detroit, Michigan.

The economic conditions and store closings were discussed in Closser’s report. Home Depot and closures of 15 underperforming stores was compared with Lowe’s. Lowe’s did not close any stores during the recession or for the dates of value for the appeal. In October 2011, after opening 25 stores in 2011, Lowe’s announced that 20 underperforming stores would be closed in 15 states. Closser opined that the market sales should be of occupied big box stores, not dark stores that have lost occupants.

The highest and best use of the subject property is “continued operation as a Lowe’s retail store.” R-2, p 46. Closser searched for sales of big box home improvement stores that retained the same use after the sale. The ideal sale would be a big box home improvement sale to an investor that leases it back so the operation continues. No sales were found, however, that sold and continued the same use as the original owner.

Closser explained his selection of sales. Seventeen transactions were found, but no big box sales of occupied buildings were found. Sales of leased occupied stores from one investor to another were found. The investors lease the stores back to the retail operator in some instances. There are also sales of leased occupied stores from an owner to an investor and then leased back. Closser calculated the net operating income for the 17 sales.

Closser analyzed the sale prices and rental trends for urban versus smaller rural properties. The gross sale per square foot is influenced by location; the rural locations are 20% lower in rental rates. This resulted in location adjustments for rural or urban locations. Therefore, no traffic count, or median income for the area was considered.

Closser described the type of sales he was looking for as

. . . the highest and best use is continuation of the existing use, which is a home improvement store, we were looking for properties that were sold for continuation of their existing use. So the ideal sale would be the home improvement store that was sold under continuing use as a home improvement store. TR Vol 2, p 77.

When questioned on why he found it appropriate to use all leased-fee sales versus fee simple sales, Closser responded:

These are sales for continuation of the existing use, and in our opinion these were evidence that these leases were -- they were build-to-suit leases, they were at market terms and when -- when lease terms are at market the fee simple and the leased fee are the same. So we felt that these were the appropriate sales to use because they were the only sales that reflected a continuation of the existing use. TR Vol 2, pp 78-79.

Closser used six sales to determine the market value of the subject property. Three of the six sales were part of a large sale-leaseback transaction of the 178 Shopko stores (RET -28, 49, and 50). Closser was unable to verify the information and details of the sale-leaseback. Two of the remaining sales were tenants purchasing the property from the investor (RET 31 and 35). Sale RET-35 was a sale between investor groups.

Closser adjusted the sale-leasebacks -15% for market conditions for properties that sold before the December 31, 2009, tax date. RET-31 is the sale of a Wal-Mart that was leasing a building and constructed a large addition two years prior to the sale. Closser opined that Wal-Mart paid a premium because it had a weak bargaining position because of the expenditure for the addition. This sale was adjusted -15% for condition of the sale. The sales were all older than the subject property resulting in a +20% adjustment to all six of the sales. RET-35 was a Kohl's Store that was adjusted an additional -15% for the interior finish. Minus 20% adjustments were made to the two urban sales (RET-49 and 55).

Closser added four additional sales for the 2011 tax year. The market conditions improved, which resulted in a lower adjustment. RET-30 was adjusted for condition of

sale. The property was leased by Sam's Club and was purchased by Sam's Club, with three years remaining on its lease. Again, all of the comparable sales were older than the subject and were all adjusted 20%. Two Kohl's stores were adjusted -15% for interior finish (RET-29 and 35). The same 2010 sales with urban locations were again adjusted -20%.

The conclusions based on the sales comparison approach are: \$9,070,000 (\$65.50 per square foot) as of December 31, 2009, and \$9,910,000 (\$71.50 per square foot) as of December 31, 2010.

Closser placed the most reliance on the income approach. He stated

The subject property is not currently under lease. Leasing is, however, a common activity among big box home-improvement stores. The subject property could be leased at any time should Lowe's decide that it is in its best interest to sell the store to an investor and lease it back. R-2, p 83.

Six properties were analyzed to determine that the median rents per square foot ranged from \$4.92 to \$5.50 per square foot. Closser made adjustments to the Kohl's store -15% for the higher level of interior finish. The Home Depot in Ft. Wayne was adjusted -20% due its urban location. It was also adjusted +25% because it took over an existing K-Mart lease dated 1990. Closser opined that it was below market rent. All of the rental properties were also adjusted +20% because the subject property is newer construction.

Closser testified that the leases were 1990 to 1994, long-term build-to-suit leases. After adjustments, the leases averaged \$6.50 per square foot, which was used to determine

the annual rent for the subject property. Closser determined that the rents were flat and used the same adjusted \$6.50 for the 2010 and 2011 determination of value via the income approach.

The type of tenant results in a low risk for vacancy. Closser thus used 2% for vacancy and credit rate. Capitalization rates extracted from the six sales of the rental properties resulted in an overall rate of 9.0% for both years. Real estate investor surveys were also considered. The Real Estate Report, published by RERC and *The Real Estate Investor Survey*, by PwC resulted in an indicated overall rate of 8.95% as of December 31, 2009, and 8.75% as of December 31, 2010. Closser concluded to overall capitalization rates of 9.00% for December 31, 2009, and 8.90% as of December 31, 2010.

The income capitalization took the gross income, deducted 2% for vacancy and credit, and 2% of the effective gross income for management, to result in net operating income of \$864,800 for both years at issue. The overall capitalization rates were applied for an indicated market value via the income approach of \$9,600,000 (\$69.30 per square foot) as of December 31, 2010, and \$9,725,000 (\$70.20 per square foot) as of December 31, 2011.

Closser also did a cost approach but the parties agreed that the cost was not the driving influence for market value.

FINDINGS OF FACT

1. Subject property is located at 3500 US 41 West, Marquette Twp., Marquette County, Michigan, in the Upper Peninsula.
2. Subject property contains 139,410 square feet.
3. Subject property has a total of 14.75 acres.
4. Subject property is an owner-occupied build-to-suit big box store.
5. The specific occupant of the subject property should not influence the market value of the property.
6. The subject is not an income-producing property.
7. The subject property's location in the Upper Peninsula of Michigan was considered by both parties.
8. Sale-leaseback transactions are not arm's-length transactions.
9. Built-to-Suit leases are not accepted as arm's-length transactions without a detailed analysis.
10. Sales from one investment group to another investment group are not a fee simple transaction.
11. Petitioner did an analysis of build-to-suit leases and re-leases of big box stores.
12. Respondent placed the greatest weight on the income approach.
13. The sales comparison approach will be given the most weight.

Both parties presented appraisals authored by an MAI, the highest designation from the Appraisal Institute. Expert witness status is based on the appraiser's education, experience, skill, and training. Based on the MAI designation, both the appraisers were designated as experts in the appraisal field. The expert witness status does not automatically grant the witness or exhibits credibility or weight.

APPLICABLE LAW

The assessment of real and personal property in Michigan is governed by the constitutional standard that such property shall not be assessed in excess of 50% of its true cash value.

The legislature shall provide for the uniform general ad valorem taxation of real and tangible personal property not exempt by law. The legislature shall provide for the determination of true cash value of such property; the proportion of true cash value at which such property shall be uniformly assessed, which shall not . . . exceed 50% Const 1963, art 9, sec 3.

The Michigan Legislature has defined “true cash value” to mean:

the usual selling price at the place where the property to which the term is applied is at the time of assessment, being the price that could be obtained for the property at private sale, and not at auction sale except as otherwise provided in this section, or at forced sale. MCL 211.27(1); MSA 7.27(1).

The Michigan Supreme Court has determined that “true cash value” is synonymous with “fair market value.” See *CAF Investment Co v State Tax Commission*, 392 Mich 442, 450; 221 NW2d 588 (1974).

A proceeding before the Tax Tribunal is original, independent and de novo. MCL 205.735(1); MSA 7.650(35)(1). The Tribunal’s factual findings must be supported by competent, material and substantial evidence. *Antisdale v City of Galesburg*, 420 Mich 265, 277; 362 NW2d 632 (1984); *Dow Chemical Co v Department of Treasury*, 185 Mich App 458, 462-463; 452 NW2d 765 (1990). Substantial evidence must be more than a scintilla of evidence, although it may be substantially less than a preponderance of the evidence. *Jones & Laughlin Steel Corp v City of Warren*, 193 Mich App 348, 352-353; 483 NW2d 416 (1992).

“The petitioner has the burden of establishing the true cash value of the property....” MCL 205.737(3). This burden encompasses two separate concepts: (1) the risk of persuasion, which does not shift during the course of the hearing; and (2) the burden of going forward with the evidence, which may shift to the opposing party. *Jones & Laughlin* at 354-355.

Under MCL 205.737(1); MSA 7.650(37)(1), the Tribunal must find a property's true cash value in determining a lawful property assessment. *Alhi Development Co v Orion Twp*, 110 Mich App 764, 767; 314 NW2d 479 (1981). The Tribunal is not bound to accept either of the parties' theories of valuation. *Teledyne Continental Motors v Muskegon Twp*, 145 Mich App 749, 754; 377 NW2d 908 (1985). The Tribunal may accept one theory and reject the other, it may reject both theories, or it may utilize a combination of both in arriving at its determination. *Meadowlanes Limited Dividend Housing Association v City of Holland*, 437 Mich 473, 485- 486; 473 NW2d 636 (1991). The Tribunal finds that Petitioner's appraisal established the true cash value of the subject property.

The three most common approaches to valuation are the capitalization of income approach, the sales comparison or market approach, and the cost-less-depreciation approach. *Meadowlanes*, at 484-485; *Pantlind Hotel Co v State Tax Commission*, 3 Mich App 170; 141 NW2d 699 (1966), *aff'd* 380 Mich 390 (1968). The Tribunal is under a duty to apply its own expertise to the facts of the case to determine the appropriate method of arriving at the true cash value of the property, utilizing an approach that provides the most accurate valuation under the circumstances. *Antisdale*, p277. Pursuant to MCL 211.27(5), "the purchase price paid in a transfer of property is not the presumptive true cash value of the property transferred."

Petitioner correctly states that the true cash value of the subject property is based on value inherent in itself and is not affected by who owns it. The Michigan Supreme Court held in *Rose Bldg Co v Independence Township*, 436 Mich 620, 640-41 (1990):

The uniformity requirement of the Michigan Constitution compels the assignment of values to property upon the basis of the true cash value of the property and *not upon the basis of the manner in which it is held*. Noticeably absent from the statutory definition of “cash value” and those enumerated factors which an assessor must consider is any reference to the identity of the person owning an interest in the property or whether there are other parcels which are owned by the same taxpayer. MCL 211.27; MSA 7.27. In other words, *the fact of ownership is not a germane consideration in determining value*: (Emphasis added.)

The Constitution requires assessments to be made on property at its cash value. This means not only what may be put to valuable uses, but what has a *recognizable pecuniary value inherent in itself, and not enhanced or diminished according to the person who owns or uses it*. (Emphasis in original.)

Conclusions of Law

Petitioner’s and Respondent’s appraisers presented all three approaches to value. The appraisers were charged with determining the market value of the fee simple interest for the subject property.

Petitioner was able to explain and provide documentation for the sales comparison approach. Allen provided known listings and sales of big box stores throughout the state. He relied upon eight sales, as well as considering information on listings for each year of the appeal. This explained to the Tribunal the decline in asking prices over a three-year period. The substance was clear, in addition to Allen explaining the market

conditions; it was the documentation that gave Allen's report weight and credibility based on substance.

Allen proved that the build-to-suit leases were above market rent, as the original big box stores are all build-to-suit the business model for each particular user. The level of documentation and clear understanding of the difference between value-in-use and market value makes Allen's report clearly understood.

Allen did a cost approach but did not place any weight on it. The cost approach was used as a check to the other approaches. The income approach was not given as much weight as this is not an income-producing property. Allen relied on the sales comparison approach.

The subject property was built for Lowe's, and continues to be used as such. The Tribunal is not looking for the market value of a Lowe's property but the market value of a big box building. The big box store is described as follows:

1. A single-use store, typically between 10,000 and 100,000 square feet or more, such as a large book store, pet store, electronics store, or a toy store. (ICSC)
 2. A general merchandiser or category killer. General merchandisers like Wal-Mart, Costco, and Target offer a wide variety of deep-discounted prices. The product mix of these stores includes nearly everything shoppers need for their home, work, garden, garage, or car, as well as recreational items and apparel. Category killers like Office Depot, OfficeMax, Best Buy, and PetSmart offer a deep selection in a single category. (CB Richard Ellis)
 3. A large stand-alone store that specializes in a single line of products, such as home improvements, toys or office supplies; no-frills discount stores that sell in volume and category killers are often big-box stores. (CoStar)
- Appraisal Institute, *The Dictionary of Real Estate Appraisal*, (Chicago: 5th ed, 2010), p 19.

Petitioner made the point clear that the secondary uses of a big box store result in a lower market value and rent than the original construction cost. The reason is the big box stores are all build-to-suit, custom built to meet the design, location and physical requirements of one major user's business needs. The secondary use may not be the same use as the original build-to-suit owner.

Petitioner, through the use of listings for multiple years, was able to show the decline in value for the secondary user. The rents for the build-to-suit users were higher than the secondary user leases resulting in a lesser market value. The resale of big box stores indicates that the improvements are razed or extensively renovated or converted to a multi-tenant use by a developer.

Closser prepared a sales comparison approach. He testified that none of his sales were fee simple transactions. All of the sales were in three categories: sale-leaseback, leased fee, and tenant purchased the remainder of its lease.

The appraisal problem was addressed in *The Appraisal Journal*², Winter 2009, *You*

Can't Get the Value Right if You Get the Rights Wrong. The abstract states:

Market value opinions of the fee interest in custom-built commercial properties present challenging problems. In these assignments, appraisers must understand the nuances between value in use and market value, and fee simple estates and leased fees. These built-to-suit properties have rents, sale prices, and overall capitalization rates that are not representative of the market for second generation users. The cost to build and worth to the initial owner or tenant well exceeds what the property would be able to command on the market for either lease or sale.

² The appraisers are both MAI through the Appraisal Institute. Based on the testimony and evidence it appears as if the article was considered by Allen and not by Closser.

This article reviews the three traditional valuation approaches and discusses the misconceptions that lead to the wrong value for the property fee interest.

The appraisal assignment requires the appraiser to value the subject property as if sold, available to be leased at market rent for the fee simple interest. Only one of the appraisers valued the fee simple interest. The other appraiser provided an opinion of the value in use of the leased fee estate based on build-to-suit obsolete leases.

Respondent begins the appraisal with determining the highest and best use as “. . . is continued operation as a Lowe’s retail facility.” R-2, p 46. He continues with “. . . it is our opinion that the improvements located on the subject site closely resemble the ideal improvements and therefore the subject building, as constructed on the site, represents the highest and best use of the property as improved.” R-2, p 56. It is clear throughout the appraisal that the highest and best use was the specific business located on the subject site.

The Tribunal finds that Closser’s value appears to be a value-in-use. This becomes more apparent in his approaches to value. The three types of transactions that were searched are: 1. Sales from one investor to another of occupied buildings under lease, 2. Sale and leasebacks of owner-occupied properties that were not leased previously, and 3. Sales from an investor to the tenant of an occupied property under lease.

The Tribunal finds that the three types of transactions sought out by Closser would not be considered fee-simple transactions. Investor-to-investor sales are a function of the

lease rent amount, terms, and tenant, not the market value of the real estate. This type of transaction is considered a leased-fee. Sale-leasebacks are a function of financing, not fee simple interest, as the owner-occupant of a building needs an influx of cash, but does not want to leave the building, the building is sold to an investor and the owner leases the property back from the investor. This is not considered a fee-simple transaction, but rather is simply a function of finance. The last transaction that was considered is the sale when a current tenant purchases the building that it occupies. Closser made no adjustments or made any determination that the three transactions are leased-fee transactions. No adjustments were made for the value-in-use versus the fee simple.

Fee simple estate is:

Absolute ownership unencumbered by any other interest or estate, subject only to the limitations imposed by the governmental powers of taxation, eminent domain, police power and escheat. Appraisal Institute, *The Dictionary of Real Estate Appraisal*, (Chicago: 5th ed, 2010), p 78.

Leased fee interest is:

A freehold (ownership interest) where the possessory interest has been granted to another party by creation of a contractual land-lord-tenant relationship (i.e., a lease). *The Dictionary of Real Estate Appraisal*, (Chicago: 5th ed, 2010), p 111.

Closser testified that the sales he selected were all leased fee transactions. He did not use properties that were for sale and closed because the subject property is occupied. The result left eight sales that were sale-leaseback, transfers of the

leased fee interest from one investor to another investor, and sales of landlord to the tenant.

The Tribunal, in *Midland Cogeneration Venture v City of Midland*, MTT 242614, addressed sale-leaseback agreement as follows:

A sale-leaseback agreement was defined in *Real Estate Taxation. A Practitioner's Guide*, Second Edition, 1998: "Leasing transactions serve as a substitute for traditional financing. In a typical sale-leaseback, the owner of the property sells the property to an investor and immediately leases the property back." The lease assures the investor a return over and above the cost to it of financing. It is a financing transaction, not a sale.

The sale-leaseback transaction at issue was a financing transaction and, as such, may not be a reliable indicator of the property's true cash value.

Sale-leaseback is currently defined as:

A financing arrangement in which real property is sold by its owner-user, who simultaneously leases the property from the buyer for continued use. Under this arrangement, the seller receives cash from the transaction and the buyer is assured a tenant. *The Dictionary of Real Estate*, (Chicago: 5th ed, 2010), p 175.

Closser went through the adjustments to the sales and conditions of the sale.

The sales were adjusted for market conditions. The only adjustment for condition of the sale was the Wal-Mart sale (RET-31), age was +20% (the subject property was one year old at the first tax date). The selection of sales and adjustments was an exercise in futility. Not one sale was an arm's-length transaction, voiding the whole purpose of the sales comparison approach, which is to determine the fee simple interest of the subject property. Respondent's sales comparison approach is given no weight or credibility.

Closser relied on the income approach. The appraisal states that “The subject property could be leased at any time should Lowe’s decide that it is in its best interest to sell the store to an investor and lease it back.” R-2, p 83. He selected six leased fee properties that were also used in the sales comparison approach.

Although Closser testified that the rents were “flat,” the rents were adjusted +20% for interior finish, and age. RET-57 was considerably below market because Home Depot took over an existing 1990 K-Mart lease at a low fixed rent, it was adjusted up by 25%. This Tribunal fails to find that RET-57 was any different than the other five leases that transpired in the same time period, did not have escalation clauses, and were therefore fixed rent.

Respondent’s appraisal fails to indicate that the six leases were build-to-suit, prior to construction of the buildings, and that the leases were from 1990-1994. It was not brought out until Closser’s testimony that the leases were not current market leases. The Tribunal finds that this is deceptive, as well as inapt to use build-to-suit leases that were entered into in a different decade and not adjusted for market conditions or a discussion that the leases could be (based on Petitioner’s study) above market. The lack of any contemporary leases that would indicate the current market rent for the subject property leaves this Tribunal in a quandary as to why an MAI would blatantly mislead the reader.

MCL 211.27 states:

- (1) As used in this act, “true cash value” means the usual selling price at the place where the property to which the term is applied is at the time of the assessment, being the price that could be obtained for the property at private sale, and not at auction sale except as otherwise provided in this section, or at forced sale. The usual selling price may include sales at public auction held by a nongovernmental agency or person if those sales have become a common method of acquisition in the jurisdiction for the class of property being valued. The usual selling price does not include sales at public auction if the sale is part of a liquidation of the seller’s assets in a bankruptcy proceeding or if the seller is unable to use common marketing techniques to obtain the usual selling price for the property.

Market value is described as:

The most probable price, as of a specified date, in cash, or in terms equivalent to cash, or in other precisely revealed terms, for which the specified property rights should sell after reasonable exposure in a competitive market under all conditions requisite to a fair-sale, with the buyer and seller each acting prudently, knowledgeably, and for self-interest, and assuming that neither is under undue duress. Appraisal Institute, *The Appraisal of Real Estate*, (Chicago: 13th ed, 2010), p 23.

Value in exchange is described as:

The estimated amount for which a property should exchange on the date of valuation between a willing buyer and a willing seller in an arm’s-length transaction after proper marketing wherein the parties had each acted knowledgeably, prudently, and without compulsion. Appraisal Institute, *The Appraisal of Real Estate*, (Chicago: 13th ed, 2010), p 23. International Valuation Standards Committee, *International Valuation Standards*, 8th ed (London, 2007) 76.

Value in use is described as:

The value of a property assuming a specific use, which may or may not be the property’s highest and best use on the effective date of the appraisal. Value in use may or may not be equal to market value but is different conceptually. *The Dictionary of Real Estate*, (Chicago: 5th ed, 2010), p 206.

The Tribunal finds that a proper income approach would serve as a check to the flawed sales comparison approach. Because Closser's sales comparison approach is also flawed, the income approach is of no value to this Tribunal in determining the market value of the subject property.

Closser was qualified as an expert, but his testimony indicates that he was not able to gather or adjust the appropriate information or understand and analyze the appraisal problem. "There is nothing so frightening as ignorance in action." (Johann Wolfgang von Goethe, 1800's)

Respondent fails in convincing this Tribunal that the appraisal by Closser is acceptable as market evidence. It was not a market valuation of the fee simple interest of the subject property. Closser's failure to disclose the facts in the report that the sales were all leased-fee transactions and that the leases were also not market based was highly misleading. In fact, it is shocking that a USPAP Instructor for the Appraisal Institute would write a deceptive report.

Closser testified that he valued the subject property as a continued use as a Lowe's store. This is a value-in-use to the owner. This value in use explains why Respondent's value is higher than the subject property's market value.

There were too many issues (as stated throughout this opinion) with Closser's report to give it any weight or credibility. The Tribunal suggests that the appraiser should be

aware of all of the circumstances surrounding sales and leases. The Tribunal finds that Closser's appraisal of the subject property was misrepresentative. It is not clear whether he had the knowledge or experience to perform the appraisal.

Costs are not awarded in this instance. Respondent defended its assessment through Closser, and although we find the appraisal meaningless, it was not frivolous in his defense on behalf of the taxing authority.

Petitioner's appraisal is accepted as the value of the subject property for the years at issue. Petitioner clearly explained the build-to-suit leases that are entered into prior to construction of a specific property to meet a business model. The difference between fee simple and leased fee ownership between the two appraisals is clear. Allen determined the value of the subject property as available for sale as of each tax day at issue. Allen had a plethora of sales and listings, as well as rents and asking rents, that indicated the difference between the fee simple ownership and the leased fee interest.

JUDGMENT

IT IS ORDERED that the subject property's true cash, assessed, and taxable values for the 2010, 2011, and 2012 tax years are those shown in the "Summary of Judgment" section of this Opinion and Judgment.

IT IS FURTHER ORDERED that the officer charged with maintaining the assessment rolls for the tax years at issue shall correct or cause the assessment rolls to be corrected to reflect the assessed and taxable values in the amounts as finally shown in

the "Final Values" section of this Opinion and Judgment, subject to the processes of equalization, within 20 days of the entry of this Opinion and Judgment. To the extent that the final level of assessment for a given year has not yet been determined and published, the assessment rolls shall be corrected once the final level is published or becomes known.

IT IS FURTHER ORDERED that the officer charged with collecting or refunding the affected taxes shall collect taxes and any applicable interest or issue a refund as required by this Opinion and Judgment within 20 days of the entry of this Opinion and Judgment. If a refund is warranted, it shall include a proportionate share of any property tax administration fees paid and of penalty and interest paid on delinquent taxes. The refund shall also separately indicate the amount of the taxes, fees, penalties, and interest being refunded. A sum determined by the Tribunal to have been unlawfully paid shall bear interest from the date of payment to the date of judgment and the judgment shall bear interest to the date of its payment. A sum determined by the Tribunal to have been underpaid shall not bear interest for any time period prior to 28 days after the issuance of this Order. Pursuant to MCL 205.737, interest shall accrue (i) after December 31, 2009, at the rate of 1.23% for calendar year 2010, (ii) after December 31, 2010, at the rate of 1.12% for calendar year 2011, (iii) after December 31, 2011, and prior to July 1, 2012, at the rate of 1.09% for calendar year 2012, (iv) after June 30, 2012, and prior to January 1, 2013, at the rate of 4.25%, and (v) after December 31, 2012, and prior to July 1, 2013, at the rate of 4.25%.

This Order resolves all pending claims in this matter and closes this case.

MICHIGAN TAX TRIBUNAL

By: Victoria L. Enyart

Entered: December 13, 2012