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

Brighton Mall, Petitioner,	
v	MICHIGAN TAX TRIBUNAL MTT Docket No. 360623
City of Brighton, Respondent.	Tribunal Judge Presiding Victoria L. Enyart

OPINION AND JUDGMENT

Introduction

Petitioner, Brighton Mall, appeals the ad valorem property tax assessment levied by Respondent, City of Brighton, against the real property owned by Petitioner for the 2009, 2010, and 2011 tax years. H. Adam Cohen and Jason C. Long, attorneys at Steinhardt, Pesick & Cohen, P.C. , appeared on behalf of Petitioner. Paul E. Burns and Bradford L. Maynes, attorneys at Law Offices of Paul E. Burns, appeared on behalf of Respondent. Petitioner's witnesses were Marc Weinbaum, real estate investor, developer, and property manager, and John Widmer, MAI. Respondent's witnesses were L. Richard Parker, MAI; Matthew Modrack, executive director of the Downtown Development Authority and the Community Development Director, and Kathleen Lupi, Michigan Advanced Assessing Officer.

The proceedings were brought before this Tribunal on October 18, 2011, to resolve the real property dispute.

Summary of Judgment

The City of Brighton has assessed the property on the tax roll as follows:

4718-19-300-024			
Year	TCV	SEV	TV
2009	$22,476,020	$11,238,010	$8,814,750
2010	$22,028,540	$11,014,270	$8,788,300
2011	$21,086,960	$10,543,480	$8,937,700

4718-30-100-019			
Year	TCV	SEV	TV
2009	$639,480	$319,740	$210,010
2010	$639,480	$319,740	$209,390
2011	$575,520	$287,760	$24,560

4718-30-100-036			
Year	TCV	SEV	TV
2009	$338,080	$169,040	$24,230
2010	$338,080	$169,040	$24,150
2011	$338,080	$169,040	$24,560

Aggregate values for the parties:

Aggregate per appraisals

		Petitioner		Respondent		
Year	TCV	SEV	TV	TCV	SEV	TV
2009	$15,475,000	$7,669,410	$7,669,410	$20,825,000	$10,412,500	$9,048,990
2010	$12,465,000	$6,211,340	$6,211,340	$20,875,000	$10,437,500	$9,021,840
2011	$11,950,000	$5,975,000	$5,975,000	$19,825,000	$9,912,500	$8,937,700

The Tribunal finds the values shall be:

Parcel No.4718-19-300-024			
Year	TCV	SEV	TV
2009	$24,628,800	$12,314,400	$8,814,750
2010	$21,700,500	$10,850,250	$8,788,300
2011	$20,300,000	$10,150,000	$8,937,700

Parcel No. 4718-30-100-019			
Year	TCV	SEV	TV
2009	$700,700	$350,350	$210,010
2010	$630,300	$315,150	$209,390
2011	$550,000	$275,000	$24,560

Parcel No. 4718-30-100-036			
Year	TCV	SEV	TV
2009	$370,500	$185,250	$24,230
2010	$330,000	$165,000	$24,150
2011	$325,000	$162,500	$24,560

Background

At issue is the true cash value for the Brighton Mall located at 8375 West Grand River, Brighton, Michigan. The property includes a 306,800(+/-) square foot retail center, three retail buildings, one office building, and a restaurant pad. The three parcels have a total of 51.73 acres.

Petitioner's Arguments

Petitioner believes that the true cash value of the subject properties for the tax years at issue should be reduced based on Petitioner's appraisal.

Petitioner's Exhibits admitted:

P-1 Photographs of subject property.
P-2 Income statements for subject properties for 2008, 2009, and 2010.
P-4 Subject properties' rent rolls for December 31, 2008, December 31, 2009, and December 31, 2010.
P-5 Summary Appraisal Report.
P-6 Excerpts from PriceWaterhouseCoopers (Korpacz) real estate investors surveys fourth quarters 2007, 2008, 2009, and 2010.

Marc Weinbaum was Petitioner's first witness. He is a real estate investor, developer, and property manager for the subject property. His employer since 1993 is Dale Investment Company. He testified as follows:

> I'm a managing member of Prospect Hill Group, which is a grocery-anchored community shopping center in Milford, Michigan. I'm managing agent for Village—I'm sorry—VCE, LLC which is another strip center in Milford, Michigan. I am a member of the general partner of 9912 East Grand River Associates, which is a strip center in Brighton Township. I am a managing member for

> Fenton Commons—I think Fenton Commons Group, LLC, or Fenton Common Associates in Fenton, which is a Target-anchored center. Tr 1, p 21.

Weinbaum stated he has predominantly looked at shopping centers for over 200 deals in the last three years. He testified that the most significant component he looks at is the net operating income. Location, physical characteristics, and condition of the property is also a factor. Weinbaum explained that shopping centers are referred to as strip shopping centers with 20,000 square feet with 12,000 to 15,000 square feet in line stores. Neighborhood or community shopping centers are an anchored grocery store with ancillary uses. Power centers are mid and large box users like Brighton Mall. Examples of big box stores are Kohls, Sears, K-mart with around 70,000 to 80,000 + square feet. The mid-box stores would be Marshalls, Pet Smart, Best Buy, or Jo-Anns.

Weinbaum or his controller prepared the rent roll (Exhibit P-4). He explained that not all of the leases were triple net or gross; they were a combination. Some of the tenants have requested and received concessions. The common area maintenance ("CAM") is not reimbursed in total. The triple net leases reimburse their pro-rata share of taxes only. Gross leases pay their rent and no additional costs. Each tenant has negotiated a lease with terms that may not be explained in detail on the rent roll.

The Brighton Mall has three new retail tenants since 2008. Dollar Tree was $11.00 per square foot for August 2008 lease. Mattress USA entered into a lease in October 2009 for $12.00 per square foot. Tuesday Morning's lease was $9.00 per square foot. Mattress USA vacated its leased space per Weinbaum.

Weinbaum testified that Exhibit P-2, the rent rolls for Brighton Mall for 2008, 2009, and 2010, accurately reflect income and expenses. The percentage of reimbursements for expenses is approximately 20% to 25%.

Brighton Mall originally was an enclosed community mall with K-mart. It was then "de-malled," meaning it was converted from a mall into inline bays. The de-malling took place before 1993, prior to Weinbaum's employment.

In addition to Brighton Mall, Weinbaum described the other buildings and occupants that are part of the subject properties. Best Buy and Pet Smart are in a stand-alone big box store located east of the mall. The building was constructed around 2005 with an office building. Brighton Annex is a strip mall with approximately 30,000 square feet of inline retail.

When questioned whether he agrees that the Brighton Mall has become the regional shopping center for people in Livingston County, Weinbaum responded in the negative, as it serves Brighton, Green Oak and Genoa. He indicated that the subject property wouldn't draw from Howell, Hartland or Novi as they all have their own set of retailers. Weinbaum testified on cross-examination that it is important to validate net operating income when looking at a property. He has considered the possible purchase or sale of over 200 shopping centers. Weinbaum explained that the NOI is a significant component. Other factors considered are demographics, location as well as determining the income stream, duration and if leases are at market rate. The company puts together a model utilizing ARGUS software. The market leasing assumptions are put in, to determine the market rate for leases. According to Weinbaum, national retail properties already figure out demographics and the appropriate rent for an area; they do not negotiate.

John Widmer, MAI, was Petitioner's valuation witness; he was admitted as an expert witness. Widmer prepared an appraisal that included the three years in contention. He testified that approximately 28 acres out of 51.62 acres is improved. The balance has significant wetlands. The southernmost wetland parcels are depicted in the area known as Best Buy Drive.

Widmer prepared a fee simple appraisal subject to existing leases. He defined fee simple interest and leased fee interest and leasehold interest. (Tr 1, p 186.) The subject property was determined to be a "power center" mall based on PriceWaterhouseCooper's description. (Exhibit P-6.)

Widmer inspected every building located on the subject properties, and stated he found the improvements to be well maintained. The actual quality and condition was estimated as average to above average. Highest and best use was to continue as a multi-tenant retail property.

Widmer testified that he did not do a cost approach in this instance because the age of the subject property makes it difficult to establish physical deterioration. The income approach, which is converting anticipated economic benefits to be received into value, was performed. He stated that the subject property is a multi-tenant income-producing property; therefore, the income approach is the most applicable. The Brighton Mall has a stabilized occupancy; therefore, a discounted cash flow was not applied.

The sales comparison approach was also calculated; however, Widmer determined that, because of the void of sales that reflect or mirror economic conditions, it is arbitrary to consider adjustments to the transactions. The exception would be owner-occupied commercial properties that would not be impacted with economic rent.

Widmer explained the steps for his income approach. He establishes the total revenue, applies a vacancy rate, and establishes operating expenses applicable to the subject property. The net operating income is the potential gross income minus vacancy and credit, and operating expenses. The net operating income is then capitalized into value using an overall capitalization rate. Widmer reviewed the actual leases. Exhibit P-5, page 44, is a recapitulation rent roll for each valuation date. Both contract and economic rent was considered. Widmer weighted the contract and economic rent 50%/50%. In each instance contract rent is higher than market rent. The contract leases in place were negotiated prior to December 31, 2008, when the market was superior.

The leases for subject property vary from triple net with maximum reimbursement for property taxes to gross leases where the tenants pay a fixed amount. The gross leases generally are higher than the triple net leases as the landlord, when setting the amount, includes some for common area maintenance and property taxes. With triple net leases the tenants agree to pay a pro-rata share of maintenance and property taxes. Widmer's appraisal concluded that the contract rent exceeds market rent by 11.5%, 14.3% and 16.9% for the 2009, 2010 and 2011 tax years at issue respectively. Widmer explained that the excess actual rent contains older leases that were negotiated when the market was stronger. The market rent was given 50% weight the actual rent was given 50% weight.

Widmer's December 31, 2008, income approach technique is explained. He used the same analysis for each tax year under appeal. Contract rent was $2,782,249; market rent was $2,261,540 as of December 31, 2008. The expenses, however, were based on actual income and expenses with the market considered. Base rental income used by Widmer was $2,378,265. After additions for reimbursement and miscellaneous income the income totaled $3,065,501. Operating expenses (including property taxes) totaled $1,241,618. Non-recoverable operating expenses were $237,735, for total operating expenses of $1,479,353. The net operating income is $1,586,149.

Widmer states:

> Real estate taxes represent a result from which this appraisal is trying [to] answer, namely true cash value. Within the appraisal of property for ad valorem purposes, it is generally appropriate to exclude the expense in total, and simply modify the cap rate with a tax capitalization rate addition. However, from a simple algebraic perspective, it is considered more fundamentally sound to simply apply iterations for the property tax expense based upon the true cash value conclusion for each retrospective date of valuation. This is especially true when the existing tenant base is

> not structured on a pure gross or full-service expense basis. Correspondingly, within the forthcoming net operating income tables, property taxes will be included, and will be the result of taking 50% of the true cash value conclusions times the noted millage rate, including administrative fee, for each year in question is: P-5, p 54.

Widmer also weights the vacancy and credit loss based on an economic basis for anchor stores (8%) and in-line retail and office spaces (11%). The result is a blended 11% vacancy.

The capitalization rate includes sales, broker reports, as well as PwC estimates for power centers. Widmer added 1% to the overall rate for Southeast Michigan and property return. The composite of non-institutional and institutional rates resulted in a 10% overall rate for tax year 2009. Widmer then adjusts for “rental loss opportunity” the market stabilized occupancy was 89%, thus 2,280 square feet needs to lease for the property to achieve the stabilized occupancy. He forecasted a four-lease time for the property to be absorbed. A discounted cash flow analysis was done to determine that one-quarter of the space would be leased in the initial year. With a 3.8% discount rate and entrepreneurial reward of 15.5% 570 square feet absorbed each year for four years the equation is:

Discount rate:	3.68%			
Entrepreneurial Reward	15%			
Vacant space	2,280			
Year	1	2	3	4
SF absorbed	570	570	570	570
SF rent loss	2,280	1,710	1,140	570
$ rent loss	$24,330	$18,247	$12,165	$6,082

PV of rent loss:	$56,620
Entrepreneurial reward	15%
Rent loss adjustment:	$65,113.

Widmer's summary of income valuation for tax year 2009 is:

Revenue:	
Total base rent (302,463 SF @ $8.34 SF)	$2,521,899
Misc revenue	10,200
Rent roll passes through	807,363
Potential Gross Income:	$3,339,462
Vacancy 11%	(367,341)
Interim Effective gross income	$2,972,121
Collection loss (0.5%)	(14,861)
Effective Gross Income	$2,957,260
Operating Expenses	
Real estate taxes	$ 417,984
Insurance ($0.12 SF)	36,296
CAM ($1.75 SF)	529,310
Office CAM ($0.09 SF)	27,222
Management fee (3.5% of EGI)	103,504
Miscellaneous Administration ($0.75 SF)	226,847
Capital reserve ($0.20 SF)	60,493
Total Operating Expenses $4.63 SF	$1,401,656
Net Operating Income (NOI)	$1,555,605
Overall Capitalization Rate (OAR)	10%
True Cash Value	$15,556,046

Widmer then deducts from True Cash Value the following:

Ordinary rent loss incurred during absorption	$65,039
Ordinary expense carries	$20,991
Forecasted improvement allowance	$23,975
Forecasted leasing commissions	$ 7,666
Total deductions	$117,671

TCV as of December 31, 2008	$15,450,000

Widmer utilized the same analysis for the subsequent tax years at issue. The True Cash Value via the income approach for December 31, 2009 was $12,450,000; December 31, 2010 was $11,925,000.

The market approach as applied by Widmer includes gathering sales data, determining that no comparable is similar to subject in that it mirrors subject's economic terms and adjustments are difficult to quantify. He found eight sales to be representative of market value for the subject property. He stated:

> In addition to the primary sample, supplementary information involving other recent transactions in the region have been reviewed to corroborate value set by the primary sample. Recall, this approach was previously identified as being suspect given the limited activity related to investment retail transactions. It has been included, however, as a test of reasonableness for the conclusions established by the more relevant income valuation. P-5, p 66.

The following sales were included in Widmer's appraisal:

Sale No	City	SF	Sale Date	SP/SF	NOI/SF	Overall Rate
1	Centerline	67,696	May-07	$132.95	$10.89	8.19%
2	W. Bloomfield	120,573	Jun-07	$143.48	$10.97	7.64%
3	Rochester Hills	42,335	Nov-07	$123.82	$10.37	8.38%
4	S. Lyon	57,056	Mar-08	$87.63	$7.93	9.05%
5	Waterford	96,101	Sep-08	$134.59	$11.36	8.44%
6	Clarkston	89,038	Sep-08	$134.67	$9.97	7.40%
7	Allen Park	275,891	Jun-10	$106.93		
8	Chesterfield	243,934	Dec-10	$108.64	$10.17	9.36%

The 2009 value considered Sales 1 through 6. The subject's net operating income is $5.14 per square foot. The range of net income for the sales ranges from $7.93 to $10.97. "When applying a qualitative overview of income productivity and influences as a result of cap rate and risk parameters, this sample is adjusted within a range from roughly $50 to $52 per square foot." Exhibit P-5, p 71. Widmer determined a $51.00 value per square foot based on the net operating income of the first six sales.

The same six sales resulted in a $41.00 per square foot value for tax year 2010.

Widmer relied on Sales 4 through 8 to determine $40.50 per square foot value for tax year 2011.

The final values via the sales comparison approach are:

December 31, 2008	$15,425,000
December 31, 2009	$12,400,000
December 31, 2010	$12,250,000

Respondent's Arguments

Respondent requests that the Tribunal accept the appraisal and reduce the true cash value of the subject properties for the tax years at issue.

Respondent's Exhibits admitted:

R-1 Summary Appraisal Report.
R-2 2009 Property Record Cards.
R-3 2010 Property Record Cards.
R-4 2011 Property Record Cards.
R-5 GIS Aerial Map of Subject Properties.
R-7 Photographs of Subject Property.

L. Richard Parker, MAI, prepared an appraisal of the leased fee estate based on the contract rent and market rent for the vacant spaces for each of the three tax years at issue.

Parker's report began with the income approach for tax year 2009. The existing leases and occupancy was considered. He states that nine leases are due to expire in 2011. The assumption was assumed that most of the tenants would renew at market rate rather than move out. Parker's second assumption is that the retail leases were triple net, that is, the tenant is responsible for all normal operating expenses leaving the landlord responsible for the structural integrity of the buildings. The office leases were on a gross basis, the landlord is responsible for expenses except utilities.

Parker compared rents from eleven mall facilities. The anchor stores leased from $5.50

to $16.50, the in-line stores leased from $9.50 to $25.00. He concluded to $14.00 per square foot for the entire 302,245 square feet. The potential gross income is $2,861,828.

Parker assumed that the subject property's 289,172 square feet of retail will be reimbursed 95.67% of its operating expenses. An additional $16,079 was added as miscellaneous income, access rental, and interest on security deposits. Using an appraiser's survey of 1,946,778 square feet of space in eleven properties, a stabilized vacancy of 13% was indicated. Vacant space was calculated at potential rent of $14.00 per square foot.

Parker calculated that expense reimbursement was $724,251 ($310,754 in property taxes). Expenses for insurance, utilities, common area maintenance, grounds, roof and outer walls, administration and management fees total $906,700 in operating expenses. Net operating income for tax year 2009 is $2,227,674, Parker deducted reserves $125,375 for a total $2,102,299.

An overall rate ("OAR") was calculated from four sales that took place from 2006 to 2009. This resulted in an average 8.31% OAR. Parker also calculated a built-up rate blending the return necessary to cover debt service and return for the equity position. He gave major consideration to mortgage rate on Marcus & Millichap Capital Corporation's Capital Alert Report on Multi-Family at 6.25 to 7.45 with a 15- to 30-year amortization. Parker assumed a 6.75% mortgage with a 30-year amortization, which resulted in a mortgage constant of 7.7832%. Equity was estimated at 10%. The equation is:

75% mortgage at 7.7832%	=	5.8374%
25% equity at 10%	=	2,500%
Indicated OAR		8.3374%

Parker selected 8.25% OAR and added 2.67% effective tax rate. The OAR is 11.00%.

The total tax year 2009 income calculation is as follows:

Revenue:	
Total base rent (265,400 SF @ $11.00 SF)	$2,345,998
Vacant space (36,845 SF at $14.00 per SF)	$ 515,830
Income:	$2,861,828
Expense reimbursement	$ 724,251
Access/Other income	$ 16,650
Potential Gross Income	$3,602,729
Vacancy and credit loss	$ 468,355
Effective Gross Income	$3,134,374
Operating Expenses	
Insurance	$ 30,225
Utilities	$ 90,675
CAM	$ 126,950
Grounds	$ 438,000
Roof/Walls	$ 30,675
Administration	$ 64,800
Management Fee	$ 125,375
Total Operating Expenses	$ 906,700
Net Operating Income (NOI)	$2,227,674
Reserves	$ 125,375
Net annual Income	$2,102,299
Overall Capitalization Rate (OAR)	11%
True Cash Value (rounded)	$20,250,000

Parker also computed a discount cash flow method, which resulted in a true cash value for tax year 2009 of $20,825,000.

Parker testified that he used the subject property's actual rent when estimating income for the occupied space. The unoccupied space $14.00 per square foot was used. When questioned on cross-examination he testified that the $14.00 triple net was used for the retail spaces and for the office space it was $14.00 gross rent. When questioned on the triple net leases, Parker indicated that subsequent to preparing the appraisal he became aware that not all of the retail leases were triple net. They were a combination of gross, modified gross, and some triple net. There was a large discrepancy in the reimbursement of expenses line item.

Parker was questioned on his expense reimbursement and asked if $724,251, which excludes property taxes, was based on actual numbers. Petitioner's Exhibit 2, p 1 indicates $303,754 after property taxes were deducted. Parker stated that approximately 70% of the expenses are reimbursed. This is contrary to Weinbaum's testimony earlier.

Parker was questioned if he changed two of his assumptions how that would change the value. Parker (R-1, p 27), calculated the vacant space using actual rent at $11.00 per square foot and the actual expense reimbursement of $301,754 equated to a true cash value of $16,209,604 approximately $4,000,000 less than Parker's original estimate of value.

Parker utilized the same income technique for all three years. This resulted in a true cash value via the income approach of:

December 31, 2008	$20,250,000
December 31, 2009	$21,550,000
December 31, 2010	$19,200,000

Parker found several malls that sold to utilize for the sales comparison approach. The tax year 2009 sales were:

Sale No	City	SF	Sale Date	Sale Price	SP/SF	Overall Rate	Adj SP/SF
6	Southfield	537,676	Dec-08	$27,993,014	$52.06	NA	$72.89
7	Waterford	188,151	Sep-08	$24,925,000	$132.47	8.02%	$97.37
8	Pontiac	218,758	May-08	$15,000,000	$68.57	8.30%	$63.83
9	W Bloomfield	119,743	Jun-07	$17,300,000	$144.24	7.56%	$105.00
12	Chesterfield	168,985	Dec-05	$22,500,000	$133.15	NA	$92.80

Parker adjusted Sale No. 6 +75% for differences in location, size, age, economics, occupancy, financing, and land/building ratio. Sale No. 7 was adjusted -25% for differences in size and age. Sale No. 8 was adjusted for differences in location, size, and economics. Sale No. 9 was adjusted 40% for differences in size, age, and occupancy. Sale No. 12 was adjusted -15% for size. All of the sales were adjusted for market conditions at 6% per year.

Parker relied on Sale No. 6, which was closest to tax date. Sales No. 7 and 12 were located on major traffic arteries and similar demographics as the subject property, as well as tenant mix and occupancy. Sale No. 8 was the most similar in size to the subject property. The sales comparison approach resulted in $85.00 per square foot.

Parker was questioned on the comparability of the sales he selected. The subject property is much larger than all of the comparable sales. Sale No. 7 is actually a combination of two separate sales where the square footage was combined. Each mall was less than 100,000 square feet. Sale No. 8 resold November 2010 with a 12% cap rate and it was not relied upon by Parker. The appraisal contained no income statements or operating statements for any of the comparable properties relied upon by Parker.

The subsequent years were also valued using the same technique with different sales for tax year 2011. The true cash value via the sales comparison approach is:

December 31, 2008	$25,700,000
December 31, 2009	$22,675,000
December 31, 2010	$21,150,000

Matthew Reed Modrack, executive director of the Downtown Development Authority and community development director testified to the development trends for the City of Brighton. He testified that he is responsible for all of the activities in the downtown area (the subject property is included in the downtown area). Business recruitment, retention, and economic development are part of Modrack's duties.

Modrack testified that while the majority of Michigan has been in a depression the City of Brighton has been growing economically. He indicated that the DAP spent approximately $4,000,000 building a Starbucks with a drive-thru and an Olga's. Little Chef restaurant rebuilt down the street. TCF Bank constructed a new $2,300,000 building close to Meijer. The vacated TCF Bank building was razed and a two-story 13,000 square foot medical and office complex was constructed. A Chili's restaurant closed and an IHOP moved in. Closer to the downtown an assemblage of older buildings was purchased and torn down with a Tim Horton's, Flower Shop, and a BP

Gas Station moving in. A restaurant, the Wooden Spoon, is approximately a mile from the subject property, and is a gourmet-type restaurant.

Modrack determined that in the location between I-96 and US-23 a dining center would be a destination use. A study determined that 45% of the dollars available in the area were leaving the area for dinner and going to Ann Arbor and Novi. He estimated that the surrounding area contains approximately 80,000 residents.

Kathleen Lupi, Michigan Advanced Assessing Officer for the City of Brighton, testified that she prepared the property records for the subject properties. She explained the cost less depreciation approach, including the use of economic condition factors to increase or decrease the cost approach based on sales, and what the sales were assessed at the time of the sale.

The following describes the three parcel identification numbers that make up subject properties. Subject property's parcel identification number 19-300-024 is the mall and the buildings individually calculated, has 27.31 acres. Parcel identification number 30-100-019 is 8.9 acres vacant (very low land) with a small parking lot. Parcel identification number 30-100-036 is 15.52 acres vacant except for a small portion of Best Buy Drive.

<u>Tribunal's Findings of Fact</u>

1. Subject properties are located at 8375 West Grand River Avenue, Brighton.
2. Subject property contains approximately 302,643 square feet.
3. Subject property has a total of 51.62 acres.
4. Subject property is a multi-tenant retail building, and an office building.

5. Subject property contains a variety of buildings on three parcels which include a strip shopping center, restaurant, big box store and a stand-alone office building.
6. Subject property has occupancy of approximately 88%.
7. Subject property has high visibility from I-96.

The subject property has been described as a "power center," described as:

> An open center dominated by at least 75.0% large big-box anchors, including discount stores, warehouse clubs and value oriented category stores and a minimal amount of inline store space. Exhibit P-6, p JW 0087.

The subject property's location is visible from I-96 with an exit that was recently renovated for easy access into the Brighton area. The management and maintenance of the shopping center has been described by both parties as good. The occupancy has averaged 88% for 2008 and 2009, and dropped to 86% in 2010. To further complicate the valuation of the subject property, contracted leases were renegotiated with concessions on behalf of Petitioner. The leases at the subject property were negotiated prior to the economic downturn and are at above market rent. Petitioner's income approach did not use conventional methodologies. Respondent used conventional methods for the income approach, but utilized incorrect information and assumptions.

Final Arguments

Petitioner's representative, Weinbaum, testified that the reimbursements are approximately 20%, not 80% as indicated by Parker in his appraisal. The leases for the retail are a mixture of triple net, modified gross, and gross. Parker assumed that the retail stores were all triple net and, therefore, reimbursements or pass through of common area maintenance was higher. Parker used $14.00 per square foot for the market rent on retail space. Weimbaum's testimony clearly stated that the only new retail tenant (that stayed) during the three years at issue pays $11.00 per square foot and that was Dollar Tree.

Petitioner argues that making two changes to Parker's appraisal would decrease the value $4,000,000. Petitioner has requested that no credibility be given to Respondent's appraisal of the subject property.

Respondent contends that the City of Brighton is an anomaly. In an area of economic downtrend, the community has added new retail, new renovations of existing retail, and commercial properties. This is while the remainder of southeast Michigan was economically depressed. Respondent contends that Widmer's appraisal is purely hypothetical. Widmer used a combination of fee simple and leased fee that does not exist and has rental rates that are not market per Respondent. Respondent continues that Widmer's capitalization rate does not reflect a power center located in Michigan.

Respondent argues that Widmer's market analysis is useless. The technique of using Net Operating Income ("NOI") as a basis for adjustments was deemed inappropriate by the Tribunal in other cases. However, in this instance the comparison of NOI from sales to his part contractual rent and part market results in a lower NOI for subject property. It indicates that the subject property is in the worst market in Southeast Michigan despite the fact that in the 2 ½ square mile city it has attracted $10,000,000 in new investments while the remainder of the area was depressed.

Applicable Law

Pursuant to Section 3 of Article IX of the State Constitution, the assessment of real property in Michigan must not exceed 50% of its true cash value. 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 the assessment, being the price which could be obtained for the property at private sale, and not forced or auction sale. See MCL 211.27(1). The Michigan Supreme Court in *CAF Investment Co v State Tax Commission*, 392 Mich 442, 450 (1974), has also held that true cash value is synonymous with fair market value.

In that regard, the Tribunal is charged in such cases with finding a property's true cash value to determine the property's lawful assessment. *Alhi Development Co v Orion Twp*, 110 Mich App 764, 767 (1981). The determination of the lawful assessment will, in turn, facilitate the calculation of the property's taxable value as provided by MCL 211.27a. A petitioner does, however, have the burden of establishing the property's true cash value. See MCL 205.737(3) and *Kern v Pontiac Twp*, 93 Mich App 612 (1974).

> 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%....; and for a system of equalization of assessments. For taxes levied in 1995 and each year thereafter, the legislature shall provide that the taxable value of each parcel of property adjusted for additions and losses, shall not increase each year by more than the increase in the immediately preceding year in the general price level, as defined in section 33 of this article, or 5 percent, whichever is less until ownership of the parcel of property is transferred. When ownership of the parcel of property is transferred as defined by law, the parcel shall be assessed at the applicable proportion of current true cash value. Const 1963 Art IX , Sec 3.

As used in the General Property Tax 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 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).

The Michigan Supreme Court, in *Meadowlanes Ltd Dividend Housing Ass'n v City of Holland*, 437 Mich 473; 473 NW2d 363 (1991), acknowledged that the goal of the assessment process is to determine “the usual selling price for a given piece of property.” In determining a property's true cash value or fair market value, Michigan courts and the Tribunal recognize the three traditional valuation approaches as reliable evidence of value. See *Antisdale v Galesburg*, 420 Mich 265, 277; 362 NW2d 632 (1984).

“The petitioner has the burden of establishing the true cash value of the property....” MCL 205.737(3); MCL 211.27(1); *Meadowlanes, supra*. “This burden encompasses two separate concepts: (1) the burden 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 Steel v City of Warren,* 193 Mich App 348, 483 NW2nd, 416 (1992), at 354-355, citing: *Kar v Hogan*, 399 Mich 529, 539-540; 251 NW2d 77(1976); *Holy Spirit Ass'n for the Unification of World Christianity v Dept of Treasury*, 131 Mich App 743, 752; 347 NW2d 707(1984).

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 Comm*, 3 Mich App 170; 141 NW2d 699 (1966), aff'd 380 Mich 390 (1968); *Antisdale*, at 276. 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*, at 277. The Tribunal finds that Petitioner used unproven methods outside of typical appraisal practice and theory.

The Tribunal may not automatically accept a respondent's assessment but must make its own finding of fact and arrive at a legally supportable true cash value. *Pinelake Housing Cooperative v Ann Arbor*, 159 Mich App 208, 220; 406 NW2d 832 (1987); *Consolidated Aluminum Corp v Richmond Twp*, 88 Mich App 229, 232-233; 276 NW2d 566 (1979). 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*, at 485-486; *Wolverine Tower Associates v City of Ann Arbor*, 96 Mich App 780; 293 NW2d 669 (1980); *Tatham v City of Birmingham*, 119 Mich App 583, 597; 326 NW2d 568 (1982). The Tribunal rejects Petitioner's theories of valuation.

Conclusions of Law

Petitioner presented the subject property's actual rent and actual vacancy. However, Petitioner then gave the occupied portion of the subject property 50% weight and the market 50% weight. This Tribunal does not understand the type of value that Petitioner appraised. It was stated several times that Widmer did a fee simple estate subject to the existing leases. To do so he did neither a fee simple nor a leased fee appraisal. The blended report leaves the Tribunal wondering what learned treatise the methodology came from. The Appraisal Institute, *The Appraisal of Real Estate*, (Chicago: 13th ed, 2008) was considered but this unconventional method was not found. Albeit a novel approach, it is one that gives this Tribunal a value other than the market value. The appraisers were charged with determining market value of the subject property.

Widmer clearly explained that some of the leases at the subject property were above market because they were negotiated prior to the economic downturn. Therefore, market rents could be somewhat lower. The research for market rents did indicate a lower market rent. The exception was the Sears store, which Widmer testified was at market rent. It was a long-term lease and while neither party discussed *CAF Investment Co v State Tax Comm*, 392 Mich 442; 221 NW2d 588 (1974), using the long-term contract rent would be in this specific instance correct for the Sears property only.

Widmer, in the sales comparison approach, included eight sales of some community shopping centers and some power centers. Sales 1, 2 and 3 took place in 2007 prior to the economic downtrend. Sales 3 and 4 are unanchored smaller properties; the subject property is six times larger. Sales 5 and 6 sold in 2008 and are approximately 1/3 the size of the subject property, and they are 85% and 90% occupied. The sale prices per square foot of the two indicate an unadjusted $134 per square foot. The indicated overall rate is 8.44% and 7.40%, and the NOI per square foot was $11.36 and $9.97. The issue with the use of NOI as the sole basis for adjustments in the sales comparison approach is the fact that the details are lacking. Including the amount of operating expenses, as well as the gross income and if property taxes were included (which in an operating statement is not uncommon), or where the basis for the NOI came from**.** If the property taxes are included as an expense the NOI could be skewed at the higher end.

Widmer's sales comparison approach resulted in an adjustment of approximately 50% of the sale prices per square foot for tax year 2009 at $51.00 per square foot. The Tribunal notes that the unadjusted sale prices per square foot for the eight sales results in only one sale (Sale 4) being under $106 per square foot. The six sales (in the appropriate time frame) ranged in sale price per square foot from $106 to $134. Therefore, the Tribunal again finds that Widmer's methodology of adjusting for differences in NOI inappropriate, not logical, and not found in any treatise as an appropriate technique used to determine market value as of tax date. This is not downplaying the importance of NOI; however, the inappropriate application of adjusting the sales using the NOI, without explaining differences in gross income, percentage of operating expenses or if the property taxes are included as part of the operating expenses skews the results and is misleading. Without knowing why the dollar per square foot NOI for the comparable properties is higher than the subject properties, a fair comparison or adjustment is not known.

The unadjusted sale price for the comparable sales per square foot ranged from $87.63 to $134.67. There was testimony from both parties that the subject property is a well-managed facility. The Tribunal finds that it makes no sense that the subject property would sell for half of the market sales. An investor would consider not only the NOI, but the basis for the operating income, rents when they expire if they are at or below market rent, location, as well as condition of the property. The Tribunal agrees with the Appraisal Institute that the NOI per square foot is not an appropriate technique because it is not independent of the income approach.

Appraisal Institute, *The Appraisal of Real Estate*, (Chicago: 13th ed, 2008), pp. 305-306, discusses selection of units of comparison for the sales comparison approach. It states:

> Prices of comparable properties are not usually adjusted on the basis of differences in net operating income per unit because rents and sale prices tend to move in relative tandem. A value indication developed using NOI per square foot as a unit of comparison is not independent of a value indication developed using direct capitalization, which negates the checks and balances provided by using more than one approach to value. In effect, the results suffer from circular logic.
>
> Nevertheless, the appraiser should consider why the income per unit varies among the sale properties. Sensitivity and trend analysis may be performed to gain an understanding of this variance. For example, an appraiser may analyze sales of income-producing properties to derive

> potential and effective gross income multipliers, overall and equity capitalization rates, and even total property yield rates. These factors are not adjusted quantitatively. Instead, the appraiser considers their ranges and the similarities and differences between the subject and comparable sale properties that cause the multipliers and rates to vary. The appraiser then selects the rate from within the refined value bracket that is most appropriate to the property being appraised for use in the income capitalization approach.

Widmer's novel sales comparison approach is given no weight and no credibility. His income approach used a blend of some actual and market rent. He states that "the controlling basis for rent is not always in-place income and should also consider prevailing market conditions." Exhibit P-5, p 51. The subject property's contract rent exceeds market by 23%. Therefore, the subject property is not at market rent.

Widmer's reluctance to give a straight answer when questioned whether the appraisal was a fee simple or a leased fee leaves the Tribunal to question the type of value he appraised.

> An important distinction is made between market value and investment value. Investment value is the value of a certain property use to a particular investor. Investment value may coincide with market value, which is defined in Chapter 2, if the client's investment criteria are typical of successful buyers in the market. In this case, the two opinions of value may be the same number, but the two types of value and their concepts are not interchangeable.
>
> Market value is objective, impersonal, and detached. Investment value is based on subjective, personal parameters. To develop an opinion of market value with the income capitalization approach, the appraiser must be certain that all the data and forecasts used are market-oriented and reflect the motivations of a typical investor who would be willing to purchase the property as of the effective date of the appraisal. A particular investor may be willing to pay a price different from market value, if necessary, to acquire a property that satisfies other investment objectives unique to that investor. Appraisal Institute, *The Appraisal of Real Estate*, (Chicago: 13th ed, 2008), p 450.

Widmer's blending of contract and market rent may have been acceptable if he used the long-term contract rent for the Sears property and then placed the market rent on the remainder of the subject property. However, he did not; he used contract rent for the occupied spaces, market rent for vacant spaces, and allocated 50% weight to contract rent and 50% to market rent. This is again a methodology that is not found in any treatise. In fact, it is not appropriate pursuant to the Appraisal Institute:

> Rent for vacant or owner-occupied space is usually estimated at market rent levels and distinguished from contract rent in the income analysis. In fee simple valuations, all rentable space is estimated at market rent levels. Any rent attributed to specific leases is disregarded in the income analysis. In a leased fee analysis, current contract rents defined by any existing leases are used for leased space, and income for the vacant space is estimated at market rent. In developing market rent and expense estimates, the appraiser should make sure that property management is competent. Appraisal Institute, *The Appraisal of Real Estate*, (Chicago: 13th ed, 2008), p 453.

After determining gross income for the subject property (albeit incorrectly in this instance), the vacancy and credit is calculated. The operating expenses are determined based on actual and the market. Deductions for operating expenses were deducted for a net operating income, which was capitalized with a 10% overall rate. The Tribunal finds that Respondent's questioning of the OAR is appropriate. The extracted overall rates based on sales of shopping centers in Southeast Michigan for 2008 were 9.05%, 8.44%, and 7.40%, which would lead to a conclusion of less than 10%. The only sale in 2010 that included an overall rate was 9.36%. Therefore, it appears as if the addition of 1% to the PwC national rates for power centers for the risk was unfounded and not supported. The reconciled overall rate before the addition of the 1% is 8.98% (December 31, 2008), 10.48%December 31, 2009), and 10.12% (December 31, 2010).

Widmer included below the line deductions for ordinary rent loss during absorption, ordinary expense carry, forecasted improvement allowance, and forecasted leasing commission. The Tribunal finds that the rent loss and expense carry are part of the vacancy rate; the improvement allowance is included in the capital reserve. Widmer did not explain where the high 15% entrepreneurial reward or the low 3.58% discount rate was based on. After exclusion of expenses that appear to be "double dipped," the forecasted leasing commissions are left at $7,666 as a deduction.

Widmer's income approach is given no credibility. Without a clear expectation of fee simple or leased fee, the Tribunal is in a quandary as to whether the value is market value or leased fee, which is value to the owner based on specific appraisal instructions or something in between. Widmer is a member of the Appraisal Institute and is aware of the difference in a fee simple appraisal and a leased fee appraisal. He did neither a fee simple nor a leased fee appraisal.

Widmer's appraisal is misleading. The application of fee simple or leased fee is simply not clear. The sales comparison approach technique is not backed by any appraisal theory. The details were lacking on why there is a difference in NOI between the sales and the subject property.

Parker, Respondent's appraiser, clearly indicated that he did a leased fee analysis for the occupied portions of the subject property and market rent for the vacant spaces. In his income approach; however, he assumed incorrectly that the retail space was all triple net basis, stating that the tenant was responsible for all normal operating expenses. Cross-examination revealed that his $14.00 per square foot for the vacant space was higher than any space in the subject property for the last several years. He also incorrectly assumed that 95.67% of the operating expenses of the occupied area were reimbursed. Leased fee interest is the value of a property to its owner. The Tribunal does not consider Parker's leased fee interest to equal fee simple and is not accepted as market value.

Petitioner rebutted Parker's assumption that the retail leases were triple net. the subject property has a mixture of triple net, gross, and modified gross leases. None of the properties leased over the term of the appeal were at $14.00 per square foot for retail. Several of the retail properties negotiated rent concessions in the last two years. Parker contended that he did not have all of the required information.

Parker went through the expense items and analyzed to project reasonable expenses that an investor would consider. This resulted in NOI of $2,102,299; however, Petitioner using Parker's income and expense summary (Exhibit R-1, p 27), adjusting the rent for the vacant space to $11.00 per square foot, and accounting for the actual reimbursements of $301,754 resulted in NOI of $1,640,301. The adjusted NOI capitalized by Parker's OAR of 11.00% equals a true cash value decrease to approximately $16,219,604. (Tr 2, p 197.) The two changes suggested by petitioner to reflect the actual rents and reimbursements, adjusts Parker's value by approximately

$2,000,000. The Tribunal finds that is a large difference, especially when considering it is based on actual information that Parker should have had available.

In addition to the direct capitalization of income, Parker also prepared a discounted cash flow analysis (“DCF”). It was not clear to this Tribunal why this was included in the report as an additional check to the income approach. A DCF is generally prepared when the income stream is not consistent or varies. Parker testified that the subject property has a steady income stream that does not vary drastically over the years at issue. The Tribunal finds the DCF does not provide assistance to the determination of true cash value. The DCF would be appropriate if subject property had large capital expenses to be spread over several years.

Thirteen sales of shopping centers were presented in Parker’s sales comparison approach. He relied on five sales for tax year 2009. Parker adjusted Sale No. 6 95% for favorable debt assumption, inferior location, larger size, age and condition, tenant mix, economic occupancy and land-to-building ratio. The adjustment of 95% indicates to this Tribunal that Sale No. 6 is not comparable. Sale No. 12 sold in 2005; the Tribunal finds this sale took place prior to the economic downtrend and is rejected as influencing the market value of the subject property as of December 31, 2008. The adjusted sale prices for the remaining three sales are $65.83, $97.37, and $105.00 per square foot. Parker’s final value was $85.00 per square foot. The Tribunal finds that the exclusion of the two sales does not affect Parker’s final value for tax year 2009.

Parker utilized the same technique for the 2010 and 2011 tax years for the sales comparison approach. After considering the sales and adjustments, the Tribunal finds that Parker's sale price per square foot is in the middle and not influenced by the extreme outliers.

The Tribunal is charged in a valuation appeal to determine the true cash value of the subject property as of each tax year at issue.

Petitioner's appraisal was given no credibility for the vague responses given at the hearing when asked if this is a fee simple or a leased fee appraisal. The written and verbal response both indicates that the appraisal was a fee simple contingent on the existing leases. Petitioner used techniques that are novel and in this instance misleading to this Tribunal. Widmer had access to all of the data and background to value the subject property as of the tax dates at issue; he failed to ascribe to acceptable methods and, therefore, Petitioner did not meet its burden of proof.

Respondent's income approach had errors. Parker stated that he did not have all of the information and based his income approach on an assumption that all of the retail space was a triple net lease with the tenants reimbursing Petitioner. However, the Tribunal finds his testimony conflicts with his report. Parker's Table 3 is Petitioner's Reconstructed Operating Statements; it includes a line item Reimbursement. The Reimbursement Line indicates that Petitioner recovers less than 22.00% of income. Petitioner, upon cross-examination, requested that Parker delete the property tax reimbursement and replace market rent for the vacant space at $11.00 per square foot. This resulted in a reduction of approximately $2,000,000. However, parts of the rents are triple net, modified gross, and gross. The application of the effective tax rate in its entirety may also need an adjustment.

The Tribunal finds that the income approach is generally the preferable method of valuing income-producing property. Having said this, due to the deviation of conventional methodologies, discretionary actions outside of typical accepted appraisal practice and theory, neither Petitioner's income approach nor sales comparison technique was accepted.

Both parties relied on some similar sales. Widmer did not do a standard adjustment grid, but made one adjustment based on NOI and reduced the value of the subject property to $51.00 per square foot for tax year 2009. The Tribunal found this singular method unconventional and not accepted. The Tribunal finds that the sales comparison analysis by Parker, even after considering some of the sales not appropriate, gives a meaningful range of value for the tax years at issue. The result is a slight decrease in true cash value and state equalized value but the taxable value remains unchanged.

JUDGMENT

IT IS ORDERED that the property's assessed and taxable values for the tax year at issue shall be as set forth in the *Summary of Judgment* section of this Final Opinion and Judgment.

IT IS FURTHER ORDERED that the officer charged with maintaining the assessment rolls for the tax year at issue shall correct or cause the assessment rolls to be corrected to reflect the property's true cash and taxable values as finally shown in this Final Opinion and Judgment within 90 days of the entry of the Final Opinion and Judgment, the subject to the processes of equalization. See MCL 205.755. 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 Order within 28 days of the entry of this Order. 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 the Tribunal's order. As provided in 1994 PA 254, being MCL 205.737, as amended, interest shall accrue for periods after March 31, 1985, but before April 1, 1994, at a rate of 9% per year. After March 31, 1994, but before January 1, 1996, interest rate of the 94-day discount treasury bill rate for the first Monday in each month plus 1%. As provided in

1995 PA 232, being MCL 205.737, as amended, interest shall accrue for periods after January 1, 1996 at an interest rate set each year by the Department of Treasury. Pursuant to 1995 PA 232, interest shall accrue (i) after December 31, 1995 at the rate of 6.55% for calendar year 1996, (ii) after December 31, 1996 at the rate of 6.11% for calendar year 1997, (iii) after December 31, 1997 at the rate of 6.04% for calendar year 1998, (iv) after December 31, 1998 at the rate of 6.01% for calendar year 1999, (v) after December 31, 1999 at the rate of 5.49% for calendar year 2000, (vi) after December 31, 2000 at the rate of 6.56% for calendar year 2001, (vii) after December 31, 2001 at the rate of 5.56% for calendar year 2002, (viii) after December 31, 2002 at the rate of 2.78% for calendar year 2003, (ix) after December 31, 2003 at the rate of 2.16% for calendar year 2004, (x) after December 31, 2004 at the rate of 2.07% for calendar year 2005, (xi) after December 31, 2005 at the rate of 3.66% for calendar year 2006, (xii) after December 31, 2006 at the rate of 5.42% for calendar year 2007, and (xiii) after December 31, 2007 at the rate of 5.81% for calendar year 2008, (xiv) after December 31, 2008, at the rate of 3.31% for calendar year 2009, (xv) after December 31, 2009, at the rate of 1.23% for calendar year 2010, (xvi) after December 31, 2010, at the rate of 1.12% for calendar year 2011, and (xvi) after December 31, 2011, at the rate of 1.09 for calendar year 2012.

This Final Opinion and Judgment resolves all pending claims in this matter and closes this case.

MICHIGAN TAX TRIBUNAL

Entered: December 13, 2011 By: Victoria L. Enyart