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

Hickory Hollow Cooperative,
Petitioner,

v   MTT Docket Nos. 277266

City of Wayne,   Tribunal Judge Presiding
Respondent.   Steven H. Lasher

FINAL OPINION AND JUDGMENT

The Tribunal, having given due consideration to the file in the above-captioned case finds:

1. On July 15, 2011, Administrative Law Judge Thomas A. Halick issued a Proposed Order Granting Respondent's Motion for Summary Disposition and dismissed the appeal. The Proposed Order provided, in pertinent part, "[t]he parties have 20 days from the date of entry of this Proposed Order to file exceptions and written arguments with the Tribunal consistent with Section 81 of the Administrative Procedures Act (MCL 24.281). The exceptions and written arguments shall be limited to the matters addressed in the motion."

2. Petitioner filed exceptions on July 27, 2011. In support of the exceptions, Petitioner contends that:

   a. "The Tribunal in its Proposed Opinion and Judgment relies on several previous Tribunal and unpublished appellate court decisions that ignore the statutory carve out provision of MCL 211.27(4)."

   b. "At issue is the meaning and application of the last two sentences" of MCL 211.27(4):

      > (4) . . . [t]his subsection does not apply to a nonprofit housing cooperative subject to regulatory agreements between the state or federal government entered into before January 1, 1984. As used in this subsection, 'nonprofit cooperative housing corporation' means a nonprofit cooperative housing corporation that is engaged in providing housing services to its stockholders and members and that does not pay dividends or interest upon stock or membership investment but that does distribute all earnings to its stockholders or members.

   c. A review of the legislative history relating to MCL 211.27(4) concludes that "Section 27 subsection (4) redefines present economic income. The carve out for certain cooperatives exempts them from this statutory definition of 'present economic income.' As a qualifying cooperative's true cash value is not to be determined by the statutory definition of 'present economic value,' it follows that it is to be determined under the *CAF* rationale and calculated using actual income."

d. " [w]hat can be gleaned from the legislative history of the carve out was that it was enacted at the same time as the *CAF* decisions were overruled by legislative fiat. The cut-out preserved the status quo ante resulting from *CAF*. The status quo was that encumbered property was to be valued, taking into account its encumbrance."

e. "A reading of the statute and its legislative history shows that the *status quo ante* as it existed in 1982 should be used in valuing certain non-profit cooperatives. That requires that the encumbrances be taken into account in valuing those cooperatives, and that actual figures such as restricted sales price, or actual income and expense numbers with a market value capitalization rate be considered."

f. Acknowledging that cases decided based on the statute prior to the 1982 and 1983 amendments do not address the specific issue before the Tribunal, Petitioner takes exception to the Tribunal's reliance on *Branford Towne Houses Coop v Taylor*, unpublished per curiam of the Court of Appeals issued April 19, 2007 (Docket No. 265398). Petitioner contends that the Tribunal and the Court of Appeals "ignore the carve-out" in concluding that the income approach to value does not necessarily have to be used in determining the true cash value of the subject property.

g. The Tribunal's reliance on non-profit cases that failed to utilize the income approach to value is misplaced because "the statute makes a distinction for such non-profit cooperatives, and the Tribunal's failure to distinguish these cases is an error of law and an adoption of a wrong principal."

h. The Tribunal is in "direct violation of *Jones & Laughlin Steel Corp. v Warren*, 193 Mich App 348; 483 NW2d 416 (1992) when it concludes that

> There is no evidentiary basis upon which the tribunal could render an "independent determination of value," other than to affirm the assessments. There is no competent evidence that the assessments exceed 50% of fair market value."

"The Tribunal is required to make an independent determination of true cash value; it may not automatically accept a respondent's assessment but must make its own findings of fact to arrive at a legally supportable true cash value."

3. Respondent filed a Response to Petitioner's Exceptions to the Proposed Judgment on August 1, 2011. In support of its response to Petitioner's exceptions, Respondent states:

a. "Petitioner's exceptions to the Proposed Judgment in regard to the income valuation approach, the legislative history of MCL 211.27, the so called 'carve out' provision of MCL 211.27(4), the CAF investment case, the Branford Townhouses cases, the Congress Hills case, and non-profit exemption case, have either been properly addressed and dismissed in the Proposed Opinion of July 15, 2011 as erroneous, or have also been addressed again in the Tribunal's Final Opinion and Judgment in *Forest Hills Cooperative v City of Ann Arbor,* Docket No. 277107 of May 11, 2011."

b. ". . . the Tribunal's Proposed Judgment of June 15, 2011 also addresses and properly negates Petitioner's exception concerning an independent determination of value as Petitioner has failed to meet its burden of proof."

4. The Administrative Law Judge properly considered the testimony and evidence submitted in the rendering of the Proposed Opinion and Judgment. Further, Petitioner's arguments in its exceptions are essentially arguments previously rejected by the Tribunal in prior cases cited by the Administrative Law Judge (e.g., *Branford* and *Forest Hills*).

a. MCL 211.27 does not require the property of a nonprofit cooperative housing corporation to be valued using the income approach. As discussed by the Court of Appeals in *Branford*:

MCL 211.27(1) does not require assessment based on a particular valuation method. MCL 211.27(1) states that, "in determining the true cash value, the assessor shall also *consider* the advantages and disadvantages of ... present economic income of structures." (Emphasis added.) Even the cases on which *Branford* heavily relies, *CAF I* and *CAF II,* state that: "there may be such facts, peculiar to the circumstances under consideration, as would indicate that the income capitalization approach is too speculative to be a reliable indicator of valuation. In such circumstances the tax assessor may base his assessment upon a more reliable method of valuation."

Petitioner argues that *Branford* is an unpublished opinion and is therefore not binding. However, it must be noted that *Branford* was an appeal of a Tribunal decision[1]. The Court of Appeals opinion upheld the Tribunal's decision and the Michigan Supreme Court denied certiorari. Petitioner has not presented any argument that would lead the Tribunal to conclude that either the Tribunal's decision or the Court of Appeals decision was incorrect.

b. Petitioner's argument that "MCL 211.27(4) requires the Tribunal to consider actual income and expenses or the actual sales price from the subject property" was also dismissed by the Court of Appeals in *Branford*. Specifically, the court held:

[1] *Branford Towne Houses Cooperative v City of Taylor*, (Docket No. 90502, September 1, 2005).

> We reject Branford's claim that actual income must be used to assess the subject property as without merit. There is no indication that by excluding nonprofit housing cooperatives from MCL 211.27(4) the Legislature intended their true cash values be assessed pursuant to the definition of "present economic income" as stated in *CAF I* and *CAF II*. The most that can be gleaned from MCL 211.27(4) is that the Legislature either intended to clarify that nonprofit housing cooperatives were not "leased or rented property" under MCL 211.27(4), or that nonprofit housing cooperatives were not the form of "leased or rented property" to which the definition of "present economic income" in MCL 211.27(4) applied.

c. Petitioner argues that by failing to adopt and apply its interpretation of MCL 211.27(4), this subsection is rendered "a meaningless nullity." (Petitioner's Exceptions, p16) Clearly, the *Branford* Court disagrees, as does the Tribunal. However, assuming, *arguendo*, that Petitioner's interpretation is correct, Article IX, Section 3 of Michigan's Constitution provides, in pertinent part:

> 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, after January 1, 1966, exceed 50 percent; and for a system of equalization of assessments. (Emphasis added.)

Under Petitioner's interpretation of MCL 211.27(4), nonprofit cooperative housing corporations would be mandatorily assessed under the income approach, using the corporation's actual income instead of the ordinary, general, and usual economic return indicated by the market. Because nonprofit cooperative housing corporations are restricted in terms of the amount of rent, or "carrying charges," they can charge, their actual income will always be less, if not substantially less, than the usual economic return indicated by the market. At the same time, property owned by for-profit cooperative housing corporations and other comparable types of multi-family housing could be assessed using other valuation methods recognized and reasonably related to fair market value. If the income approach is utilized, the assessment must be based on the usual economic return indicated by the market. Clearly, assessing property under Petitioner's statutory interpretation would result in non-uniform assessment and be in violation of Article IX, Section 3.

d. In conclusion, the Tribunal adopts the July 15, 2011 Proposed Order as the Tribunal's Final Opinion and Judgment in this case pursuant to MCL 205.726.

> The Tribunal also incorporates by reference the Findings of Fact, as corrected herein, and Conclusions of Law in the Proposed Order in this Final Opinion and Judgment.

Therefore,

IT IS ORDERED that the Administrative Law Judge's Proposed Order is AFFIRMED and adopted by the Tribunal as the Final Opinion and Judgment.

IT IS FURTHER ORDERED that the officer charged with collecting or refunding the affected taxes shall collect taxes and any applicable interest or issue a refund as required by this Final Opinion and Judgment within 28 days of the entry of the Final Opinion and Judgment. If a refund is warranted, it shall include a proportionate share of any property tax administration fees paid and of penalty and interest paid on delinquent taxes. The refund shall also separately indicate the amount of the taxes, fees, penalties, and interest being refunded. A sum determined by the Tribunal to have been unlawfully paid shall bear interest from the date of payment to the date of judgment and the judgment shall bear interest to the date of its payment. A sum determined by the Tribunal to have been underpaid shall not bear interest for any time period prior to 28 days after the issuance of this Final Opinion and Judgment. Pursuant to MCL 205.737, interest shall accrue (i) after December 31, 1999, at the rate of 5.49% for calendar year 2000, (ii) after December 31, 2000, at the rate of 6.56% for calendar year 2001, (iii) after December 31, 2001, at the rate of 5.56% for calendar year 2002, (iv) after December 31, 2002 at the rate of 2.78% for calendar year 2003, (v) after December 31, 2003, at the rate of 2.16% for calendar year 2004, (vi) after December 31, 2004, at the rate of 2.07% for calendar year 2005, (vii) after December 31, 2006, at the rate of 3.66% for calendar year 2007, (viii) after December 31, 2007, at the rate of 5.81% for calendar year 2008, (ix) after December 31, 2008, at the rate of 3.31% for calendar year 2009, (x) after December 31, 2009, at the rate of 1.23% for calendar year 2010, and (xi) after December 31, 2010 at the rate of 1.12% for calendar year 2011.

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

MICHIGAN TAX TRIBUNAL

Entered: August 19, 2011 — By: Steven H. Lasher

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

Hickory Hollow Cooperative,
Petitioner,

v

City of Wayne,
Respondent.

Tax Tribunal
MTT Docket No. 277266

Administrative Law Judge Presiding
Thomas A. Halick

PROPOSED ORDER GRANTING RESPONDENT'S MOTION
FOR SUMMARY DISPOSITION

On May 26, 2011, Respondent filed a Motion for Summary Disposition and a brief in support.

On June 9, 2011, Petitioner filed an Answer and a Brief in Opposition to Respondent's Motion for Summary Disposition.

Facts not in Dispute

1. Respondent assessed the subject parcels for each year at issue.

2. The subject property is a 267-unit housing complex with the following parcel identification numbers: 55-024-99-0002-000 and 55-024-99-0004-002.

3. Parcel identification number 55-024-99-0004-002 ("parcel 002") was constructed, financed, and is operated as a nonprofit housing cooperative under Section 236 of the National Housing Act.

4. Parcel 002 includes 173 units and was assessed at a TCV of $2,067,400 for the 2000 tax year. The average TCV per unit for the 2000 tax year was $11,950. The average TCV per unit for the 2011 tax year is $24,238.

5. Parcel identification number 55-024-99-0002-000 ("parcel 000") was constructed, financed, and is operated as a nonprofit housing cooperative under Section 221(d)(3) of the National Housing Act.

6. Parcel 000 includes 94 units and was assessed at a TCV of $1,123,200 for the 2000 tax year. The average TCV per unit for the 2000 tax year was $11,948. The average TCV per unit for the 2011 tax year is $26,810.

7. For 2010, Petitioner paid a total of $99,394.86 in property taxes for the two subject parcels, which if divided equally among the 267 units, equals $372.26 per unit. (Official notice is taken of Respondent's public tax records.) According to Petitioner's Valuation Disclosure (2007 Financial Statements), Petitioner paid $87,110 in property taxes.

8. From the property's inception and for all years at issue, regulatory agreements were in effect between Petitioner and the Department of Housing and Urban Development, which impose restrictions that make the housing affordable to persons with low and moderate incomes. Attached to Respondent's Valuation Disclosure is a copy of a "Flexible Subsidy Use Agreement" recorded with the Wayne County Register of Deeds, July 31, 2008, at liber 47389, page 1062-1069, pursuant to which Petitioner and its successor and assigns are bound to "operate the project so as to preserve the affordable housing for low and moderate residents until July 1, 2038."

9. Petitioner offers the same valuation methodologies as the petitioner in *Forest Hills Cooperative, Inc v City of Ann Arbor*, MTT Docket No. 277107, which here produces similar values per unit, which were found to be unreasonable and not reflective of "true cash value" within the meaning of MCL 211.27(1) in *Branford Towne Houses Cooperative v City of Taylor and County of Wayne*, MTT Docket No. 90502. In the event that Petitioner seeks to offer testimony regarding adjusting the capitalization rate to account for the restricted rents, this presents the same issue as in *Roseville Townhouses v Roseville*, MTT Docket No. 269701 [Proposed Order Granting Motion to Dismiss entered March 3, 2011].

10. Petitioner filed a valuation disclosure with a cover letter dated May 19, 2008 (when this case was in the Small Claims Division). Petitioner filed an updated valuation disclosure with a cover letter dated May 6, 2011. Both documents consist of regulatory agreements, cooperative agency agreements, mortgages, rent rolls, occupancy reports, bylaws, information bulletins, articles of incorporation, occupancy agreements, subscription agreements, rent supplement addendums, and a "book value transfer computation." Neither document contains an income approach, sales comparison approach, or cost approach to value. The valuation disclosure is not an appraisal as that term is defined in the appraisal literature. Appraisal Institute, *The Dictionary of Real Estate Appraisal*, (Chicago: 5th ed, 2010), p 10.

11. The Financial Statements apply to years 2000 through 2007 with no such information for years 2008 through 2011. The "book value transfer computations" apply to years 2000 through 2008, with no documentary evidence whatsoever pertaining specifically to years 2009 through 2011.

12. The record cards for the subject parcels show that the current assessments were established by the cost less depreciation approach.

Standard for Summary Disposition

A motion for summary disposition under MCR 2.116(C)(10) tests the factual support of a claim. The Tribunal must consider the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted or filed in the action to determine whether a genuine issue of any material fact exists requiring trial. *Spiek v Dep't of Transportation*, 456 Mich 331; 572 NW2d 201 (1998). When determining whether there is a genuine issue of any material fact, the admissible evidence must be viewed in the light most favorable to the non-moving party. *Heckman v Detroit Chief of Police*, 267 Mich App 480; 705 NW2d 689 (2005). A court may not make findings of fact or weigh credibility when deciding the motion. *In Re Handleman*, 266 Mich App 433 (2005). If the "affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay." MCR 2.116(I)(1).

Law and Analysis

This case is factually and legally indistinguishable from several cases recently decided or pending before the Tribunal involving regulated nonprofit housing cooperative properties, where the petitioners were represented by the same law firm, and the legal issues, evidence, and the appraisal theories are substantively identical. Proposed Orders granting summary disposition have been entered in several of these similar cases. See, *Westwick Square Cooperative v City of Wayne*, MTT Docket No. 269704, *Hanover Grove Cooperative v City of Fraser*, MTT Docket No. 277142 [Proposed Order Granting Partial Summary Disposition on the valuation issue], *Roseville Townhouses v City of Roseville*, MTT Docket No. 269701 [Proposed Order Granting Motion to Dismiss], *Forest Hills Cooperative, Inc v City of Ann Arbor*, MTT 277107 [Proposed Opinion and Judgment issued 7-1-2010, Final Judgment adopting the Proposed Opinion without substantive modification, issued __-__-2011].

Respondent cites *Branford Towne Houses Coop v City of Taylor,* unpublished opinion per curiam of the Court of Appeals issued April 19, 2007 (Docket No. 265398), which affirmed the Tribunal's ruling denying relief under similar facts and law. The difference with this present case is that Petitioner's valuation disclosure does not offer an opinion of value by the income approach using actual rents and expenses, but rather relies only upon the "transfer value" approach, which has also been discredited by this Tribunal as bearing no relationship to fair market value. Nevertheless, Petitioner's response to Respondent's motion argues that a regulated nonprofit housing cooperative property *must* be valued using the income approach *only*, with actual, restricted rents and actual expenses used to calculate net operating income. Established appellate case law and Tribunal decisions have rejected the use of the income approach to determine the true cash value of a regulated nonprofit housing cooperative property. *Branford Towne Houses Coop v City of Taylor,* unpublished opinion per curiam of the Court of Appeals issued April 19, 2007 (Docket No. 265398). *Georgetown Place Co-Op v City of Taylor,* MTT Docket No. 89960 [entered 2-17-95], upheld by *Georgetown Place Co-Op v City of Taylor*, 226 Mich App 33 (1998). *Kensington v Township of Milford,* MTT Docket No. 119850 (1998). *Carriage House Co-op v City of Utica*, MTT Docket No. 64618 (1986). *Carriage House Cooperative v City of Utica*, 172 Mich App 144; 431 NW2d 406 (1988). Also see *Meadowlanes Limited Dividend Housing Ass'n v City of Holland*, 437 Mich 473; 473 NW2d 636 (1991) [no particular approach is mandated for subsidized housing].

In several of the post-*Forest Hills* cases, the petitioners have suggested that the restricted, net operating income produces a reliable indication of value if the overall capitalization rate is adjusted appropriately. This approach was rejected by this hearing officer in the Order Granting Respondent's Motion to Strike in *Eastwick Square Townhouse Cooperative v City of Roseville*, MTT Docket No. 269883:

> Respondent's motion to strike the testimony of Dan Tomlinson is granted on the grounds that the testimony is irrelevant. TTR 283(1), MRE 401 and 402. It is determined as a matter of law that Petitioner's income approach is not relevant to the determination of the true cash value of a nonprofit housing cooperative. The net income of a federally regulated nonprofit housing cooperative is not a reliable indicator of the property's true cash value. Therefore, testimony offered in support of a capitalization rate is irrelevant and inadmissible. For the same reasons, Respondent's Motion to Strike Petitioner's Income Valuation Approach Documents is granted. *Id*.

In any event, because Petitioner's valuation disclosure in this case does not include any form of income approach, Petitioner would be precluded from offering any evidence or expert testimony pertaining to an income approach at the hearing.

Starting with MCL 211.27(1), when determining the "true cash value" or "usual selling price" of property, the assessor "shall consider" all the relevant, enumerated factors, including the "present economic income," which is defined in subsection (4) as the market income that the subject property would be expected to earn by comparison to income of similar income-producing properties. The definition in subsection (4) provides guidance to the assessor to use market income and that "actual income generated by the lease is not the controlling indicator of its true cash value in all cases." The actual income may be proven to be consistent with the market and appropriate in certain cases, but the actual income is not "controlling."

MCL 211.27(1) states that the assessor shall consider "present economic income of *land* if the land is being farmed or *otherwise put to income producing use*. . . ." [Italics added]. The italicized language states the principle that the income approach applies to "income producing" property. The statute also refers to "present economic income of *structures*, including farm structures." With regard to land, the legislature specified that "present economic income" is relevant where the land is "put to income producing use." It is recognized that the income method applies only to property of a type that would be purchased by an investor for its income-producing potential. Furthermore, subsection 27(4) plainly defines "present economic income" in the context of "leased or rented property." *There is nothing in the language of MCL 211.27(1) or (4) that indicates that the income approach is appropriate when determining the true cash value of property that would not be purchased by an investor for its income-producing capacity.* Section 27(1) does not require any particular approach for any type of property.

As applied to "leased or rented property" the term "present economic income" means the "ordinary, general, and usual economic return realized from the lease or rental of property negotiated under current, contemporary conditions between parties equally knowledgeable and familiar with real estate values." MCL 211.27(4). In appraisal terms, this means "market income" rather than "actual income" received from a leased or rented property. "Market income" means the rents that are typically charged for similar, competitive properties. The income approach requires the use of market rents.

Prior to the enactment of MCL 211.27(4), the Supreme Court had interpreted "present economic income" as it appears in section 27(1) to mean "actual income" in the context of a long term lease of commercial, income-producing property, *where the lease was negotiated at market rates at its inception, but the rents did not adjust to current market conditions, and were below market for the years at issue. CAF Investment Co v State Tax Comm,* 392 Mich 442; 221 NW2d 588 (1974) *(CAF I),* and *CAF Investment Co v Saginaw Twp,* 410 Mich 428; 302 NW2d 164 (1981) *(CAF II*).

Petitioner's claims are grounded upon its interpretation of the following sentence in italics that appears in MCL 211.27(4):

> (4) As used in subsection (1), "present economic income" means for leased or rented property the ordinary, general, and usual economic return realized from the lease or rental of property negotiated under current, contemporary conditions between parties equally knowledgeable and familiar with real estate values. The actual income generated by the lease or rental of property is not the controlling indicator of its true cash value in all cases. This subsection does not apply to property subject to a lease entered into before January 1, 1984 for which the terms of the lease governing the rental rate or tax liability have not been renegotiated after December 31, 1983. *This subsection does not apply to a nonprofit housing cooperative subject to regulatory agreements between the state or federal government entered into before January 1, 1984. As used in this subsection, "nonprofit cooperative housing corporation" means a nonprofit cooperative housing corporation that is engaged in providing housing services to its stockholders and members and that does not pay dividends or interest upon stock or membership investment but that does distribute all earnings to its stockholders or members*. MCL 211.27(4) [Relevant part - Italics added].

As indicated in *Forest Hills*, this hearing officer is not persuaded by Petitioner's theory under MCL 211.27(4). The fact that a panel of the Court of Appeals, which included Judges Zahra (now a Justice of the Michigan Supreme Court), Bandstra, and Owens, unanimously and unequivocally rejected that theory in *Branford* is persuasive. *Branford Towne Houses Coop v City of Taylor*, unpublished opinion per curiam of the Court of Appeals issued April 19, 2007 (Docket No. 265398). The most straightforward reading of this provision is that the definition of "present economic income" found in 27(4) does not apply to a nonprofit cooperative housing corporation. As noted by the court, a nonprofit housing cooperative is not "rented or leased property." The statute does not mandate the income approach for a nonprofit, non-income-producing property. The reasoning of the Court of Appeals in *Branford* is persuasive:

> Branford claims that the tribunal erred in failing to value the subject property using the income capitalization method based on actual income. We disagree.

> While the phrase "present economic income" is defined in MCL 211.27(4) "for leased or rented property," Branford, as a "nonprofit housing cooperative" is excluded from this definition. Branford, however, argues being excluded from MCL 211.27(4) as a nonprofit housing cooperative indicates that the Legislature intended its true cash value be assessed pursuant to the definition of "present economic income" as stated in *CAF Investment Co v. State Tax Comm,* 392 Mich. 442, 221 NW2d 588 (1974) *(CAF* I), and *CAF Investment Co v. Saginaw Twp,* 410 Mich. 428, 302 NW2d 164 (1981) *(CAF* II), which would be based on Branford's actual income.
>
> We reject Branford's claim that actual income must be used to assess the subject property as without merit. There is no indication that by excluding nonprofit housing cooperatives from MCL 211.27(4) the Legislature intended their true cash values be assessed pursuant to the definition of "present economic income" as stated in *CAF I* and *CAF II.* The most that can be gleaned from MCL 211.27(4) is that the Legislature either intended to clarify that nonprofit housing cooperatives were not "leased or rented property" under MCL 211.27(4), or that nonprofit housing cooperatives were not the form of "leased or rented property" to which the definition of "present economic income" in MCL 211.27(4) applied.
>
> Further, MCL 211.27(1) does not require assessment based on a particular valuation method. MCL 211.27(1) states that, "in determining the true cash value, the assessor shall also *consider* the advantages and disadvantages of ... present economic income of structures" (Emphasis added). "Consider" is commonly defined as "to think carefully about, esp. in order to make a decision; contemplate; ponder." Random House Webster's College Dictionary, 2 ed. Case law verifies that no particular valuation method is required for real property assessments. Even the cases on which Branford heavily relies, *CAF I* and *CAF II,* state that: "there may be such facts, peculiar to the circumstances under consideration, as would indicate that the income capitalization approach is too speculative to be a reliable indicator of valuation. In such circumstances the tax assessor may base his assessment upon a more reliable method of valuation." *CAF I, supra,* at 456; *CAF* II, *supra,* at 461. *Branford Towne Houses Coop v City of Taylor,* unpublished opinion per curiam of the Court of Appeals issued April 19, 2007 (Docket No. 265398).

Petitioner misinterprets the exception for leases in effect and negotiated prior to 1984 (in circumstances such as *CAF*) as evidence that the legislature intended the same treatment for non-income-producing, nonprofit housing cooperatives. The better view is simply that the definition in MCL 211.27(4) does not apply to a *nonprofit housing cooperative* because nonprofit housing cooperatives are not "rented or leased property."

Petitioner believes that its interpretation is supported by legislative history following the Supreme Court's rulings in the *CAF* cases in 1974 and 1981. Those cases involved land owned by C.A.F Investment Company that it leased to S.S. Kresge Company in 1963 for a 20-year term.

The lease was negotiated at market rates in 1963. The 20-year lease could be extended for three 5-year renewal options at the same rental. As of 1971, the lease rates were no longer favorable to the lessor, being considerably below market. If the lessor sold his leased fee interest in this investment property, the buyer would take the property subject to the long term lease with the below market rents locked in. *CAF Investment Company v Michigan State Tax Commission*, 392 Mich 442; 221 NW2d 588 (1974). This case is commonly referred to a *CAF I*.

There was no dispute in the *CAF* cases that the property was investment property that would be purchased based on its income-producing capacity. The question was how the income approach should be applied, not whether it should be applied. The Court based its decision on the fact that the CAF-Kresge lease was negotiated at market rates at the inception and later turned out to be unfavorable to the lessor. Had that not been the case, actual rents would not have been an appropriate measure for determining net income. The below-market rates were not implemented to reduce the value for tax purposes or otherwise lacking in economic substance.

> "Consideration" of the various factors may well indicate that the application of some or all enumerated factors is inappropriate. For example, in the event lease rental . . . were not arrived at on the basis of arms length bargaining or in other respects had no relationship to 'usual selling price', as statutorily defined, it would be appropriate for the taxing authority to ignore lease rental as a component of valuation. It is only because in this case the record indicates that long term lease rental fairly reflects economic circumstances at the outset of the lease term and bears a demonstrable relation to true cash value that we require its consideration. *CAF I*, fn 6.

If Petitioner were correct that the law espoused in the *CAF* cases applies here, "it would be appropriate for the taxing authority to ignore the lease rental as a component of valuation." *CAF I*. *CAF* cannot be read to control the assessment of a nonprofit housing cooperative. The reasoning in the *CAF* cases is entirely dependent upon the property's status as income-producing investment property that was subject to an arms length (albeit ultimately unfavorable) long term lease. In our case, the subject property is not income-producing investment property. The subject is not "rented or leased." *The carrying charges paid by the members are not rents, and were not negotiated or established at market rates*. The carrying charges are intended to cover debt service, operating expenses, reserves, and property taxes, with no profit after these items are accounted for. The net operating income calculated for the income approach would often equal the expenses that are not included in the NOI calculation: debt service and property taxes. In this regard, the property is more like owner-occupied condominium units than a rental apartment complex, although it exhibits characteristics of both. The above quote from *CAF I* proves that, even if Petitioner were correct that the 1982 and 1983 amendments (1983 PA 254) preserved the law under *CAF* for nonprofit cooperatives, by no means do the *CAF* cases hold that the income approach is appropriate for cooperatives and it is certainly not mandated. There is no motivation for the cooperative to control expenses or maximize gross rents so as to produce a profit. There is no demonstrable relationship between the NOI of a regulated nonprofit housing cooperative and the true cash value of the property.

In determining which approach is most reliable in appraising property, the first principle is to select the method that a potential purchaser would most likely rely upon to determine a price that he or she is willing to pay for the subject property. The valuation method chosen must reflect the behavior and motivations of buyers in the subject's market. "Income-producing real estate is typically purchased as an investment, and from an investor's point of view earning power is the critical element affecting property value." Appraisal Institute, *The Appraisal of Real Estate* (Chicago: 12th ed, 2001), p 471. The income method in its various forms "consider[s] anticipated future benefits and estimate[s] their present value." *Id*. The income method should be applied to simulate investor motivations. *Id*., 473. There is no evidence that the subject property or any unit in the subject property would be acquired by an investor for its income-producing capacity or for investment purposes. To the extent that the income approach could be used to produce a reliable estimate of TCV, it would be appropriate to use market rents and expenses, with recognition given for any distinguishing factors related to the status as a nonprofit cooperative. However, based on *Branford* and *Georgetown*, an estimate of fair market value must be discounted due to restrictions on marketability (illiquidity).

To the extent that the Proposed Opinion and Judgment in *Forest Hills* suggests that the income approach has probative value as applied to a non-profit cooperative, that discussion is not consistent with the Tribunal's prior rulings in *Georgetown*, *Kensington*, and *Branford*. Assuming *arguendo* that the income approach could be used to produce a reliable indication of value, market income and expenses would be appropriate.

In *Colonial Square Cooperative v Ann Arbor*, MTT Docket No. 46435 (1982), the Tribunal approved of the use of actual income and expenses with a capitalization rate developed from "a mortgage constant (based on the 3%, 40 year mortgage) plus the actual tax cap rate." *Id*. The decision in that case was issued October 22, 1982, prior to *Meadowlanes v Holland*, 437 Mich 473; 473 NW2d 636 (1991). *Colonial Square* was not appealed, nor was it cited in the Tribunal's decision in *Branford Towne Houses Cooperative v City of Taylor*, MTT Docket No. 90502. The approach in *Colonial Square* (MTT Docket No. 46435) was stated to be based on *Congresshills Apartments v Township of Ypsilanti*, 128 Mich App 279; 341 NW2d 121 (1983), which involved the valuation of a subsidized apartment complex (not a cooperative). In *Congresshills*, the Court of Appeals rejected the Tribunal's use of the income approach (restricted income) with an "absurdly low" capitalization rate in an effort to adjust for the federal interest subsidy. (Some of the reasoning in *Congresshills* is no longer viable after *Meadowlanes*.) Despite the rejection of the "low cap rate" in *Congresshills*, the Tribunal, in *Colonial Square* (MTT Docket No. 46435) adopted an income approach by Terrell R. Oetzel, MAI, which used actual income, actual expenses, and a capitalization rate that consisted of the mortgage constant plus the actual tax cap rate. Although the parties and the Tribunal assumed that the use of the income approach in *Congresshills* was also applicable to a nonprofit cooperative, that assumption cannot be sustained after consideration of subsequent Tribunal decisions. The reasoning of *Colonial Square Cooperative v Ann Arbor*, MTT Docket No. 46435, is subject to question, where the case refers to the nonprofit association as an "investor." This case has not been followed by the Tribunal.

In *Pinelake Housing Cooperative v City of Ann Arbor*, 159 Mich App 208; 406 NW2d 832 (1987), the Court of Appeals upheld the income approach using actual income, actual expenses, and a market capitalization rate, for a section 236 cooperative. *Pinelake* applied to years 1981-

1984. Although 1983 PA 254 (which enacted MCL 211.27(4)) was given immediate effect on December 29, 1983, and applied to 1984 assessments, *Pinelake* does not mention MCL 211.27(4). Petitioner has argued that *Pinelake* represents the proper approach after the *CAF* cases, and that the exception in MCL 211.27(4) means that this approach must be followed today. However, the reasoning of *Pinelake* was rejected by the Supreme Court's 1991 decision in *Meadowlanes*. *Pinelake* rests in part on the erroneous premise that the interest subsidy was an intangible asset that could not be valued for property tax purposes. Petitioner argues that *Pinelake* reflects the valuation methodology in effect after *CAF*, and that 1983 PA 254 preserves the *Pinelake* approach. The problem with this position is that it fails to take into account the Supreme Court's ruling in *Meadlowlanes*, which undercut the reasoning of *Pinelake*. Also, the *Pinelake* approach considers the negative influences upon value related to restricted rents, but fails to consider the contribution to value of the subsidized mortgage and other positive value influences related to a section 236 cooperative. Furthermore, the Tribunal has not followed *Pinelake* in subsequent cases.

The case of *Village Townhouses Cooperative v City of Lansing*, MTT Docket No. 110370, was heard by the Tribunal on December 6, 1989, and supplemental evidentiary proceedings were held on September 29, 1993. The subject property was a 221(d)(3) nonprofit housing cooperative subject to regulatory agreements for 20 years into the future. The tax years at issue were 1987, 1988, and 1989. Interestingly, the proposed opinion in that case rejected all three traditional approaches to value and relied upon a "hybrid variant of the market approach" in accordance with other authorities that had approved "some form of mortgage-equity technique." These mortgage-equity techniques had been rejected by *Meadowlanes* as of the date the Tribunal's Final Opinion and Judgment was issued. The Proposed Opinion applied pre-*Meadowlanes* law. The reasoning of that Proposed Opinion was not followed by the Tribunal and is contrary to appellate case law.

Georgetown Place Cooperative v City of Taylor, 226 Mich App 33; 572 NW2d 232 (1997), is a published, post-*Meadowlanes* case involving a nonprofit housing cooperative that was subsidized and regulated by HUD under section 221(d)(3), including a 3% (effective rate) mortgage over a 40-year term. The Tribunal issued its decision in *Georgetown* in 1995. It was determined that a 30% discount must be applied to the value indicated by the sales comparison approach to adjust for the lack of marketability due to the HUD restrictions. The sales comparison approach considered sales of physically similar "federally subsidized apartment complexes." The 30% discount was based on expert testimony, which was supported by studies of the lack of marketability of the stock of closely held corporations. The 30% discount was held to apply to the tax years at issue in that case, 1984 through 1994. The adjusted prices indicated a price per unit of $19,000 as of 1983. The Tribunal agreed with both parties "that the income approach is not an accurate assessment of TCV due to the nature of the property as a nonprofit cooperative." *Georgetown Place Cooperative v City of Taylor*, MTT Docket No. 89960.

The Tribunal did not merely rule that the income approach was "not an accurate assessment of TCV" *under the facts of that case*, but ruled that the income approach is not accurate for any nonprofit cooperative, without regard to whether actual or market "rents" are used. In *Georgetown*, neither party raised an issue regarding MCL 211.27(4), which was in effect during the tax years at issue.

Kensington v Township of Milford, MTT Docket No. 119850 (1998), is a post-*Meadowlanes*, post-*Georgetown* case in which the Tribunal rejected use of any income approach for a regulated nonprofit housing cooperative. Hearing officer James R. Neumann's proposed opinion held that "Respondent's modified market approach as correlated with his other approaches produces a reasonable estimate of true cash value. . . ." In reviewing exceptions filed by the petitioner, the Tribunal adopted the hearing officer's conclusions. **However, the Tribunal found that the hearing officer *erred* by relying upon the income approach "to correlate the modified market approach" because the income approach produces an "unreasonable estimate of value."** The Tribunal held that it was error for the hearing officer to place any weight whatsoever upon the income approach. The Tribunal applied the "discounting method used in *Georgetown* – 30% discount rate deduced from the analogous relationship between closely held corporations and HUD 221(d)(3) cooperative housing. . . ." A close reading of both the proposed and final opinions in *Kensington* indicates that there was no evidence or testimony introduced in that case to support the 30% discount rate. *Kensington* involved tax years 1988 through 1995, which were also years involved in *Georgetown*. The property in *Kensington* was a section 236 property. The Tribunal held that "the Kensington Heights project is prohibited from earning a profit. The property cannot be sold, in its entirety, during the 40-year term of the mortgage." The income approach was not merely ruled to be flawed, but the Tribunal held that the hearing officer erred in relying upon it to any extent. This case is also significant for the proposition that the same valuation principles apply to a section 236 property as for a 221(d)(3) property. *Kensington* was not appealed.

In *Knollwood Country Club v Township of West Bloomfield*, MTT Docket Nos. 238636 and 259512 (2002), the Tribunal held the income approach is not applicable to a nonprofit private equity country club, which consisted of a golf course, club house, and other improvements. In *Knollwood*, the Tribunal rejected the sales approach due to lack of sales of nonprofit country clubs. The Tribunal also rejected the income approach based on the following reasoning:

> Petitioner's utilization of the income approach when valuing a non-profit private equity golf and country club where the parties have stipulated that the property's highest and best use as improved is the continued use of its present use as a non-profit private equity golf and country club is flawed where Petitioner assumes that the property and improvements will be sold to a purchaser whose motivation is to make as much profit off of the club as he can until the club sells its memberships out (October 15, 2001 Tr. at pp.144-145) and is rejected by the Tribunal. This Tribunal stated in *Warwick Hills Golf and Country Club v Grand Blanc Township*, MTT Docket No. 225492: 'The Tribunal next turns to the income approach. In that regard, the Tribunal finds the application of this approach to be subjective and speculative given the fact that the property is operated as a non-profit corporation existing for the pleasure of its members. As indicated by Petitioner, it is not the mission of Warwick to make a profit.' Petitioner's general manager testified in this matter in almost identical terms that it was not the mission of Knollwood to make a profit. Having concluded that Petitioner's utilization of the income approach is flawed when attempting to ascertain true cash value of a non-profit private equity golf and country club, the Tribunal next

> turns to and considers Petitioner’s valuation using the cost approach. *Knollwood Country Club, supra.*

The above rationale is relevant to our present case. After rejecting the sales and income approaches in *Knollwood*, the Tribunal determined the TCV by the cost approach. (There was sufficient evidence of vacant land sales that sold for use as golf courses to estimate that land value used in the cost approach.)

Branford Towne Houses Co-Op v City of Taylor, MTT Docket No. 90502 (2005), adopted the approach approved by the Tribunal and the Court of Appeals in *Georgetown.* At issue were tax years 1984 through 2002. *Branford* relied heavily upon *Georgetown*, which involved tax years 1984 to 1994. In *Branford*, there was expert testimony regarding discounting for lack of marketability, although the Tribunal rejected the expert’s specific method and rate of discount, and rather applied the 30% discount approved in *Georgetown*.

Therefore, these cases indicate that in 1995, the Tribunal determined that the sales comparison approach, using sales of subsidized apartments, with a discount for lack of marketability was the appropriate method for valuing a section 221(d)(3) nonprofit cooperative, specifically rejecting the income approach. *Georgetown.*

Although the decisions of the Tribunal and Court of Appeals in *Branford* are not binding, they are persuasive on the main point at issue: Petitioner’s theory under MCL 211.27a(1) and (4) is legally incorrect, which means Petitioner has failed to go forward with competent evidence of TCV.

If there is room for development in the law in this context, the lack of clarity pertains to whether the income approach (using market rents and expenses) is ever appropriate, along with other approaches, to arrive at a supportable opinion of value. Furthermore, the underlying reasoning regarding the need for a discount for lack of marketability[2] is subject to legal debate. As recognized by the Court of Appeals in *Branford*, “Members may sell their share in the cooperative and the right to occupy their unit.” *Id*. The individual units are transferable, but not for consideration determined by a competitive market. Perhaps the better analysis focuses upon the value of the shareholder’s rights to each unit. From this perspective, there is no restriction on marketability or alienability – each member is free to transfer his or her rights to a unit, albeit at a restricted, non-market price. The fact that the rights to the unit cannot be converted to cash at a market price does not detract from the fact that the holder of that right enjoys the use of a residence and may transfer those rights to another. As stated in *Forest Hills*, the occupant/transferee gets more than he or she bargained for in that the “down payment” (transfer value) and the monthly carrying charges are likely below-market as compared to the price to obtain another property of similar utility. The below-market consideration paid to acquire the right of occupancy is irrelevant to the value of the right. Under the principle of substitution, the value of the rights to the unit is not greater than the price that would be paid to acquire a substitute unit of equal utility. Assuming no other coop units were available, if a physically

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[2] As used in the relevant case law, the restrictions upon “marketability” means that the property cannot presently be sold for a price determined in an open, competitive market.

similar condominium unit could be acquired in the market for $40,000, a case can be made that the fair market value of the subject coop unit is not less than $40,000.

Although MCL 221.27(4) has been in effect in its current form since 1984, no case addressed that provision in a nonprofit housing cooperative valuation case until *Branford*. As discussed above, the Court of Appeals upheld the Tribunal's decision in *Branford.* The court fully considered and unequivocally rejected Petitioner's interpretation of MCL 211.27(4). The court provided its own detailed analysis rejecting Petitioner's arguments pertaining to MCL 211.27(1) and (4).

Petitioner's claim rests completely upon its erroneous interpretation of MCL 211.27(1) and (4). Petitioner offers no other evidence to challenge the accuracy of the assessments, which were established by the cost less depreciation approach. Therefore, there can be no evidentiary basis upon which the Tribunal could render an "independent determination of value." The property record cards indicate that the current assessments were established by the cost less depreciation approach as approved by the State Assessor's Manual (MCL 211.10e). The cost approach has been approved under similar circumstances. *Knollwood, supra*. Also, see *Forest Hills, supra*. There is no competent evidence that the assessments exceed 50% of fair market value. *If Petitioner believes that the assessor's cost approach as applied to the subject property is inaccurate, it should have presented a valuation disclosure setting forth its own cost approach.* Petitioner believes that the law does not permit the cost approach, and therefore, has not offered an alternative opinion of value by that approach.

Given that Petitioner's approach has been specifically rejected by the Tribunal, Petitioner cannot meet its burden of going forward with evidence "establishing" the property's TCV, as required by MCL 205.737(3). Petitioner's proofs cannot prove by a preponderance of the evidence that current estimates of TCV are excessive. It can be concluded as a matter of law that Petitioner's approach does not produce a more accurate or credible estimate of TCV than the values on the record cards.

Petitioner's answer to the motion proclaims that, ". . . the Tribunal must pick or invent a methodology and make a determination as to what renders the best approximation of true cash value under MCL 211.27." *Id*, p 7. However, when a petitioner fails in its primary burden of proof, it is not the function of the Michigan Tax Tribunal to perform its own appraisal based on incomplete and piecemeal information offered by the parties. Petitioner erroneously attempts to cast the Tribunal in the role of a super-assessor or appraiser. Petitioner essentially asks the Tribunal to compile the documentary evidence to be submitted in its case in chief, prepare an appraisal, and serve as an expert witness. The Tribunal is a quasi-judicial body that conducts contested case hearings under the Tax Tribunal Act and the Administrative Procedures Act. Petitioner has a statutory burden to introduce evidence and expert testimony as necessary to *establish* the property's true cash value. MCL 205.737(3). The Tribunal's findings of fact are based upon the evidence presented. The determination of value is a conclusion of law that is rendered by application of the law to the proven facts. The Tribunal has a duty to apply its expertise and render an independent determination of value, but this is not possible when the evidence is insufficient to allow such a determination. Merely casting doubt upon the accuracy of

Respondent's assessment methods is not sufficient to meet the burden to go forward with competent evidence of value.

> Plaintiffs cite *Jones & Laughlin Steel Corp v City of Warren,* 193 Mich App 348; 483 NW2d 416 (1992), for the proposition that even when the plaintiff fails to meet his burden of proof, the tribunal must still make an independent determination of the true cash value of the property in question. However, unlike the plaintiff in *Jones & Laughlin,* in the present case plaintiffs did not meet their burden of going forward with evidence. See *id.* at 354-356. Under the circumstances, the tribunal could not make an independent determination of the true cash value of the property because it had no evidence on which to base such a determination except that provided by defendant. A contrary holding would be tantamount to requiring the tribunal to hire its own appraiser. *Country Meadows, GP v Township of Macomb,* unpublished opinion per curiam of the Court of Appeals issued April 1, 1997 (Docket No. 182305).

Petitioner cannot merely allege that the assessment is excessive, and thereby have the right to demonstrate error in the assessment by cross-examination of Petitioner's witnesses, or rebuttal evidence. By requiring prior disclosure of a party's valuation theories, the Tribunal's rules require that a petitioner come forward with evidence, law, and appraisal analysis to support its contentions of value as part of its case in chief. TTR 101(m).

Assuming that Petitioner relies upon the "transfer value approach" set forth in its valuation disclosure, that approach clearly lacks merit and is not an indication of fair market value. *Branford Towne Houses Co-Op v City of Taylor*, MTT Docket No. 90502 (2005).

Upon review of the motions, legal briefs, documentary evidence, and pleadings, and being fully informed of the premises, it is determined that Petitioner has failed to demonstrate the existence of a genuine issue of material fact. MCR 2.116(10). Furthermore, the legal theories upon which Petitioner's case rests fail to state a claim upon which relief may be granted. MCR 2.116(8). Under such circumstances, "the court shall render judgment without delay." MCR 2.116(I)(1).

PROPOSED JUDGMENT

IT IS ORDERED that Respondent's motion for summary disposition is GRANTED and this appeal is DISMISSED.

IT IS FURTHER ORDERED that the parties shall have 20 days from date of entry of this Proposed Order to file exceptions and written arguments with the Tribunal consistent with Section 81 of the Administrative Procedures Act (MCL 24.281). The exceptions and written arguments shall be limited to the matters addressed in the motion. This Proposed Order, together with any exceptions and written arguments, shall be considered by the Tribunal in arriving at a final decision in this matter pursuant to Section 26 of the Tax Tribunal Act (MCL 205.726).

MICHIGAN TAX TRIBUNAL

Entered: July 15, 2011 By: Thomas A. Halick