STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
LANSING

GRETCHEN WHITMER
GOVERNOR

ORLENE HAWKS
DIRECTOR

Menard Inc,
Petitioner,

v

City of Escanaba,
Respondent.

MICHIGAN TAX TRIBUNAL

MOAHR Docket No. 14-001918

Presiding Judges
Preeti P. Gadola
Victoria L. Enyart

FINAL OPINION AND JUDGMENT

INTRODUCTION

Petitioner, Menard Inc., appeals ad valorem property tax assessments levied by Respondent, City of Escanaba, against Parcel No. 051-420-2825-100-006 for the 2012, 2013, and 2014 tax years. Steven P. Schneider and Daniel L. Stanley, Attorneys, represented Petitioner; Jack L. Van Coevering and Thomas K. Dillon, Attorneys, represented Respondent. This case is on remand from the Court of Appeals (COA),[1] with two instructions regarding the Tribunal's independent determination of the true cash value of the subject big-box retail building, site improvements and land: (1) take additional evidence with regard to the market effect of deed restrictions[2] and (2) allow the parties to submit additional evidence regarding the cost-less-deprecation approach to value.

[1] See *Menard Inc v Escanaba*, 315 Mich App 512; 891 NW2d 1 (2016).
[2] *Id*. at 532. The COA went on to say, relative to the sales approach, "if the data is insufficient to reliably adjust the value of the comparable properties if sold for the subject properties HBU [highest and best use], then the comparable should not be used."

In its prior Final Opinion and Judgment, the Tribunal considered Petitioner's valuation expert, Mr. Torzewski's sales approach most persuasive in making its final determination of the true cash value of the subject property for the tax years at issue. However, the COA noted that Mr. Torzewski testified that most[3] of his comparables had deed restrictions, which the subject property did not, and the deed restrictions "limit the ability of prospective buyers to use the comparable properties for the subject property's HBU . . . ."[4] The COA found that because a purchaser of a deed restricted property would be required to modify the property to a use which is not restricted, such as industrial use, the purchaser would pay a lower price.[5] Though the Tribunal accepted Mr. Torzewski's testimony that the deed restrictions had little effect on value, the COA was dissatisfied with that conclusion and ordered the Tribunal to have the parties provide additional evidence on the market effect of deed restrictions. The COA found Mr. "Torzewski failed to mention all the deed restrictions in his valuation report, [and] did not make any adjustments for their existence."[6] The COA held that "The Tribunal committed an error of law requiring reversal when it rejected the cost-less-depreciation approach and adopted a sales-comparison approach that failed to fully account for the effect on the market of the deed restrictions in those comparables."[7]

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[3] See initial hearing transcript at 63-64. See *Menard, supra* at 516. The Court went on the find Mr. Torzewski specifically acknowledged that comparables 1,3, 5, and 8 had use restrictions and comparables 6 and 7, did not. See *Menard, supra* at 516.
[4] *Menard, supra* at 525. "[T]o determine true cash value; the property must be assessed at its highest and best use." *Huron Ridge, LP v Ypsilanti Twp*, 275 Mich App 23, 33, 737 NW2d 187 (2007). Highest and best use is the maximally productive use (highest relative value considering risk) of the property. See Appraisal Institute, *The Appraisal of Real Estate* (Chicago: Appraisal Institute, 14th ed, 2014), p. 335.
[5] *Menard, supra* at 525.
[6] *Id.* at 524.
[7] *Id.* at 531.

The COA also ordered the Tribunal to allow the parties to submit additional evidence regarding the cost approach to value. "In the cost approach, value is estimated as the current cost of reproducing or replacing the improvements (including an appropriate entrepreneurial incentive or profit), minus the loss in value from depreciation, plus land value."[8] The parties' experts submitted replacement cost approaches to value, but disagree upon the correct Marshall Valuation Service (MVS) cost category, what should be included in the various calculations and at what rate, and depreciation, especially obsolescence, among other issues.[9]

A hearing on this matter was held from May 13-17, 2019, and June 3-7, 2019. Petitioner's sole witness was Laurence G. Allen, Member, Appraisal Institute (MAI). Respondent's witnesses were Steven Laposa, PhD, William H. Miller, Certified General Appraiser, Michael Williams, Professional Engineer, and Peter F. Korpacz, MAI.

Based on the evidence, testimony, and case file, the Tribunal finds that the true cash value (TCV), state equalized value (SEV), and taxable value (TV) of the subject property for the 2012, 2013, and 2014 tax years are as follows:

Parcel No.	Year	TCV	SEV	TV
051-420-2825-100-006	2012	$5,000,000	$2,500,000	$2,500,000
051-420-2825-100-006	2013	$5,000,000	$2,500,000	$2,500,000
051-420-2825-100-006	2014	$5,000,000	$2,500,000	$2,500,000

[8] Appraisal Institute, *The Appraisal of Real Estate* (Chicago: Appraisal Institute, 14th ed, 2014), at 36. The three major categories of depreciation include physical deterioration, functional, and external obsolescence. See *The Appraisal of Real Estate,* at 569.
[9] "The parties stipulated that, because the subject property was not income-producing, the income approach was inapplicable. In its final opinion and judgment, the Tribunal gave no weight to the income approach. That decision has not been challenged on appeal." See *Menard, supra* at n. 1.

PETITIONER'S CONTENTIONS

Petitioner's contention of TCV, SEV, and TV for the tax years in question:

Parcel No.	Year	TCV	SEV	TV
051-420-2825-100-006	2012	$3,870,000	$1,935,000	$1,935,000
051-420-2825-100-006	2013	$3,870,000	$1,935,000	$1,935,000
051-420-2825-100-006	2014	$3,870,000	$1,935,000	$1,935,000

As noted above, Petitioner contends that both parties' experts presented a cost approach to value the subject, owner-occupied big-box store, improvements and the land they are situated on, as required by the COA. However, the most significant difference between the parties' contentions is the calculation of obsolescence. Both parties commenced with replacement cost new from MVS/Core-Logic, but Petitioner contends Respondent's expert, Mr. Miller, presented inappropriate data to quantify obsolescence, which must be subtracted when concluding in value.

Petitioner's expert, Mr. Allen, "explained in his appraisal [regarding obsolescence,] 'the subject is oversized for what is generally required in the market and has a façade and other features, including interior layout and design that is specific to a Menard business.'"[10] He explained that big-box stores are not constructed for the purpose of selling or leasing them in the future, but built to suit the requirements of the initial occupant. Any future buyers choose to "incur modification costs to create their own image or utilize features different than those designed."[11] As such, obsolescence exists, functional and external obsolescence are intertwined, and are best calculated together.

[10] Pet's Brief at 32, citing P-1 at 77.
[11] Pet's Brief at 33.

Mr. Allen calculated functional/external obsolescence utilizing six different indicators, but determined his total obsolescence using the capitalized rent loss method to conclude an obsolescence of between $6,698,674 and $6,984,887 for the tax years at issue. Petitioner alleges that Mr. Miller, "on the other hand accounts for no economic obsolescence and applies only 2.4 to 2.2% functional obsolescence ($314,753 to $300,911), quantified by simply removing the replacement cost of the Menard's mezzanines from his replacement cost conclusion."[12]

Petitioner contends Mr. Miller's data, utilized in calculating obsolescence, "consists of properties selling to investors with historic build-to-suit leases in place. All of Respondent's sales reflect what investors paid for a store leased to either Lowe's or Home Depot and the cash flow from such creditworthy tenant pursuant to a build to suit lease."[13] Petitioner contends that Respondent's sales and leases reflect a value-in-use to Lowe's and Home Depot for buildings built for their specific needs and do not put forth any market-based evidence of obsolescence. Petitioner contends Respondent utilized leased-fee sales in an attempt to calculate the fee simple interest of the property; however, leased-fee sales must be adjusted to represent the value of the real estate only, which Mr. Miller did not attempt. Petitioner contends the COA explicitly held "that the subject property and other owner-occupied big boxes should be valued as 'vacant and available.'"[14]

Petitioner contends the Tribunal must make an independent determination of the true cash value of the subject property and further contends that MCL 211.27 requires

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[12] Pet's Brief at 44, citing R-1 at 94, 144.
[13] *Id.* at 2.
[14] *Id.* at 12.

the use of a value-in-exchange standard and excludes value-in-use. Petitioner cites long-standing case law, including the Michigan Supreme Court holdings in *Edward Rose Building Co v Independence Twp*[15] and *First Federal Savings and Loan Ass'n v City of Flint*,[16] which find that property tax assessments must be based on market value, not value to the owner, and as such, not the value to Menards.

Petitioner contends that Respondent argues for the Tribunal to redefine the term "fee simple" to include leased properties, "in an attempt to then argue that the fee simple interest in the subject property can be valued by using the sale of leased fee properties subject to build-to-suit leases without making any adjustments."[17] Petitioner argues that redefining the term is beyond the limited scope of remand in this case.

Petitioner claims, relative to its use of market comparable sales and leases in its calculation of obsolescence, that "Respondent attempts to prevent . . .[their] use . . . because such sales or leases are 'second generation.' This practice overlooks the obvious fact that, if the subject property sold, it would be to a 'second generation' user.""[18] Petitioner contends "[i]t is undisputed that, to properly appraise the subject property, one must assume a hypothetical sale of the subject property. 1Tr 95 (Allen); 6 Tr. 22-23 (Miller); 9 Tr. 153 (Korpacz). Thus, the property appraisal methodology must assume a 'second generation' sale."[19]

Petitioner contends the property's highest and best use (HBU), as improved, has been determined to be the "'continued use of the existing improvements as a free-

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[15] *Edward Rose Building Co v Independence Twp*, 436 Mich 620, 462 NW2d 325 (1990).
[16] *First Federal Savings and Loan Ass'n v City of Flint*, 415 Mich 702; 329 NW2d 755 (1982).
[17] Pet's Response at 8.
[18] *Id.* at 18.
[19] *Id.*

standing retail building use.'"[20] Petitioner contends Mr. Miller attempted to change the property's HBU to "continued use as a Menard's,"[21] or "home improvement store."[22] Petitioner alleges continued use does not mean "occupied before and after sale by the same entity (owner or tenant). It simply means that the subject is used for retail now and its (forward looking) HBU continues to be retail."[23]

Petitioner contends deed restrictions have an immaterial effect on sales price.[24] Mr. Allen prepared a detailed analysis and concluded all of his comparable deed-restricted properties sold for more than the non-deed restricted sales.[25] He also testified that the deed restrictions in Mr. Torzewski's sales had little effect on their purchase price. Petitioner contends Respondent presented no evidence on the effect of deed restrictions other than the opinion of two witnesses.

PETITIONER'S ADMITTED EXHIBITS

P-1: Appraisal Report for Menards Escanaba Retail Store, Prepared by Allen & Associates Appraisal Group, Inc., dated August 13, 2018

P-4: Map and Google Earth Photos of Escanaba Retail Areas

P-5: Larry Allen Materials on Sales of Big-Box Stores used for Obsolescence Indications

P-8: Appraisal of Sam's Club Retail Property, Madison, Wisconsin, by Integra Realty Resources, dated December 31, 2017

P-9: Appraisal of Sam's Club Retail Property, Kenosha, Wisconsin, by Integra Realty Resources, dated December 31, 2017

[20] Pet's Brief at 9, citing P-1, initial hearing at 34.
[21] *Id.* at 12-13, citing R-1 at 5, R-1b at 2 of 7.
[22] *Id.* at 13-14, citing R-1 at 34, T7 at 144.
[23] *Id.* at 11.
[24] *Id.* at 19-28.
[25] *Id.* at 28.

P-10: Appraisal of Sam's Club Retail Property, West Allis, Wisconsin, by Integra Realty Resources, dated December 31, 2017

P-11: Larry Allen Materials on Leases used for Obsolescence Indications

P-12: Larry Allen Matched Pairs Analyzed for Deed Restrictions

P-13: Barrera-Villarreal study, "How to Best Redevelop Vacant Big Box Retail Property in Texas"

P-14: ESRI "Retail Market Place Profile"

P-15: NAICS Subsector Code 444 Building Material and Garden Equipment and Supplies Dealers

P-16: NIACS Code 444190 Other Building Material Dealers

P-17: Portions of William Miller Work File Materials re: sales on pages 117-119

P-18: American Finance Trust Form 8-K, Securities and Exchange Commission

P-19: CoStar materials regarding Home Depot, Plainwell, Michigan

P-22: Larry Allen materials on the decline of capitalization rates

P-24: Menards Escanaba layouts before and after expansion

P-26: Excerpts from Duff & Phelps appraisal regarding Cole Credit Property Trust, Inc

P-27: Subject Marketability Analysis: Home Improvement Store Case Study (R-2)

P-30: Michael Williams Work File Materials re: Building Permit Fraser Source Club

PETITIONER'S WITNESS

Laurence G. Allen

Petitioner's only witness was Laurence G. Allen. Mr. Allen holds a MBA degree from the University of Michigan, and is a Member of the Appraisal Institute and Institute of Chartered Financial Analysts. He has been a real estate appraiser since 1973, has lectured on the valuation of real property and has published articles on the subject. The majority of Mr. Allen's appraisal work has related to commercial real property in Michigan.

In Michigan's Upper Peninsula (UP), Mr. Allen has appraised twelve properties over the last few years, including the paper mill in Escanaba, Delta Plaza, (an Escanaba

mall), the Walmart in Sault Ste. Marie, a shopping center that was formerly the Walmart in Sault Ste. Marie, a number of retail properties in Marquette, the Lowe's in Marquette, and the Home Depot in Iron Mountain. Mr. Allen has appraised Cabela's, Bass Pro, Walmart, Sam's Club, Target, Kmart, Lowe's, Kohl's, Home Depot, Menards, Meijer, and Costco, and has appraised close to 200 big box stores, which he defines as 80,000 square feet or larger, over the last ten years.[26] Mr. Allen has appraised big-box stores for taxpayers, municipalities, and the Michigan Department of Treasury.[27] The Tribunal qualified Mr. Allen as an expert in appraisal and the appraisal of big-box stores.[28]

Mr. Allen appraised the subject property as of December 31, 2011, December 31, 2012, and December 31, 2013.[29] The subject property comprises a single tax parcel and the appraisal report was prepared in August 2018. It includes a valuation based on the cost approach; the income and sales comparison approaches were not prepared. Pursuant to the cost approach, when determining if the subject property has functional/external obsolescence, Mr. Allen utilizes a series of calculations to conclude a net operating income (NOI) for the subject property. The NOI carries over to the estimated obsolescence calculation, which is utilized to determine TCV. The report also includes a section analyzing deed restrictions on certain comparables. The report presents an appraisal of a fee simple interest in the property, with a HBU as a freestanding retail building.

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[26] T1 at 48-53. Mr. Allen testified the majority of the big-box stores he has appraised have been located in Michigan. See T1 at 54.
[27] *Id.* at 54-55.
[28] *Id.* at 65.
[29] *Id.* at 70-71.

The subject property is located at 3300 Ludington Street, Delta County, in the UP of Michigan, and is included in the Escanaba Micropolitan Statistical Area.[30] This area has seen a small increase in population between 2000 and 2010, but declining population in the one and two-mile radius. There are also "very low median incomes in the half-mile, one-mile and two-mile radiuses."[31] Income in Escanaba is approximately 18% less than the rest of the state. In terms of location, to the west of the subject property is undeveloped forest land and to the south, the majority of Escanaba development. As mentioned above, there is a mall in Escanaba, the Delta Plaza, which had close to 50% vacancy over the tax years at issue.[32] Some of the vacant space was the former Menards which vacated and relocated to its present site, opening in 2009. The former store has been vacant since that time, only recently renting to another tenant, ten years after relocation.[33] Mr. Allen testified, "the experience in Delta Plaza it demonstrates economic conditions in the Escanaba market."[34] There are three other big-box retailers in Escanaba: Kmart, Wal-Mart, and Meijer. Kmart has closed since the last tax date at issue in this appeal.[35] It "sold for about $13 a square foot - - I believe used as a U-Haul."[36] The subject property is about 140 miles from the nearest expressway.[37]

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[30] T1 p. 80. While the most common reference to statistical area is "metropolitan statistical area," the subject property is in a micropolitan area due to its small market size.
[31] *Id.* at 81,83.
[32] *Id.* at 87. Mr. Allen appraised Delta Plaza Mall, so he previously analyzed its vacancy rate.
[33] *Id.* at 87-88.
[34] T2B at 69
[35] T1 p. 86.
[36] *Id.*
[37] *Id.* at 89.

Cost Approach

The site of the subject property comprises 18.35 acres.[38] Site improvements include a parking lot, yard storage area, garden center area, and an open 22,000 square foot storage building for lumber/drywall/large building material, into which vehicles can drive and load materials.[39] The building is 165,000[40] square feet with a 10,000 square foot mezzanine and was built in 2008. [41] It was built with tilt-up concrete walls, is about 30 feet tall, and has three dock doors. The floors are exposed concrete and the ceilings are open. There is sodium vapor lighting and a minimal number of windows. There is an elevator serving the mezzanine area "[a]nd around the side of the building there's a canopy that's used for outdoor storage . . . of building materials, which is about 36,000 square feet."[42] There is also a guardhouse "that provides controlled access to the storage yard areas."[43] Mr. Allen testified that Menards' type storage sheds are not typically utilized by other big-box retailers, nor do other retailers have mezzanines. The store was designed and constructed to conform to Menards' business model; however, the space is capable of being used by other retailers.[44] "The typical buyer, however, would not pay for the unique characteristics that make it a Menards' store versus their store."[45] Mr. Allen testified that a Menards store "is very deep, which makes it more difficult to use for multiple retail users in terms of some big-box stores are

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[38] T1 at 89.
[39] *Id.* at 89-91.
[40] In the initial hearing of this case, the parties stipulated that the square footage of the first floor of the subject property is 166,196. Mr. Allen testified that if he valued the property at 165,000 square feet or the slightly higher 166,196 square feet, his conclusion of value would be the same. See Initial Hearing, Stipulation of Fact, no. 2. See *Menard supra*, at 514.
[41] T1 at 90.
[42] *Id.*
[43] *Id.* at 91.
[44] *Id.* at 91-92.
[45] *Id.* at 92-93.

bought for multi-tenant conversion. This one could be, but the depths make it more difficult."[46] He testified that "The design of the property in many ways is more similar to a warehouse than a retail store. The ceiling heights, the location of the truck doors, and the large open spaces are characteristics of an industrial warehouse."[47]

As noted above, the scope of Mr. Allen's appraisal was limited to the cost approach.[48] The site was purchased for $1,150,000.[49] Four comparable big-box stores were used for land value computation, all located in the UP of Michigan.[50] The following four sales of vacant land were considered:

	Subject	Marquette	Escanaba	Sault Ste. Marie	Marquette
	Menards	Lowe's	Meijer	Meijer	Meijer
Acres	18.35	14.75	47.86	32.21	29.95
Sale date	Apr-08	Mar-08	Oct-15	Jun-15	Jan-17
Sale price	$1,150,000	$2,000,000	$3,500,000	$1,944,270	$3,910,000
Per acre	$62,670	$135,593	$73,130	$60,362	$130,551
Per SF	$1.43	$3.11	$1.68	$1.39	$3.00

Mr. Allen considered market adjustments for differences in time, demographics, and arterial attributes. His adjusted range and sale prices for vacant land was $63,018 per acre to $92,104 per acre. The conclusion for total land value, based on the comparables as adjusted, is $75,000 per acre, or a total of $1,380,000, as of each valuation date.[51] The land value conclusion by both valuation experts was similar and they agreed it was not a point of contention.[52]

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[46] T1 at 92.
[47] P-1 at p 31. In fact, the subject property is zoned "F, Light Manufacturing." See P-1 at 1.
[48] T1 p. 107.
[49] *Id.*
[50] *Id.* at 108, P-1 at 59.
[51] T1 at 111.
[52] *Id.* at 109-110.

Utilizing MVS for construction costs, Mr. Allen determined that the property is a Class C low-cost warehouse discount store.[53] Low cost was utilized because the subject property has none of the finishing in average cost.[54] Finishing of "average cost included acoustical tiled ceiling, vinyl floor coverings, a deli or some kind of restaurant operation. Whereas the subject property has concrete floors, open ceilings. So, it has none of the finishing that's in average cost."[55]

A large adjustment was made for HVAC because the subject property is located in an extreme climate. Other adjustments were made for sprinklers, story height, perimeter, mezzanine cost, and mezzanine elevator. [56] No replacement cost was included for the storage building because Mr. Allen testified, in his experience, when a property such as the subject is sold, the storage building is torn down or not used. This method is appropriate when an item is not demanded in the market.[57] A cost multiplier was applied to adjust the cost for each of the tax years.[58] Site improvements were estimated separately per MVS, including canopies which were valued at $19 per square foot.[59] Further, five percent was added for additional soft costs not already included in MVS.[60] Straight line depreciation was applied for physical deterioration.[61] The calculation of cost new, minus physical depreciation is represented below:

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[53] T1 at 111.
[54] *Id.* at 112.
[55] *Id.* at 111-112.
[56] *Id.* at 112.
[57] *Id.* at 113.
[58] *Id.* at 114.
[59] *Id.*
[60] *Id.*
[61] *Id.* at 115.

Replacement Cost New	12/31/2011	12/31/2012	12/31/2013
Building	$8,701,423	$8,980,567	$9,273,992
Physical Depreciation	10%	13%	16.7%
Deduction	$870,142	$1,197,409	$1,545,655
Building Depreciated	$7,831,281	$7,783,158	$7,728,337
Site Improvements	$2,059,926	$2,126,009	$2,195,473
Depreciation	20.0%	26.7%	33.3%
Deduction	$411,985	$566,936	$731,824

Mr. Allen testified that the subject property suffers from functional and external obsolescence. He testified that "[f]unctional obsolescence is loss in value due to factors within the boundaries of the property."[62] Functional obsolescence exists with big-box stores:

> [b]ecause typically big big-box stores are not built on the speculative basis so that they're adaptable for multiple users readily. They're built for a specific user with a specific business plan of that user in mind and specific characteristics of that particular brand. And so when they're sold in the market to another user typically they're major items of difference in how that retailer wants to operate. And he might need a different size or different ceiling height or not need the storage building or not need as big a canopy area and so he's not going to pay for that and that results in prices that are significantly less than the price that was paid to design and build it to the specific specifications of the original retailer.[63]

Mr. Allen testified that that he knows of no freestanding big-box stores over 80,000 square feet that have ever been constructed for the purpose thereafter of leasing the property to an unknown tenant or entering into an agreement to sell to an unknown purchaser. He testified the scenario does not occur in the market because the stores are built to suit the specific users, "whether it's Menards, Lowe's, Home Depot, Target,

[62] T1 at 115.
[63] *Id.* at 115-116.

Meijer, Wal-Mart. And they're not built to be put on the general market and leased or sold to a typical retailer if there is such a thing."[64]

Mr. Allen testified that external obsolescence is "loss in value due to factors outside of the property boundaries."[65] He testified it is not mandatory pursuant to appraisal techniques to quantify external and functional obsolescence separately and that functional obsolescence and external obsolescence are intertwined for a big-box store.[66] He testified the advantage to quantifying all forms of obsolescence together is that "you can extract them directly from the market."[67] As such, he did not separate out functional and external obsolescence. He testified:

> Take the size of the building, for instance. That's characteristic of the property within the boundaries of the property so it's – functionally each retailer is going to want a different size and maybe want a larger building or smaller building. And so typically there is a loss in value because the size is not perfect for a retailer so it's not going to pay for additional size he doesn't need or the deficient size. So, you'd think that would be functional obsolescence, but for large retail buildings it's because the market for large buildings is thin and there's not a lot of users. So, part of its external factors that drive down the price of the property.[68]

Mr. Allen testified that the market value of the fee simple interest is adversely impacted by obsolescence because if the property were sold in the market, a buyer is not going to pay replacement cost for features that are specific to a Menards' store.[69] A prudent buyer would pay market value, which reflects functional obsolescence.[70]

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[64] *Id.* at 116.
[65] T1 at 117.
[66] *Id.* at 119.
[67] *Id.*
[68] *Id.* at 119-120
[69] *Id.* at 120.
[70] *Id.* at 130.

Mr. Allen described photographs of the subject Menards in his appraisal and explained how Lowe's and Home Depot have different characteristics than Menards. One difference is the entry façade. Further, Menards has a lumber yard with gatehouse to control access, while Lowe's and Home Depot sell lumber inside. Additionally, Mr. Allen does not know of any other big-box retailers that use outside storage buildings and Menards has a much larger yard, fenced with built-in storage area, outside the building. Menards also has a significant amount of storage in canopy areas, which are open. Mr. Allen testified that in "this store there is about 36,000 square feet of canopy areas and something like a Home Depot or Lowe's might only have 12,000 square feet of canopied area. So, they have much larger canopy areas. "[71] A special feature unique to a Menards store is that "they have their lighting department right inside the window, so when you drive by the building you see all these – all these lights and you know that it's a Menards store and their lighting department."[72] Also, Menards utilizes sodium vapor lighting which is good for indoors and outdoors in the canopy area while other retailers generally use fluorescent lighting. The ceiling heights in Menards are higher than in Lowe's or Home Depot; there is a fifty-foot span between columns. Menards has a mezzanine area with stairs and an elevator and generally the employee break area is located there. Lowe's and Home Depot do not have mezzanines and the employee break areas are located on the main level of the store. Menards does not have finished office space such as Home Depot and Lowe's.

[71] T1 at 125.
[72] *Id.*

Mr. Allen was asked if were Lowe's or Home Depot that purchased the subject property, would they pay replacement construction cost, less physical depreciation, less the cost of mezzanine removal, as alleged by Respondent. He answered in the negative, explaining Lowe's and Home Depot or even Menards, would pay market value.

Mr. Allen applied six techniques to demonstrate that obsolescence exists in big-box stores. First, he looked at the re-lease of twelve properties built with a build-to-suit lease in place, as compared to current market rent, demonstrating that any future lease rate would be for much less, "[b]ecause the original build-to-suit lease was based on the cost to the original owner including all the special features, and that generally would not be recoverable in the market."[73] Mr. Allen testified that with an existing store, the retail purchaser will need "to adapt the existing store to their retailing needs rather than having it already built for their retailing needs. So it won't - - they won't pay as much rent as on a build-to-suit basis."[74] He testified the build-to-suit rent is calculated, "based on a return on construction costs plus a profit."[75] He answered that a developer would not enter into a lease that would not recover the construction cost plus a reasonable profit.

Mr. Allen testified that he valued the subject property as an existing building, not a building that would be built to suit a buyer's specifications. Further, by comparing market rents and build-to-suit rents, Mr. Allen determined the subsequent re-lease of build-to-suit leased spaces are at an average of 46.55% percent of the build-to-suit

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[73] T1 at 132.
[74] *Id.* at 137.
[75] *Id.*

lease.[76] Additionally, he testified regarding the subject property, that re-lease rates would be even lower than average, because "the subject has a lot more characteristics that aren't typical for other retailers."[77]

Pursuant to Allen's second method of calculating obsolescence, he analyzed the losses incurred by five Meijer Source Clubs (Source Club). Source Club was an attempt by Meijer to enter the warehouse, retail market, such as Sam's Club or Costco, however Meijer abandoned the idea and decided to sell the stores. Mr. Allen considered actual construction and land costs to demonstrate the loss Source Clubs incurred after marketing the properties for sale. The typical Source Club building was 130,000 square feet, which is smaller than the subject property and more like a Target, Home Depot, or Lowe's. The properties were in fact purchased by Home Depot,[78] Target, Lowe's, and Horizon Properties, which is a redeveloper of retail properties. These were essentially brand-new stores, but some took a number of years to sell, so there was some depreciation. The purchases by Home Depot were redeveloped for home improvement use and Lowe's tore down the Source Club it purchased and thereafter, constructed its store.[79] Mr. Allen noted that this information is dated, from the 1990s, however, he found this analysis, "demonstrates there was significant obsolescence then, and that the same obsolescence would be true today."[80] Mr. Allen's analysis concluded a 14% to 56% discount in sale price from development costs.[81]

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[76] See P-1 at 78.
[77] T1 at 139.
[78] Home Depot purchased two properties.
[79] T10 at 15.
[80] T1 at 161.
[81] See P-1 at 79.

Mr. Allen noted that there were no deed restrictions on the Source Club properties when they sold, "but a deed restriction was put on when they were—when the deed was recorded."[82] The deed restrictions were not imposed on the properties prior to the price of the property being negotiated. Mr. Allen testified, "[i]t's my experience that these retailers that they determine what they think the value of the store is, they put it on the market, they get an offer and negotiate a price. And then they talk to the buyer about the deed restrictions and if it interferes with the price, they modify the restrictions, so it does not."[83] In fact, he agreed that the deed is filed sometime after the closing on the property. Mr. Allen testified the deed restrictions could have some effect on the sale price of these Source Clubs, but it is not material, "because they didn't need to modify the price and if—if the buyer didn't conform to their deed restriction, they would change it. Like – like, the Target store, for instance, doesn't fit within their deed restrictions so they make an exception for the Target store."[84] The Source Club store in Westland sold to Lowe's, but was prohibited to become a Target in the deed restriction, but then the Wyoming store was sold to Target, which was not prohibited. Mr. Allen testified the reason for the scenario is the "the buyer of the Westland store was a Lowe's and the buyer of the Wyoming store was Target."[85] As such, the sales were carved out from the deed restrictions. He testified, "[t]his is an example of what is done in the market to modify a deed restriction so that the price and the sale won't be impaired."[86]

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[82] T1 at 161.
[83] T1 at 162.
[84] *Id.* at 163.
[85] *Id.* at 168.
[86] *Id.* at 169.

Pursuant to the third method of determining obsolescence, Mr. Allen extracted obsolescence from actual sales of big-box stores, "[b]ecause sales of big-box stores most directly demonstrate the value of big-box stores, or the usual selling price."[87] Mr. Allen presented six sales from the Midwest that were all fairly new stores which he actually, physically examined and inspected, and they sold between $17 to $38 per square feet. Further, most of the sales were of home improvement stores including four Lowe's, one Home Depot, and one Super Walmart. He did not utilize any big-box sales from the UP, because there are not many. In fact, Mr. Allen knows of only one sale in the UP, as noted above, the Kmart in Escanaba, which sold recently for about $13 per square foot, but was an older store.[88] All of the sales he analyzed were from a big-box retailer to another retailer and were fee simple sales. Obsolescence was calculated to be between 34 to 71% and the six sales are presented in the chart below:

	1	2	3	4	5	6
City	Holland	Aurora	Elgin	Brown Deer	Hartland	Oswego
State	Michigan	Illinois	Illinois	Wisconsin	Michigan	Illinois
Type of Store	Home Depot	Lowe's	Lowe's	Lowe's	Walmart	Lowe's
Sale Price	$1,750,000	$4,000,000	$5,500,000	$4,000,000	$4,175,000	$3,650,000
Year Built	2006	2005	2006	2006	2009	2005
Square Feet	103,540	139,494	139,410	139,571	186,763	140,061
Sale Date	1/14	1/12	4/16	12/13	7/16	2/14
Age as of Sale	8	7	10	7	7	8
RCN Bldg/Site	$7,185,289	$10,857,027	$11,527,709	$10,324,030	$13,495,094	$11,510,495
Less Physical Depreciation	$2,192,184	$2,858,792	$4,307,270	$2,734,606	$3,197,053	$3,442,961
Depreciated Value of Improvements	$4,993,106	$7,998,235	$7,220,439	$7,589,424	$10,298,041	$8,067,534
Sale Price	$1,750,000	$4,000,000	$5,500,000	$4,000,000	$4,175,000	$3,650,000
Land Value at Time of Sale	$1,200,000	$1,850,000	$2,230,000	$2,490,000	$3,440,000	$2,450,000
Residual Value To Improvements	$550,000	$2,150,000	$3,270,000	$1,510,000	$735,000	$1,200,000
Obsolescence Estimate	$4,443,106	$5,848,235	$3,950,439	$6,079,424	$9,563,041	$6,867,534
Obsolescence % of RCN	61.8%	53.9%	34.3%	58.9%	70.9%	59.7%

[87] *Id.* at 156.
[88] T1 at 86.

Fourth, he considered and explained the capitalized rent loss method of calculating obsolescence. He testified, “[t]he capitalized rent loss method involves taking a return on the replacement cost of the improvements, in this case, the physically depreciated replacement costs to get a required net operating income to support the value of the improvements or to support the replacement costs of the improvements. And that’s then compared to the net income projected for the property and the difference is it’s capitalized to indicate the obsolescence.”[89] It represents the difference in income if the subject property had a stabilized income stream versus the income stream based on the replacement cost and market rent as utilized in the analysis.

Four new lease comparables from smaller communities around Michigan were selected to estimate market rent for the subject property. Two of the comparables were located in Northern Michigan and a third in the UP of Michigan. The fourth comparable is located in Adrian and Mr. Allen has appraised three of the four properties. Three are leases to Hobby Lobby and the fourth is a Kohl’s lease and they leased between 2010 and 2015 .[90] None of the leases were build-to-suit because “Build-to-suit leases don’t fit the definition of market rent and they are not market rent for an existing store.”[91] All of the leases are triple net leases which, “means that the tenant pays a base rent plus he pays additional rent for the operating costs of the property, specifically the common area maintenance costs, the property taxes, insurance.”[92] Further, leases of big-box stores typically include a tenant improvement allowance that is provided by the landlord

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[89] T2A at 4 - 5.
[90] See P-1 at 81.
[91] T2A at 6.
[92] *Id.* Common area maintenance costs for items such as snow removal, parking lot maintenance, and sidewalk maintenance. See T2A at 22.

for the tenant to reimage the property. It is important to consider tenant improvement allowances because, "the tenant can lease the property as is, or as I indicated, quite often, the landlord will give the tenant an allowance and increase the rent by that allowance so that the landlord will pay for the improvements instead of the tenant."[93]

Mr. Allen notes that the comparables are all junior box stores because he was not able to locate any big-box rent comparables in Northern Michigan or the UP. He testified that the potential problem with using smaller stores is, "I could be overstating market rent."[94] "Typically, junior box leases, junior box properties lease for higher rent per square foot than big box stores."[95] "There's more demand [for junior box stores] because there's more tenants that can lease a smaller store."[96] Mr. Allen made adjustments to his lease comparables for market conditions, size, arterial attributes, demographic attributes, age, and condition. His adjusted rents ranged from $2.41 to $4.06 per square foot and he concluded to a rent of $3.50 per square foot. For the mezzanine space, a factor of 35% was applied.

Potential gross income consists of rental income, common area maintenance (CAM), insurance and property taxes, less vacancy and credit loss of 15%[97] for effective gross income (EGI) of $911,629. Unreimbursed operating expenses included management fees, replacement reserves and CAM, insurance and property taxes, for total expenses of $533,216. Subtracting total expenses from EGI puts forth a net

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[93] T2A at 7.
[94] *Id.* at 12.
[95] *Id.* at 12-13.
[96] *Id.* at 13.
[97] One reason stated for the choice of 15% vacancy and credit loss figure, is the former 59,000 square foot Escanaba Menards store, vacant for ten years, after Menards moved to its present location. He also considered the former Walmart in Sault St Marie, CoStar Delta County and UP vacancy rates, and his experience researching big-box stores. See P-1 at 83-84.

operating income (NOI) of $378,413 for all three tax years. NOI is utilized to "estimate the subject property's obsolescence via the income shortfall."[98] Mr. Allen's NOI calculation is reflected in the following table:

Income $3.50 SF	165,866		
MZ $1.23 SF	10,220		
			$593,051
Reimbursement:			
CAM	$316,955		$316,955
Insurance	$40,500		$40,500
Taxes	$122,000		$122,000
Potential Gross Income			$1,072,505
(V&C)	15%		-$160,876
Effective Gross Income			**$911,629**
Expenses			
Cam 1.80sf	$316,955		$316,955
Insurance 0.23 sf	$40,500		$40,500
Taxes	$122,000		$122,000
Management fee 3% EGI	$27,349		$27,349
Reserves 0.15 sf	$0		$26,413
Total Expenses			**$533,216**
Net Operating Income			**$378,413**[99]

With regard to determining the applicable capitalization rate, Mr. Allen considered the band-of-investment technique of deriving an overall rate based on current mortgage and equity requirements. He also considered survey data from Realtyrates.com – free standing, PwC real estate investment survey, a market derived rate with information from CoStar for shopping center and retail building sales greater than 35,000 square feet, among other sources. Considering all of this information, Mr. Allen concluded to a cap rate of 10% for all three tax years.[100] Obsolescence of 58-65% was calculated

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[98] P-1 at 89.
[99] The NOI remained the same for the three years in contention.
[100] See P-1 at 85-88, T2A at 26-33.

utilizing the subject's depreciated costs of improvements plus land, and capitalizing them against the costs to indicate the required net income. The obsolescence is applicable only to the improvements.

Fifth, Mr. Allen pointed to the preference of a buyer to tear down an existing building rather than reconfigure. Mr. Allen presented six examples where major retailers purchased existing buildings that were 5-11 years old "and chose rather than try to adapt them to their retail use they demolished them and just built a new store. Those included Lowe's buying a - - the Handy Andy and the Source Club store that I mentioned and Menards buying a couple of Super Ks and IKEA buying a fairly new Super K."[101] He testified, "[f]our of them were purchased by a home improvement retailer and redeveloped for home improvement use."[102] Five of the six stores are the approximate size of the subject property and they were demolished well before the end of their useful life, based on the 30-year useful life. Mr. Allen testified that the demolition of the existing store represents 100% obsolescence.

Finally, sixth, Mr. Allen considered the cost of modification of an existing big-box store. Mr. Allen "talked to an engineering firm that typically does reconfigurations for big-box retailers. And they went through what they normally have to do and how it's - - how much is spent on reconfiguring existing big-box stores for another big-box user."[103] The firm, Richard Bowen and Associates has worked for Meijer, Kohl's, and Walmart. Its conclusion of modification costs was \$15-\$53 per square foot for retrofitting depending on the specification of the buyer's business model. This conclusion was based on an

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[101] T1 at 139-140, P-1 at 90.
[102] T10 at 15.
[103] T1 p. 133-134.

analysis of a Meijer and Target store.[104] Further, Mr. Allen toured Meijer and Target in Auburn Hills with Mr. Burton and Mr. Pempus, from the firm, in relation to appraisals he was conducting for those two stores, and he determined "that it costs a lot and you have to generally do a lot of things to make a property ready for another retailer."[105] Including, "the most obvious is the façade changes, but other changes often will include the flooring or the ceiling and the lighting configuration, HVAC configuration. If you're going multi-tenant that would be partitioning walls and reconfiguring HVAC further."[106] Mr. Allen gave examples of modification costs, including Super K in Dearborn which was purchased by Walmart in 2006 for $50 per square foot and they subsequently spent another $50 per square foot converting it from Super K to Walmart, "which was the same use, and the footprint of the building wasn't changed. It was just all interior reconfiguration for a Walmart store and then the exterior signage changes."[107] Additionally, Walmart purchased the Brown Deer, Wisconsin Lowe's store, and spent $11,000,000 making it into a Super Walmart, and Meijer in Portage, Indiana purchased Super K and spent $7,000,000 reconfiguring it. Mr. Allen testified that the costs to reimage the aforementioned stores, had nothing to do with deed restrictions.[108] Mr. Allen also agreed, as noted above, that renovation costs could actually exceed replacement cost new, and as such, some retailers choose to tear down the building and start new.[109]

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[104] P-1 at 91, T1 at 153.
[105] T1 at 147
[106] *Id.*
[107] *Id*. at 154.
[108] *Id*. at 154-155. See also P-1 at 91.
[109] T1 at 155-156.

After considering all methods of quantifying obsolescence, Mr. Allen employed the income capitalized rent loss method.

The calculation for the 2012 obsolescence via income loss analysis is presented below:[110]

Petitioner Cost of Improvements		
Total Building- Site Improvement	$10,761,349	
Deduct Physical Depreciation	-$1,282,128	
Plus, Land Value	$1,380,000	
Total	$10,859,221	
Overall Cap Rate	10.0%	
Required NOI for Feasibility		**$1,085,922**
Land Value	$1,380,000	
Land Cap Rate	9.0%	
NOI attributable to Land	$124,200	$124,200
NOI Required for Improvement Feasibility		$961,722
Subject NOI	**$378,413**	
Land NOI deduction	$124,200	
Subject NOI - Land NOI=		
NOI to just Improvement		**$254,213**
Deficient Income from Improvement		**$707,509**
Improvement Capitalization Rate		10.13%
Estimated Obsolescence		**$6,984,887**

As noted above, Mr. Allen's final conclusion of obsolescence accounted for both functional and economic obsolescence. He wrote, "[a]lthough this method is to a large degree interdepended with the income approach analysis, it is generally supported by other obsolescence method analyses combined with the adverse economic conditions that existed as of each valuation date."[111] He also testified that the capitalized rent loss

[110] Tax year 2012 is shown and the remaining tax years were calculated in the same manner.
[111] See T2A p. 37. "On the re-lease study that averaged about 46 percent. That was calculated based, including land and building, not just applied to building. The Source Club was 14 to 56 percent. The market extractions were 34 to 71 percent. The capitalized income loss was about 58 to 65 percent. The purchases of fairly new buildings for demolition indicated 100 percent obsolescence in those situations." See also, P-1 at 92. As noted above, Mr. Allen's concluded obsolescence was $6,984,887 for 2012, $6,848,382,000 for 2013 and $6,698,674 for 2014.

method was utilized because it was the only technique that was specific to the subject property.

After calculating obsolescence, Mr. Allen's conclusion of the TCV of the subject property pursuant to the cost approach for the 2012 tax year is put forth below:

Cost Approach Summary	
Depreciable Basis	
Store Building	$8,701,423
Site Improvement	$2,059,926
Total	**$10,761,349**
Less Depreciation	
Incurable Physical	
Store Building	$870,142
Site Improvement	$411,985
Deferred Maintenance	$0
Obsolescence	$6,984,887
Total Depreciation	$8,267,014
Depreciated Cost	$2,494,335
Land Value	$1,380,000
Cost Approach Value Est	$3,874,335
Rounded	**$3,870,000**

Petitioner's conclusion of the fair market value of the subject property as of December 31, 2011, as well as, December 31, 2012, and December 31, 2013, is $3,870,000.[112]

Deed Restrictions

The description of testimony regarding deed restrictions was commenced above in the obsolescence discussion of Source Clubs. It continues with Mr. Allen's analysis of the effect of deed restrictions on the market value of big-box stores, relative to Respondent's appraiser, Mr. Torzewski's sales presented in this case before appeal

[112] See calculations for 2013 and 2014 at P-1 at 92.

and remand. The COA specifically identified four sales as being deed restricted. Mr. Allen is familiar with those sales and has, in fact, utilized some of them in his own appraisals.

The first sale is the former Home Depot in Holland, MI; this sale was also used as an obsolescence comparable. It has an Operation and Easement Agreement between Target (shares a wall with Home Depot) and Geenen DeKock properties, which is the developer of the Holland site where the former Home Depot was situated. Mr. Allen reviewed the Operation and Easement Agreement to "consider what, if any, effects that might have on the sale price of the property."[113] He concluded, "[i]t didn't limit Home Depot's ability to sell the store to another big box user."[114] The uses prohibited included uses that emit obnoxious noise or odors, pawnshops, mobile home parks, junkyards, and body shop repairs, for example. The prohibited uses were to "maintain the property as a first class shopping center."[115] "This type of agreement would make the property more attractive to most users."[116] He testified there would be no reason to make and adjustment to the sale price relative to the agreement.

The third sale utilized by Mr. Torzewski is the former Walmart in Alma, Michigan. Mr. Allen testified he was familiar with the sale and spoke to the broker who confirmed there was a deed restriction. However, the "deed restriction . . . was put on when the sale closed. And it was a typical Walmart deed restriction. The property was marketed without a deed restriction, but I think it was generally known that Walmart will put a deed

[113] T2A at 41.
[114] *Id*. at 43.
[115] *Id*. at 44.
[116] *Id*. at 46.

restriction but they will make exceptions for buyers."[117] The property was not sold to a big-box store because Alma is a small market and the majority of big-box stores are located in the larger, nearby, Mount Pleasant. Further, Meijer built a new store in Alma and did not consider the Walmart property, because the Walmart was too small for its needs. In the end, the best offer to purchase was from an industrial user. A deed restriction was added at the time of sale, but no carve out was necessary given the buyer was not utilizing it for retail.[118] Mr. Allen testified that in "this instance, I don't believe the deed restriction affected the sale price."[119]

Mr. Allen next discussed Mr. Torzewski's sale number five, which was the Walmart in Auburn Hills. It was not located in a successful area for retail as it was situated in an industrial location near the Silverdome which was redeveloped into an industrial park. In fact, Walmart sold the property and built a Super Walmart in the successful retail area near Meijer. Mr. Allen spoke to the broker who indicated he was not able to find retailers who were interested in purchasing the property. Mr. Allen testified the property was eventually sold to a plumbing supply distributor, "which is more like a warehouse distribution use than a retail use."[120] Mr. Allen testified Walmart "put a deed restriction that was pretty much standard Walmart restricting like grocery stores or large discount stores."[121] Mr. Allen testified that, in his opinion, the deed restriction had no effect on the purchase price.

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[117] T2A at 49.
[118] *Id*. at 50.
[119] *Id*. at 51.
[120] *Id*. at 54.
[121] *Id*.

The last Torzewski comparable discussed by Mr. Allen was number eight, the former Walmart in Frenchtown Township. Mr. Allen testified he utilized this comparable a number of times in past appraisals and he has also appraised the property. Mr. Allen discussed the sale with the broker and purchaser, a developer, Hinman Company, who develops many retail properties around Michigan. Hinman purchased the property and retrofitted it for multi-tenant use after Walmart vacated it to build a Super Walmart down the road. The property was not marketed with a deed restriction, but one was added at closing. Mr. Allen's research indicated the deed restriction, "didn't affect the purchaser and the price that he was willing to pay and the broker would have liked to find other big box users to buy it, but this buyer was the one who was willing to pay the highest price."[122] Further, "the deed restriction allowed the intended use which is to put Hobby Lobby immediately, and he had some other tenants in mind that he was going to put in there."[123]

In order to provide additional information about the effect of deed restrictions, Mr. Allen prepared a "matched pair analysis" including four pairs of sales, "that I am familiar with and used most of them in appraisals previously."[124] In the matched pair analysis, a comparison was made of similar properties where one was subject to a deed restriction and the second was not. The first pair was a former Walmart and a former Target in McHenry, Illinois. McHenry is a small town north of Chicago "with a main highway going through the town. And on one side of the street was a Walmart store and on the other side of the street is a Target store. And both of them sold fairly close in time,

[122] T2A at 58.
[123] *Id.* at 59.
[124] *Id.* at 62.

approximately six months apart."[125] The Walmart had a deed restriction and sold for $25 per square foot. The Target without a deed restriction sold for $22 per square foot.[126] The size of the stores was fairly similar; they were both big-box sores and they were built around the same time. "To me, this was as close to a matched pair as I'm going to find."[127]

The second pair was a former Lowe's in Berlin Township, MI, and the former Home Depot in Holland, MI which was utilized by Mr. Torzewski. Both stores were home improvement stores and both were close to the same size. They were built around the same time and sold close to the same time. The Lowe's sold for $24 per square foot with a deed restriction; the Home Depot sold for $17 per square foot without a deed restriction.[128] The Home Depot "didn't have a deed restriction. It did have the operation agreement, but that wasn't a deed restriction that restricted big box use for that property."[129]

The third pair was a former Menards store and a former American TV store located in the quad cities area (Moline, IL and Davenport, IA). Mr. Allen testified, "these properties aren't as similar but were, were picked because they are both in the same market even though they are in two different states, they are in the quad cities and across the river from each other, so they are about five miles apart, both on major traffic areas with other big box stores around them."[130] Both stores sold between 2013 and 2014 and the Menards sold for $45 per square foot with a deed restriction; the American

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[125] T2A at 62-63.
[126] *Id*. at 63.
[127] *Id.*
[128] T2A at 68.
[129] *Id.* at 67-68.
[130] *Id.* at 68-69.

TV store sold for $42 without a deed restriction.[131] Mr. Allen did note that that the American TV store was larger.

The last matched pair consists of a former Menards and a former Super K in northern Indiana. Both are very large stores and were built approximately three years apart. They sold about a year apart and the Menards "sold for slightly higher dollars per square foot with the deed restrictions than the Super K without deed restrictions."[132] Mr. Allen testified that all the sales were "retail before and after sale, three of them were purchased for multi-tenant retail and five of them were purchased for owner/occupant use."[133] Mr. Allen concluded from his paired sales analysis that the restricted sales sold for about 12 percent more than the unrestricted sales.[134] He also considered survey data from the International Appraisal Company of fee simple big-box sales from across the country, that compared deed restricted and non-deed restricted sales.[135] After completing his appraisal, Mr. Allen also considered and interviewed the author of a big-box study prepared by Situs Real Estate Research Corporation which included a sample of 800 sales. "Part of the study looked at deed-restricted sales versus undeed-restricted sales."[136] He testified that what he learned from the study did not change his opinion regarding the effect of deed restrictions on big-box sales.

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[131] T2A at 69.
[132] *Id.* at 72.
[133] T10 at 14.
[134] T2A at 75.
[135] T2B at 5, P-1 at 95.
[136] *Id.* at 14-15.

RESPONDENT'S CONTENTIONS

The property's original TCV, SEV and TV, as reflected on its property record card, for the tax years in question, are as follows:[137]

Parcel No.	Year	TCV	SEV	TV
051-420-2825-100-006	2012	$8,048,700	$4,024,350	$4,024,350
051-420-2825-100-006	2013	$8,233,669	$4,116,835	$4,116,835
051-420-2825-100-006	2014	$8,368,544	$4,227,711	$4,182,704

Respondent's contentions of the property's TCV, SEV and TV in this appeal for the tax years in question, **before remand**, were as follows**:**

Parcel No.	Year	TCV	SEV	TV
051-420-2825-100-006	2012	$7,815,976	$3,907,988	$3,907,988
051-420-2825-100-006	2013	$7,995,596	$3,997,798	$3,997,798
051-420-2825-100-006	2014	$8,210,938	$4,105,469	$4,061,762

Respondent's contentions of the property's TCV, SEV and TV for the tax years in question **in this hearing on remand**, are as follows**:**

Parcel No.	Year	TCV	SEV	TV
051-420-2825-100-006	2012	$13,700,000	$6,850,000	$3,907,988
051-420-2825-100-006	2013	$13,880,000	$6,940,000	$3,997,798
051-420-2825-100-006	2014	$13,760,000	$6,880,000	$4,105,469

Respondent contends that the COA "identified the highest and best use of the subject property as "an owner-occupied freestanding retail building, a conclusion that the COA repeated throughout its decision. The COA distinguished this HBU conclusion from second generation users."[138] Respondent contends that on "remand, Respondent submitted additional evidence valuing the subject property as an owner-occupied freestanding retail building. Petitioner used old, dark stores that had been redeveloped

[137] See R-1 at 173-191 (Addendum C). Respondent's assessor amended the TCV of the subject property to reflect its correct square footage.
[138] See Resp's Brief at 3-4.

for different uses."[139] Respondent further contends "[t]he dark store theory underlies the 8 comparable sales used in the first hearing. All but one was actually vacant; six were converted to different uses other than 'an owner-occupied freestanding retail building;' four had deed restrictions and a fifth was subject to an Operating and Easement Agreement."[140]

Respondent contends Mr. Miller determined that the property was designed and built to be a home improvement store; therefore, he analyzed the home improvement market by conducting research on Lowe's and Home Depot. As such, he narrowed the HBU determination from "owner-occupied freestanding retail building" to "owner-occupied freestanding retail building" that operates in the home improvement market.

Regarding the cost approach, Respondent contends Petitioner calculated alleged functional and external obsolescence, separately, which was improper. Respondent contends it did not observe any elements of functional obsolescence in the subject property, other than its mezzanine. Further, Respondent contends the subject property does not suffer from external obsolescence. Respondent claims its analysis of the Escanaba home improvement market concludes that the Escanaba store is in the most successful market for Menards and it is a "Grade A Investment Property."[141] Respondent claims the store is a "first mover," "meaning that the subject operates without any competition for supply in its market,"[142] and suffers no economic obsolescence. Respondent further contends it sought additional sources to calculate external obsolescence, including, among others, the use of "30 home improvement

[139] Resp's Brief at 2.
[140] *Id.* at 4.
[141] T3 at 115, R-1 at 244.
[142] Resp's Brief at 28.

stores in similar ages and markets that were being leased. . . ."[143] "From this information, two tests were performed: a test of feasibility rent against the assessment and a test of feasibility rent against the cost conclusion."[144]

On remand, Respondent provided a lengthy discourse on its determination of the correct definition of "fee simple." Respondent contends that Petitioner adopted the appraiser's definition of "fee simple estate" which it interpreted to exclude leased property.[145] Respondent contends that Mr. Miller, in preparing his rent-feasibility analysis, utilized 30 investor owned home improvement stores "because those properties are occupied and represent the most comparable data to the subject and the owner-occupied market."[146] Respondent contends this was proper given that under Michigan law fee simple includes property that is leased or occupied.

Respondent contends, fee simple, is "'an estate in, and individual ownership of, real property, without any limitation as to duration, disposition or descendability.'"[147] Respondent contends further that "the Revised Statutes of 1846 provides that '[e]very estate of inheritance shall continue to be termed a fee simple, or fee; and every such estate, when not defeasible or conditional, shall be a fee simple absolute, or an absolute fee.' MCL 554.2."[148] Respondent maintains its definition of fee simple "is also consistent with Black's Law Dictionary, which defines fee simple as '[t]he largest estate

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[143] Resp's Brief at 43.
[144] *Id.*
[145] See Resp's Brief at 14.
[146] *Id.* at 15.
[147] *Id.* at 16, quoting *Rathbun v State*, 284 Mich 521, 280 NW 35 (1938) (emphasis removed).
[148] *Id.* at 17.

and most extensive interest that can be enjoyed in land.’ *Black's Law Dictionary* 554 (5th ed 1979).”[149]

Respondent contends that Petitioner’s use of the appraisal definition of fee simple has no force of law and is not binding on the Tribunal and instead it should follow the legal definition as outlined above, which puts forth that fee simple includes leased or occupied property. Respondent also contends the International Association of Assessing Officers’ (IAAO) “legal conclusion [in its white paper] is consistent. ‘[F]ee simple’ has absolutely nothing to do with leases/mortgages/liens/deed restrictions or any other encumbrance or distribution of any of the property rights to others. It simply means that the current owner has full control of the disposition of the property."[150] Respondent contends the Appraisal Institute in its 2017 Property Rights Symposium, “recommended that the definition between fee simple and leased fee interests (and the appraisal problems resulting therefrom) could be resolved by eliminating the term “leased fee” and restoring the term “fee simple” to its original, intended definition.”[151]

With regard to deed restrictions, Respondent contends the COA in *Menard v Escanaba* wrote, “‘the anti-competitive nature of deed restrictions means that the deed-restricted comparable sales could not be sold for their HBU.’”[152] Respondent claims that Petitioner provided no evidence at the hearing of this matter that deed restricted

[149] See Resp’s Brief at 17.
[150] *Id.* at 18, citing R-1 at 275-276 (Addendum I), IAAO *Commercial Big-Box Retail: A Guide to Market-Based Valuation*, by the Special Committee of Big-Box Valuation, September 2017.
[151] See Resp’s Brief at 21. See R-1 at 308 (Addendum K), Appraisal Institute, “*Property Rights Symposium Discussion Paper,* December 21, 2017.”
[152] See Resp’s Brief at 46, citing *Menard*, supra at 525

properties were proper comparables, nor did it provide any method to reliably adjust comparable sales for the fact that they are deed restricted.

RESPONDENT'S ADMITTED EXHIBITS

R-1: Respondent's Additional Valuation Evidence Report
R-1B: Respondent's Additional Valuation Evidence Report Errata
R-2: Fanning, "Highest and Best Use and Property Rights – Does it Make a Difference," Appraisal Institute
R-3: Lowe's Fact Book Update, March 2016
R-4: Lowe's Annual Report 2011
R-5: Lowe's 10K 2011
R-6: Home Depot Fact Book Update, March 2016
R-7: Home Depot Annual Report 2011
R-9: Minn. Tax Court, Ex. K001-004, Actual Store Cost
R-10: Source Club Information - Kentwood
R-11: Source Club Information – Wyoming
R-12: Source Club Information – Okemos
R-13: Source Club Information – Westland
R-14: Source Club Information – Taylor
R-15: Source Club Information – Fraser
R-16: Source Club Information – Livonia
R-17: Home Quarter Articles
R-18: Home Quarter – 13700 Middlebelt
R-20: Extraction of Obsolescence from Sales – Holland
R-21: Extraction of Obsolescence from Sales – Aurora
R-22: Extraction of Obsolescence from Sales – Elgin
R-23: Extraction of Obsolescence from Sales – Brown Deer
R-24: Extraction of Obsolescence from Sales – Hartland
R-25: Extraction of Obsolescence from Sales – Oswego
R-26: Menard v Port Huron; MTT 14-001953
R-27: Peter F. Korpacz, Respondent's Review Appraisal (without Exhibit C)

R-29: Curriculum Vitae of William H. Miller

R-28, pp. 9-10, up to the sentence, "A list of the actual big box store conversions we reviewed is presented in Attachment 2"

R-30: Curriculum Vitae of Peter F. Korpacz

R-32: Curriculum Vitae of Steve LaPosa

R-33: Menards Discovery Responses and Laurence G. Allen Deposition Transcript

RB-2: Market Derived Cap Rates

RB-3: Short Term Capitalization Data

RB-4: Menards Oakridge One-Story Home

RB-5: Allen Data

RB-6: Graph of Owner-Occupied, Income Occupied, Vacant/Not Occupied

RB-7: Builders Square appraisal June 22, 1994

RD-01A: Fanning, Six Step Process

RD-11: Menards Coon Rapids Construction Costs

RD-16: Lowe's Ticonderoga, NY

RD-18: History of Fee Simple

RD-19: Market segmentation

RD-20: Broker Summaries

RESPONDENT'S WITNESSES

Respondent called four witnesses: Steven Laposa, Ph.D., William H. Miller, MAI Michael Williams, PE, and Peter F. Korpacz, MAI.

Steven Laposa, Ph.D.

Dr. Steven Laposa was found to be an expert in real estate market analysis and trends.[153] He was asked to research, analyze and provide an opinion on four questions. First, he addressed the classification of the Escanaba Menards store, concluding it is an investment Grade A property based on a September 2017 paper published by the IAAO

[153] T3 at 103.

because "it's an owner-occupied, it's first generation. It's, you know, as far as, you know, it's –those two alone – and it's in a good marketplace".[154] Second, he addressed the economic rationale underlying the Escanaba location. Third, he was asked to analyze comparable sale guidelines and finally, he was asked to consider the negative impact of deed restrictions.[155] Dr. Laposa testified that data was used from AggData and Esri, which provide retail location for geocoding and demographic data. With these sources, he is able to track how much people spend within 10 or 20 miles of the Menards' store. He used SPSS data analytics for statistical applications, to analyze the market data.

Dr. Laposa applied the six-step process described in an article called *"Highest and Best Use and Property Rights—Does It Make a Difference?"* by Stephen F. Fanning[156] to analyze the HBU of the subject property. The first step is to identify the property including its physical, legal, regulatory, and location attributes. Second, the boundaries of the market are delineated. Dr. Laposa defined the market more broadly than Mr. Allen. He determined, based on gravity models, that the market extended out 25 miles from the subject property. Third, demand is analyzed, and the fourth step consists of a supply analysis, determining where the competitors are. Fifth, supply and demand interaction is considered to determine the condition of the particular market and

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[154] T3 at 104, 116. Dr. Laposa writes in his report, prepared for this remand, that the Escanaba Menards is "Grade A investment property," per the IAAO white paper, however, the IAAO white paper suggests the property is in "Investment Class A." See R-1 at 244 (Addendum H), R-1 at 284 (Addendum I).
[155] See R-1 at 242, at Addendum H.
[156] Stephen F. Fanning, Larry T. Wright, and Rick J. Muenks, *"Highest and Best Use and Property Rights—Does It Make a Difference?" The Appraisal Journal* (Summer 2018): 171–191. See R-2.

finally, the sixth step is to conclude to the capture (the portion of the local economy received) of the particular property.[157]

Based on his location economic analysis, Dr. Laposa determined that Menards in Escanaba was a first mover. This gives Menards an advantage over any competitors who enter the market later. “If the marketplace can only support one of the particular types – in this case a home improvement retailer – then the second one comes in . . . [t]hey both lose.”[158] He concluded that the likelihood of a second home improvement store in Escanaba is pretty close to zero.[159] With regard to deed restrictions, Dr. Laposa testified, “by their very nature, [deed restrictions] reduce who the investors are and what you can do with the property.”[160]

During cross examination regarding his conclusion that the subject property is a Grade (Class) A investment, per the IAAO white paper, he was questioned, “So now, this property is not an investment property, the subject property, because an investor would receive no cash flow from a lease, would they?” “A. No.”[161] He went on to testify, “I think I'm not communicating. Investor grade means that's all it is. It's just a quality of an apple or an orange or something of this nature, but it may mean something if it is up for sale -- you know, if you put Menard's up for sale there, package it with, you know, a hundred other stores it would be investor grade, it would likely be purchased.”[162]

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[157] T3 at 111-114.
[158] *Id.* at 117.
[159] *Id.* at 121.
[160] *Id.* at 129.
[161] *Id.* at 146.
[162] *Id.* at 148.

William H. Miller

William H. Miller was found to be an expert in appraisal and able to provide an opinion of value.[163] Though not an MAI, he is licensed in Michigan and has appraised roughly 40 big-box stores consisting of over 100,000 square feet, but only 30 over 80,000 square feet if he removes stores attached to department stores.[164] Mr. Miller contends he prepared a valuation report based on the instructions of the Michigan COA valuing the property as of December 31, 2011, December 31, 2012, and December 31, 2013. He claims the report focuses on three aspects: (1) evaluating the deed-restricted sales used in the Tribunal's original decision, (2) providing additional evidence about the market effect of the deed restrictions, and (3) focusing on the cost-less-depreciation approach per the remand order. The valuation report did not consider other valuation approaches.[165] The property was appraised pursuant to the legal definition of its fee simple estate, using a TCV standard.[166] He testified he had discussions with Dr. Laposa, Mr. Williams, and Mr. Korpacz, but prepared his own independent report, utilizing his own original work.[167] Mr. Miller included Dr. Laposa's and Mr. Williams' reports in his appraisal report, testifying, "I did that because they - - they informed my opinions by confirming my methodology and my conclusions."[168] Mr. Miller's appraisal report for this matter is the first appraisal he has prepared for property tax purposes in Michigan and he has never testified before the Tribunal.[169]

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[163] T4 at 31.
[164] *Id.* at 30.
[165] *Id.* at 13.
[166] *Id.* at 35.
[167] *Id.* at 15.
[168] *Id.* at 15.
[169] *Id.* at 30-31.

Mr. Miller testified that he concluded to a HBU for the property consistent with the COA, as "[a]n owner-occupied freestanding retail property."[170] However, he also testified that in his report, his "paraphrase" of HBU was, "continued use as a Menard's."[171] He again clarified, that his conclusion of the HBU of the property is the same as the COA, "for continued use of the existing improvements as a free-standing retail building;" however, he further contends "[t]he subject actual use as of each valuation date on is as a single-occupant home improvement store. The HBU is to continue this use. Thus, the comparables should be similar home improvement stores where the store is in 'continued use' as of the valuation dates. This excludes dark stores."[172] He testified, "in terms of valuation, no, I'm not valuing it as a Menard's or a Lowe's. It's a home improvement store. Its current use, though, it has a Menard sign in front of it."[173]

Mr. Miller testified, in preparing his report, he utilized the guidance of the IAAO, which states, in its white paper, "an appraiser's conclusion of the market value of a big-box property should reflect the actual condition of the property on the date of value,"[174] including whether it is occupied or vacant. If the property is occupied, whether by an owner or a tenant, the property should be valued as occupied. If the property is vacant as of the date of valuation, then the market value conclusion should arrive at a value vacant. He testified "[t]hat is typically what we appraisers do. If we're appraising anything different than what it is actually there, that's a hypothetical property because

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[170] T4 at 14.
[171] *Id.* at 23, 24, R-1 at 5.
[172] R-1 at 34.
[173] T4 at 33.
[174] *Id.* at 41.

that property doesn't exist."[175] Mr. Miller testified "there's about 8,000 stores that are greater - - that are single-tenant retail greater than a hundred thousand square feet in the United States."[176] "98.4--.6 to 98.8 percent of those stores were occupied as of the dates of valuation. 1.2 to 1.4 percent weren't."[177] "Most stores remain occupied, and for valuation it is - - our store is occupied. Every indication is it will continue to be occupied. It's in a strong market, first mover. Comparison to the occupied stores, to the 98 percent, is more logical than relying on the 1 percent - - 1.2 to 1.4 percent that have closed."[178] He also testified "it's a rare occurrence for a big-box – one big-box retailer to purchase another big-box retailer's asset, for many reasons. The largest one is most of the big-box retailers, number one, 85% plus tend to own their stores, particularly in the home improvement market. So that means there's very few – as they own their own stores they tend to stay in their stores. "[179]

Cost Approach

Mr. Miller's cost approach commences with his selection of sales to determine land value. The following sales were considered:

	Sales Location	Sale Date	Sale Price	Sq. Ft	$/Sq. Ft
	Subject			799,326	
1	Greenfield, Wisconsin	9/11	$7,365,000	818,248	$9.00
2	W Milwaukee, Wisconsin	11/11	$6,600,000	655,436	$10.07
3	Waukesha, Wisconsin	2/12	$11,875,000	1,480,561	$8.02
4	Fitchburg, Wisconsin	5/12	$2,815,000	357,628	$7.87
5	Sun Prairie, Wisconsin	5/12	$4,358,843	578,564	$7.53
6	Kenosha, Wisconsin	10/13	$4,435,000	901,707	$4.92
7	New Berlin, Wisconsin	11/13	$5,275,000	687,812	$7.67
8	Oak Creek, Wisconsin	12/13	$7,000,000	761,818	$9.19
9	Merrill, Wisconsin	12/12	$1,600,000	973,696	$1.64

[175] T4 at 41.
[176] *Id.* at 61.
[177] *Id.*
[178] *Id.* at 62.
[179] *Id.* at 153.

Mr. Miller's site valuation utilized nine sales located in Wisconsin which ranged in value from $4.92 to $10.07 per square foot. Further, the 2012 sale in Merrill, Wisconsin at $1.64 per square foot was specifically compared to the Escanaba Menard's' 2008 purchase of 18.35 acres for $1,150,000, as Mr. Miller deemed them "core cities." His conclusion of land value from these considerations was $1,198,989.[180] Again, the land value conclusion by both valuation experts was similar and they agreed it was not a point of contention.[181] However, as noted above, Mr. Miller's land sales were located outside of the state of Michigan.[182]

Mr. Miller based his improvement, replacement cost calculations on the on-line service, Core-Logic (Marshall Valuation) and applied them to the square footage of the property.[183] Mr. Miller chose the Class C Warehouse Discount Store cost category, as did Mr. Allen, but he determined the subject property fell into the average quality category, not low quality. He testified the property has good tilt-up concrete walls, good framing, is tall, wide, with 50 feet between its columns, is big and has "to support a very large roof surface, which has a tremendous amount of weight."[184] He testified, "but really as you look at the front and the façade and the totality of the subject property it is – it's good material. I mean, that's the simplest answer."[185] He also testified regarding the subject's adequate lighting and restrooms as required under the "average" category.

[180] R-1 at 88.
[181] T1 at 109-110.
[182] See T1 p. 108.
[183] Mr. Miller utilized a square footage of 162,340, which he alleges he received from Menards. "it's in their plans, it is in their statement of square footage of the subject. All of these numbers match that source." See T4 at 116. It should again be noted, in this case prior to remand, the parties stipulated to a square footage of 166,196.
[184] T4 at 110.
[185] T4 at 111.

Mr. Miller contends the property has 162,340 square feet, with a 26,420 square foot lumber shed, 40,608 square foot garden center and canopies, 8,360 square foot ancillary canopies and guardhouse, and 11,040 square foot mezzanine.[186] Mr. Miller's base replacement cost was $46.29 per square foot. Applying cost adjustments and multipliers, the total base cost for the subject property per is $55.57 per square foot. Mr. Miller included the lumber yard in his replacement cost new because it exists and contributes to the property's use as a home improvement store.[187] Site improvements were added and 10% for soft costs. Mr. Miller's conclusions of replacement cost new for the subject property including depreciation, but excluding obsolescence and land, is illustrated in the chart below:[188]

Replacement Cost New	12/31/2011	12/31/2012	12/31/2013
Building	$10,791,271	$111,153,824	$11,287,670
Site Improvements*	$2,421,695	$2,519,676	$2,549,913
Total	$13,212,966	$113,673,500	$13,837,582
Depreciation Physical	3%	5%	7.00%
Deduction	$396,388	$683,675	$968,631
TCV Building/Site	$12,816,578	$112,989,825	$12,868,951

Mr. Miller testified he utilized several tests to determine the accuracy of his cost calculations, including actual costs reported from Menards, the Williams and Beck engineering report cost calculations, and a comparison to the actual costs of the Greenfield Walmart Super Center.[189]

Mr. Miller considered deductions from his replacement cost for physical depreciation, functional and external obsolescence. Depreciation was based on MVS's

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[186] R-1 at 28, T4 at 116-118.
[187] See T4 at 107.
[188] See R-1b at 5, 7.
[189] See T4 at 127-128.

30-year depreciation table and the subject's depreciation was determined to be 3%, 5%, and 7% for the years at issue. Mr. Miller's method of calculating depreciation is "described as a curvilinear line, that the rates of depreciation are slower in the early years, faster in the later years."[190] Mr. Miller testified the subject store opened on March 23, 2009, and, as such, it was two years old on the first date of value of December 31, 2011.[191]

Mr. Miller next turned to his functional obsolescence determination. He described functional obsolescence as "something within the property that is a defect in design or something that's not up to current standards in the marketplace, of what's desired in the marketplace. It could be something that's curable. Often times it is something that is incurable when it's present."[192] He also testified that functional obsolescence may be removed through a replacement cost of the property.[193] He testified that branding is not functionally obsolete in replacement cost, because "the branding, the design they had, is not in the replacement cost that you begin with. So, there's no reason to deduct for something that isn't in the cost"[194] Mr. Miller testified regarding all three home improvement store brands, Menards, Home Depot and Lowe's, built between 2003-2013, that "a number of stores, and that in general there have been minimal changes in the design of the stores in each brand over time."[195] He testified that each store has its own unique sign and color, but in terms of facades, "there may certainly be times where a retailer wants to, they're making major changes to the property and they put a new

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[190] T4 at 137.
[191] *Id.* at 138.
[192] *Id.* at 139.
[193] *Id.* at 139.
[194] *Id.* at 140.
[195] T4 at 146-147.

façade on."[196] "Often times it's simply by changing the color, paint, taking out a small portion of the property, blocks and putting different blocks there. You know, a variety of things, filling in windows, adding windows, et cetera, that are changes. And then others do very, very little."[197]

Mr. Miller put forth the example of Fairlane North Center on Mercury Drive in Dearborn. Referring to photographs in his appraisal, he testified that the former Super K is now occupied by Walmart and Pace box was occupied by Sam's Club, then Garden Ridge, then At Home. He testified, "[y]ou'll notice that the façade of all of them is very, very similar."[198] He also testified that Home Depot was originally a Builder's Square, and he "walked through the store, and once I was on the inside of it, it was a time warp, literally. With the exception of the orange on the racking, which is not real estate, because Home Depot likes the orange on the racking, I felt like I was in a 1980s, I think, Builders Square store."[199] He testified, "all of these changes over time where multiple brands have come in, and they said, yeah, the façade is perfectly fine. We want to sell product from the store. These are great boxes to sell product."[200] Mr. Miller testified about the Source Clubs in Okemos and Livonia and how the buyers and lessees, Home Depot, Home Quarters, and Costco, made few changes to the original design.[201] He testified, "I read some information really - - from Livonia regarding building permits that were done and looking at what Williams and Beck described. I think there were fairly

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[196] *Id.* at 148
[197] *Id.*
[198] *Id.* at 151, R-1 at 107-108.
[199] T4 at 151.
[200] *Id.* at 152.
[201] T4 at 162-164.

minimal changes that were done for the Home Quarters and, again, the changes that were done by Costco were really putting in their own equipment in the property"[202]

Mr. Miller testified that the only item he found to be functionally obsolete in the subject property was the mezzanine; "that is specific to Menard in terms of the size and the location of it. It is something that could be removed reasonably easily – easy. It's simply metal. Someone could keep it and use it as a storage mezzanine."[203] He testified, however, that some retailers want clear floor space across the entire building and, as such, he determined the mezzanine was functionally obsolete in the marketplace and applied 2% functional obsolescence.

With regard to external obsolescence, Mr. Miller defined it as "a loss in value from something outside the boundary of the property. . . it's not something that the owner can directly control. It could be a noxious use; it could be a number of factors. It can be an oversupply in the marketplace."[204] With regard to big-box stores, Mr. Miller contends external obsolescence, relative to oversupply in the market, exists. He gave the example of Walmart where the demand was for a bigger store, "[b]ut as soon as Wal-Mart built that store the old 100,000 square foot store was extra supply. That was – there was no evidence in the marketplace from Wal-Mart's decision. And then when they deed restrict it, they may get it back to balance, but all of this affects supply and demand. The restriction is permissible."[205] Further, oversupply can occur when "you have older stores at, quote, the old location but all the new stores are going somewhere

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[202] *Id.* at 167.
[203] *Id.* at 170.
[204] *Id.* at 171.
[205] *Id.*

else, be it a mile away or two miles away and now the old location is the spot where few go anymore. And so now that location has an oversupply of old stores."[206]

With specific regard to economic obsolescence and the subject property, Mr. Miller reiterates that per Dr. Laposa, the subject property is a first mover, it fulfills the Escanaba home improvement needs and it is unlikely a competitor will come into the market. As such, he attempted to find similar properties to utilize as comparables to determine economic obsolescence. However, he was unable to find a first mover, in Escanaba or in a small market, in the UP, that sold recently. As such, he did a nationwide search and found 30 sales of properties that are leased. Further, he "didn't find any examples where Menard's had bought a Lowe's or Home Depot had bought a Menard of any of those situations. They weren't there."[207] Mr. Miller testified he "was focused on the leased fee interest because I knew there weren't any sales – I'm sorry, I used the word "leased fee," and I said that and that is incorrect. It's a fee simple interest of where there was a lease in place for the store."[208] He testified he focused on home improvement stores that were occupied, because market data confirms, "occupied stores sell in a different marketplace. They do not – they sell in a different marketplace than stores that are not occupied. Vacant stores sell for one range of prices; occupied stores sell for another range of prices, and there is minimal crossover between the two."[209] He testified that in the "secondary investor market is fine. In the secondary market as vacant is not."[210] "The secondary investment market is simply where one

[206] *Id.*
[207] T4 at 179.
[208] T4 at 180-181.
[209] T4 at 181-182.
[210] *Id.* at 182.

investor owns it and they sell it to another investor."[211] "They do not directly meet the test of ownership."[212]

In order to determine obsolescence Mr. Miller completed a study that he explained as follows, "[s]o is there a difference of rents that we – that we observe in the marketplace [from the 30 home improvement comparables] in comparison to the 'as is' feasibility rent of the subject property, and the capitalization rate is the methodology to compare the two."[213] Mr. Miller testified he found a tight range of capitalization rates from the 30 sales in the home improvement market by year. Additional sources were Calkain and Boulder Group brokerage firms, and PwC. Instead of the typical formula utilized in the income approach of IRV, "income divided by the rate equals value. I'm reverse – flipping the formula, in a sense, and saying value times a rate equals income."[214] He utilized Investment Class A investments delineated in the IAAO Market Segmentation publication,[215] which mentions the word, "occupy." As such, Class A property, like the subject property, is occupied.

Mr. Miller testified that Boulder Group will look at different grades in terms of a big-box capitalization rate. Also, "they look at the length of term of the – of the lease, remaining length of term. Because if you're buying a property that has two years remaining, it's going to be a different answer than a lease that has 15 years remaining."[216] He testified, "properties with longer lease terms they're more desired by

[211] *Id.*
[212] T5 at 124.
[213] T4 at 183.
[214] *Id.* at 184.
[215] This is part of the IAAO white paper.
[216] T4 at 192.

investors, but they also tend to be newer properties."[217] He testified that Menards, Home Depot and Lowe's are creditworthy tenants and that Home Depot and Lowe's lease some of their properties, but not most. However, he does not know of any Menards that are leased.[218] Mr. Miller testified that examples of non-investment grade properties would be Kmart or Toys R Us, which are closing. Mr. Miller concluded to capitalization rates of 7.3%, 6.8% and 6.5% for the 2012-2014 tax years, respectively, from the sources enumerated above.[219] Mr. Miller also concluded, with regard to NOI and triple-net rent, that "net income on a single-occupant property, a big-box property, is considered equivalent in the marketplace to the rent for the property that is paid. And that no deduction for vacancy is appropriate, number one, and no deduction for expenses is appropriate, number two."[220]

The next step was determining "as is" feasibility rent. He wrote, "[a]s a first step in this process, we use the actual value that is the basis for the assessment that is being appealed. This is an interim threshold test of the reasonableness or unreasonableness of the full value assessment."[221] Mr. Miller commences with a threshold test based upon an assessment of $8,250,000, explaining the feasibility rent is the rent that would support that investment value. He testified that "[t]he overall rate changed in each of the years, so the 'as is' feasibility rent, the dollar amount changes, that number whole dollar – in the first column it's $602,250, dividing that by [162,340]

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[217] *Id.*
[218] T4 at 193, 188.
[219] See R-1 at 132.
[220] T4 at 199-200.
[221] R-1 at 135.

square feet is $3.71."[222] For 2013 and 2014, the "as is" feasibility rent is calculated to be $3.46 and $3.30 as shown in the following table:

Dates	12/31/2011	12/31/2012	12/31/2013
Threshold Assessment	$8,250,000	$8,250,000	$8,250,000
Overall Rate	7.30%	6.80%	6.50%
"As Is" Feasibility Rent	$602,250	$561,000	$536,250
Total Enclosed Area	162,340	162,340	162,340
"As Is" Feasibility Rent Per Square Foot (PSF)	$3.71	$3.46	$3.30

On an annual basis actual rents extracted from 20 out of 30 of the comparable properties are higher than the "as is" feasibility rents. Mr. Miller concluded that the $8,250,000 assessment is "well supported by property sales proximate to each valuation date in the home improvement marketplace."[223]

Next, Mr. Miller applied the same "as is" feasibility rent methodology against his replacement cost new, less obsolescence, and concluded an "as is" feasibility rents of $6.16, $5.81 and $5.51.[224]

	12/31/2011	12/31/2012	12/31/2013
Development Costs Less Depreciation & Obsolescence	$13,698,675	$13,882,252	$13,765,014
Development Costs Less Depreciation & Obsolescence PSF	$84.38	$85.51	$84.79
Overall Rate	7.30%	6.80%	6.50%
"As Is" Feasibility Rent Per Square Foot	$6.16	$5.81	$5.51
Garden Center Non-enclosed & Lumber Yard Contribution	13.00%	13.00%	13.00%
Enclosed Contribution	87.00%	87.00%	87.00%

[222] T4 at 201-202, R-1 at 136.
[223] See R-1 at 136.
[224] See R-1b at 6.

"As Is" Feasibility Rent	$1,000,003	$943,993	$894,726
Rent Contribution of Garden Center et al	$129,599	$122,346	$115,868
Rent Contribution of Enclosed	$870,404	$821,647	$778,858
PSF Rent Contribution of Garden Center et al	$0.80	$0.75	$0.71
PSF Rent Contribution of Enclosed	$5.36	$5.06	$4.80
"As Is" Feasibility Rent: PSF of Enclosed	$6.16	$5.81	$5.51

Contribution Allocations

Cost new Garden Center, Non-Enclosed & Lumber Warehouse	$1,876,631.60	$1,939,680	$1,962,957
Depreciation	$101,303	$140,472	$180,379
Allocation Value	$1,775,329	$1,799,209	$1,728,577
Allocated Value of Enclosed	$11,923,346	$12,083,044	$11,982,346
Development Cost Less Depreciation & Obsolescence	$13,698,675	$13,882,252	$13,765,014

The third method "is providing a different metric from the marketplace, one looking at the total rent, second looking at the square foot rent and they get slightly different results."[225]

In conclusion, Mr. Miller determined the subject property suffered no economic obsolescence. He wrote, "[a]fter analysis of 30 comparable home improvement properties with relevant acquisition, capitalization rate and rental rate information, our analysis of the subject[']s home improvement market segment leads to one conclusion – the subject property does not suffer from external obsolescence and therefore it is

[225] T4 at 205, R-1 at 138.

inappropriate to deduct external obsolescence in valuing the subject property via the cost approach."[226] Mr. Miller's final determination of the TCV of the subject property for the 2012-2014 tax years is $13,700,000, $13,880,000 and $13,760,000, respectively, reflecting 2.2%-2.4% functional obsolescence and 0% external obsolescence.[227]

Dates	12/31/2011	12/31/2012	12/31/2013
Replacement Cost	$13,212,936	$13,673,500	$13,837,582
Physical Depreciation %	3%	5%	7%
Physical Depreciation $	$396,388	$683,675	$968,631
Functional Obsolescence %	2.4%	2.2%	2.2%
Functional Obsolescence$	$316,861	$306,562	$302,927
Total %	5.4%	7.2%	9.2%
Total $	$713,250	$990,237	$1,271,558
Depreciated Replacement Cost	$12,499,686	$12,683,263	$12,566,025
Plus Land Value			
Land Value (799,326 SF @ $1.50 PSF	$1,198,939	$1,198,939	$1,198,939
Indicated Value via the Cost Approach	$13,698,675	$13,882,252	$13,765,014
Rounded:	$13,700,000	$13,880,000	$13,760,000

Deed Restrictions

Mr. Miller was questioned regarding Mr. Torzewski's sales comparables and whether they were appropriate to utilize in a sales comparison approach and whether deed restrictions affected the sales transactions. Sale number one was the West Shore [Holland] Home Depot, where there was a restriction, "primarily with Target, who was the - - they a shared party wall in the strip center and that Target would not want a competitor to them competing in the marketplace."[228] Mr. Miller answered in the affirmative when questioned if the store was vacant for a long period, and whether the

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[226] See R-1 at 142.
[227] See R-1b at 7.
[228] T4 at 74.

restrictions were a factor. He replied, "[t]o empirically prove it becomes difficult. Does common sense say that there may well be? Yes."[229]

Mr. Torzewski's comparable two was a Circuit City that was converted into the Westland City Hall. Mr. Miller found "it not to be comparable, and the reason is the highest and best use of that property differs from the Escanaba store. It is older [built in 1996] it is smaller, and it is distant from the subject property."[230] Comparable three was the former Walmart in Alma which Mr. Miller testified was located in an oversupplied market. A Super Walmart was constructed across the road and the former was deed restricted to keep away competition. As such, any direct competitor would know they would have very little chance of purchasing the property.

Mr. Torzewski's comparable four is the Sam's Club in Madison Heights. This property was originally a Pace Club, which Sam's Club took over. Mr. Miller does not find it comparable to the subject property because it is an old 1986 property, was in the Detroit metropolitan area, and in an industrial area. It also had a long sales history of Pace Club to Sam's Club to Apex Carting, then back to the bank, and is truly not comparable to the subject property.[231]

Mr. Torzewski's comparable six[232] was a small, older furniture store acquired by another located in Flint, Michigan. Mr. Miller determined it was not comparable to the subject property because it was considerably smaller, at only 53,000 square feet, considerably older (constructed in 1986), and distant from Escanaba, a different market.

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[229] *Id.*
[230] T4 at 75.
[231] *Id.* at 82-84.
[232] Mr. Miller did not offer testimony on Mr. Torzewski's comparable five.

Mr. Torzewski's comparable seven was a grocery store in Dearborn. Mr. Miller found it was not comparable to the subject property because it was not large enough to qualify as a big-box store at 55,474 square feet, was built in 1981, had a different use and sold without a parking lot. Comparable eight is the former Walmart in Frenchtown Township which Mr. Miller testified does not have the same HBU as the subject property because it was purchased and subdivided for multiple tenants. Also, there were deed-restriction carve-outs; he gave the following example: "That's, okay, we'll let you put a Staples in there."[233] Mr. Miller testified, "[a] lot of times these decisions are made somewhat simultaneously, is that the developer is talking to Wal-Mart and say, I'd like to buy the property, Wal-Mart is saying, great, let's close tomorrow, but the developer conversationally is saying, let me go find some tenants. And then they come back and say, I have some tenants now, I'll put in a purchase offer. They haven't sold it to anybody else. I'll put in a purchase offer and can we carve out exceptions. Efficiency of the market."[234] Mr. Miller was questioned whether any of Mr. Torzewski's comparables reflect the HBU as an owner-occupied freestanding retail building. He answered, "In my opinion, no."[235] He further testified that the comparables cannot be adjusted to the subject property's HBU because "[i]t is very difficult to adjust for different highest and best uses. You want to stay narrow; you want to stay as close as possible to the subject property. As the farther - - if this is the highest and best use of the subject – home improvement – the farther distant you get away from that use, the more difficult it is to make any adjustment"[236]

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[233] T4 at 87.
[234] *Id.* at 88.
[235] *Id.* at 91.
[236] *Id.*

Michael Williams

Mr. Williams, president of Williams and Beck, was found to be an expert in engineering. He provided a report, included in Mr. Miller's report, which Mr. Miller testified supports his cost calculations for the subject property.[237] Mr. Williams testified, however, "I haven't done any specific cases of such that are related to a big-box store, but there are many design improvements or replacements that I have designed that would be applicable not only to where they were applied but to a big-box store."[238] He further testified, "[w]e have never built anything as big as 80,000 square feet."[239] Mr. Williams prepared a replacement cost analysis for the subject property; however, Respondent's counsel at the hearing of this matter, indicated it would not rely on Mr. Williams' cost estimate.[240] Mr. Williams' report also gave an opinion relative to the functional utility of the subject property. However, Mr. Williams was questioned, "so your definition of functional utility has nothing to do with market demand; is that correct? A: It is."[241]

Mr. Williams testified that he conducted a site visit of the subject property. He testified that he, or other members of his team, conducted site visits of additional big-box stores, such as the former Source Club, Meijer, Kmart, Walmart, At Home, Lowe's, Home Depot, and quite a few Menards stores. He testified, "[w]e've looked at a variety of stores that have been converted to other things that are no longer home improvement stores but have been previously. We have a database of about 400 big-box stores and

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[237] T4 at 131.
[238] T8 at 103.
[239] *Id.* at 99.
[240] *Id.* at 106.
[241] *Id.* at 157-158.

at least 50 of those are home improvement stores."[242] He testified that the database was compiled for this case.[243]

Mr. Williams testified that either he or his team, evaluated the structural system, utilities and mechanical components of the building. Additionally, his report included an evaluation of site improvements. The report evaluated the quality of the elements in terms of durability, flexibility and strength.[244] Mr. Williams testified that the "Menard's is a good example of the industry standards. In fact, I think it's a good example of some of the best quality in the industry standard components."[245]

Mr. Williams testified, generally, when converting from one user to another, modifications were not extensive and nowhere near $15-$53 per square foot, as in previous testimony relative to the Bowen and Associates report. He testified regarding the Source Club modifications Mr. Miller analyzed, that the average costs are closer to $3 to $5 per square foot. He testified that the Source Club modifications were generally less than half a million dollars. [246]

During cross-examination, Mr. Williams answered in the negative when questioned if one of the purposes of his report was to render an opinion on factors that might impact the value of the Escanaba Menards store. He answered in the affirmative when questioned if he was not qualified to render an opinion and he is not an expert in depreciation.[247] Mr. Williams wrote in his report, "our findings demonstrate that, in general, a typical Menard's store could be easily converted and operated by a

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[242] *Id.* at 106-107.
[243] *Id.* at 130.
[244] T8 at 108-110.
[245] *Id.* at 122-123.
[246] *Id.* at 127.
[247] *Id.* at 156.

competing home improvement retailer."[248] However, he answered in the affirmative when questioned, "Sir, you have absolutely no experience about what it would take to convert and operate the Menard's store – Menard's store by a competing home improvement retailer; is that correct?"[249]

With regard to the Source Club to Meijer conversion, Mr. Williams was questioned regarding the building permits allegedly issued by the City of Fraser for $400,000 in 1994, which were the basis of his conclusion of conversion costs. Mr. Williams was asked to read what he wrote in his report in this regard, "In Fraser, Meijer nearly doubled the size of the building and the parking lot and those two things accounted for the majority of the conversion costs."[250] He was questioned, "Sir, do you think it's possible to double the size of a 128,000 square foot store and only pay $400,000?" "A: No, I don't, and I don't think that's what we were representing here."[251]

Mr. Williams was asked to view materials from his work file. He reviewed building permits relative to the Fraser Source Club to Meijer conversion, and concluded that the estimated cost on the building permits were $6.3 million and an additional $500,000 in 1994, when the conversion from Source Club to Meijer occurred.[252] There was also an additional 1994 permit for interior demolition.[253] He answered in the affirmative that Meijer had many items that Source Club did not, like floor coverings, freezers, refrigerators, bakery, and pharmacy departments that require electrical, plumbing and dividers. He testified when questioned, "So, sir, why did you just testify –

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[248] *Id.* at 156, citing R-1 at 207.
[249] T8 at 157.
[250] See R-28 at 9, T8 at 163.
[251] T8 at 163-164.
[252] *Id.* at 166, P-30.
[253] See P-30.

well, do you stand by your assertion that the conversion cost to convert the Fraser Source Club to Meijer cost $400,000?" "A: No, I don't think I can."[254]

Mr. Williams was further questioned about potential inaccuracies regarding his additional Source Club conversion costs in Livonia, Wyoming and Kentwood. He was questioned, "So, sir, there are a lot of errors in your Table 2 regarding Source Club conversion costs, aren't there?" "A: Apparently so."[255] He was questioned, "so you still stand by the testimony you gave earlier today about the cost to convert big-box stores?" "A: I don't see how I can."[256] Mr. Williams was further questioned, "[w]here were you when this report was written?" "A: I was in Ireland."[257] He testified it was arranged to gather whatever potential conversion cost information was available from the local assessors' offices and he did not visit any of the Source Clubs, but a colleague visited Fraser and Livonia Source Clubs.

Peter F. Korpacz

Mr. Korpacz is a real estate appraiser with 56 years of experience. He has the MAI designation and wrote four chapters of and edited the 8th edition of *The Appraisal of Real Estate*, published by the Appraisal Institute. He also wrote a follow-up chapter on the income approach for the 9th edition[258] and worked on the first and second editions of the Dictionary of Real Estate Appraisal. He created the Korpacz Investment Survey and was a task force member of the [Appraisal Institute] Property Rights Symposium Discussion Paper, in September 2017, "which was organized to deal with the fee simple

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[254] T8 at 169.
[255] T8 at 179.
[256] *Id.*
[257] *Id.* at 180.
[258] *Id.* at 212.

problem, the debate on fee simple."[259] He also worked with the IAAO, which primarily represents the interests of assessors and "put out the [big-box] valuation guide in 2017. And then we followed up with a practical applications type presentation for the fall conference in 2018 on the same topic."[260]

Mr. Korpacz testified he collected over 350 broker submissions to, in part, determine how investor/leased sales are marketed. He noted the sheets refer to, for example, the "[r]are opportunity to acquire fee simple Wal-Mart Super Center."[261] Another refers to a triple net sale leaseback opportunity as fee simple. He testified that "the important point is that of all the listings I have looked at – over 350 – when they say something about the ownership interest and they say fee simple, not a single one says leased-fee. That, to me, is the market – market behavior talking to us. They understand what fee simple is."[262] However, during cross-examination, Mr. Korpacz, when questioned if the listing could have been written by a "secretary, office assistant or an overworked intern; is that correct?,"[263] answered that "[t]he exact person in each office who put that together is unknown to me."[264] He also answered in the affirmative that brokers are often not attorneys or appraisers. He testified regarding the broker's submissions, "[t]hey never mention leased fee and they often don't mention fee simple. They just don't say anything about the type of ownership rights that are being conveyed."[265]

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[259] *Id.* at 214.
[260] T8 at 215, T9 at 136.
[261] T9 at 42.
[262] *Id.* at 44.
[263] *Id.* at 138.
[264] *Id.* at 138-139.
[265] *Id.* at 138.

With regard to the cost approach, Mr. Korpacz testified that appraisers are competent, but not experts in the cost approach. He testified, "[a]ppraisers in general do not have the knowledge, the training and experience in the area of building construction, particularly in systems analysis for HVAC and plumbing and electric and that sort of thing. And they also don't have training in understanding functional utility of certain building components, including all the systems. And therefore, I don't think they can claim to be experts, but they can claim to be competent, which is the USPAP standard. USPAP doesn't say anything about being an expert in anything. It talks about competency, and I think many appraisers, if not most appraisers, can be considered competent in the cost approach."[266]

Mr. Korpacz reviewed Mr. Allen's appraisal and wrote, "[t]he Appraisal Report fails to discuss the two remaining Michigan Source Clubs that were transferred or converted without deed restrictions."[267] He went on the write, "[t]he modifications to both stores appear to be minimal."[268] He was questioned, "That's not true, is it?" "A: Well, I believed it was when I wrote that, and I don't know anything different today."[269] When questioned if he received a draft of Mr. Williams' report, Mr. Korpacz replied, "I don't recall getting any of his reports after or otherwise. I may have got the final, but I certainly don't recall reading it."[270] However, a copy of his draft report, dated April 18, 2019, was in his work file.[271]

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[266] T9 at 48.
[267] *Id.* at 147, R-27 at 18.
[268] *Id.* at 147, R-27 at 18.
[269] *Id.* at 147.
[270] *Id.* at 147.
[271] *Id.* at 149.

In his testimony, Mr. Korpacz indicated a number of other areas in Mr. Allen's appraisal that were suspect. He testified that Mr. Allen could not recall any discussion of the HBU by the COA and Mr. Allen was unfamiliar with whether the COA affirmed the Tribunal's HBU.[272] Because of this, his comparable properties may not have the same HBU as the subject property.[273] In fact, the HBU conclusion in Allen's report of "retail," is contrary to the HBU conclusions of the Tribunal and the COA and is much broader.[274]

Further, with regard to Mr. Allen's replacement costs calculation, Mr. Korpacz indicated that the property seems to fit the average quality description from MVS, but Mr. Allen's report uses the low cost description.[275] Mr. Korpacz also criticized Mr. Allen's use of a paired sales analysis because there were too many differences amongst each of the paired sales.[276] Finally, Mr. Allen in his HBU analysis, presented two alternative uses for the property, single-tenant retail use or multiple-tenant retail use, but did not test which of the alternative uses would provide the maximum productivity.[277]

FINDINGS OF FACT

STIPULATION OF FACTS PRESENTED AT THE ORIGINAL HEARING

1. The subject property is located at 3300 Ludington St., City of Escanaba, Delta County, Michigan.
2. The subject building contains 166,196 square feet on the 1st floor per Respondent's Exhibit 11.
3. The subject property has a total land area of 18.35 acres.

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[272] *Id.* at 10.
[273] T9 at 11.
[274] *Id.* at 21-22.
[275] *Id.* at 51-52.
[276] *Id.* at 85-86.
[277] *Id.* at 129.

4. The occupant of subject property should not influence the market value of the property.
5. The subject property is not an income-producing property; thus, the income approach is not given weight in the final conclusion of value.
6. The subject property is located in the Escanaba (Delta County) Core Based Statistical Area (CBSA).
7. The total population for the Escanaba CBSA is 37,069. The total population for Escanaba is 12,616 (2010 US Census).
8. The subject property is located on the north side of Ludington Street West of North 30th Street.
9. The subject site is located near the western edge of the developed area of Escanaba.
10. The unemployment rates in the Escanaba CBSA decreased from 10.1% in 2011 to 8.93% in 2013.
11. Both parties have furnished valuation disclosures in the form of appraisal reports. Petitioner's appraisal was prepared by Joseph L. Torzewski, MAI of Stout Risius and Ross and Respondent's appraisal was prepared by Daina Norden, Assessor for Escanaba.
12. Petitioner's appraisal report includes values for 2012, 2013, and 2014.
13. Respondent's appraisal report includes values for 2012, 2013, and 2014.
14. The Petitioner believes that the cost approach is not relevant in this tax appeal. The Respondent disagrees.
15. Both parties have appraised the subject property as a fee simple interest.
16. Petitioner developed the sales comparison and income approaches to value and conveys an opinion based on the sales comparison approach.
17. Respondent developed the cost and sales approaches to value and conveys an opinion of value from the cost approach.
18. Petitioner used 8 comparable sales for analysis purposes.

FINDINGS OF FACT ON REMAND

1. The subject property's parcel identification number is 051-420-2825-100-006.

2. The subject property is zoned F, Light Manufacturing.
3. The subject property was built-to-suit for Petitioner in 2008, (building permit issued 11/28/2007). The property is owner-occupied.
4. Petitioner's appraiser Larry G. Allen, MAI, prepared an appraisal, which presented the cost approach to value for tax years 2012-2014.
5. Respondent's appraiser William H. Miller prepared an appraisal, which also presented the cost approach to value for tax years 2012-2014.
6. Mr. Allen's concluded HBU for the subject property as improved, contains a freestanding store building and its HBU is retail. Mr. Allen's HBU is consistent with that determined by Mr. Torzewski in his appraisal report.
7. Mr. Miller's concluded HBU for the subject property, as improved, is continued use as Menards'.[278] Mr. Miller expanded this to continued use as a "home improvement store."
8. The COA found the parties' agreed upon HBU in the original hearing was continued use of the subject property as an owner-occupied freestanding retail building, which is consistent with Mr. Torzewski's testimony at the original hearing.
9. In his cost approach, Mr. Allen commenced with construction costs from MVS for Class C, Low-cost, Warehouse Discount Store. From the base cost, he adjusted up for HVAC and sprinklers. He did not include the Class D lumber storage building.
10. Mr. Miller in his cost approach, commenced with construction costs from Core Logic (Marshall Valuation) for Class C, Average, Warehouse Discount Store. He did include replacement cost for the lumber storage building. He did not subtract from base costs for items the subject property did not have, such as a deli, fast food or snack bar, vinyl flooring, office area, and acoustic ceilings.
11. Mr. Miller based his replacement cost calculations on a property with 248,768 square feet.
12. Mr. Miller and Mr. Allen had no material dispute over land value.[279]

[278] R-1 at 5.
[279] See T1 at 109.

13. Both appraisers calculated physical, functional, and external obsolescence, as part of their cost approach to value.
14. Mr. Allen applied straight-line physical depreciation for physical deterioration. He determined the subject property had effective ages of 3, 4, and 5 years for the dates of value, respectively, which based upon a 30-year (straight-line) useful life would result in depreciation of 10%, 13.3%, and 16.7%.
15. In his cost calculations, Mr. Miller concluded to depreciation utilizing a curvilinear approach at 3%, 5%, and 7% for the tax years at issue. Mr. Miller concluded that the property was two years old on the first date of value, December 31, 2011.
16. Mr. Allen concluded to combined external and functional obsolescence, utilizing six methods: the re-lease of twelve properties with build-to-suit leases in place, losses incurred upon the sale of Source Clubs, extraction from actual sales of big-box stores, capitalized rent loss, the preference to tear down an existing building rather than reconfigure and finally modification costs. Mr. Allen based his obsolescence conclusions of $6,984,887, $6,848,382, and $6,698,074 for tax years 2012-2014, respectively, on the capitalized rent loss method. His capitalized rent loss method included leases from Northern Michigan and one UP lease.
17. In his cost calculations, considering the capitalized rent loss method to conclude obsolescence utilizing long term triple net leases, Mr. Allen allowed for CAM, insurance and property taxes to flow-through in his calculation of NOI.
18. Mr. Miller concluded that functional obsolescence for the subject property of 2.4% to 2.2% ($314,753 to $300,911) for removal of the mezzanine. He concluded to zero external obsolescence by completing a market analysis, utilizing 30 Lowe’s or Home Depot stores that were leased, reports from brokerage firms and two national surveys. From the information gathered, he performed two tests, a test of feasibility rent against the assessment, and a test of feasibility rent against the cost conclusion
19. Mr. Miller’s sales of leased big-box home improvement stores were all sold from investor to investor. They were not owner-occupied, but occupied by a home improvement tenant.

20. Mr. Miller did not know who the parties to the leases were and two of the thirty were located in Michigan. The two Michigan properties were located in Adrian and Plainwell. No rents in the UP of Michigan were provided. Mr. Miller assumes no vacancy or expenses in his lease rates.
21. No adjustments to the sales of leased properties were provided.
22. Big-box stores, when sold, will generally be remodeled or torn down.
23. No examples of Lowe's or Home Depot purchasing a Menards, were provided.
24. Lowe's and Home Depot have not constructed any new stores in Michigan since 2008 through the tax dates at issue.[280]
25. The average Home Depot store has 104,000 square feet of retail selling space and the average Lowe's store has 112,000 square feet of retail selling space.[281]
26. Mr. Miller prepared three appraisals for Sam's Club, after the IAAO white paper, *Commercial Big-Box Retail A Guide to Market-Based Valuation*, was issued.
27. Mr. Miller's Sam's Club appraisals valued the properties as vacant and available and their HBU was "continued use as a [big] box retail location."[282]
28. Mr. Miller's conclusions of fair market value for the subject property for the 2012, 2013, and 2014 tax years are $13,700,000, $13,880,000, and $13,760,000.
29. Ms. Norden's conclusions of fair market value for the subject property for the 2012, 2013, and 2014 tax years are $7,815,976, $7,995,596, and $8,210,938.
30. Both Mr. Allen and Mr. Miller testified that they appraised the fee simple interest.
31. Respondent argued for redefinition of the appraisal term "fee simple" to include leased properties, pursuant to the IAAO white paper, and the Appraisal Institute discussion paper.
32. Petitioner argues that the redefinition of "fee simple" by Respondent enhances its use of built-to-suit leases without adjustments.
33. Respondent's witness Mr. Korpacz, agreed that the redefinition of "fee simple" will never be accepted by the Appraisal Institute.[283]

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[280] R-1 at 104.
[281] See R-1 at 42,44.
[282] P-8, P-9 and P-10 at 5.
[283] T9 at 137.

34. Mr. Korpacz replied in the affirmative that the IAAO white paper has exactly the same legal authority as a white paper issued by counsel's mother's knitting club.[284]
35. The COA did not order additional information or discussion regarding a potential redefinition of fee simple.
36. With regard to deed restrictions, in the original case, Mr. Torzewski presented eight sales comparables, and the COA found he specifically acknowledged that comparables one, three, five, and eight had deed restrictions.
37. The COA found Mr. Torzewski testified comparables six and seven had no deed restrictions.
38. Comparable one, the Holland Home Depot, sold to Rural King, who subsequently sold it to a developer for multi-tenant conversion.
39. Comparable two, a former Circuit City in Westland, was a REO sale and converted into a City Hall.
40. Comparable three, a former Walmart in Alma, sold for industrial use.
41. Comparable four, a former Sam's Club in Madison Heights, sold for redevelopment as an industrial property and involved a sheriff's deed on mortgage sale.
42. Comparable five, a former Walmart in Auburn Hills, sold for industrial use.
43. Comparable six, a former Peerless Furniture Store consisting of 53,474 square feet, sold for the same use.
44. Comparable seven, a former Kroger in Dearborn, consisted of 55,474 square feet.
45. Comparable eight, a former Walmart in Frenchtown Township, sold to a developer for conversion into multi-tenant space.
46. Mr. Allen consulted brokers, developers, and real estate departments for big-box stores, to determine the process for creating and applying deed restrictions.
47. Mr. Allen prepared a paired sales analysis to investigate the effect of deed restrictions on value.

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[284] *Id.* at 136.

48. Mr. Allen considered survey data of a comparison of deed restricted and non-deed restricted big-box sales from across the country, from the International Appraisal Company. He also considered and interviewed the author of a big-box study prepared by Real Estate Research Corporation which included a sample of 800 sales.
49. Mr. Allen determined deed restrictions had a neutral effect on value, due to carve-outs for potential buyers.
50. Mr. Miller, Dr. Laposa, and Mr. Korpacz gave their opinion that deed restrictions negatively affected value.

CONCLUSIONS OF 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 TCV.[285]

> The legislature shall provide for the uniform general ad valorem taxation of real and tangible personal property not exempt by law except for taxes levied for school operating purposes. 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 percent.[286]
>
> The Michigan Legislature has defined TCV 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.[287]

The Michigan Supreme Court has determined that "[t]he concepts of 'true cash value' and 'fair market value' . . . are synonymous."[288]

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[285] See MCL 211.27a.
[286] Const 1963, art 9, sec 3.
[287] MCL 211.27(1).
[288] *CAF Investment Co v Michigan State Tax Comm*, 392 Mich 442, 450; 221 NW2d 588 (1974).

"By provisions of [MCL] 205.737(1) . . . , the Legislature requires the Tax Tribunal to make a finding of true cash value in arriving at its determination of a lawful property assessment."[289] The Tribunal is not bound to accept either of the parties' theories of valuation.[290] "It is the Tax Tribunal's duty to determine which approaches are useful in providing the most accurate valuation under the individual circumstances of each case."[291] In that regard, 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."[292]

A proceeding before the Tax Tribunal is original, independent, and de novo.[293] The Tribunal's factual findings must be supported "by competent, material, and substantial evidence."[294] "Substantial evidence must be more than a scintilla of evidence, although it may be substantially less than a preponderance of the evidence."[295]

"The petitioner has the burden of proof in establishing the true cash value of the property."[296] "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."[297] However, "[t]he assessing agency has the burden of proof in establishing the ratio of the average

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[289] *Alhi Dev Co v Orion Twp*, 110 Mich App 764, 767; 314 NW2d 479 (1981).
[290] *Teledyne Continental Motors v Muskegon Twp,* 145 Mich App 749, 754; 378 NW2d 590 (1985).
[291] *Meadowlanes Ltd Dividend Housing Ass'n v Holland,* 437 Mich 473, 485; 473 NW2d 636 (1991).
[292] *Jones & Laughlin Steel Corp v City of Warren*, 193 Mich App 348, 356; 483 NW2d 416 (1992).
[293] MCL 205.735a(2).
[294] *Dow Chemical Co v Dep't of Treasury*, 185 Mich App 458, 462-463; 462 NW2d 765 (1990).
[295] *Jones & Laughlin Steel Corp, supra* at 352-353.
[296] MCL 205.737(3).
[297] *Jones & Laughlin Steel Corp, supra* at 354-355.

level of assessments in relation to true cash values in the assessment district and the equalization factor that was uniformly applied in the assessment district for the year in question."[298]

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.[299] "The market approach is the only valuation method that directly reflects the balance of supply and demand for property in marketplace trading."[300] 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 TCV of the property, utilizing an approach that provides the most accurate valuation under the circumstances.[301] Regardless of the valuation approach employed, the final valuation determined must represent the usual price for which the subject would sell.[302]

In its Opinion requiring remand, the COA provided the Tribunal with the following findings and instructions:

> The tribunal committed an error of law requiring reversal when it rejected the cost-less-depreciation approach and adopted a sales-comparison approach that failed to fully account for the effect on the market of the deed restrictions in those comparables. Given this error, and the fact that there is little if any evidence in the record about the effect of the deed restrictions on the comparables, we conclude that it is inadequate to simply remand to the tribunal for a new determination regarding value.
>
> Instead, on remand, the tribunal shall take additional evidence with regard to the market effect of the deed restrictions. If the data is insufficient to

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[298] MCL 205.737(3).
[299] *Meadowlanes, supra* at 484-485; *Pantlind Hotel Co v State Tax Comm*, 3 Mich App 170, 176; 141 NW2d 699 (1966), aff'd 380 Mich 390 (1968).
[300] *Jones & Laughlin Steel Corp, supra* at 353 (citing *Antisdale v City of Galesburg*, 420 Mich 265; 362 NW2d 632 (1984) at 276 n 1).
[301] *Antisdale, supra* at 277.
[302] See *Meadowlanes supra* at 485.

> reliably adjust the value of the comparable properties if sold for the subject property's HBU, then the comparables should not be used.
>
> The tribunal shall also allow the parties to submit additional evidence regarding the cost-less-depreciation approach.
>
> After allowing the parties the opportunity to present additional testimony in light of the deficiencies identified in this opinion, the tribunal shall make an independent determination of the property's TCV using correct legal principles. In doing so, the tribunal must "apply its expertise to the facts of a case in order to determine the appropriate method of arriving at the true cash value of property, utilizing an approach that provides the most accurate valuation under the circumstances." *Great Lakes,* 227 Mich. App. at 389, 576 N.W.2d 667.[303]

As noted above, in this matter, the Tribunal is to make an independent determination of the true cash value of the subject property, after taking additional evidence with regard to the market effect of deed restrictions and considering additional evidence regarding the cost approach to value. As such, given Respondent's novel arguments relative to the COA's remand order, the question must be posed, "what is the Tribunal required to value in this appeal?" The answer is that the Tribunal is required to determine the fair market value of the subject property building, improvements, and the land they are situated on. The parties agree that "the occupant of [the] subject property should not influence the market value of the property."[304]

Menards, based on its business success, remits to the State of Michigan, corporate income tax (CIT), collects and remits sales tax, pays withholding tax for its employees, among other possible business-related taxes. The Tribunal is not required to determine the correct amount of CIT, sales, or withholding taxes Menards is required to remit based on the success or losses in its business volume; the Tribunal is required

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[303] *Menard, supra* at 531-532 (paragraphs added for ease of review).
[304] *Menard*, initial hearing, Finding of Fact 6, Stipulation of Facts, 4, T6 at 22.

to determine the value of the building, improvements, and the land they are situated on considering, among other factors, their highest and best use.. By doing so, the Tribunal concludes to the property's true cash value and taxable value, which upon a transfer of ownership, is the starting basis for determining the amount of tax due.[305]

The Tribunal must determine *the usual selling price* of the building, improvements, and land, as a fee simple estate.[306] When the fee simple estate is transferred, the buyer can occupy the property, mortgage the property, lease the entire property to one tenant, modify it to lease to multiple tenants, tear it down, tear part of it down, give it away, or any other legally permissible action ("subject only to the limitations imposed by the governmental powers of taxation, eminent domain, police power and escheat.")[307] If a property is sold with a long term lease in place, the buyer does not have the full bundle of rights and, in fact, has a ready income stream and a building at the end of the lease, which is not the same as buying a property with no lease in place. It is just a matter of common sense.

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[305] "The concept of highest and best use relates to what is done physically with real estate, and physical land use should not be confused with the motivation of owners or users." Appraisal Institute, *The Appraisal of Real Estate,* 14th ed. (Chicago: Appraisal Institute, 2013), 334. See also MCL 211.27a.

The Appraisal of Real Estate is the appraisal profession's "flagship text, reflects this recommitment to the essential principles of appraisal and the sound applications of recognized valuation methodology." Further, "both appraisers and users of their services can be assured that this volume builds on time-tested foundational knowledge and contains the most up-to-date information and learning on valuation available anywhere." *Appraisal of Real Estate,* Forward, written by Richard L. Borges II, MAI, SRA, 2013 President, Appraisal Institute.

[306] MCL 211.27(1).

As noted above, fee simple is defined as "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 Appraisal of Real Estate* (Chicago: Appraisal Institute, 14th ed, 2014), at 5.

[307] *The Appraisal of Real Estate*, supra at 5.

Respondent spent a good part of ten days presenting four witnesses to persuade the Tribunal that the purchase of a leased big-box store, or leased-fee sale, which provides the purchaser with some, but not all, of the rights to the real property, plus the right to receive income under a lease, presents the Tribunal with the value of the building, improvements, and the land they sit on. However, if a leased-fee sale is to be considered by the Tribunal in its determination of the TCV of the property, or in this case, the appropriateness of Respondent's economic obsolescence conclusion, it must be adjusted to reflect the price paid for the real property, alone, which was not done by Mr. Miller. *The Appraisal of Real Estate* states that a lease fee comparable may not be a valid indicator of the fee simple interest:

> Income producing real estate is often subject to an existing lease or leases encumbering the title. By definition, the owner of real property that is subject to a lease no longer controls the complete bundle of rights, i.e., the fee simple estate. The price paid for a leased fee sale is a function of the contract rent, the credit worthiness of the tenant, and the remaining years on the lease. If the sale of a leased property is to be used as a comparable sale in the valuation of the fee simple interest in another property, the comparable sale can only be used *if reasonable and supportable market adjustments for the differences in rights can be made.*[308]

The COA and the Tribunal allowed the parties to submit additional evidence regarding the cost-less-depreciation approach to value. Part of the cost approach requires consideration of depreciation from all sources - physical, functional and external.[309] Mr. Allen presented six reasonable methods to conclude to functional and external obsolescence utilizing comparables he was familiar with, having appraised 200

[308] *The Appraisal of Real Estate*, *supra,* at 406.
[309] *Id.* at 562.

big-box stores, the majority in Michigan and twelve in the UP.[310] On the other hand, Mr. Miller calculated external obsolescence (or lack thereof) by choosing 30 leased-fee sales, of which only two were located in Michigan. Further, he lacked essential knowledge about the sales and, as such, was unable or unwilling to adjust them to be considered as appropriate comparables.

Nevertheless, it seems Respondent's mission in this matter is to persuade the Tribunal that a leased-fee sale is the same as a fee simple sale and, in fact, is a fee simple sale, because when a property is inherited, whether leased or not, the entire interest, or entire fee, is bequeathed. The Tribunal finds "changing" the definition of fee simple is not part of the remand order. Further, Mr. Korpacz testified the Appraisal Institute would never accept the "legal" definition,[311] and in fact, the Tribunal is trying to determine the value of the property utilizing appraisal principals, not deliver its opinion on estate law. Appraisers have utilized the same definition of fee simple from *The Appraisal of Real Estate* since at least 1984, per the testimony at hearing.[312] While the IAAO white paper suggests that the appraisal definition of leased-fee properties are included in the legal definition of fee simple, Mr. Korpacz, Respondent's witness and a member of the IAAO work group, answered in the affirmative that the white paper has "exactly the same legal weight as a white paper issued by my mother's knitting club; is that correct?" [313] The Tribunal finds the Appraisal Institute's definition of fee simple, as presented in *The Appraisal of Real Estate*, is the proper one to utilize in this matter.

[310] See T1 at 49, 53-54.
[311] T9 at 137.
[312] See T6 at 49.
[313] T9 at 136.

Further, relative to occupancy, it should be noted (and agreed upon by Mr. Miller), that HBU looks forward to what use the property purchaser puts to the property, not the former use of it by the seller.[314] As such, whether a property is occupied or not at the time of sale, is not determinative of its HBU. Additionally, just because a big-box store is occupied, does not indicate it is in better condition or in a more advantageous location than an unoccupied store. A big-box store in a "good" location or even a "first mover" store, might go vacant because the business, not the location, failed, i.e., Kmart in Escanaba failed and sold to U-Haul.[315] An example of a failed "first mover," is the Walmart in Hartland, Michigan, one of Mr. Allen's obsolescence comparables, which was the first entry into the market. Walmart failed when Meijer moved across M-59. Mr. Allen opined the store was sold because "it wasn't meeting their profit requirements."[316] Also, Mr. Miller testified that Lowe's in Berlin Township allegedly failed because two home improvement stores went in at the same time.[317]

Respondent's witnesses testified, based on the IAAO white paper, that the subject property is a "Class A investment," in part, because it is occupied. However, this classification is not utilized by market participants and is confusing to the reader given that assessors in Michigan class properties as A, B, C, and D, based on their construction quality.[318]

The Court in *Lowe's v Grandville Twp*, clarified the irrelevance of occupancy and found:

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[314] See T5 at 20, T6 at 117.
[315] T1 at 75.
[316] T1 at 200, T10 at 17. The Hartland Walmart sold to Rural King and is Mr. Allen's comparable five included in his obsolescence calculations extracted from actual sales of big-box stores.
[317] T3 at 34-35.
[318] See R-1 at 284.

> **Respondent's argument on appeal that the exiting use of the subject property as improved should be as a "continuously-occupied, successful home improvement store" attempts to include in the property's TCV a measure of value attributable solely to the owner and the owner's use of the property.** As our Supreme Court explained, "[t]he 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.*" *Edward Rose Bldg Co,* 436 Mich. at 640–41. (internal quotation marks and citations omitted). **Therefore, even if the subject property is in fact continuously-occupied and successful, these characteristics of the property are not relevant for determining the property's TCV. They are accidents of ownership, not measures of value inherent to the property itself***,* and the tribunal did not misapply the law nor adopt a wrong principle by categorizing the existing use of the subject property as improved as commercial retail.[319]

Respondent alleges that Petitioner utilized vacant sales from the secondary market, not occupied stores, as comparables. However, once an existing property is sold, *unless the operating business is sold*, it is vacated, becomes part of the secondary market, and is purchased by a secondary user. Mr. Allen was questioned about his alleged use of comparables from the secondary market. He replied that "secondary use means if you were to put this property on the market and sell it for its usual selling price, then it would be another user or a second user would be using the building."[320] He testified, "If you sell it to anybody else it's a secondary use, whether you sell it to Lowe's or Home Depot or Farm and Fleet or At Home or anyone else in the market, that's – you're selling an existing building . . . for [its] usual selling price, it'll – it'll bring into the market to a user who has a demand for that building."[321] Much has been made of savvy big-box store owners and their business practices, including deed restrictions which do

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[319] *Lowe's Home Ctrs, Inc v Grandville*, unpublished per curiam opinion of the Court of Appeals, issued December 30, 2014 (Docket No. 317986). (Emphasis supplied and added).
[320] T2B at 39-40.
[321] *Id.* at 40.

not allow all potential buyers to come to the table. The Tribunal, however, finds based on the testimony and evidence at hearing, that vacant big-box stores are professionally marketed to obtain the best price and exceptions to any restriction are carved-out for the purchaser.

The Tribunal does not find it inappropriate to utilize vacant and available properties that have sold to compare to an "occupied" property for which it must determine the usual selling price of the building, improvements and the land they are situated on. The Tribunal is not tasked with determining the value to Menards, or its value-in-use. It is imperative that value to the owner not be substituted for TCV.

Further, the Tribunal queries, why did Respondent attempt to narrow the COA's conclusion of the HBU of the property from free standing *retail building*, to free standing home improvement store, or even free standing Menards?[322] Mr. Miller wrote, "[t]he subject's highest and best use was concluded to be **'***for continued use of the existing improvements as a free-standing retail building***,'"** however, he further contends, "[t]he subject actual use as of each valuation date is as a single-occupant home improvement store. The HBU is to continue this use. Thus, the comparables should be similar home improvement stores where the store is in 'continued use' as of the valuation dates. This excludes dark stores."[323] The Tribunal again queries, if the big-box comparables are in "continued use" as of the valuation dates, how can they provide information about the usual selling price of the building, improvements and land? The Tribunal opines that the term "continued use," of the HBU determination, "continued use as an owner-occupied

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[322] See Resp's Brief at 28, citing T6 at 11. R-1 at 5 (emphasis added).
[323] R-1 at 34.

freestanding retail building," suggests the current use is owner-occupied freestanding retail, and when transferred, the HBU is owner-occupied freestanding retail, *not retail, home improvement store.* As noted above, only one, stale example of a home improvement store purchasing a home improvement was given,[324] but there are examples of big-box stores utilized for retail purposes after sale. In fact, the evidence and testimony at hearing demonstrate that former big-box stores with or without deed restrictions, sell to other big-box stores, junior box stores, convert to multi-tenant, among other possible sale outcomes.[325]

Respondent alleges that Menards is perfectly suited to be occupied by Lowe's or Home Depot without any modifications, even though the stores are smaller in size, have different lighting, have indoor lumber storage and sales, lower ceilings, finished office

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[324] Mr. Miller testified that Home Depot purchased Builder's Square in Dearborn at Fairlane North Center. No details about this purchase were given in Mr. Miller's appraisal, including the date of sale. See R-1 at 107. See T4 at 151.

[325] It is interesting to note, as stated above, that Mr. Torzewski found the highest and best use of the property, to be "for continued use of the existing improvements as a freestanding retail building." See *Menard., supra* at 514. See also P-1, (Mr. Torzewski's appraisal report) initial hearing at 34. Ms. Norden, Respondent's valuation witness in the first hearing is not an appraiser, was qualified as an expert in assessing, and did not make a determination as to the highest and best use of the property, though her valuation disclosure on its cover states, "Menards Free-Standing Retail Building." See initial hearing transcript at 141. See also initial hearing exhibit R-9, Ms. Norden's valuation disclosure.

Mr. Torzewski testified at the initial hearing of this matter that the property's highest and best use is, "continuing its use as an *owner-occupied*, freestanding retail building." See initial hearing transcript at 36 (emphasis added). The COA noted that, "Escanaba and the amici argue that the tribunal failed to make an explicit determination of the property's HBU. However, we conclude that such a finding is implicit in the tribunal's decision, which recounted in the findings of fact that the parties did not dispute the HBU. Given that the matter was not contested, and that the tribunal recognized the agreed-upon HBU, we conclude that the tribunal did not err by not expressly stating the HBU." See *Menard, supra* at n.4.

The Tribunal, however, is unable to locate a finding of fact in the initial opinion, or the stipulation of facts presented at the initial hearing, that "recognized the agreed-upon highest and best use." In fact, in the initial opinion, the only reference to highest and best use is in the "Summary of Petitioner's Case," which states, "Mr. Torzewski described the highest and best use of the subject property relative to the fee simple owner-occupied elements." Nevertheless, from the testimony and evidence presented in the record, the COA, in a published case, found the HBU of the property to be "continued use as an owner-occupied freestanding retail building." As such, the Tribunal will accept this HBU.

space and no mezzanines, among other differences, as they are built-to-suit the needs of the owner. Further, no examples of Lowe's or Home Depot purchasing a Menards were presented. Mr. Miller testified, "it's a rare occurrence for a big-box - - one big-box retailer to purchase another big-box retailer's asset, for many reasons. The largest one is most of the big-box retailers, number one, 85 percent plus tend to own their stores, particularly in the home improvement market. So that means there's very few - - as they own their own stores they tend to stay in their stores. "[326] He further testified that he "didn't find any as an example where - - Menard's had bought a Lowe's [,] or Home Depot had bought a Menard or any of those situations. They weren't there."[327] In fact, Mr. Laposa and Mr. Miller testified that Escanaba cannot support two home improvement stores.[328] As a result, if the Escanaba Menards was to again move to another location in the City, Respondent's experts found that Lowe's or Home Depot would not survive and, as such, the Tribunal is confident they would not purchase the existing Menards store. Also, the former 59,000 square foot Menards, that the subject Menards vacated to build a larger store, stood empty for 10 years.

Mr. Miller did testify, interestingly, that if Menards left Escanaba, vacated the subject property, and there was no deed restriction, Home Depot would move right in, rather than building its own store to its own specifications. He testified, "I believe Home Depot would look at the property because it was a vacant -- because it was available for their occupancy and directly fulfills the demand in the marketplace. And it would be the best alternative for them rather than building a brand new store. Because any other

[326] T4 at 153.
[327] *Id.* at 179.
[328] T3 at 121, T4 at 63.

store that they build cannot be at that location."[329] "This store they could move into, this property they could move into immediately and begin selling product. If they have to build a store, it might take a year or 18 months to get all the entitlement and to get it built at what would likely be an inferior location and creating an oversupply in the marketplace down the street or somewhere else in Escanaba."[330] Immediately subsequent to this testimony, he was asked by the bench, "How often does that happen in the marketplace, that one big-box retailer goes and buys another competitor's building?" He replied, "Fairly rare."[331]

Mr. Allen testified, "if Home Depot were to look at this property, their prototype is generally less than a hundred thousand square feet, so this property would have a lot of extra space that they would not need," creating obsolescence.[332] When questioned if Lowe's or Home Depot would pay replacement cost less physical depreciation, as alleged by Respondent, for a store size they have demonstrated they do not want, he answered in the negative. In fact, Mr. Allen testified they would pay market value.

Mr. Allen further testified, "Lowe's, it's demonstrated they – if they do buy a big-box store they're more likely to tear it down than use it, and build their own store, like they did with the five-year-old Handy Andy in Saginaw and they did with the Source Club they bought in Westland. But if – it they were to buy a larger store, which I don't think they would, and they didn't tear it down, they wouldn't pay for the extra space they don't need or want"[333] Mr. Allen testified, in the alternative, "if they bought the store,

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[329] T6 at 93-94.
[330] *Id.*
[331] T6 at 97.
[332] T10 at 50.
[333] *Id.* at 52.

they would want to modify it to their prototype, like Home Depot did in Plainwell. They spent a ton of money to have the landlord – have the developer take this Kmart store and move truck wells, change the façade and make it a layout like a Home Depot store. And because of the cost of the modifications, if they bought this Menard's store not only would they not pay for the size and the special features, but they would pay less because of their modifications they would have to make to the store. Otherwise, and especially in the case of Lowe's, they would just build a new store, or if Lowe's were to buy this store, they probably, a least from their history, they would tear it down and build their own store."[334] Mr. Allen also testified, if Home Depot or Lowe's moved into Escanaba, they "could cannibalize the sales of their existing stores. So, I don't believe that they're a likely purchaser for this property if was available"[335] Their stores are currently in Iron Mountain or Marquette which are 52 and 60 miles away.[336] Mr. Miller wrote in his appraisal that Lowe's and Home Depot have not constructed any new stores in Michigan since 2008[337] and, as noted above, no examples of Lowe's, Home Depot, or Menards purchasing each other's stores was provided.

Based on Mr. Allen's extensive testimony and the evidence presented at the hearing of this matter, the Tribunal finds the subject property's HBU cannot be extended to "continued use as a freestanding *home improvement* store." The Tribunal finds it highly unlikely that Lowe's or Home Depot would move into the subject property, without tear-down or extensive modification.

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[334] T10 at 63.
[335] *Id.* at 62.
[336] *Id.* at 120.
[337] See Pet's Brief at 49 referencing R-1 at 104.

Value-in-use versus Value-in-exchange

Before going on to a detailed discussion of deed restrictions and the cost-less-depreciation approach to value, the Tribunal finds it appropriate to present a short discussion of value-in-use versus value-in-exchange, since it is fundamental to determining TCV.

The history of "value in use" versus "value in exchange" has long been explored by Michigan Courts. As early as 1887, our Supreme Court recognized that TCV "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."[338]

In *Safran Printing Co v City of Detroit*,[339] a Tribunal majority rejected the petitioner's valuation of a printing plant, which relied on market value "based on a future or alternative use while ignoring its present existing use as an industrial printing plant which we believe to be the highest and best use."[340] The higher Court explained the Tribunal's error:

> In the instant case the tribunal apparently attributed great weight to the fact that the subject property was being used as a printing plant, stating that this was the highest and best use of the property. Normally, existing use may be indicative of the use to which a potential buyer would put the property and is, therefore, relevant to the fair market value of the property. However, in this case it is undisputed that the property is obsolete, inefficient, and could not be sold as a printing plant. Only the prohibitive cost prevents Safran from relocating. It is evident, therefore, that under the facts of this case the existing use of the property bears no relationship to what a likely buyer would be willing to pay for it.[341]

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[338] *Perry v City of Big Rapids*, 67 Mich 146, 147; 34 NW 530 (1887). This language was later quoted by our Supreme Court in *Washtenaw Co v State Tax Comm*, 422 Mich 346, 370 n 4; 373 NW2d 697 (1985) and *Edward Rose Building Co*, *supra* at 641.
[339] *Safran Printing Co v City of Detroit*, 88 Mich App 376, 382; 276 NW2d 602 (1979).
[340] *Id*. at 380 (quotation marks omitted).
[341] *Id*. at 382.

The Court found that, "[b]y expressly rejecting the usual selling price or fair market value standard and attributing a significant amount of value to the existing use of the property where such use bears no relationship to what a likely buyer would pay for the property, the tribunal used a wrong principle of evaluation."[342]

In *Clark Equip Co v Leoni Twp*,[343] the petitioner submitted only a market approach to value the property, a heavy industrial plant.[344] The Tribunal held that a cost-less-depreciation approach represented the most accurate method of determining TCV.[345] Specifically, the Tribunal stated that "the best and most appropriate method of appraising an owner-occupied, on-going use industrial facility wherein the present use represents the highest and best use of the property for assessment purposes is to calculate its replacement (as distinct from reproduction) cost, allow for physical, functional and economic obsolescence (or depreciation) and add the land value to the appraisal."[346] The petitioner argued that this approach, which it characterized as a "value in use" approach, had no relationship to the usual selling price under MCL 211.27.[347] The Court distinguished the facts from those in *Safran*, stating that no buyer would purchase the property for its current use because of its "inefficiency and obsolescence."[348] In *Clark Equip Co*, however, the current use *was* the property's

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[342] *Id.*
[343] *Clark Equip Co v Leoni Twp,* 113 Mich App 778; 318 NW2d 586 (1982).
[344] *Id.* at 780.
[345] *Id.*
[346] *Id.* at 781.
[347] *Id.*
[348] *Id.* at 782.

HBU.[349] Importantly, the Court reasoned, "the Court in *Safran* did not hold that a cost analysis based on value in use could never be used to determine usual selling price."[350]

The *Clark Equip Co* Court held that "to the extent a large industrial facility is suited for its current use and would be considered for purchase by a hypothetical buyer who wanted to own an industrial facility which could operate in accordance with the subject property's capabilities, said facility must be valued as if there were such a potential buyer, even if, in fact, no such buyer (and therefore no such market) actually exists."[351] It stated that this holding was in accordance with the decision of the COA in *First Fed S&L Ass'n of Flint v City of Flint*.[352] Although *Clark Equip Co* was decided prior to November 1, 1990, and is thus not precedential,[353] the COA cited it with approval in this case.[354]

The decision of the COA in *First Fed S&L Ass'n of Flint* was subsequently reversed.[355] In *First Fed S&L Ass'n of Flint*, the petitioner purchased the property and improved it to suit the image of a bank.[356] Although the petitioner used the income approach to value the property, the assessor utilized the cost approach to value the building and improvements.[357] The Tribunal upheld the assessment on the basis that the improvements had value to the petitioner "because they enhanced a financial institution's image of stability and success."[358] The COA affirmed the Tribunal on the

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[349] *Id.*
[350] *Id.* at 783.
[351] *Id.* at 785.
[352] *First Fed S & L Ass'n of Flint v City of Flint*, 104 Mich App 609; 305 NW2d 553 (1981).
[353] See MCR 7.215(J)(1).
[354] *Menard, supra at* 527.
[355] See *First Fed S & L Ass'n of Flint v City of Flint*, 415 Mich 702; 329 NW2d 755 (1982).
[356] *Id.* at 703.
[357] *Id.* at 704.
[358] *Id.*

basis that "the income approach was inappropriate because the property had a unique value" to the petitioner.[359] In reversing, the Supreme Court explained that "if a bank puts fine hardwood and marble throughout a building, those expenditures may not enhance the selling price of the building in an amount equal to their cost. While the expenditures may add to the selling price of the building, they may not add dollar-for-dollar."[360] The Supreme Court further stated that "we reject the notion that it is proper to include, in determining value, expenditures made, as the Tax Tribunal found, to enhance plaintiff's image and business without regard to whether they add to the selling price of the building."[361] The Court noted that "[t]he constitution requires that property tax assessments reflect 'true cash value,'" and "[t]he General Property Tax Act defines that term to mean 'the usual selling price' of the property." The Court went on to state that "[w]hile actual and reproduction cost are some evidence of value, the constitutional and statutory standing is market based."[362] It is also interesting to note that the Court in *Jones & Laughlin Steel* found "that evidence of sale price at which an item of property sold is certainly relevant evidence of its value . . . ."[363] However, the Court went on to say, *Clark* applies to "industrial property for which no ready market exists and a hypothetical buyer must be posited, in this case the equipment was actually sold in a commercial transaction . . . ."[364] In the matter before us, the property is not industrial, its HBU is owner-occupied freestanding retail, and a ready market for former owner-occupied, freestanding big-box stores, exists.

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[359] *Id.*
[360] *Id.* at 705-706.
[361] *Id.* at 706.
[362] *Id.* at 705.
[363] *Jones and Laughlin*, supra at 354.
[364] *Id.*

Several other cases decided after *First Federal S&L Ass'n of Flint* warrant mentioning. As noted above, in *Edward Rose Bldg Co v Independence Twp*,[365] the Supreme Court explained that valuing the property according to who owns it violates the principal of uniformity.[366] The COA in *Huron Ridge LP v Ypsilanti Twp*[367] stated that "'[u]se value' refers to the economic value of the use made by the property owner, regardless whether it is the highest and best use of the property."[368] Further "[h]ighest and best use 'recognizes that the use to which a prospective buyer would put the property will influence the price which the buyer would be willing to pay.' "[369]

In an unpublished case in 2014, mentioned by the COA in footnote 5, the COA addressed the difference between value in use and value in exchange:

> Moreover, by taking the position that the HBU of the properties is use as a Lowe's and Home Depot store, respondents confuse the distinct concepts of fair market value (i.e., value-in exchange) and value to the owner (i.e., value-in-use) by treating them as one in the same. Our Supreme Court has expressly stated that "the constitution and the General Property Tax Act require that property tax assessments be based on market value, not value to the owner . . . ." [*First Fed S&L Ass'n of Flint*, 415 Mich at 703]. Similarly, this Court has explained that "[r]eal property may not be assessed on the basis of the value of its use to the owner[,]" because "'use value' refers to the economic value of the use made by the property owner, regardless whether it is the highest and best use of the property." *Huron Ridge LP*, 275 Mich App at 33. The HBU looks to the use "a prospective buyer would put the property," recognizing that this use is what "will influence the price which the buyer would be willing to pay." *Id*. Likewise, "[e]xisting use may be indicative of the use to which a potential buyer would put the property and is, therefore, relevant to the fair market value of the property." *Detroit Lions, Inc*, 302 Mich App at 697 (quotation marks and citation omitted; emphasis added). Therefore, while the existing use of a property informs the HBU of the property, the value of the property to the owner is not equivalent to the value of the HBU, i.e., the

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[365] *Edward Rose, supra.*
[366] *Id*. at 641.
[367] *Huron Ridge LP*, *supra*.
[368] *Id*. at 33.
[369] *Id*. (quotation marks and citation omitted).

TCV.[370]

The Tribunal finds the present use of the subject property may be considered because it might be indicative of the potential buyer's use; however, its value-in-exchange is what its true cash or fair market value should reflect.

Deed Restrictions

In this matter, the COA ordered the Tribunal to take additional evidence with regard to the market effect of the deed restrictions, and further ordered, if the data is insufficient to reliably adjust the value of the comparable properties if sold for the subject property's HBU, then the comparables should not be used.

From the testimony and evidence provided at the hearing of this matter, the Tribunal finds that the greater weight of the evidence suggests that deed restrictions have a neutral market effect due to "carve-outs" for buyers potentially subject to any deed restriction, and the addition of the deed restriction after a buyer is located. Mr. Allen prepared a matched pair analysis of four pairs of sales that he is personally familiar with. The analysis included a comparison of the sale price of similar properties where one was subject to a deed restriction and the second was not. The analysis demonstrated that the deed restricted properties sold for about 12% more than the non-deed restricted properties.[371] Mr. Allen also spoke with the real estate departments of two big-box stores to consider how deed restrictions are handled.

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[370] *Lowe's Home Ctrs Inc v Marquette Twp*, *and Home Depot v Breitung Twp*, unpublished per curiam opinion of the Court of Appeals, issued April 22, 2014 (Docket Nos. 314111 and 314301).
[371] T2A at 75

Mr. Allen met with the Lowe's real estate department at their headquarters in North Carolina and learned about the procedures they go through when selling a property. He testified that the:

> First thing they do is internal valuation of the property, determine the price that they want to and think they can sell the property for. And they put it on the market for sale and looked for buyers through – through a broker, typically. And when they get a purchaser, they negotiate a price. And – and when they think the price is satisfactory, they take that price to their board for approval. And then after it's approved, they go back and they talk to the buyer about deed restrictions, and they will typically put on a deed restriction that won't interfere with the purchase price. In fact, they said they never had to reduce the purchase price as a result of a deed restriction. Or never lost a buyer. So, they'll customize the deed restrictions, so it doesn't interfere with the purchase price or the purchaser.[372]

With regard to the Hartland sale of the former Walmart to Rural King,[373] Mr. Allen learned Walmart's intention was to sell the property without a deed restriction for an asking price of $5.5 million, but it received no offers. However, there was a deed restriction in place when Rural King made an offer to purchase, which would prevent the transaction. Mr. Allen testified, "Walmart did a carveout to accommodate this sale."[374] He testified, "I met with Walmart people a couple of times in Bentonville, Arkansas, and the real estate people. Generally, with Walmart they have standard deed restrictions that they like to put on, but they'll make exceptions like they did here or they'll offer property without deed restrictions like they did here."[375] Mr. Allen testified that he had no "indication that there were any other higher offers."[376] He testified he chatted with

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[372] T1 at 189.
[373] As noted above, this sale is one of Mr. Allen's obsolescence comparables.
[374] T1 at 202.
[375] *Id.*
[376] *Id.* at 203.

Walmart specifically about the deal and was told the offer from Rural King was the best offer it could get.

Mr. Allen testified that the Westland Source Club sold to Lowe's, but was prohibited to become a Target in the deed restriction, yet the Wyoming Source Club sold to Target, which was not prohibited. He testified the sales were carved out from the deed restrictions. He testified, "[t]his is an example of what is done in the market to modify deed restrictions so that the price and the sale won't be impaired."[377] He testified the Aurora, IL Lowe's sold to Cosmopolitan Marketplace, without a deed restriction, but one was added after the sale. However, though Home Depot and Menards were restricted from purchasing the property, they were already in the market and would not have a need for the former Lowe's.[378] Lowe's in Elgin, IL sold to Blain's Farm and Fleet without a deed restriction, but one was tailored to allow the particular purchaser.[379] The Lowe's in Oswego, IL was marketed without a deed restriction, but when it sold to a purchaser who was going to divide the property into traditional retail uses, a deed restriction was added that would allow the sale. Further, Home Depot and Menards were already in the area, so they were not potential purchasers of the former Lowe's.[380]

Mr. Miller testified with regard to Mr. Torzewski's sale comparable eight, the former Walmart in Frenchtown Township, "[a] lot of times these decisions are made somewhat simultaneously, is that the developer is talking to Wal-Mart and say, I'd like to buy the property, Wal-Mart is saying, great, let's close tomorrow, but the developer

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[377] *Id.* at 169.
[378] T1 at 188.
[379] *Id.* at 191.
[380] *Id.* at 205.

conversationally is saying, let me go find some tenants. And then they come back and say, I have some tenants now, I'll put in a purchase offer. They haven't sold it to anybody else. I'll put in a purchase offer and can we carve out exceptions. Efficiency of the market."[381]

Mr. Korpacz, however, put forth his opinion:

> [T]he one thing that's missing from this whole discussion is with deed restrictions you don't know if there are any potential buyers who don't even come to the negotiating table because there are -- they're expected or there are definitely going to be deed restrictions.
> They just don't show up to negotiate, so we don't know how many there were or what they would have paid had there been no deed restrictions.[382]

Dr. Laposa testified, "by their very nature, [deed restrictions] reduce who the investors are and what you can do with the property."[383]

Responding to these points, Mr. Allen testified that with the majority of his sales, he knew of no higher offer to purchase than what was consummated in the transaction. Mr. Miller testified that in the market, it is known that Walmart, for example, will add a deed restriction, so any direct competitor might not even consider making an offer to purchase.[384] Mr. Allen testified conversely, "I think it was generally known that Walmart will put a deed restriction but they will make exceptions for buyers."[385]

In *Greenfield – 8 Mile Plaza v City of Southfield,* the Court affirmed the Tribunal's determination based on Respondent's testimony and evidence, that the deed restriction on the subject wholesale business (former big-box store) did not affect its usual selling

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[381] T4 at 88.
[382] T9 at 87.
[383] T3 at 129.
[384] T4 at 77-78.
[385] T2A at 49.

price.[386] Petitioner contended that under *Menard*, "the value of the property was required to be lowered because of the existence of the deed restriction."[387] The Court held, however:

> This is an incorrect reading of *Menard,* which only holds that parties and the tribunal must consider the impact of deed restrictions in determining the value of property. That is what occurred here. The tribunal considered the impact of the deed restriction, but concluded that it was insignificant to the property's value. This finding is supported by Thurston's testimony that the restriction was "very narrow" because it only prevented the property from being used as a home improvement or hardware store, it did not otherwise make the property unsuitable for retail purposes, and there were still retail users or commercial property users that would find this building to have utility. In Thurston's opinion, this was a common type of restriction, which was "[n]ot very restrictive at all."[388]

As noted above, the Tribunal finds the greater weight of the evidence in this case demonstrates that deed restrictions do not impact the sale price achieved. However, acknowledging Mr. Korpacz's and Dr. Laposa's testimony, and the Court's holding in *Greenfield – 8 Mile Plaza*, the Tribunal finds the most favorable progression would be for a prudent appraiser or valuation expert to thoroughly examine the transaction, make any adjustments for any effect of a deed restriction on sale price if appropriate, and present their conclusions to the Tribunal.

With specific regard to Mr. Torzewksi's deed restricted sales, the Tribunal must determine their market effect. In addition, the Tribunal must determine if the data is sufficient to "reliably adjust the value of the comparable properties if sold for the subject property's HBU."[389]

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[386] *Greenfield – 8 Mile Plaza v City of Southfield,* unpublished per curiam opinion of the Court of Appeals, issued December 12, 2019 (Docket No. 346183). The Tribunal held the deed restriction, "had an insignificant effect of value."
[387] *Greenfield – 8 Mile Plaza, supra.*
[388] *Greenfield – 8 Mile Plaza, supra.*
[389] *Menard, supra* at 532.

Mr. Torzewski's first sale was the Holland Home Depot, with the Operation and Easement Agreement between Target and the developer of the site. Mr. Allen testified that Agreement did not limit Home Depot's ability to sell the store to another big-box user, but the restrictions were to "maintain the property as a first class shopping center."[390] "This type of agreement would make the property more attractive to most users."[391] He testified there would be no reason to make an adjustment to the sale price relative to the agreement. Mr. Miller, however, testified the property was vacant for a long time and that the restrictions were a factor. However, he also testified, "[t]o empirically prove it becomes difficult. Does common sense say that there may well be? Yes."[392] Whether the deed restriction had an effect on the sale price or not, the Tribunal finds this comparable is not truly comparable to the subject property. It sold to Rural King, who resold it to a developer, who then put in retail, but not owner-occupied retail.[393] The Tribunal is unable to reliably adjust the value of this comparable property if sold for the subject property's HBU.

Mr. Torzewski's sales comparable two was the former Circuit City in Westland. It was built in 1996, had only 63,686 square foot, and sold to be converted into a City Hall. The property was not deed restricted, but did not sell for the subject property's HBU. Further, Mr. Torzewski's property data sheet indicates this was a REO sale and the listing broker suggested, "the sale price does not reflect market value as the bank

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[390] T2A at 44.
[391] *Id.* at 46.
[392] T4 at 74.
[393] See P-1, admitted exhibit, initial hearing, at 84 (Mr. Torzewski's appraisal).

wanted to get the asset off their books."[394] As such, the Tribunal does not find this sale appropriate to utilize as a comparable to the subject property.[395]

Mr. Torzewski's sales comparable three was the former Walmart in Alma, Michigan. It was built in 1989, had a deed restriction, and sold in 2012 for redevelopment as an owner-occupied, industrial property. Mr. Allen spoke to the broker, who confirmed the property was marketed without a deed restriction. Mr. Allen opined it did not sell to a big-box store because Alma is a small market and area big-box stores are generally located 20 minutes north, in Mount Pleasant. Further, Mr. Miller testified the local market was oversupplied. Mr. Allen testified Meijer considered the store, but in the end built a new store because the former Walmart was too small for its needs. The property sold for industrial use, and a deed restriction was added, but no carve out was necessary given the subsequent use was not for retail.[396] The Tribunal is not persuaded that the deed restriction placed on the property after sale affected the purchase price; however, it also finds the property did not sell for the subject property's HBU. It is interesting to note, however, that per the property write up, this property sold "in a leased-fee transaction in July of 2010 for $3,550,000," but then sold for "market value" in December 2012 for $1,100,000.[397]

Mr. Torzewski's comparable four was the former Sam's Club in Madison Heights. It was built in 1986 and sold in 2012 for redevelopment as an industrial property. Mr.

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[394] See P-1 initial hearing, at 88.
[395] In order to be accepted as an indicator of value, a property must be proven to have sold "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, [with] neither . . . under undue duress." *The Appraisal of Real Estate*, *supra,* p 58.
[396] T2A at 50.
[397] See P-1 initial hearing at 89-90.

Miller did not find this property to be comparable to the subject because it was old, was in the Detroit metropolitan area and in an industrial area. It also had a long sales history from Pace Club, to Sam's Club, to Apex Carting, including a sheriff's deed on mortgage sale.[398] Neither appraiser in this matter, nor Mr. Torzewski, suggested that the property had a deed restriction. However, given its sales history, the purchase transaction may not be subject to normal market pressures. Further the property did not sell for the subject property's HBU. As such, the Tribunal does not find it comparable to the subject property.

Mr. Torzewski's comparable five is the former Walmart in Auburn Hills. It sold for industrial use and had a deed restriction that prohibited use of the property as a grocery store over 35,000 square feet or a discount store over 50,000 square feet. There was no carve-out of the deed restriction given that the property did not sell for retail use and Mr. Allen testified that the deed restriction had no effect on the purchase price. The property was located in an industrial area and Walmart vacated the property and moved to a better retail area.[399] The Tribunal does not find the comparable to be a good comparable to the subject property as it did not sell for owner-occupied, free-standing retail use. Further, no expert on appeal, nor Mr. Torzewski suggested any way to adjust this comparable to be consistent with the subject property's HBU.

Mr. Torzewski's comparable six is the former Peerless furniture store in Flint. It had 53,474 square feet, sold in 2010, and continues to operate as a furniture store. The comparable was not deed restricted, but is too small and is located in a

[398] T4 at 82-84, R-1 at 75.
[399] T2A at 54.

much different market than Escanaba. As such, it does not provide the best evidence of the value of the subject property.

Mr. Torzewski's comparable seven is a former Kroger in Dearborn. It was built in 1986 and consisted of 55,474 square feet. It was located next to a municipal parking lot and sold without the lot. Neither Mr. Allen, Mr. Miller, nor Mr. Torzewski provided additional relevant information about comparable seven. Nevertheless, based on its size, the Tribunal does not find it to be comparable to the subject property.

Mr. Torzewski's comparable eight is the Walmart in Frenchtown Township. It was built in 1993 and sold to a developer to be divided into multi-tenant space. Mr. Allen testified the property was not marketed with a deed restriction, but one was added after closing and his research indicated the deed restriction, "didn't affect the purchaser and the price that he was willing to pay, and the broker would have liked to find other big box users to buy it, but this buyer was the one who was willing to pay the highest price."[400] The Tribunal again finds this comparable is not comparable to the subject property given it did not sell for the subject property's HBU.

Mr. Miller testified that the comparables cannot be adjusted to the subject property's HBU because "[y]ou want to stay narrow, you want to stay as close as possible to the subject property. As the farther - - if this is the highest and best use of the subject – home improvement – the farther distant you get away from that use, the more difficult it is to make any adjustment"[401] The Tribunal does not agree with Mr. Miller's HBU determination, but acknowledges his contention. The Tribunal finds that

[400] T2A at 58.
[401] T4 at 91.

reliable data to adjust the value of the comparables if sold for the subject property's HBU was not provided.

The Tribunal is not persuaded that Mr. Torzewski's sales approach to value is the appropriate technique to utilize in determining the TCV of the subject property for the reasons enumerated above and synopsized here: some comparables were too small, some were not subject to normal market pressures, most did not sell for the subject property's HBU, and no reliable data to adjust for this factor was provided by either party.

Cost Approach

It is interesting to note that in this matter, that Petitioner's conclusion of the TCV of the subject property utilizing the cost-less-depreciation approach is not far off its initial contention using the sales approach.[402] Respondent's expert, Ms. Norden, Assessor for the City of Escanaba, concluded to the TCV in the initial case, using the mass appraisal cost-less-depreciation approach, at $7,815,976 for 2012, $7,995,596 for 2013, and $8,210,938 for 2014.[403] In this remand, however, Respondent contends the subject property's fair market value, utilizing the cost-less-depreciation approach, to be $13,700,000 for 2012, $13,880,000 for 2013, and $13,760,000 for 2014, approximately one-and-three-quarters times the original expert's contentions of value. It is also

[402] Petitioner's conclusion of the TCV of the subject property, pursuant to the sales approach to value, in the original hearing was $3,300,000 for all three tax years, and it this matter, its contention of value, pursuant to the cost-less-deprecation approach, is $3,870,000 for all three tax years.
[403] In original hearing, Ms. Norden lowered her contention of value, based on the corrected square footage of the property.

interesting to note that Respondent did not call Ms. Norden as an expert witness to defend the value of the property on the tax roll.

In its remand order, the COA ordered the Tribunal to allow the parties to submit additional evidence regarding the cost-less-depreciation approach to value. Both appraisers commenced with replacement cost values from MVS and then considered depreciation from three sources: (1) Physical depreciation, (2) functional obsolescence, and (3) external obsolescence. Physical depreciation refers to aging or the wearing out process. Functional obsolescence refers to loss in value due to factors within the boundaries of the property, such as construction materials or the design of the improvements. It can occur when there is a feature for which the market is unwilling to pay, such as excess ceiling height. External obsolescence is a loss in value caused by factors outside the property, such as a nearby garbage dump or the 2008 financial crisis.[404] "To determine the present TCV of property under the cost-less-depreciation approach, deprecation must be subtracted from the replacement costs."[405]

The Tribunal finds the COA properly reminded the Tribunal that the cost-less-depreciation approach could be an appropriate technique to consider in valuing the subject big-box store. The Tribunal agrees that it is prudent to gather additional information regarding the cost approach to value. This approach is particularly applicable when a property is new, such as the subject. *The Appraisal of Real Estate* states, "[b]ecause cost and market value are usually more closely related when properties are new, the cost approach is important in estimating the market value of

[404] The Appraisal of Real Estate at 569, 601, 623, 632,
[405] See *Menard, supra* at n. 6, citing *Teledyne Continental Motors v Muskegon Twp*, 145 Mich App 749, 755; 378 NW2d 590 (1985).

new or relatively new construction."[406] However, in this case, given that the property was built to suit, the market demonstrates that a buyer would not purchase it and occupy it without significant modification, therefore obsolescence exists. Mr. Allen testified that the Super K at Fairlane North Center in Dearborn was purchased by Walmart in 2006 for $50 per square and it subsequently spent another $50 per square foot converting it to a Walmart. He testified, it "was the same use, and the footprint of the building wasn't changed. It was just all interior reconfiguration for a Walmart store and then the exterior signage changes."[407] This is the same shopping center which Mr. Miller utilized to suggest big-box store retrofitting including façade changes were minimal, but the Tribunal questions whether he inspected the interior?[408]

Additionally, Mr. Allen testified that Walmart purchased the Brown Deer, Wisconsin Lowe's store and spent $11,000,000 making it into a Super Walmart and Meijer in Portage, Indiana purchased Super K and spent $7,000,000 reconfiguring it.[409] Mr. Williams testified that the Source Club to Meijer conversion in Fraser, wherein the building was doubled in size, cost $400,000. However, on cross examination, he noted there were two building permits, filed at the time of conversion, for $6.3 million and $500,000.[410] He was questioned if he would stand by his $400,000 conversion costs from Source Club to Meijer and he replied, "No, I don't think I can."[411] The lease involving the Home Depot, which was formerly a Kmart in Plainwell, included required

[406] *The Appraisal of Real Estate*, *supra*, p 566
[407] T1 at 153-154.
[408] T4 at 152, R-1 at 107-108.
[409] T1 at 155. See also P-1 at 91.
[410] T8 at 166. There was an additional building permit for $100,000, dated 2/3/94 for "interior demolition." See P-30.
[411] T8 at 169.

renovations and expansion by the developer before rent was payable.[412] Mr. Miller cited the “minor” Livonia Source Club modification costs, in part based on information from Williams and Beck, but this report has been discredited.[413]

Additionally, Mr. Allen spoke to architectural/engineering consultants who concluded to a cost of $15 to $53 per square foot for retrofitting, depending on the specifications of the buyer’s business model.[414] Mr. Allen also agreed that renovation costs could actually exceed replacement cost new, and as such, some retailers choose to tear down the building and start new.[415] Mr. Miller testified with regard to his Sam’s Club appraisals, that $2.5 to $3.04 million dollars were spent in lease-up costs.[416] The examples of modification and lease-up costs do not support Mr. Miller’s conclusion that only the mezzanine in the subject property was functionally obsolete.[417] Big-box stores are not built on a speculative basis and they are not adaptable to many users, as-is. They are built for a specific user, with a specific business plan, with specific characteristics of that brand. When big-box stores are sold in the marketplace, a buyer is not going to pay for the aforementioned specific items that it does not require. Mr. Allen testified:

> Home Depot doesn’t have the same building needs as the Menards store. For instance, their store in Iron Mountain is about 95,000 square feet and their stores are generally a lot smaller so they wouldn’t pay for a larger building than they need. They also don’t have a storage yard or big yard area, or gatehouse or as high of ceiling heights or the same kind of lighting or as large of – they have much smaller canopy areas and they

[412] See P-19, at 25, T10 at 29-30.
[413] T4 at 168-169.
[414] P-1 at 91, T1 at 153.
[415] T1 at 155-156.
[416] See P-8, P-9, P-10, T6 at 75-76.
[417] T4 at 170.

> don't need all that or they wouldn't need all that extra space and features and wouldn't pay for it.[418]

The Tribunal finds these arguments by Mr. Allen are supported by the evidence and testimony in the record.[419] Further, the Court in *Meijer Inc v Midland* held that when a buyer would be expected to make modifications, then that loss in value must be deducted from replacement cost:

> Petitioner first argues that the Tax Tribunal committed legal error in determining the true cash value of petitioner's property under the replacement cost approach when it failed to include a deduction for functional obsolescence due to the cost of modifying the buildings for use by another retailer if the buildings were leased or sold. We agree.[420]

As a result of the discussion above, it is apparent that in this matter, the calculation of obsolescence from all sources is the most significant factor in concluding in the fair market value of the property using the cost approach.

As noted above, both appraisers and Ms. Norden, calculated the replacement cost of the subject property, which "is the estimated cost to construct, as of the effective appraisal date, a substitute for the building being appraised using contemporary materials, standards, design, and layout."[421] The cost approach prepared by both parties begins with the classification and extraction of construction costs from MVS/Core-Logic.[422] The differences in the parties approaches, including Ms. Norden's

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[418] T1 at 131.
[419] *Id.* at 115-116.
[420] *Meijer Inc v City of Midland,* 240 Mich App 1, 5-6; 610 NW2d 242 (2000).
[421] *The Appraisal of Real Estate*, supra at 570.
[422] Ms. Norden utilized the State Tax Commission Manual for Commercial and Industrial Properties (Marshall Swift basis).

cost calculations and Menards' actual construction costs, before depreciation are illustrated in the chart below:

	P-1, pp. 72, 76	R-9,[423] pp. 8, 37	R-1b, pp. 94, 144	R-1, pp. 97,98
TCV	Petitioner Allen	Respondent Norden	Respondent Miller	Menard's Costs
Land Value	$1,380,000	$649,904	$1,198,989	$1,150,000
Site Improvements	$2,059,926	$248,981	$2,421,655	$3,963,913
Building Value	$8,701,423	$6,917,091	$10,791,271	$5,384,717
TCV Depreciation[424]	$12,141,349	$7,815,976	$14,015,537	$10,498,630

Ms. Norden utilized the State Tax Commission Manual for Commercial and Industrial Properties. The Tribunal finds that an assessor who utilizes a cost approach, albeit on a mass basis, should have reliable cost calculations. In this instance, however, the evidence presented by Ms. Norden was the property record card with the cost approach for the 2014 tax year only. It is incomplete as the calculations for the subject were too long and require the valuation printout for complete pricing.[425] In addition, the vacant land studies and sales that were relied upon for the economic condition factor were not included. As such, the basis for the value conclusion is incomplete and unsupported. Therefore, this Tribunal cannot rely upon the Assessor's cost approach.

The differences between Mr. Allen's and Mr. Miller's building values are generally contained in the calculations for canopies, lumber storage, and mezzanine/elevator. In Mr. Miller's appraisal, the canopies were separately "costed."[426] He calculated 40,608 square feet of canopies for the garden center plus roof extensions at $30.86 per square

[423] Initial hearing, R-9.
[424] This chart represents, Mr. Allen's, Ms. Norden's and Mr. Miller's determination of TCV (minus) physical depreciation.
[425] Initial hearing R-9 at 37-43.
[426] Assessor/Appraiser terminology for extracting and calculating costs from MVS.

foot. Additionally, the entrance canopies and guardhouse, consisting of 8,360 square feet, were costed at $25.43. Mr. Allen's cost calculation choice of $19.00 per square foot for canopies was applied to 36,828 square feet.

Also, Mr. Miller included 26,240 square feet of lumber storage at $550,000 in his cost calculations and Mr. Allen attributed zero value. Mr. Miller's mezzanine with elevator is calculated to be $47,014 higher than Mr. Allen's. As such, Respondent's replacement costs, without site improvements and land value, are higher than Petitioner's. Mr. Allen utilized MVS Class C warehouse discount store, low cost construction as the basis for his replacement cost. He testified:

> The average cost included acoustical tiled ceiling, vinyl floor coverings, a deli or some kind of restaurant operation. Whereas the subject property has concrete floors, open ceilings. So, it has none of the finishing that's in average cost.
>
> There's a large adjustment for HVAC and the low cost has space heaters in it and the subject has package HVAC. And also, the subject's located in extreme climate classification by Marshall, so the HVAC cost is higher than average.
>
> Other adjustments are for sprinklers and then various multipliers for story height. The subject property is about a 40-foot[427] height so that results in higher cost. A perimeter adjustment, that's based upon the overall building perimeter. There's adjustment for the mezzanine and the cost of the mezzanine, the elevator in the mezzanine and then local multipliers and current multipliers.[428]

The Tribunal finds that based on the characteristics of the subject property, Mr. Allen's cost calculations are correct. The subject property fits into low cost versus average cost construction. Further, based on the evidence and testimony provided at the hearing, the Tribunal finds Mr. Allen's canopy and mezzanine costs to be accurate and the

[427] Per Mr. Allen's appraisal, the subject property is 30 feet high. See P-1 at 1, 29.
[428] T1 at 111-112.

exclusion of the lumber storage building to be appropriate. Mr. Allen persuasively testified, that in his experience, when a property such as the subject is sold, the lumber storage building, which is not demanded in the market, is torn down or not used.[429]

In his cost approach, Mr. Allen added value to his choice of low cost construction for HVAC, for example; however, while Mr. Miller chose average cost construction, he failed to subtract for items the property does not have, including, as noted above, office space, vinyl floors, acoustical ceiling, and a deli, fast-food, or snack bar operation.[430] Further, in actuality, Mr. Miller's replacement cost is based on 248,768 square feet which includes the warehouse at 162,340 square feet, garden center canopies at 40,608 square feet, entrance canopies/guardhouse at 8,360 square feet, lumber storage at 26,420 square feet, and mezzanine at 11,040 square feet.[431] However, the COA on remand recognized the parties stipulated square footage for the subject property big-box store, of 166,196. Additionally, Mr. Miller includes a multitude of addenda (A-K) from other sources he relied upon. However, he "independently" agreed with them. Respondent's cost calculation was $12,816,548 after the application of depreciation and should have been a "red flag" when compared to Menard's March 23, 2009 reported costs of construction minus land of $9,348,630.[432] Mr. Miller also confirmed his construction costs by comparing them to actual construction costs of the Greenfield, WI Walmart Supercenter, which reveals reproduction, not replacement

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[429] *Id.* at 113.
[430] See R-1 at 91
[431] R-1 at 94.
[432] R-1 at 98. "Replacement structures usually cost less than identical structures (i.e. reproductions) because they are constructed with materials and techniques that are more modern, more readily available and less expensive in the current market. Also correcting deficiencies may result in lower costs. Thus, a replacement cost is usually lower . . . . See *The Appraisal of Real Estate, supra* at 570.

costs.[433] Further, Super Walmart has a higher level of build out and is more costly than the subject property because it has approximately 50,000 square feet of grocery space.[434]

Additionally, he confirmed his construction costs by comparing them to those concluded to by Williams and Beck,[435] however, on cross examination, Mr. Williams testified he could not stand by all his numbers as he was in Ireland when his report was completed.[436] Further, at the hearing of this matter, Respondent concluded it would not rely on Mr. Williams' cost calculations[437] and counsel stated "this witness is not qualified in cost estimation."[438]

Mr. Miller alleged that, generally, reported costs for big-box stores may not include all costs, and gave the example of Menards 2008 new construction in Coon Rapids, Minnesota, which he testified is about the same size as the subject and also a "R-5 prototype." He testified that there were some costs unreported to the Assessor because when comparing detailed costs to the summary of costs, "it becomes apparent to me that there was added on cost spent on Coon Rapids that was not identified on the first [summary] page."[439] Mr. Miller, however, was unable to explain the "unreported costs," and was not certain what the unreported costs represented. As such, the Tribunal gives no weight and credibility to this testimony.[440]

[433] See R-1 at 96.
[434] See T7 at 109-110.
[435] T4 at 15.
[436] See R-1 at 97, T8 at 163-164, 180.
[437] See T8 at 106.
[438] *Id.* at 103.
[439] T4 at 134.
[440] See and R-9.

As noted above, obsolescence exists in the subject property. Mr. Allen calculated external/functional obsolescence utilizing six methods, the re-lease of twelve properties with build-to-suit leases in place, losses incurred upon the sale of Source Clubs, extraction from actual sales of big-box stores, capitalized rent loss, the preference to tear down an existing building rather than reconfigure, and finally modification costs. These approaches were not perfect, but Mr. Allen knew his comparables[441] having inspected and even having appraised many of them. Mr. Allen spoke to brokers, developers, real estate departments for big-box stores and he has appraised 200 big-box stores, most in Michigan, including twelve in the UP,[442] and he completed a traditional, straightforward, easy-to-follow cost approach to value. Mr. Miller, on the other hand, concocted novel techniques that took weeks for the Tribunal to unravel. This is especially frustrating when Mr. Miller completed three appraisals for Sam's Club,[443] after the IAAO big-box valuation guide was published; however, in the Sam's Club appraisals, he utilized a traditional approach to value.

Mr. Miller was questioned about the appraisal he did for the Sam's Club in Madison, Wisconsin; however, he answered in the affirmative when questioned whether he made the same assumptions and followed the same methodology in all three appraisals.[444] He prepared both sales and income approaches to value; however, the cost approach was not completed.[445] The Madison Sam's Club property was 100% owner occupied as of the effective date of the appraisals but, "became vacant or

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[441] For example, Allen prepared a "matched pair analysis" including four pairs of sales, "that I am familiar with and used most of them in appraisals previously." T2A at 62.
[442] T1 at 49-50, 53-54.
[443] P-8, P-9, P-10.
[444] T6 at 75.
[445] *Id.* at 65.

unoccupied by Sam's Club within less than 30 days of this time and we were being – valuing the property based upon its lack of occupancy."[446] He further testified, "[i]t would be presumed to be vacant, it was going to be vacant, and without an occupant would be available."[447] He testified the Sam's Club was purchased by At Home and "in the neighborhood of two and a half million"[448] dollars was invested in the store after it was purchased by Sam's Club. He utilized the terms "leased-fee" and "fee simple" throughout the reports. However, in the report, they were not equivalent.

Mr. Miller testified that he relied on rental rates in the Sam's Club reports that were not from build-to-suit properties, but from leases for space in existing stores[449] as well as sales of big-box stores that were vacant and available at the time of the sale "because that was what was comparable to the property."[450] He testified the property "had been unleased before. It was an owner-occupied, and never been leased, as far as I'm aware."[451] The cap rates (9.75%-9.5%-9.75%) in all three appraisals were higher, with lower rent per square foot ($4.75-$5.00-$4.25) than he utilized in his appraisal for the subject property. Further, in the three Sam's Club appraisals, lease-up costs were 2.58, 3.04, and 2.6 million dollars.[452] This resulted in a conclusion of value of $25, $30 and $22 per square foot for the three Sam's Club properties.[453] The conclusion of value for the subject property, however, ranged from $84-$85 per square foot, which is higher than any actual sale of an unleased big-box store than Mr. Allen has ever seen in

[446] *Id.* at 63, 66.
[447] *Id.* at 68-69.
[448] *Id.* at 70.
[449] T6 at 72-73, 79.
[450] *Id.* at 79.
[451] *Id.* at 74.
[452] *Id.* at 75-76.
[453] *Id.* at 80.

Michigan.[454] Mr. Miller also testified that the Sam's Clubs were all subject to deed restrictions which affected their sales prices. However, he admitted in testimony "[t]he deed restrictions are not noted in the appraisals."[455] Based on Mr. Miller's testimony and a review of the three Sam's Club appraisals, the Tribunal finds the Sam's Club appraisals were not prepared in the same manner as the subject, Menards Escanaba report, which calls into question the credibility of the subject report.[456]

There are numerous flaws in Mr. Miller's appraisal report. The largest error is the use of "market rent," from 30 investor to investor, institutional grade,[457] sales to demonstrate lack of external obsolescence. The 30 properties were build-to-suit,[458] and leased to Home Depot or Lowe's[459] (sale-leasebacks),[460] then the initial investment was resold. They were passive investor to passive investor sales[461] and the second owner purchased the income-producing properties for their credit worthiness, an established income stream, and the remaining value of the building. All the occupants of the

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[454] T10 at 41-42, 95-96.
[455] T6 at 69, 84.
[456] This suggests to the Tribunal that Mr. Miller's appraisal in this matter may be made to order. Further, Mr. Miller, a non-attorney, continuously cites case law in his appraisal, and the Tribunal questions how he is able to read and interpret Michigan case law. See R-1, footnotes, 11, 12, 13, 14, 15, 21, 22, 23, 24, 25, 26 ,27, 28 ,29, 30, 31, 32, 33, 35, 36, 96, 97, 98 ,99, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132. He also continuously cites *The Appraisal of Real Estate*, yet rejects its definition of fee simple, for "the legal definition." He also writes; "[t]herefore, Michigan law requires a property assessment to be based on the property's 'true cash value,' which necessarily includes an analysis of all three valuation approaches but *may also include an assessment of the property's fair market value."* See R-1 at 13. It is well settled in Michigan that TCV and fair market value are synonymous. See *CAF Investment Co v Michigan State Tax Comm, supra.* Mr. Miller cites *The Appraisal of Real Estate* in R-1, footnotes, 6, 19, 80, 82, 84, 85, 86, 87, 91, 92, 94, 104, 105, 106, 107, 108, 109, 110, 111, 112.
[457] An institutional-grade property is defined as "a property of sufficient size and stature to merit attention by large national or international investors." *The Dictionary of Real Estate Appraisal*, (Chicago: Appraisal Institute, 6th ed, 2015).
[458] T7 at 94-95.
[459] T6 at 121.
[460] Sale/leaseback transactions are, "transactions in which real estate 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." Appraisal Institute, *The Dictionary of Real Estate Appraisal*, *supra* at 207.
[461] T6 at 122.

properties remained the same, but they were not owner-occupied.[462] Further, Mr. Miller was not familiar with any of the properties, only two were in Michigan, there were no examples of Escanaba rental rates, no rental rates from the UP of any kind, and no rental rates in Northern Michigan - nothing north of Plainwell, MI or Adrian, MI.[463] Mr. Miller was unable to testify to any of the transaction details. Some of leases should be disregarded outright because they were ground leases, were IRS section 1031 exchanges for debt assumption and depreciation, were portfolio sales to REITs,[464] two were unoccupied properties, and the average start date was 2001 which does not reflect market rents for Escanaba ten years later.[465]

Mr. Miller does not present any details regarding the 30 investor to investor sales. He did not discuss the specifics of any lease. He does not tie the leases into the owner-occupied subject property. Further, brokers were not contacted and the identity of the investors was not presented. The Appraisal Institute has rejected sale-leaseback transactions as financing vehicles and determined they are not an indication of market rent.[466] Mr. Miller was questioned:

> Q: Okay. I'm talking about -- this should be done very simply because you know the concepts and I know the concepts. Let me try the question one more time, given that we have now defined the terms. A build-to-suit rent is not based on the supply and demand reflecting market conditions for existing already built property, but, rather, the developer and lessor's cost plus expected profit to build a building for the eventual tenant's needs; right?

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[462] *Id.* at 121-122.
[463] *Id.* at 146, R-1 at 117-119
[464] See P-17, P-18.
[465] T10 at 44-47, P-22.
[466] From *The Appraisal of Real Estate, supra*, at 466, “It is also important to ascertain that the lease represents a freely negotiated, arm’s length transaction. A lease that does not meet these criteria, such as a lease to an owner-tenant or a sale-leaseback, often does not provide a reliable indication of market rent. Since sale-leasebacks are actually financing vehicles, they should not be used in estimating market rent.”

A. Reasonable.[467]

Mr. Miller's investor "sales" include properties in Arizona, Nevada, Ohio, New York, North Carolina, and two in California, including Silicon Valley.[468] Most of the investor sales are in more advantageous locations as compared to the subject property. As such, the Tribunal agrees with Mr. Allen that favorable location is one reason all of Mr. Miller's investor sales sold for, on average, $118.51 per square foot above the subject property's replacement cost.[469] Only one comparable, located in Ticonderoga, New York, had less population than the subject property and it ceased operations. The remainder of the leased properties presented household density within 30 minutes of their location, of: 50,250-96,918 (10 comparables) and 100,000-850,868 (20 comparables). This is very unlike the subject property which has a 2010 CBSA population of 37,069 and total population of 12,616.[470] It is also interesting to note that Mr. Miller does not identify his 30 comparables as build-to-suit in the appraisal, but testified, "I think it is somewhat self-evident because they are Home Depot and Lowe's, and we've already discussed that those are typically built not on a speculative basis, to meet the demands of the user."[471] It is again also interesting to note that Mr. Miller testified that he knows of no Menard properties that are leased. He testified, "there may be an exception. They're a private company. I've not seen one."[472]

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[467] T7 at 50.
[468] Mr. Allen also utilizes some out of state sales, but they are located in the Midwest.
[469] T10 at 42.
[470] The Finding of Fact, No. 9, initial final opinion and judgment, Stipulation of Facts no. 8, initial hearing.
[471] T6 at 147-148.
[472] T4 at 188. Curiously, Menard leased its space in Delta Plaza in Escanaba before relocating to the subject property.

The Tribunal finds Respondent's inclination to interchange "leased-fee" and "fee simple," stems from Mr. Miller's use of 30 build-to-suit investor sales. He testified his 30 sales were "a fee simple interest of where there was a lease in place for the store."[473] However, the build-to-suit, sale-leasebacks with subsequent sale, do not value the real estate. The bond-like rent that was structured by the sale-leaseback transaction is not based on the market. The investor not only purchases a building, it is also guaranteed a long-term income stream from a credit worthy tenant for the remaining term of the lease. This is a leased-fee transaction, not a fee simple sale where the building sells, the buyer has the right to occupy, leave vacant, lease, or raze the improvements. The occupant of the leased-fee structure is Lowe's or Home Depot, which does not change, only the investor/owner is altered. Mr. Korpacz was questioned, "And the current use of the subject property on the relevant tax dates was not to generate passive income from realty through a lease; is that correct? A: That's correct."[474] None of Mr. Miller's comparables sold for owner-occupied freestanding retail use, they were passive investment transactions for collecting cash flow from a lease.[475] In a fee simple sale, an investor must "find a tenant, negotiate a lease and build out the space for that tenant before you can achieve the kind of price that you can achieve with a leased fee sale."[476]

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[473] T4 at 180-181.
[474] T9 at 155.
[475] It is interesting to note that Ms. Norden surmised in her valuation disclosure, "[i]n reviewing the sales of leased properties, they clearly sell for a larger price per square foot because of the return on the investment. These properties are investment properties and unless Menards, subject property, would like to sell their property to an investor and lease it back from them these comparable properties would not qualify as a comparable. The value per square foot of leased space is roughly $100 to $115 per square foot." See R-9, initial hearing at 52.
[476] T1 at 177.

However, Mr. Miller did not adjust his leased-fee sales in order for them to reflect a fee simple interest.[477]

Mr. Korpacz suggested that Mr. Allen put forth the incorrect highest and best use (HBU)[478] for the subject property, leaving out "owner-occupied" in the HBU - owner-occupied freestanding retail building, however, the Tribunal finds Mr. Allen utilized owner-occupied freestanding retail buildings as comparables to the best of his ability, whereas none of Mr. Miller's comparables sold for the subject property's HBU.[479]

For the reasons stated above, the Tribunal finds Mr. Miller's use of investor to investor sales to justify lack of external obsolescence to be ill-judged and does not find it to be persuasive in its determination of the true cash value (TCV) of the subject property for the 2012-2014 tax years. Mr. Miller failed to produce a credible appraisal by flaunting terminology and techniques in direct opposition to *The Appraisal of Real Estate* and Michigan statutory and case law, which leaves the Tribunal to give the appraisal minimal to no weight.[480]

In determining the TCV of the subject property, the Tribunal finds the cost-less-deprecation approach to value to be the appropriate technique to employ. Although it also finds that the greater weight of the evidence suggests that deed restrictions have a

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[477] "The application of the cost approach produces a value indication of the fee simple estate of a property at market rent and stabilized occupancy. If a property is not at market occupancy or not at market rent, then an adjustment may need to be made to the indicated value in the cost approach. This is usually called a property rights adjustment." See *The Appraisal of Real Estate, supra* at 638.
[478] Because of the length of this opinion, the Tribunal has repeated certain acronyms for those not familiar with the terms.
[479] For example, five out of eight of Mr. Allen's comparables utilized in his paired sales analysis were owner-occupied. See T10 at 14. The Holland Home Depot was occupied when offered for sale. See T1 at 184.
[480] The Tribunal suggests that it would be appropriate for at least two of the witnesses to refund some, if not all, of any stipend provided by any governmental entity, to Respondent.

neutral effect on sale price, Mr. Torzewski's sales are eliminated from consideration for the reasons enumerated above.

Also, as noted above, the Tribunal finds Mr. Allen's calculation of obsolescence, relying on the capitalized rent loss method, to be appropriate. Mr. Allen contends this method is recommended by the Appraisal Institute.[481] However, while the Tribunal finds Mr. Allen's calculations utilizing this method to be appropriate, it finds for the purpose of calculating obsolescence, consideration of a bondable lease is proper. A property owner with a long-term triple net lease, (a net bond lease) has, as its only expenses, vacancy and credit loss, and a minimal management fee, as the tenant is responsible for all of the expenses.[482]

> An extreme form of net lease is commonly referred to as a bondable lease (or sometimes as an absolute net or a triple net lease). In effect, the tenant is responsible for all expenses for the entire duration of the lease term, and is even obligated to pay rent after a causality or condemnation. The shifting of risk from landlord to tenant creates a lease with the obligations equivalent to a bond. Bondable leases are most often used in credit tenant leases.[483]

Consideration of a bondable lease alleviates the addition and deduction (flow-through) of common area maintenance (CAM), insurance, and property taxes in the calculation of the net operating income (NOI).

Further, with regard to physical deterioration, Mr. Miller's calculation of depreciation was based on Marshall Valuation Service's (MVS) 30-year depreciation table, and the subject's depreciation was determined to be 3%, 5%, and 7% for the years at issue. His method of calculating depreciation is "described as a curvilinear line,

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[481] See P-1 at 80, citing The Appraisal of Real Estate, 13th Edition (page 444).
[482] Properties are not 100% occupied all of the time, therefore allowance of vacancy and credit loss is appropriate.
[483] *The Appraisal of Real Estate, supra* at 445

that the rates of depreciation are slower in the early years, faster in the later years."[484] Mr. Miller testified the subject store opened on March 23, 2009, and as such, it was two years old on the first date of value of December 31, 2011.[485] However, the Tribunal finds Mr. Miller utilized the incorrect construction date, or "year built," of 2009, when the property was completed in 2008.[486]

Mr. Allen subtracted straight-line depreciation for physical deterioration. He wrote, "[i]ncurable physical depreciation is calculated based on an age/life method."[487] "The subject warehouse discount store had effective ages of 3, 4, and 5 years for the dates of value, respectively; which based upon a 30-year useful life would result in 10% to 17% depreciation from cost new."[488] Respondent alleges that even "'a slight variation the percentage of depreciation or of obsolescence may produce a considerable difference in valuation.'"[489]

While neither party's method of depreciation is incorrect, in this instance, considering the newer age of the subject, the use of the curvilinear depreciation, considering the correct year of construction is appropriate. As a result, physical depreciation is calculated at 5%, 7% and 9%, respectively, for the tax years at issue. The change in depreciation together with the lack of flow through of CAM, insurance, and property taxes, results in the following changes utilizing Mr. Allen's determination of

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[484] T4 at 137.
[485] *Id.* at 138.
[486] See R-1 at 18. Respondent's appraiser is the only witness that utilizes 2009 as the year built. The Tribunal notes the building permit was applied for November 28, 2007, the remainder of the witnesses in both hearings utilize 2008 as the year built.
[487] P-1 at 76. See also T1 at 115.
[488] *Id.*
[489] See Resp's Brief at 41, citing *Fisher-New Ctr Co v State Tax Com*, 380 Mich 340, 369; 157 NW2d 271 (1968), vacated on other grounds on remand, 381 Mich 713; 167 NW2d 263 (1969).

obsolescence. The first of three calculations (used to extract obsolescence) result in a determination of NOI, as of December 31, 2011, for tax year 2012.[490]

Petitioner Net Operating Income Calculation		**Tax Year 2012 Category**	**Amended Net Operating Income Calculation**	
165,866		Income $3.50 PSF	165,866	
10,220		Mezzanine $1.23 PSF	10,220	
	$593,051			$593,051
		Reimbursement		
$316,955	$316,955	CAM		
$40,500	$40,500	Insurance		
$122,000	$122,000	Taxes		
	$1,072,505	Potential Gross Income		
15%	($160,876)	Vacancy and Credit	15%	($88,958)
	$911,629	Effective Gross Income (EGI)		$504,093
		Expenses		
$316,955	$316,955	CAM 1.80 PSF		
$40,500	$40,500	Insurance 0.23 PSF		
$122,000	$122,000	Taxes		
$27,349	$27,349	Management fee 3% EGI		$15,123
$0	$26,413	Reserves 0.15 PSF		
	$533,216	Total Expenses		$15,123
Petitioner	**$378,413**	Net Operating Income	Amended	**$488,970**

The next step to determine if obsolescence exists in the subject's improvements, and not land as it is not a wasting asset, begins with the replacement cost new, minus physical depreciation, plus the land value. This result is multiplied by the overall rate (OAR) which is the required NOI for feasibility.[491] The land value is multiplied by its

[490] This calculation is the same for all three years and will not be repeated for 2013 and 2014. (P-1 at 89).
[491] OAR P-1 at p 88. "Feasibility rent may also be used to estimate the depreciation of an improved property. The capitalized difference between feasibility rent and market rent represents total depreciation of the existing improved property if market rent is less than feasibility rent." See *The Appraisal of Real Estate*, supra at 342.

OAR to result in the NOI attributable to the land; which is deducted from the required NOI for feasibility, to result in the NOI for improvement feasibility only. Next, the land NOI is subtracted from the subject NOI (from first calculation) and the remainder is the NOI for just the "improvement," as if there was no obsolescence.

Petitioner Obsolescence Calculation		**Category for Obsolescence Tax Year 2012**	**Amended Obsolescence Calculation**	
$10,761,349		Total Building and Site Improvement	$10,761,349	
-$1,282,128		Deduct Physical Depreciation	-$641,064	
$1,380,000		Plus Land Value[492]	$1,380,000	
$10,859,221		Total	$11,500,285	
10.0%		Overall Cap Rate	10.0%	
	$1,085,922	Required NOI for Feasibility		**$1,150,029**
$1,380,000		Land Value	$1,380,000	
9.0%		Land Cap Rate	9.0%	
$124,200	$124,200	NOI attributable to Land	$124,200	$124,200
	$961,722	NOI Required for Improvement Feasibility		$1,025,829
$378,413		Subject Net Operating Income	**$488,971**	
$124,200		Land NOI Deduction	$124,200	
		Subject NOI - Land NOI =		
	$254,213	NOI to Just Improvement		**$364,771**
	$707,509	Deficient Income for Improvement		**$661,058**
	10.13%	Improvement Capitalization Rate		10.13%
	$6,984,887	Estimated Obsolescence		**$6,525,740**

[492] As noted above, the parties agreed that land value was not an issue in this matter and agreed to "split the difference" between the two determinations of value. However, Petitioner's counsel had second thoughts, suggesting Mr. Allen would have to redo his math and the Tribunal replied, "[w]e'll figure it out." The Tribunal has determined that it will utilize Mr. Allen's land value conclusion given his sales were located in the UP, not Wisconsin, but also notes any difference in calculation by "splitting the difference," would be insignificant. See T1 at 109-110.

The NOI to just the improvement is deducted from the required NOI for feasibility which results in a deficient income from the improvement. The deficiency is capitalized for an estimated obsolescence (income loss capitalized for estimated obsolescence). This is deducted in the final step of the cost approach.[493]

In order to calculate the TCV, depreciation and obsolescence are deducted from cost new; land value is then added to conclude in the TCV of the subject property via the cost approach. The 2012 conclusion of value via the cost approach is:

Petitioner Cost Conclusion	**Category for Cost Conclusion Tax Year 2012**	**Amended Cost Conclusion**
	Depreciable Basis	
$8,701,423	Store Building	$8,701,423
$2,059,926	Site Improvement	$2,059,926
$10,761,349	Total	**$10,761,349**
	Less Depreciation	
	Incurable Physical	
$870,142	(10%) Store Bldg. (5%)	$435,071
$411,985	(20%) Site Imp. (10%)	$205,993
$0	Deferred Maintenance	$0
$6,984,887	Obsolescence	$6,525,740
$8,267,014	Total Depreciation	$7,166,804
$2,494,335	Depreciated Cost	$3,594,545
$1,380,000	Land Value	$1,380,000
$3,874,335	Cost Approach Value	$4,974,545
$3,870,000	Rounded	**$5,000,000**
$23.29	**Square Foot Value**	**$30.08**

[493] See grid above.

The TCV for tax year 2013, without repeating the calculation of NOI, beginning with obsolescence is:

Petitioner Obsolescence Calculation		**Category for Obsolescence 2013**	**Amended Obsolescence**	
$11,106,577		Total Building and Site Improvement	$11,106,577	
-$1,764,345		Deduct Physical Depreciation	$926,281	
$1,380,000		Plus Land Value	$1,380,000	
$10,722,232		Total	$11,560,296	
10.0%		Overall Cap Rate	10.0%	
	$1,072,223	Required NOI for Feasibility		**$1,156,030**
$1,380,000		Land Value	$1,380,000	
9.0%		Land Cap Rate	9.0%	
$124,200	$124,200	NOI attributable to Land	$124,200	$124,200
	$948,023	NOI Required for Improvement Feasibility		$1,031,830
$378,413		Subject NOI	**$488,971**	
$124,200		Land NOI deduction	$124,200	
		Subject NOI - Land NOI =		
	$254,213	NOI to Just Improvement		$364,771
	$693,810	Deficient Income for Improvement		$667,059
	10.13%	Improvement Capitalization Rate		10.13%
	$6,848,382	Estimated Obsolescence		**$6,584,981**

The 2013 conclusion of value via the cost approach is:

Petitioner Cost Conclusion	**Category for Cost Conclusion Tax Year 2013**	**Amended Cost Conclusion**
	Depreciable Basis	
$8,980,567	Store Building	$8,980,567
$2,126,009	Site Improvement	$2,126,009
$11,106,577	Total	**$11,106,577**
	Less Depreciation	
	Incurable Physical	
$1,197,409	(13.3%) Store Bldg. (7%)	$628,640
$566,936	(26.7%) Site Imp (14%)	$297,641
$0	Deferred Maintenance	$0
$6,848,382	Obsolescence	$6,584,981
$8,612,727	Total Depreciation	$7,511,262
$2,493,850	Depreciated Cost	$3,595,315
$1,380,000	Land Value	$1,380,000
$3,873,850	Cost Approach Value	$4,975,315
$3,870,000	Rounded	**$5,000,000**
$23.29	**Square Foot Value**	**$30.08**

The TCV for tax year 2014, without repeating the calculation of NOI, beginning with obsolescence is:

Petitioner Obsolescence Calculation		**Category for Obsolescence 2014**	**Amended Obsolescenc e**	
$11,469,465		Total Building and Site Improvement	$11,469,465	
-$2,277,490		Deduct Physical Depreciation	-$1,229,844	
$1,380,000		Plus Land Value	$1,380,000	
$10,571,976		Total	$11,619,621	
10.0%		Overall Cap Rate	10.0%	
	$1,057,198	Required NOI for Feasibility		**$1,161,962**
$1,380,000		Land Value	$1,380,000	

9.0%		Land Cap Rate	9.0%	
$124,200	$124,200	NOI attributable to Land	$124,200	$124,200
	$932,998	NOI Required for Improvement Feasibility		$1,037,762
$378,413		Subject NOI	**$488,971**	
$124,200		Land NOI deduction	$124,200	
		Subject NOI – Land NOI =		
	$254,213	NOI to Just Improvement		$364,771
	$678,785	Deficient Income for Improvement		$672,991
	10.13%	Improvement Capitalization Rate		10.13%
	$6,698,674	Estimated Obsolescence		**$6,643,545**

The 2014 conclusion of value via the cost approach is:

Petitioner Cost Conclusion	**Calculation for the Cost Conclusion**	**Amended Cost Conclusion**
	Depreciable Basis	
$9,273,992	Store Building	$9,273,992
$2,195,473	Site Imp	$2,195,473
$11,469,465	Total	**$11,469,465**
	Less Depreciation	
	Incurable Physical	
$1,545,665	(16.7%) Store Bldg. (9%)	$834,659
$731,824	(33.3%) Site Imp (18%)	$395,185
$0	Deferred Maintenance	$0
$6,698,674	Obsolescence	$6,643,545
$8,976,163	Total Depreciation	$7,873,389
$2,493,302	Depreciated Cost	$3,596,076
$1,380,000	Land Value	$1,380,000
$3,873,302	Cost Approach Value	$4,976,076
$3,870,000	Rounded	**$5,000,000**
$23.29	**Square Foot Value**	**$30.08**

The minor change in the lack of flow through of CAM, insurance, and property taxes in a bond lease results in a slightly higher NOI. Further, the use of curvilinear

depreciation, reduced Mr. Allen's conclusion of physical depreciation. As a result of these two changes, the Tribunal finds the TCV of the subject property for the 2012, 2013, and 2014 tax years is $5,000,000.

The Tribunal must reiterate because of its paramount importance, that in this matter, it finds the cost-less-depreciation approach to be the best technique to utilize in determining the TCV of the subject property for the 2012-2014 tax years given the testimony and evidence presented. However, that is not to say that the cost approach is the appropriate technique to utilize in concluding the TCV of *every* big-box store. In fact, "[t]he market approach is the only valuation method that directly reflects the balance of supply and demand for property in marketplace trading."[494] Also, the Appraisal Institute suggests that "[t]ypically, the sales comparison approach provides the most credible indication of value for owner-occupied commercial and industrial properties.... These types of properties are amenable to sales comparison because similar properties are commonly bought and sold in the same market."[495] Mr. Torzewski testified that appraisers do not generally utilize the cost approach with this type of property because buyers do not consider it when they are looking to purchase a property. He testified that "[t]hey're looking at sales of similar properties and identifying how much people are paying for them and using that as their basis to determine what they're willing to pay."[496] He also testified that obsolescence is difficult to analyze.[497] It should also be noted, however, that both appraisers agree that if the income or sales comparison approach

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[494] *Jones & Laughlin Steel Corp, supra* at 353 (citing *Antisdale v City of Galesburg*, *supra* at 276 n 1). The Tribunal again notes that in this matter, the parties found the income approach to be inapplicable in valuing the subject non-income producing property.
[495] *The Appraisal or Real Estate, supra* at 380.
[496] Initial hearing transcript at 60.
[497] *Id.*

were prepared, the result would be very similar. Mr. Miller testified relative to the COA remand, "I do note in the report that a sales comparison approach and income approach could be used and I would believe they would lead to equivalent, very similar conclusions."[498] This testimony parallels *The Appraisal of Real Estate*'s determination that "[t]he three approaches to value are interrelated."[499]

In this matter, relative to the sales comparison approach, the Tribunal found Mr. Torzewski's comparables were too small, their sale was not subject to normal market pressures and/or did not sell for the subject property's highest and best use, which the COA found the parties' agreed was "continued use as an owner-occupied freestanding retail building."[500] The comparables were also not reliably adjusted to reflect their value if sold for the subject property's highest and best use; therefore Mr. Torzewski's sales comparison approach did not provide the best evidence of the true cash value of the subject property for the tax years in question. The Tribunal did find in this case, that the greater weight of the evidence suggests that deed restrictions had a neutral effect on sales price. However, given the testimony and evidence presented at the hearing of this matter, the Tribunal's conclusion of value is based on the cost-less-deprecation approach. Therefore, the Tribunal finds, based upon the Findings of Fact and the Conclusions of Law set forth herein, that the subject property is over assessed. The subject property's TCV, SEV, and TV for the tax years at issue are as stated in the Introduction section above.

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[498] See Pet's Brief at 30, T6 at 125.
[499] *The Appraisal of Real Estate, supra* at 36.
[500] *Menard, supra* at 522-523.

Dark Store Theory

Respondent's counsel alleged in his opening statement and post-hearing brief, that this case "arises out of Appellant Menard, Inc.'s . . . attempts to reduce its property tax liability using the "dark store" valuation theory."[501] He expressed in his opening statement that the redefinition of fee simple estate is important, "because that definition is the foundation of dark store theory. That foundation has meant that all properties must be evaluated -- valued particularly in terms of comparable sales, only with sales in which the property has gone dark."[502] "Here the vacant store means that is the basis for what is purported to be the definition of fee simple." [503] "Vacant stores drives everything in that dark store theory. It requires vacant stores, it requires really old buildings, it requires converted properties. It doesn't work in any other way."[504]

However, despite Respondent's "testimony" regarding the "dark store theory," the COA, in its opinion, did not mention, cite or order information regarding the "dark story theory." Further, Petitioner's witness did not testify about the "dark story theory," Respondent's witnesses did not refer to the "dark story theory," by name, though Mr. Miller testified dark stores were not good comparables and included the IAAO white paper as an addendum to his appraisal,[505] and there is no "dark store theory" cited by the parties or the Court from *The Appraisal of Real Estate*. The Tribunal located a

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[501] Resp's Brief at 1.
[502] T3 at 88.
[503] *Id*
[504] *Id.* at 89.
[505] See T7 at 141-142, See R-1 at 268 (Addendum I) for a copy of the IAAO white paper which was determined to have no legal significance. See testimony of Mr. Korpacz, T9 at 136.

definition of "dark store *clause*," related to leased properties,[506] not owner-occupied freestanding retail buildings. There is no Michigan statute or case law on the "dark store theory."

Respondent repeats its explanation of the "dark store theory," in its post-hearing brief, citing to *State Tax Notes* articles from, *The Review,* and *Bridge Magazine,* which were not admitted into evidence.[507] Respondent again contends the Tribunal must consider the legal definition of fee simple, in which there is no leased-fee estate, not the non-legal, appraisal definition that requires a vacant property.[508] As noted above, whatever the "dark store theory," is, was not requested by the COA for review. Nevertheless, in this matter, the Tribunal found, that to transfer the fee simple estate, the property must be vacated at the time of sale, so that the purchaser has the full bundle of rights. It must be valued as vacant and available for immediate occupancy or lease at market rents. Further, a sale already subject to a long-term lease is not a good comparable unless it can be adjusted for property rights. Finally, if a property is vacant, really old or converted to another use, it should not be chosen as a comparable because it is not in the same condition as the subject, *unless* it can be adjusted to reflect the characteristics of the subject property, including conditions of sale.[509] That is the art of appraisal because no two properties are exactly alike. Further, the Tribunal

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[506] "A lease's *dark-store clause* is a clause that states that the tenant must continue to occupy the site throughout the term of the lease and is barred from opening a competitive store within a certain period after the expiration date of the lease. A dark store clause protects a landlord, whose property could be put in a poor releasing position if a tenant moves out and opens another store within the same trade area. A dark store clause may be especially important in a percentage lease involving an anchor or other major tenant." *The Appraisal of Real Estate, supra* at 475 (emphasis added).
[507] See Resp's Brief at 2.
[508] See Resp's Brief at 4.

[509] *Id*

found that vacant and distressed are not synonymous. A property can be vacant because the business failed, not due to the failure of the real property.

It should again be noted that Mr. Miller utilized 28 out-of-state sales of leased, institutional grade, build-to-suit properties that were then resold to a different investor. The average lease start date was “old,” from 2001, and no adjustments were made to allegedly reflect market rent in Escanaba 10 years later. Respondent alleges Mr. Torzewski utilized old, dark sales as did Mr. Allen in his obsolescence calculations. Mr. Torzewski’s sales have been adequately discussed and Mr. Allen’s sales were not utilized in a sales comparison approach, but as a check and balance relative to how obsolescence appeared in his big-box and other retail comparables, regardless of age.

The Tribunal cannot debunk or affirm the “dark store theory,” whatever it might be, in this opinion. It can only follow well-established appraisal theory, Michigan statutory and case law. It can only find facts and express conclusions of law, requested by the COA. As such, it has explored to the best of its ability, the market effect of deed restrictions and the cost approach to value to conclude in its independent determination of the TCV of the subject property for the 2012-2014 tax years.

JUDGMENT

IT IS ORDERED that the property’s SEVs and TVs for the tax years at issue are MODIFIED as set forth in the Introduction section of this Final 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 property’s TCVs and TVs as finally shown in this Final Opinion and Judgment within 20 days of the entry of the Final Opinion and Judgment,

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 within 28 days of entry of this Final Opinion and Judgment. If a refund is warranted, it shall include a proportionate share of any property tax administration fees paid and 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 Final Opinion and Judgment. 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, through June 30, 2012, at the rate of 1.09%, (iv) after June 30, 2012, through June 30, 2016, at the rate of 4.25%, (v) after June 30, 2016, through December 31, 2016, at the rate of 4.40%, (vi) after December 31, 2016, through June 30, 2017, at the rate of 4.50%, (vii) after June 30, 2017, through December 31, 2017, at the rate of 4.70%, (viii) after December 31, 2017, through June 30, 2018, at the rate of 5.15%, (ix) after June 30, 2018, through December 31, 2018, at the rate of 5.41%, (x) after December 31, 2018 through June 30, 2019, at

the rate of 5.9%, and (xi) after June 30, 2019 through December 31, 2019, at the rate of 6.39%, and (xii) after December 31, 2019, through June 30, 2020, at the rate of 6.40%.

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

APPEAL RIGHTS

If you disagree with the final decision in this case, you may file a motion for reconsideration with the Tribunal or a claim of appeal with the Michigan COA.

A motion for reconsideration must be filed with the required filing fee within 21 days from the date of entry of the final decision.[510] Because the final decision closes the case, the motion cannot be filed through the Tribunal's web-based e-filing system; it must be filed by mail or personal service. The fee for the filing of such motions is $50.00 in the Entire Tribunal and $25.00 in the Small Claims Division, unless the Small Claims decision relates to the valuation of property and the property had a principal residence exemption of at least 50% at the time the petition was filed or the decision relates to the grant or denial of a poverty exemption and, if so, there is no filing fee.[511] A copy of the motion must be served on the opposing party by mail or personal service or by email if the opposing party agrees to electronic service, and proof demonstrating that service must be submitted with the motion.[512] Responses to motions for reconsideration are prohibited and there are no oral arguments unless otherwise ordered by the Tribunal.[513]

[510] See TTR 261 and 257.
[511] See TTR 217 and 267.
[512] See TTR 261 and 225.
[513] See TTR 261 and 257.

A claim of appeal must be filed with the appropriate filing fee. If the claim is filed within 21 days of the entry of the final decision, it is an "appeal by right." If the claim is filed more than 21 days after the entry of the final decision, it is an "appeal by leave."[514] A copy of the claim must be filed with the Tribunal with the filing fee required for certification of the record on appeal.[515]

The fee for certification is $100.00 in both the Entire Tribunal and the Small Claims Division, unless no Small Claims fee is required.[516]

By Preeti Gadola

By Victoria L. Enyart

Entered: May 28, 2020

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[514] See MCL 205.753 and MCR 7.204.
[515] See TTR 213.
[516] See TTR 217 and 267.