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

ATC Properties, LLC,
Petitioner,

v

MTT Docket No. 345544

City of Lansing,
Respondent.

Tribunal Judge Presiding
Paul V. McCord

FINAL OPINION AND JUDGMENT

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

1. Administrative Law Judge John S. Gilbreath, Jr. issued a Proposed Opinion and Judgment on September 30, 2011. The Proposed Opinion and Judgment states, in pertinent part, "[t]he parties have 20 days from date of entry of this Proposed Opinion and Judgment to file any written exceptions to the Proposed Opinion and Judgment. The exceptions must be stated and are ***limited*** to the evidence submitted prior to or at the hearing and any matter addressed in the Proposed Opinion and Judgment." (Emphasis added.)

2. On October 20, 2011, both Petitioner and Respondent filed exceptions to the Proposed Opinion and Judgment. In the exceptions, Petitioner states:

    a. That reference to the "discounted cash flow method" on page 2 of the Proposed Opinion and Judgment is a typographical error and should instead make reference to the cost approach.

    b. Petitioner takes further exception stating that the ALJ's reference on page 28 of the Proposed Opinion and Judgment that "[p]etitioner has not met the burden of proof as described above" was erroneous and likely a typographical error.

    c. Respondent argues the Proposed Opinion and Judgment commits several errors of law or adopts a wrong principal including the ALJ's conclusion on page 27 that the existence of asphalt paving covering the majority of the Subject Property and fencing adds no value to the site improvements.

    d. Respondent presses its exception stating that the ALJ's conclusion that the asphalt paving covering the Subject adds no contributory value because it serves as a cap

to existing contamination on the Subject amounts to an adoption of a wrong principal.

e. Finally, Respondent takes exception to the ALJ's conclusion that the stigma of environmental contamination prevents the Subject from being used in a manner similar to non-contaminated property is against the weight of the evidence. Respondent argues that the environmental contamination of the Subject has been effectively remediated and points to the fact that both appraisal experts used uncontaminated comparable properties in both their sales and income approaches.

3. On November 3, 2011, the parties filed corresponding responses to the opposing party's previously filed exceptions. The responses essentially take issue with the opposing party's asserted exceptions.

4. The Administrative Law Judge properly considered the testimony and evidence submitted in the rendering of the Proposed Opinion and Judgment. As a result, Respondent has not demonstrated good cause warranting either a modification of the Proposed Opinion and Judgment or a rehearing in this matter.

5. Petitioner has shown good cause justifying the modification of the Proposed Opinion and Judgment by striking the references on pages 2 and 20 to the "discounted cash flow method" and inserting in its stead "cost approach." Further, referenced on page 28 of the Proposed Opinion and Judgment that "Petitioner has not met the burden of proof . . ." should be modified by striking the word "not."

6. Accordingly, as indicated herein, the Tribunal modifies the Proposed Opinion and Judgment and adopts the modified Proposed Opinion and Judgment as the Tribunal's final decision in this case. See MCL 205.726. The Tribunal also incorporates by reference the Findings of Fact and Conclusions of Law contained in the Proposed Opinion and Judgment, as modified herein, in this Final Opinion and Judgment. Therefore,

a. The property's TCV, SEV and TV as established by the Board of Review for the tax years at issue are as follows:

Parcel Number: 33-01-01-28-151-011

Year	TCV	SEV	TV
2008	$654,000	$327,000	$327,000
2009	$624,400	$312,200	$312,200
2010	$570,600	$285,300	$285,300

b. The property's final TCV, SEV and TV for the tax years at issue are as follows:

Parcel Number: 33-01-01-28-151-011

Year	TCV	SEV	TV
2008	$418,000	$209,000	$209,000
2009	$418,000	$209,000	$209,000
2010	$418,000	$209,000	$208,373

IT IS SO ORDERED.

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 true cash and taxable values as finally provided 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 as required by the 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, 2005, at the rate of 3.66% for calendar year 2006, (ii) after December 31, 2006, at the rate of 5.42% for calendar year 2007, (iii) after December 31, 2007, at the rate of 5.81% for calendar year 2008, (iv) after December 31, 2008, at the rate of 3.31% for calendar year 2009, (v) after December 31, 2009, at the rate of 1.23% for calendar year 2010, (vi) after December 31, 2010, at the rate of 1.12% for calendar year 2011, and (vii) after December 31, 2011, at the rate of 1.09% for calendar year 2012.

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

MICHIGAN TAX TRIBUNAL

Entered: March 13, 2012 By: Paul V. McCord

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

ATC Properties, LLC,

Petitioner,

v

MTT Docket No. 345544

City of Lansing,

Respondent.

Administrative Law Judge
John S. Gilbreath, Jr.

PROPOSED OPINION AND JUDGMENT

INTRODUCTION

This real property tax valuation case came before the Michigan Tax Tribunal for hearing beginning on Tuesday, February 1, 2011, in Lansing, Michigan. Daniel L. Stanley, Attorney at Law, represented Petitioner, ATC Properties, LLC, hereinafter referred to as "ATC." Derk W. Beckerleg, Attorney at Law, represented Respondent, City of Lansing, hereinafter referred to as the "City."

At issue is the true cash value of the subject property. The subject property is located at 2200 Washington Avenue, Lansing, Michigan. The property consists of a trapezoid shaped parcel consisting of 7.5 acres with 337.5 feet of frontage on the west side of Washington Avenue. The property is improved with a 4,000 square foot pole building that, along with the extensive paved surface area, is home to a motorcycle training facility.

The property at one time had been the home of Federal Drop Forge Company from approximately 1920 to 1985 when the facility was closed. Subsequent to the closure, the structures associated with that use have been razed and the site was paved over so that in its present condition 90% of the site is paved.

The tax years at issue are 2008, 2009, and 2010. In this proceeding, AV refers to assessed value, SEV refers to state equalized value, TV refers to taxable value, and TCV refers to

true cash value. The property is classified for taxation purposes as Commercial Real property. The average level of assessment in effect for the subject property's classification for each tax year in question is 50%.

The parties provided a Joint Stipulation of Facts filed on November 16, 2010. Additionally, each party offered testimony and documentary evidence. Petitioner's Exhibits P-1 (Appraisal), P-2 (Baseline Environmental Assessment), and P-4 through P-9 were admitted into evidence.1 Respondent's Exhibits R-1 (Appraisal), R-6 (Listing for Subject Property), and R-8 (Property Depiction) were admitted into evidence. Each party filed post-hearing memorandums of law.

Based on the findings of fact and conclusions of law, the Tribunal relies on the discounted cash flow method. The Tribunal concludes that the true cash value and revised assessments of the subject property are as follows:

2008

ID Number	TCV	SEV	TV
33-01-01-28-151-011	$418,000	$209,000	$209,000

2009

ID Number	TCV	SEV	TV
33-01-01-28-151-011	$418,000	$209,000	$209,000

2010

ID Number	TCV	SEV	TV
33-01-01-28-151-011	$418,000	$209,000	$208,373

1 Petitioner's exhibits consist of the following:

Exhibit 1	Petitioner's Appraisal of the Subject Property
Exhibit 2	Baseline Environmental Assessment
Exhibit 4	Property Record Cards for the Subject Property
Exhibit 5	Pictures of Fence
Exhibit 6	Picture of Pavement
Exhibit 7	Land Comp Sheets
Exhibit 8	Property Record Card for property located on Pennsylvania Ave.
Exhibit 9	Deeds for comparable properties

PROCEDURAL HISTORY

The 2008 property tax assessments were based on Respondent's estimate of the TCV of the subject property as of December 31, 2007. Petitioner appeared before the March 2008 Board of Review for the City of Lansing to protest the TCV, SEV, and TV for the subject property. The Board of Review denied the relief requested and affirmed the tax assessments. On May 7, 2008, Petitioner filed a Petition with the Tribunal alleging that Respondent erred in its assessment of true cash value, state equalized value, and taxable value for the 2008 tax year. Respondent filed a timely answer. The Tribunal granted Petitioner's motions to amend its original Petition to add subsequent tax years 2009 and 2010.

PARTIES' CONTENTIONS OF ASSESSED AND TRUE CASH VALUE

Petitioner contends that the property is assessed in excess of 50% of its true cash value and that the actual state equalized values, assessed values, taxable values and true cash values for the tax years 2008, 2009, and 2010 are as follows:

2008

ID Number	TCV	SEV	TV
33-01-01-28-151-011	$430,000	$215,000	$215,000

2009

ID Number	TCV	SEV	TV
33-01-01-28-151-011	$400,000	$200,000	$200,000

2010

ID Number	TCV	SEV	TV
33-01-01-28-151-011	$375,000	$187,500	$187,500

Respondent contends that the property is assessed at 50% of its true cash value and that the state equalized values, assessed values, taxable values and true cash values for tax years 2008, 2009, and 2010 are as follows:

2008

ID Number	TCV	SEV	TV
33-01-01-28-151-011	$690,000	$345,000	345,000

2009

ID Number	TCV	SEV	TV
33-01-01-28-151-011	$620,000	$310,000	$310,000

2010

ID Number	TCV	SEV	TV
33-01-01-28-151-011	$575,000	$287,500	$287,500

PETITIONER'S EVIDENCE, APPRAISAL AND EXPERT TESTIMONY

APPRAISAL EVIDENCE

Petitioner submitted an appraisal valuing the subject property as of December 31, 2007, December 31, 2008, and December 31, 2009. The appraisal was prepared by **George E. Bratcher, Jr.**, MAI. In the appraisal, the three basic appraisal approaches--the cost approach, the sales comparison approach and the income approach--were accounted for. Petitioner claims that the true cash value should be based on the sales comparison method described in the appraisal report.

TRIAL TESTIMONY

Five witnesses were sworn and testified for Petitioner: **James Kraus**, Co-Owner of Petitioner; **Antonia Kraus**, Co-Owner of Petitioner; and **George E. Bratcher, Jr.**, MAI.

A history of the subject property was provided by **James Kraus.** Mr. Kraus testified that he is employed by the Lansing Police Department as a lieutenant in command of the detective division. He has been with the Department for twenty years. He and his wife, Antonia Kraus, are the co-owners of Alpha Training Center. Alpha Training Center is located at the subject property and is a limited liability corporation formed to conduct motorcycle safety training. Petitioner, ATC Properties, LLC, was set up as the vehicle used to purchase the land for the business.

Mr. Kraus testified that he first became aware of the property in 2002 when he was researching locations with sufficient space to conduct motorcycle riding classes. Given his

police officer status, he spends time driving around the Lansing area. It was while he was working that he became aware of the subject property. It was a good location because it was vacant and paved with no light posts and other impediments that cause new motorcyclists problems. He knew that the property was owned by Ingham County. Prior to actually closing on the purchase of the property, he knew of the existence of a Baseline Environmental Assessment or BEA because his realtor gave it to him as part of the disclosures coming from Ingham County.

Mr. Kraus testified that in 2002, he initially approached the County about leasing the property. They never reached agreement. In 2006 the Training Center was required to move from its location and he approached the realtor, CBRE, who was listing the subject property. Negotiations took place and Petitioner eventually bought the property in January of 2007 for $202,500. As to the marketing of the property, he recalled seeing a large "for sale" sign for at least two years before contact was made with the realtor. It was also listed on the internet.

At the time of the purchase Petitioner had an environmental study performed on the property that was ultimately filed with the DEQ (State of Michigan Department of Environmental Quality). The study was an update of an environmental study that was done by Ingham County in 1985. (This baseline environment assessment, hereinafter referred to as BEA, was identified and admitted as Petitioner's exhibit P-2.)

Mr. Kraus stated that, at the time, the property consisted of 7.5 acres of vacant black-topped land. A majority of it was and is paved. There was a mound for a sound buffer along Washington Avenue. There were no buildings or any other improvements on the property. There was a perimeter fence along the south, west and north sides of the property. The asphalt was not in good condition when purchased. There were a number of cracks and some of the seams in the pavement were several hundred feet long. There was a substantial area of pavement that actually had small shrubs growing up through the surface of the pavement along with two sinkholes at the southwest corner of the pavement. He believed that the property was originally paved in 1999.

Mr. Kraus testified that the subject property is bordered to the north by an old industrial complex, warehouse facility. To the south is the Ingham Medical employee parking lot. To the

west is some vacant land that abuts a neighborhood. To the east, directly across from the subject property, is a residential area. The property fronts Washington Avenue, a major thoroughfare.

Mr. Kraus testified that in 2007 a 40' x 100' pole building was constructed. There is no basement to the structure. It has metal siding. The building has two finished rooms in addition to a common entry area. One end of the building is a classroom that is 40' x 40'. The classroom is air conditioned and carpeted. The rest of the building is storage for the motorcycles owned by the company and this area is less finished area than the classroom. A significant portion of that building is finished with air conditioning and lighting and carpeting. At the same time repairs to the asphalt in front of the building were made because of the utility cuts coming to the building. A four-foot chain link fence from the corner of the building to the property lines was erected for security purposes and to prevent people from driving onto the back lot during training sessions. The total cost for all these improvements was $203,315. Included in this figure was a cost overrun associated with re-engineering of the pilings because of debris encountered when digging below the surface.

Mr. Kraus testified that there is a fence on both the north and south lot lines that runs the length of the property, and there is a fence along the west edge that bisects the property. He is unclear as to who owns the fencing. In his estimate, the fencing is "very old" because it is rusted and collapsing on itself. There are a few areas where there are full-grown trees that have grown up through the chain.

With respect to the asphalt in front of the building, a rectangular cut was made in the asphalt by Consumers Power from the building to Washington Avenue for gas lines. These areas were repaired when the building was completed. Seal coating was put down in this area. Nothing was done to the asphalt behind the building because it would be cost prohibitive given the amount of pavement involved. Also, it is bad for the purpose of motorcycle training because the surface becomes very slippery when wet.

Mr. Kraus testified that when they were in the process of looking to purchase the property, Ingham County had provided them with a copy of the original 1985 BEA. They had conversation with the Lansing Economic Development Corporation, Lansing EDC, over whether

they should pursue a brownfield permit for a future use. As part of that investigation they had the environmental assessment updated and then made a determination that there was really minimal advantage to pursue a brownfield. Through his exposure to BEA Mr. Kraus understood that the property was contaminated and he was told that the existing pavement serves as a cap for environmental contamination and would have to remain intact, but it did not prevent the construction of the building, which itself would then become a cap.

Mr. Kraus testified that after he purchased the property, it was listed in the summer of 2010 with a company known as CBRE. It was originally listed at $525,000. It is currently listed for $425,000. The listing price was based upon the amount of money that is owed as well as the lost future revenue from the potential closure of the business. The mortgage on the subject property is approximately $303,300.

Petitioner then called **George E. Bratcher, Jr**., appraiser. Mr. Bratcher testified that he has Bachelor and Master Degrees in public administration from Western Michigan University. He has taken course work through the Appraisal Institute and he has the MAI (Member of the Appraisal Institute) designation through the Institute. In addition, he has taken course work through the International Association of Assessing Officers **(**IAAO**)** and American Industrial Real Estate Association. He has taken environmental courses though National Association of Real Estate Appraisers or NAREA. He is a Michigan State Certified Real Estate Appraiser. He has appeared in cases before the Michigan Tax Tribunal and been certified as a valuation expert. He has prepared appraisals involving industrial properties and environmentally contaminated properties. He has prepared appraisals for both private and public clients. In total he has prepared about 10,000 appraisals. Currently he owns his own appraisal business, Bratcher & Associates. An employee of that business, Brian Brohl, had previously appraised the subject property in 2007. Some of the work associated with that appraisal was part of a template used in P-3 but Mr. Bratcher is exclusively responsible for the final conclusions and analysis found in P-1.

Mr. Bratcher was offered and certified as an expert in the valuation of real property. Mr. Bratcher testified that he appraised the subject property and he prepared an appraisal

identified as Petitioner's exhibit P-1. He determined the market value of the fee simple interest of the subject property for all the relevant tax days, December 31, 2007, December 31, 2008 and December 31, 2009, using the three basic approaches: the cost less depreciation approach, the sales comparison approach and the income capitalization approach. His estimate for December 31, 2007 was $430,000, for December 31, 2008 was $400,000, and for December 31, 2009 it was $375,000.

He determined that the subject property consisted of one parcel of property, parcel number 33-01-01-28-151-011. From assessing records he learned that the site constituted 7.5 acres. From zoning records he learned that the property is located in an industrial zoning district.

At the outset, he received from Ms. Kraus and reviewed the 2007 Baseline Environmental Assessment (P-2). He learned that the subject property had been the site of an industrial forging operation from 1920 to 1985 at which time the operation closed. Subsequent to the closure, the buildings on the site had been razed and paving was placed over virtually the entire property. He believed that this was done to enable the site to be used as a parking lot for a local hospital and to cap the environmental contamination associated with the forging operation. He had limited familiarity with the exact type (chemical composition) and extent of the contamination. From his own observation no obvious contamination was present. He offered no opinion as to the cost of further clean-up of the site except to say that it would be very expensive. He noted that without the asphalt cap the uses of the property would be very limited because any use of the property, save total remediation, would require that the cap stay in place to limit contact with the contaminants. This would preclude activity such as digging a basement that would disturb the contaminated subsoil.

He also testified that from his review of the pertinent zoning ordinance land not associated with the building is "surplus" as opposed to "excess." Excess land is land which can be split off from a larger parcel and developed. With surplus land this cannot be done. Because of set-back requirements, the bulk of the subject parcel cannot be split from the building section and therefore it cannot be sold and developed separately. This makes this land "surplus" and less valuable. He noted that this was explained in page 31 of the appraisal.

Mr. Bratcher testified that he inspected the property in May of 2010. He identified site improvements (asphalt and perimeter fencing) and the land improvements (the building, security fencing and the berm). He learned from the owners that the property had been purchased in 2007 as vacant and the land improvements had been made in that same year. He noted from the location of the property that it is not a prime industrial site because the distance and methods of access from major transportation linkages is not suited for truck traffic used in industrial activities. He concluded that the subject property location is below average for industrial property because the subject property is in an urban area that would not compete well with some of the outlying industrial parks that have infrastructure, good access, and good linkages. In his opinion the site is a secondary industrial site. He noted that there are many uses for secondary sites, i.e., motorcycle training facilities and contractor shops.

Additionally, when Mr. Bratcher talked to the city zoning department he found that the zoning ordinance required a minimum lot width of 100 feet. He was advised that a building requires a 25-foot side yard. With the subject property a developer would not have a hundred feet left to have a separate parcel that could be developed. This is what he called extra or surplus

land as opposed to excess land2. The significance of this factor is that excess land can be divided, sold and developed separately or separated and developed separately while surplus land cannot. He used the same value on the whole rather than discount it, because there were insufficient industrial sales and market information to discount for excess to surplus.

Mr. Bratcher concluded to a highest and best use of the property as improved as the property's existing commercial use.

In valuing the property, Mr. Bratcher considered all three approaches. He concluded that the cost approach had no validity and market participants would not utilize the cost approach to value this property, but he decided to include this approach as a means of testing the other values derived through the other methods.

As part of this approach Mr. Bratcher determined the replacement cost new, less all forms of depreciation and the land value. To determine the value of the land he used vacant land comparables that were located in secondary industrial areas. He also considered the sale of the subject property. In this regard he talked to Robert Callum, a real estate agent who handled the sale of the subject property. He asked Mr. Callum how the deal came together. Mr. Callum said they had listed the subject property for a period of time for $300,000. Petitioner made an offer, there was some due diligence on the part of the seller, and the transaction was concluded. In Mr. Callum's mind the sales was an arm's-length transaction.

Mr. Bratcher then spoke to Jim Hudgins from the purchasing department at Ingham County to investigate the process regarding the transfer. He told Mr. Bratcher that at the time

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2 From the *The Dictionary of Real Estate*, 4th Ed., **Excess land**, with regard to an improved site, is defined as:

> The land not needed to serve or support the existing improvement. In regard to a vacant site or a site considered as though vacant, the land not needed to accommodate the site's primary highest and best use. Such land may be separated from the larger site and have its own highest and best use, or it may allow for future expansion of the existing or anticipated improvement.

Surplus land is defined as:

> Land not necessary to support the highest and best use of the existing improvement but, because of physical limitations, building placement, or neighborhood norms, **cannot be sold off separatel**y. Such land may or may not contribute positively to value and may or may not accommodate future expansion of an existing or anticipated improvement. See also excess land. (Emphasis added.)

Petitioner made its offer in 2007, he asked the county equalization director to give them some idea of what they thought the property was worth. They also had a BPO (broker price opinion) from Certified Broker Richard Ellis. From these sources he felt that the property would be sold for the offer price. Mr. Hudgins thought that the transaction was an arm's-length transaction. He had no knowledge of the environmental issues.

To better understand environmental issues associated with the property and the effect these had on the 2007 transaction, Mr. Bratcher contacted Ben Hall, the district representative of the State of Michigan Department of Environmental Quality. Mr. Bratcher was concerned from reading the Baseline Environmental Assessment that there was an environmental contamination problem and that he had been told the asphalt was a cap for that. He asked Mr. Hall how long blacktop had to be maintained and Mr. Hall stated that "due care" had to be used to keep that cap in place forever.

Mr. Bratcher testified that the Uniform Standards of Professional Appraisal Practice (USPAP) requires that consideration be given to the sale of a subject property if that sale occurred within the last three years of the date of valuation. In this regard his appraisal states that it does not appear that the asphalt paving contributes value to the subject property. This is because the blacktop cap gives the land a high value. Mr. Hall said that this site was closed based on a matrix based closure, where the contamination is capped. The result according to Mr. Hall is that it will never be used as a residential subdivision or a day care center. The capping means any deed associated with the transfer of this property needs to reflect that the asphalt cannot be disturbed and that a subsequent BEA will set the limit of liability.

Mr. Bratcher testified that if the cap was removed there are no comparables sales of contaminated property to be used to establish the property values as borne out by the two appraisals provided.

As for the cost of improvements in the cost approach, Mr. Bratcher testified that he was provided with some of the same costs that were originally budgeted and some final costs. He did not use these costs. He estimated a replacement cost out of the Marshall Valuation Service to be $176;400 for December 31, 2007; $190,920 for December 31, 2008; and $176,440 for December

31, 2009. These costs were depreciated. External or economic obsolescence was applied to the years after the 2008 tax year based on the current soft real estate market. Next he calculated the depreciated costs of the site improvements from the fence towards the front and the sealed blacktop pertaining to the building area. These were added to the land value which had been calculated to be $202,500 for December 31, 2007; $192,375 for December 31, 2008 and $182,700 for December 31, 2009. The final values using the cost approach were $420,000 for December 31, 2007; $400,000 for December 31, 2008 and $370,000 for December 31, 2009.

Mr. Bratcher next prepared a sales comparison approach. In this approach he identified sales comparables of properties that in his opinion were of similar function to the subject and he then applied adjustments for things that he thought were dissimilar to the subject property. He viewed each comparable property. He prepared a sales grid showing the adjustments made for time, location, quality, age, condition adjustments, and for one land-to-building ratio. The concluded true cash values based on the sales comparison approach were $442,500 for December 31, 2007; $386,725 for December 31, 2008; and $375,500 for December 31, 2009.

He testified that, with respect to the surplus land, he arrived at a value of $27,000 an acre and applied it to what he called surplus land of six and a half acres. He did not add any additional value for the asphalt.

He testified that he prepared an income approach. In so doing he searched for comparable rentals or rentals of what he considered to be the most comparable rents from properties in the Lansing area. He then adjusted these for dissimilarities and what he thought the subject would rent for. He then estimated vacancy and operating expenses, found some industrial cap rates that he thought were applicable and capitalized his projected income or his projected NOI into value. This analysis was displayed in a grid and includes his three rent comparables. To these he made certain adjustments for location. In one comparable he made an adjustment for size, and in another he made an upward adjustment for what he considered inferior condition.

Mr. Bratcher stated that he inspected each of the income comparables. He used a vacancy rate of ten percent. He assumed that the subject would rent on triple net terms. He assumed that

the property owner would have no expenses except a small management fee of two percent. He had two cap rates from the industrial sales and concluded to an average cap rate of 9.3. Using the band of investment he concluded to a ten percent cap rate. Once the net income was capitalized he added the value of the surplus land of $27,000 per acre as he had done in the sales comparison approach. He concluded true cash values based on the sales comparison approach were $415,000 for December 31, 2007; $410,000 for December 31, 2008: and $395,000 for December 31, 2009.

Mr. Bratcher testified that he reconciled the three approaches. He found that the cost approach had basically no value. This was done as a test against the other two approaches. In his opinion his comparables in the sales comparison approach were stronger than the overall data in the income approach; as such, he gave the sales comparison approach most weight. His concluded true cash values based on the sales comparison approach were $430,000 for December 31, 2007; $400,000 for December 31, 2008; and $375,000 for December 31, 2009.

On cross-examination, Mr. Bratcher testified that he concluded that, with the cap in place, he could call the site remediated. This allowed him to use comparables that were not environmentally impacted because he no longer considered the site to be contaminated and he could use sales of uncontaminated properties. Furthermore, he testified that there is a certain amount of parking that is required for that building and that he put value on that blacktop, but for the remainder he did not. The asphalt in the back does not add any value for two reasons: it is an over improvement and it serves to cap the contamination of the property. It also has to be maintained. In his opinion, in the general market, an investor looking for a piece of property is not going to pay hundreds of thousands of dollars for asphalt that caps the property's environmental problems while taking on that risk and that responsibility into the future.

Antonia Kraus was called as a rebuttal witness. She stated that she was on site when Mr. Heinowski inspected the property. Although it was raining that day, he had unlimited access to the site, meaning that observations could be made as to the condition of the perimeter fencing and the state of the un-sealed coated asphalt.

RESPONDENT'S EVIDENCE, APPRAISAL AND EXPERT TESTIMONY

APPRAISAL EVIDENCE

Respondent submitted an appraisal valuing the subject property as of December 31, 2007, December 31, 2008, and December 31, 2009. The appraisal (R-1) was prepared by **David M. Heinowski, MAI**.

TRIAL TESTIMONY

One witness was sworn and testified for Respondent: **David M. Heinowski, MAI**. Mr. Heinowski testified that he has a Bachelor of Arts degree from Michigan State University. He has taken course work through the Appraisal Institute and he has the MAI (Member of the Appraisal Institute) designation through the Institute. He is an Associate Member of the International Association of Assessing Officers **(**IAAO**)** and American Industrial Real Estate Association. He has taken environmental courses through the National Association of Real Estate Appraisers. He is a Michigan State Certified Real Estate Appraiser and Michigan State Licensed Real Estate Broker. He has prepared appraisals involving industrial properties and environmentally contaminated properties. He has prepared appraisals for both private and public clients. He has appeared in cases before the Michigan Tax Tribunal and been certified as a valuation expert. Currently he owns his own appraisal business, Heinowski Appraisal and Consulting, LLC. An employee of that business, Robert W. Scherer, provided some of the work associated with that appraisal, which was part of a template used in R-1, but Mr. Heinowski is exclusively responsible for the final conclusions and analysis found in R-1.

Mr. Heinowski was offered and certified as an expert in the valuation of real property.

Mr. Heinowski testified that he inspected the property on May 7, 2010. He looked at the structure of the building and at the fit and finish found within the building. He found the structure was primarily made up of a large classroom or meeting hall type area, a central hallway with rest rooms, and a utility room and a storage area. He did not walk the whole site because it was raining but did walk the improved portion of the site.

He did participate in the preparation of an appraisal marked as Respondent's Exhibit R-1. R-1 is a summary appraisal with the charge of coming up with an estimate of true cash value or market value as of three separate dates of valuation: December 31, 2007, December 31, 2008, and December 31, 2009.

Mr. Heinowski testified to the scope of participation of the appraisal. The market data was researched by an independent contractor, Robert Scherer, who works with him. Mr. Scherer verified the sales and the two of them analyzed the data to reach final valuation conclusions. Mr. Heinowski was responsible for the conclusions contained in the appraisal and he adopts that work as his own. He was responsible for the processes and procedures that were contained in the appraisal as well as the valuation conclusions. He signed the appraisal.

Mr. Heinowski testified that he valued the fee simple property rights of the subject property owned by ATC Properties, LLC. The property was purchased by Petitioner in 2007 from Ingham County for $202,500. The property is in an older industrial area that is now a mixed use area on the west side of Washington Avenue and south of Mt. Hope Road. The property has another old industrial complex to the north and residential neighborhoods to the east and the south.

The land consists of 7.5 acres. At the time there was asphalt capping of the majority of the lot and fencing around the perimeter. The subject was located in zone I, heavy industrial. It is permitted to have structures that are used in metal fabrication and finishing. Permitted uses include power plants, stamping, automotive parts and assembly, industrial scrap metal processing, cleaning, processing, servicing, and repair of any product. The zoning allows uses that pyramid down to other uses for lower zoning classifications. It could allow office/warehouse uses and commercial uses. The subject property is used as a legally nonconforming use under the zoning ordinance.

The buildings and improvements located on the subject as of the pertinent tax dates consisted of a 3,811 square foot office/warehouse. The structure was a pole building, which means it was wood frame, generally with pole construction, which uses the pole for foundation. It was in average condition; about 62% of the building was finished. The building had both forced

air heating and air conditioning. There was a central hallway with the restrooms and a service closet and then a large area that could be used as a meeting hall or classroom, and with the remainder of the building being a warehouse area where, at the time, motorcycles were being stored. The finished or classroom area was finished like an office with carpeting, painted drywall, dropped ceilings, et cetera.

The site improvements included parking in front of and on the sides of the building on an asphalt prepared surface. The area behind the building was surrounded by fence. For its age the fence was in average to poor condition.

Mr. Heinowski did a market analysis on a regional analysis, community analysis, and neighborhood analysis of the area within which the subject property lies, and found that for all days in question it was in a falling market or a depreciating market. He concluded that this had an impact on the subject property because values decreased. There is more supply in the real estate market than there is demand right now.

In terms of environmental issues, Mr. Heinowski was aware that there had been an old foundry at the site. As a result, the property "has a stigma of being environmentally impaired." The result was a BEA to determine any environmental impairment. It was Mr. Heinowski's opinion that the asphalt cap on the property served to negate the contamination so the property could be used for the uses as indicated by zoning. (Trial Transcript, MTT Docket No. 345544, *ATC Properties v City of Lansing*, Volume 2, Page 26). He felt that a larger structure could be built on the site as long as the structure still acted as a cap.

In terms of highest and best use, he did such an analysis by looking at the four-pronged criteria of physically probable, legally permissible, financially feasible and maximally productive. He found that the subject use is legally permissible and physically possible. It is feasible, but the question is the maximal productivity at this time, given economic constraints. He concluded with respect to the highest and best use as vacant and as improved is as an improved industrial property.

Regarding the valuation of the property, Mr. Heinowski used the three approaches to value: the cost approach, the sales comparison approach and the income capitalization approach.

They were all relevant but were given different weight. The cost approach was relevant because of the age of the structure and because it reflects the use of the property before the valuation dates. He concluded that this approach should be given the least weight of the three approaches.

With regard to the cost approach Mr. Heinowski testified that he first developed a land value by using six listings and four sales. He included the sale of the subject as the fifth sale. Once he determined the land value, he determined the replacement costs new. He depreciated the property and any improvements. He then added the two together to reach an indication of value via the cost approach.

With respect to the land sales utilized, all were relatively close to the subject property. Adjustments were made for conditions of sale as well as location adjustments, adjustments for size, shape, topography, whether or not there was an old structure on the property that had to be demolished and any changes or difference in zoning. The result was a value conclusion of $195,000 for the 7.5 acres.

With respect to the building improvements, Mr. Heinowski utilized the Marshall Valuation Service. Cost interior finish for the areas for the classroom and central hall as of December 31, 2007 came to $216,735.

He then valued the site improvements, which included the fencing and paving on the property. He determined the area for the paving, checking it against that on the assessment record card, and assigned a value per square foot based upon costs in Marshall Valuation Service. He did the same for the lineal feet of fencing. He concluded that the site improvements as of December 31, 2007 were $436,372 on replacement cost new. As of December 31, 2008, these costs were calculated to be $412,618. As of December 31, 2009, these costs were calculated to be $429,811.

With respect to the site improvements, Mr. Heinowski disagreed with Mr. Bratcher, who attributed no value for the paving. Mr. Heinowski believes that the paving and fencing and building improvements were all man-made improvements placed upon the land, and these improvements added value to the subject property as of the relevant tax dates.

Mr. Heinowski also disagreed with Mr. Bratcher's argument that the improvements did

not provide value because they acted as a cap, are over improvements and are in poor condition. In contrast, he believes that the land was valued at sixty cents a square foot and this recognizes "the stigma of potential impairment. With the addition of the man-made improvements, the paving, especially, it brought it up to the point that it was usable as it compared to other properties." To add the depreciated value of the "paving to our conclusion of the value of the underlying land, you then come up more within the midpoint of the array of land sales" identified. (Trial Transcript, MTT Docket No. 345544, *ATC Properties v City of Lansing*, Volume 2, Pages 34-36). Mr. Heinowski stated that the paving did add utility to the site because it could now be used similarly to other industrial sites and it allows the site to be used for other possible uses as long as those improvements associated with the use act as a cap to any underlying contamination.

Mr. Heinowski's ultimate true cash value conclusions utilizing the cost approach were: for December 31, 2007, $710,000; as of December 31, 2008, $630,000; and as of December 31, 2009, $600,000.

Relative to the sales approach and the income capitalization approach Mr. Heinowski used a value for the excess land, the 6.5 acres, and improvements as determined in the cost approach. These values were added to the values derived through the sales approach and income approaches because he felt he was limited to comparable property used in those approaches to a half an acre and the size of the existing structure. Once he came up with a conclusion for the primary site he then added the excess land and depreciated land improvements to the findings from the two approaches to come up with a final indication of value.

Mr. Heinowski stated that he prepared an income approach. It was a direct capitalization rate. He did not find any direct leases that he felt were similar to that of the subject, but did find a series of eight listings in the greater Lansing area and made adjustments to the asking rent. Considerations were made for the property rights, the financing, condition of sales, and market conditions. Once he determined the dollar amount he made sure that the rent was all in the same terms, be it triple net, modified gross or gross. In this case he adjusted everything to a triple net basis. He then made adjustments for location and then physical traits, such as size, office

percentage, land-to-building ratio and age and condition of the properties. Once done with the adjustments, he concluded that as of December 31, 2008, the property had an estimated market income of $7.50 per square foot. He made an allowance for vacancy and bad debt to arrive at the effective gross income of the property.

Mr. Heinowski next calculated the expenses. He concluded that expenses borne by the owner of the property on a triple net basis would be five percent of the effective gross income. This results in a net operating income for the three years in question. To this he applied a capitalization rate through a market derived methodology known as a band of investment. He calculated the cap rate for each year using the band of investment. For December 31, 2007 he came up with an overall rate of 10.7 percent, as of December 31, 2008 he came up with an overall rate of 10.5 percent, and then for December 31, 2009 he came up with an overall rate of 10.7 percent. He took the net operating income divided by the overall rate to determine an indication of the primary site to which he added the excess land and depreciated the land improvements. The true cash values of the subject property pursuant to the income approach were, as of December 31, 2007, $665,000, as of December 31, 2008, $615,000 and as of December 31, 2009, $575,000.

For the sales comparison approach, Mr. Heinowski identified sales that he felt were similar to the subject and sales that provided similar utility as the subject. He found nine sales within Lansing. He used nine sales because multiple sales provided a better indication of market. He made adjustments to them for property rights, financing, conditions of sales and market conditions. He reconciled a unit rate and came up with a value of $250,000 for the primary site or the typical site. Then he added the value of the excess land and the land improvements on the excess land of $450,000, to reach a total value conclusion as of December 31, 2007 of $700,000. As of December 31, 2008, the value indication was $625,000. And as of December 31, 2009, the valuation was $570,000.

Mr. Heinowski next reconciled the approaches to determine final opinions of value. The sales approach is the approach he most relied upon.

On cross-examination Mr. Heinowski stated that he read Petitioner's appraisal. He

testified that "[t]he crux of the case really comes down to how we treated land improvements on the excess land, the fencing and the paving." (Trial Transcript, MTT Docket No. 345544, *ATC Properties v City of Lansing*, Volume 2, Page 63). It was his belief that how Mr. Bratcher treated the land improvements was in error because he incorporated these values within the value of the land, and given the sales that he found for land values he did not find that to be indicated by the market. *Id*. at p 63.

Mr. Heinowski testified that the January 2007 sale of the subject property resulted in a land rate of sixty-two cents per square foot including the existing paving and fencing and was, in fact, the most telling transaction to determine land value.

FINDINGS OF FACT[3]

The subject property consists of the real property consisting of approximately 7.5 acres and a 3,811 square foot building. The property at one time had been the home of Federal Drop Forge Company. This Company operated at this location from approximately 1920 to 1985 when the facility was closed. Subsequent to the closure, the structures associated with the forge were razed. Later the site was paved over and used as a parking lot for a local county-owned medical facility. Once the paving occurred the site remained vacant of any structures until the existing building was added in 2007.

Petitioner purchased the property as vacant in January of 2007 for $202,500 from Ingham County. This was an arm's-length transaction. Petitioner was aware of the site's previous industrial use and contemporaneous with the purchase of the subject property, a baseline environmental assessment ("BEA") was performed pursuant to Section 20126(1)(c) [MCL 234.20126(1)(c)] of part 201, Environmental Remediation. This is part of the Natural Resources and Environmental Protection Act [MCL 324.101 et seq].

From this report it was determined that previous environmental assessments had been done in late 1984, early 1985 and in September 1993. Pursuant to this most recent 2007 assessment the subject property is deemed to be a "[f]acility" or "any area, place, or property where a hazardous substance in excess of the concentrations that satisfy the cleanup criteria for unrestricted residential use has been released, deposited, disposed of, or otherwise comes to be located." MCL 324.20101(1)(r)

The property is located in a Heavy Industrial Zoning District, and is currently used by Alpha Training Center for motorcycle training purposes. In its vacant state, the site had perimeter fencing that at the time of purchase was overgrown with various forms of vegetation.

The building consists of two areas, one larger section used for classroom purposes and a second smaller section used for motorcycle storage.

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3 This section is a "concise, separate, statement of facts" within the meaning of MCL 205.751; and, unless stated otherwise, the matters stated or summarized are "findings of fact" within the meaning of 1969 PA 306, MCL 24.285.

Both parties provided appraisals. Each appraisal provided a highest and best use analysis and value conclusions utilizing the three traditional methods of valuation: the comparative sales, the cost less depreciation and the income capitalization approaches. Each party provided expert appraisal testimony to elucidate upon the appraisals each expert produced. Both appraisers used comparative sales of uncontaminated properties as documentary support for both the income and sales comparison approaches. Both appraisers used uncontaminated vacant land sales in their cost approaches. Both appraisers agreed that, with the addition of the paving, the land was improved to the point that it could be compared to other uncontaminated properties.

Each expert agreed that the January 2007 sale was an arm's-length transaction and was an important transaction in determining the land value of the subject property and was corroborated by other market evidence.

The property was listed in the summer of 2010 at $525,000. As of February 11, 2011 it was listed for $425,000. The listing price was based upon the amount of money that was owed, as well as the lost future revenue from the potential closure of the business. The mortgage on the subject property is approximately $303,300.

The Tribunal finds the valuation methodology that is the most reliable indicator of the property's true cash value for the tax years at issue is Petitioner's discounted cash flow with adjustments made to the discount rate to reflect the existence of fixed long term revenue generation.

CONCLUSIONS OF LAW

The assessment of real and personal property in Michigan is governed by the constitutional standard that property shall not be assessed in excess of 50% of its true cash value, as equalized, and that increases in the taxable value are limited by statutorily determined general price increases, adjusted for additions and losses. Michigan Constitution of 1963, Article IX, Sec. 3.

As used in the General Property Tax Act, "true cash value" means the usual selling price at the place where the property to which the term is applied is at the time of assessment, being

the price that could be obtained for the property at private sale. MCL 211.27(1).

A proceeding before the Tax Tribunal is original, independent, and de novo. MCL 205.735(1). "The petitioner has the burden of establishing the true cash value of the property." MCL 205.737(3); MCL 211.27(1); *Meadowlanes Limited Dividend Housing Ass'n v City of Holland*, 437 Mich 473, 483-484; 473 NW2d 363 (1991). "This burden encompasses two separate concepts: (1) the burden of persuasion, which does not shift during the course of the hearing; and (2) the burden of going forward with the evidence, which may shift to the opposing party." *Jones and Laughlin Steel Corp v City of Warren*, 193 Mich App 348; 483 NW2d 416 (1992), citing: *Kar v Hogan*, 399 Mich 529, 539-540; 251 NW2d 77 (1976); *Holy Spirit Ass'n for the Unification of World Christianity v Dept of Treasury*, 131 Mich App 743, 752; 347 NW2d 707 (1984).

"True cash value" is synonymous with "fair market value." *CAF Investment Co v State Tax Comm*, 392 Mich 442, 450; 221 NW2d 588 (1974). The Michigan Supreme Court, in *Meadowlanes, supra*, held that the goal of the assessment process is to determine "the usual selling price for a given piece of property." In determining a property's true cash value or fair market value, Michigan courts and the Tribunal recognize the three traditional valuation approaches as reliable evidence of value. See *Antisdale v Galesburg*, 420 Mich 265; 362 NW2d 632 (1984). These three approaches are the capitalization of income approach, the sales comparison or market approach, and the cost-less-depreciation approach. *Meadowlanes*, at 484-485; *Pantlind Hotel Co v State Tax Comm*, 3 Mich App 170; 141 NW2d 699 (1966), aff'd 380 Mich 390 (1968); *Antisdale*, at 276. The Tribunal is under a duty to apply its own expertise to the facts of the case to determine the appropriate method of arriving at the true cash value of the property, utilizing an approach that provides the most accurate valuation under the circumstances. *Antisdale*, at 277.

Pursuant to MCL 205.737(1), the Tribunal must find a property's true cash value in determining a lawful property assessment. *Alhi Development Co v Orion Twp*, 110 Mich App 764, 767; 314 NW2d 479 (1981). The Tribunal may not automatically accept a respondent's assessment but must make its own finding of fact and arrive at a legally supportable true cash

value. *Pinelake Housing Cooperative v Ann Arbor*, 159 Mich App 208, 220; 406 NW2d 832 (1987); *Consolidated Aluminum Corp v Richmond Twp*, 88 Mich App 229, 232-233; 276 NW2d 566 (1979). The Tribunal is not bound to accept either of the parties' theories of valuation. *Teledyne Continental Motors v Muskegon Twp*, 145 Mich App 749, 754; 377 NW2d 908 (1985). The Tribunal may accept one theory and reject the other, it may reject both theories, or it may utilize a combination of both in arriving at its determination. *Meadowlanes*, at 485-486; *Wolverine Tower Associates v City of Ann Arbor*, 96 Mich App 780; 293 NW2d 669 (1980); *Tatham* v *City of Birmingham*, 119 Mich App 583, 597; 326 NW2d 568 (1982).

As to the conduct of a hearing, when determining whether to admit testimony, the fundamental inquiry of the Tribunal is whether the information will "assist the trier of fact to understand the evidence or to determine a fact at issue." *Bass Pro Outdoor World v Auburn Hills*, MTT Docket No. 275731 (2003).

Relative to valuation of real property it is widely recognized that there are three methods typically used to accomplish this task. In *The Appraisal of Real Estate,* Appraisal Institute (Chicago, 12th ed, 2001, pp 49-50), the following is written:

> In assignments to develop an opinion of market value, the ultimate goal of the valuation process is a well-supported value conclusion that reflects all of the pertinent factors that influence the market value of the property being appraised. To achieve this goal, an appraiser studies a property from three different viewpoints, which are referred to as the *approaches to value*. The three approaches are described below.
>
> 1. 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 or site value.
> 2. In the sales comparison approach, value is indicated by recent sales of comparable properties in the market.
> 3. In the income capitalization approach, value is indicated by a property's earning power, based on the capitalization of income.

With respect to this appraisal theory, the Michigan Supreme Court has stated that "[a]ll three approaches should be used whenever possible, and an appraisal which disregards an approach by mere statements and without research justifying its nonuse is considered

incomplete." *Meadowlanes Limited Dividend Housing Association v City of Holland*, 437 Mich 473, 485; 473 NW2d 636 (1991)(citing American Institute of Real Estate Appraisers, *The Appraisal of Real Estate* (Chicago: 9th ed, 1987).

As for the sales comparison approach, its utility is more for properties "that are bought and sold regularly" and "[w]hen the data is available, this is the most straightforward and simple way to explain and support a value opinion." *The Appraisal of Real Estate*, p 419.

The income capitalization approach is a "systematic valuation process" used to analyze a "property's capacity to generate future benefits and capitalizes the income into an indication of present value." *The Appraisal of Real Estate*, p 417. The analysis is dependent upon the development of a capitalization rate which is defined as "[a]ny rate used to convert income into value." See Appraisal Institute, *The Dictionary of Real Estate Appraisal*, (4th ed, 2002). These rates may be "derived from comparable sales" Appraisal Institute, *The Appraisal of Real Estate*, p 531 (12th ed, 2001).

As to the cost approach it is "particularly important when a lack of market activity limits the usefulness of the sales comparison approach and when the properties to be appraised—e.g., single family residences—are not amenable to valuation by the income capitalization approach." *Supra* at 353-354.

Finally, as stated in Appraisal Institute, *The Appraisal of Real Estate*, p 277, (13th ed, 2008):

> The analysis of relevant data to develop a market value opinion requires two important steps in the valuation process before the applicable approaches to value are applied. Market/marketability analysis begins the process of narrowing the focus from a broader macro view to data that is especially pertinent to the appraised property. Highest and best use relies on that analysis to then identify the most profitable, competitive use to which the subject property can be put. The highest and best use is shaped by competitive forces within the market where the property is located and provides the foundation for a thorough investigation of the competitive position of the property in the minds of the market participants.

Thereafter the highest and best use may be defined as:

> The reasonably probable and legal use of vacant land or improved land that is physically possible, appropriately supported, and financially feasible and that

results in the highest value.

Against this backdrop several facts stand out. Over time, the subject property has gone through a change in use. Originally the property had been the location for a forge operation that ceased operating around 1985. Subsequently the structures associated with that operation were razed. Since 1985 the property has been subject to a number of base line environment assessments (BEAs). The latest of these was done in 2007 contemporaneous with the purchase of the property by Petitioner. In that BEA the subject property was defined as a "facility" as that term is defined within the Natural Resources and Environmental Protection Act, Act 451 of 1994 (MCL 324.201 et seq). In spite of this designation the property is currently used as a motorcycle training facility. The immediate preceding use was as a paved parking lot.

With respect to the environmental issue in this case, an extraction from the following Michigan State Bar Journal article, Trigger, Gilezan and Tripp, Making Brownfields Green Again: How Efforts to Give Urban Centers an Economic Facelift Changed the Face of Environmental Policy, 76 Mich. B.J. 42 (1997), is useful:

> On June 2, 1995 Governor John Engler signed into law substantial and significant amendments to Act 307, Michigan's Environmental Response Act (MERA), Part 201 of the Natural Resources and Environmental Protection Act (NREPA or the "Environmental Code"). These amendments ("MERA Amendments") implemented a major overhaul of the liability structure applicable to environmentally contaminated property. No longer under Michigan law is the mere ownership of property sufficient to impose liability on those who had nothing to do with any activity causing a release of contamination. Consequently, a buyer or developer can acquire property for brownfield redevelopment purposes with a reduced threat of environmental cleanup liability.
>
> The MERA Amendments revised the liability structure, modified the basis for the cleanup standards, and substantially altered transactional issues and related approval processes by reducing uncertainties.
>
> . . . .
>
> Strict status liability was essentially eliminated by removing the provisions of the statute that imposed strict liability on those who merely own or operate

> property. [MCL 324.20126] The current owner or operator of a facility, or the owner or operator at the time of disposal of a hazardous substance, is liable only if he or she is responsible for an activity causing a release or threat of release. [MCL 324.20126(1)(a) and (b)] Persons who become owners or operators of a facility after June 5, 1995 are liable for the contamination at the facility unless they comply with the Baseline Environmental Assessment (BEA) procedures. [MCL 324.20126(1)(c)] Preparation of a BEA in accordance with the statute provides the new owner or operator with an exemption from liability unless he or she is responsible for an activity causing the contamination. [MCL 324.20126(2)]
>
> . . . .
>
> If, however, the property is known to be contaminated (*i.e.*, it is known to be a "facility" and the buyer cannot invoke the innocent purchaser defense), a BEA and related documents may allow the buyer, nonetheless, to buy the property and qualify for an exemption from liability. [MCL 324.20126(1)(c)]
>
> To qualify for this exemption, a new owner or operator of property must perform a BEA within 45 days after the earlier purchase, occupancy, or foreclosure. [MCL 324.20126(1)(c)] A BEA is an evaluation of environmental conditions that exist at a facility at the time of purchase which reasonably defines the existing conditions at the facility so that, in the event of a subsequent release caused by the new owner or operator, there is a means of distinguishing the new release from preexisting contamination.

The effect of this policy is to establish that a "facility" is a property that is capable of being used within certain limitations. The limitations arise because of the existence of contamination as identified in a BEA. What is significant is that the "baseline" identifies a going forward point; it "defines the existing conditions at the facility so that, in the event of a subsequent release caused by the new owner or operator, there is a means of distinguishing the new release from preexisting contamination."

In this case the evidence is unequivocal that the subject property has been analyzed in a number of BEAs. The most recent BEA establishes a baseline with the existence of a "cap" or paving which was placed over the top of the previously vacant land. The effect of the cap is to contain whatever contamination was buried on the property from the prior use as a forge. This baseline means that going forward any use of the property has to be consistent with the maintenance of the cap. This scenario is analogous to a property encumbered by an easement or

existing within a natural encumbrance such as a flood plain. The cap, the easement or the flood plain cannot be ignored and each is essentially part of the land. In each of these instances the use of the land is not precluded, but the type of use may be restricted. Respondent is correct in arguing that possible uses are many given the funneling effect of zoning but there is a restriction in that the cap has to remain in place to preclude a "subsequent release." This fact restricts the building parameters of any proposed use.

But because the baseline identification of contamination is associated with the land, it necessarily has an effect on the value of the land. This relationship between contamination and valuation is explained in the case of *Sweepster, Inc v Scio Twp*, 225 Mich App 497, 501; 571 NW2d 553 (1997). In *Sweepster*, the land was found to have contaminated drinking water. Rather than remediating the whole site, the previous owner agreed through an indemnification agreement to provide drinking water. This constituted a covenant that ran with the land. The Court of Appeals concluded that "[t]he indemnification agreement unquestionably affects the value of the subject property because it relieves petitioner and its successors of the financial consequences of the contamination." The cap acts in the same way.

Nevertheless, the ultimate question is how should the cap or the paving be valued? Respondent believes that the paving is a "site improvement" or an improvement that is a permanent structure attached to the land that contributes value to the land such as street paving in a subdivision. Respondent attributes a value of approximately $400,000 for the property, a component of which is an approximate $200,000 for the replacement of the paving. Petitioner believes that there is no replacement value associated with the paving because the paving enables the property to be used and as such it contributes no value enhancement to the property as an improvement would. In this regard, Petitioner's characterization of the cap is not as a site improvement in the traditional sense but as a tool used to partially remediate the contamination at the site.

Both parties provided appraisals. Each appraisal provided a highest and best use analysis. As to the highest and best use, each concluded to the existing use as the highest and best use as improved or the use with the paving in place. Each appraisal developed value conclusions

utilizing the three traditional methods of valuation: the comparative sales, the cost less depreciation and the income capitalization approaches. This is consistent with the tenets provides in both *Meadowlanes Limited Dividend Housing Association v City of Holland*, 437 Mich 473, 485; 473 NW2d 636 (1991) and Appraisal Institute, *The Appraisal of Real Estate*, p 277, (13th ed, 2008). Each party provided expert appraisal testimony to elucidate upon the appraisals each expert produced. Importantly, both appraisers used comparative sales of uncontaminated properties as documentary support for both the income and sales comparison approaches. Both appraisers used uncontaminated vacant land sales in their cost approaches.

Significantly, both appraisers agree that in valuing a property, the analysis of the legitimacy of a transfer concerning that property is important in order to ultimately determine the property's land value. In this case, both parties concluded that the 2007 sale was an arm's-length transaction. Petitioner's appraiser in particular interviewed county officials and reviewed the evolution of the sale to verify the legitimacy of the transfer from the county's perspective. In short, this transfer is not only useful but it is the only sale involving a contaminated property and it is also, and more importantly, the only sale of a remediated contaminated property. The property rights transferred were those associated with a 7.5 parcel of land encumbered by existing contamination remediated by paving. For these reasons, this transfer value is the most persuasive evidence of the land value as of the 2008 tax day. Petitioner's appraiser came to this conclusion as well.

That said, is it fair to assume that if Petitioner sold the property, as of a given tax day, that a premium could be extracted for the cost of the paving to account for the existence of the paving when in fact Petitioner bought the property with the paving? The simple answer is no. As an analogy, when a large parcel of land is subdivided, typical site improvements such as streets, utilities and utility feeds are provided by the developer. The developer then sells each lot including an allocated amount of the cost of the site improvements. At no time does the developer add an additional premium for the cost of the existing site improvement allocation. Rather, what is added is the value of the contribution4 that the site improvements make to the

4 Contribution is defined in *The Dictionary of Real Estate Appraisal*, 4th ed, as:

once unimproved lot above and beyond the cost of those improvements. This contribution is determined in the marketplace by comparing the subject lot to the sales of like improved lots. In this case, there are no sales of like properties; therefore, it is impossible to determine what, if any, contribution the paving makes that should be added as a premium to the existing value of the property. What is known is that a contribution has been made by the paving, but not as a quantifiable premium; rather, the contribution is that the paving allows for the use of the property through partial remediation of the existing contamination. Without the paving the property could not be used without the payment of significant total remediation costs. For these reasons to add the cost of the paving in the way advocated by Respondent is error and the value of the land for the 2008 tax year is $202,000.

Additionally as stated, the cost approach is "particularly important when a lack of market activity limits the usefulness of the sales comparison approach." Appraisal Institute, *The Appraisal of Real Estate*, pp 353-354, (12th ed, 2001). It is the opinion of the undersigned that, while both appraisers put greatest relevance on the sales comparison approach, this reliance is not borne out by the evidence given that there were no sales identified of contaminated or contaminated but remediated properties. Furthermore, the efforts used to circumvent this deficiency were effectively discredited by the cross-examination of the experts by the parties' respective counsel. What survived this process were the elements of the cost approach, the land value through the use of the actual transaction and the costs of the improvements (building, fencing and seal-coating costs) through an analysis of the actual costs and an independent determination of those costs by each appraiser through the use of the Marshall Swift Valuation Service.

As for the cost of the structure, the seal coating, the additional fencing, and the actual out-of-pocket costs as provided by Petitioner were $203,315. Each appraiser calculated the costs using the Marshall Valuation Service. Using this service both parties arrived at a depreciated

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> The concept that the value of a particular component is measured in terms of its contribution to the value of the whole property, or as the amount that its absence would detract from the value of the whole.

cost of $216,000 for 2008. Using these costs and adding them to the actual transfer value of the land results in a value of $418,000 for the 2008 tax year. Both parties concluded that the property should be depreciated from 2008 to 2010, although Respondent's evidence actually shows an increase in the value of the cost of the improvements (the building, the fence and the seal coating) for that period of time. Countervailing any significant depreciation in value is the fact that the subject property was listed for sale in the summer of 2010 for $525,000. As of the date of the hearing the property was listed for $425,000. This means that for each tax day an argument could be made that the value of the property need not be lower than $418,000.

CONCLUSION

Based on the findings of fact and conclusions of law, the undersigned concludes that Petitioner has not met the burden of proof as described above and also concludes that the best evidence of the true cash value of this property is the actual transfer price for the value of the land and the cost of improvements as developed by both parties using the Marshall Valuation Service. The concluding values are as listed below:

2008

ID Number	TCV	SEV	TV
33-01-01-28-151-011	$418,000	$209,000	$209,000

2009

ID Number	TCV	SEV	TV
33-01-01-28-151-011	$418,000	$209,000	$209,000

2010

ID Number	TCV	SEV	TV
33-01-01-28-151-011	$418,000	$209,000	$208,373

JUDGMENT

IT IS ORDERED that the property's assessed and taxable values for the tax years at issue are as set forth in the *Summary of Judgment* and *Conclusions of Law* sections of this Proposed Opinion and Judgment unless modified by the Tribunal in the Final Opinion and Judgment.

Entered: September 30, 2011 By: John S. Gilbreath, Jr.