

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

Kohl's Department Stores, Inc.,
Petitioner,

v

MTT Docket No. 369840

Township of Kochville,
Respondent.

Tribunal Judge Presiding
Steven H. Lasher

FINAL OPINION AND JUDGMENT

INTRODUCTION

Petitioner, Kohl's Department Stores, Inc., appeals ad valorem property tax assessments levied by Respondent, Township of Kochville, against parcel no. 18-13-4-34-4008-001 for the 2009, 2010, 2011, and 2012 tax years. Michael B. Shapiro and Jason S. Conti, attorneys, represented Petitioner, and Andrew Concannon and David B. Meyer, attorneys, represented Respondent.

A hearing regarding this matter was held on December 18 and December 19, 2012. Petitioner's witnesses were its appraiser, Laurence G. Allen, MAI, and David J. Kern, Assessor, Kochville Township. Petitioner also called Respondent's appraiser and sole witness, Alan L. Johns, MAI, as an adverse witness.

Based on the evidence, testimony, and case file, the Tribunal finds that

Petitioner has met its burden of proof in establishing the subject property's true cash value and further finds the true cash values ("TCV"), state equalized values ("SEV"), and taxable values ("TV") of the subject property for the years under appeal are as follows:

PARCEL NUMBER	YEAR	TCV	SEV	TV
18-13-4-34-4008-001	2009	\$3,420,000	\$1,710,000	\$1,710,000
18-13-4-34-4008-001	2010	\$2,930,000	\$1,465,000	\$1,465,000
18-13-4-34-4008-001	2011	\$2,770,000	\$1,385,000	\$1,385,000
18-13-4-34-4008-001	2012	\$2,790,000	\$1,395,000	\$1,395,000

PETITIONER'S CONTENTIONS

Petitioner contends that the evidence presented in this case strongly supports a determination that the true cash value of the subject property as determined by Respondent is substantially overstated. Petitioner further contends that: (i) the subject improvements were constructed and custom-designed exclusively for Petitioner and were built-to-suit pursuant to a lease agreement between the owner and Petitioner, (ii) the Tribunal must value the subject property as a retail store building rather than as a Kohl's store, (iii) pursuant to MCL 211.27(4), the fee simple interest in the property subject to a lease in place with market rent must be valued rather than the leased fee interest, as the statute requires a determination of market rents rather than contract rents, (iv) contract rents can be used to value a property using the income approach only if contract rents are reflective of market

rents, (v) other than the identification of two market rent comparables, Respondent's appraiser essentially provided "no other relevant testimony . . . that could be used to conclude to the lawful true cash value of the subject property" (Transcript, Vol. 2, pp. 108, 109), (vi) Respondent's appraiser erroneously determined a value for the leased fee interest in the subject property, (vii) Respondent's appraiser erroneously applied capitalization rates in his income approach based on Kohl's use of the subject property and the creditworthiness of Kohl's, (viii) Respondent's appraiser determined the subject property's value-in-use rather than its value-in-exchange, (ix) Respondent's appraiser illegally considered the trade name, goodwill, and reputation of Kohl's in making his value determinations, (x) the Tax Tribunal has consistently held that it is not looking for the value of a property based on its specific user; instead, it is looking for the value of the property itself, and (xi) the Tax Tribunal has repeatedly held that using leased fee sales and build-to-suit rents distorts in an upward fashion the value of the subject property. (Transcript, Vol. 1, pp. 6 – 36; Vol. 2, pp. 107 – 157)

Finally, Petitioner requests an award of costs because Respondent's appraiser has ignored the law in Michigan in determining a true cash value for the subject property and has ignored his own prior work because "when he valued other properties that were subject to lease he valued it based upon market rent." (Transcript, Vol. 2, p. 156)

As determined by Petitioner's appraiser, the TCV, SEV, and TV for the subject property for the tax years at issue should be:

PARCEL NUMBER	YEAR	TCV	SEV	TV
18-13-4-34-4008-001	2009	\$3,420,000	\$1,710,000	\$1,710,000
18-13-4-34-4008-001	2010	\$2,930,000	\$1,465,000	\$1,465,000
18-13-4-34-4008-001	2011	\$2,770,000	\$1,385,000	\$1,385,000
18-13-4-34-4008-001	2012	\$2,790,000	\$1,395,000	\$1,395,000

PETITIONER'S ADMITTED EXHIBITS

P-1 Appraisal Report prepared by Allen & Associates Appraisal Group, Inc. dated October 8, 2012.

PETITIONER'S WITNESSES

David J. Kern

David J. Kern is the current assessor for Saginaw Township and for Respondent. Mr. Kern testified that: (i) the subject property was assessed for the tax years at issue using the cost approach, (ii) the true cash value of the subject property decreased from 2011 to 2012 either because of economic obsolescence or a change in the economic condition factor, and (iii) in applying the income approach to value, he would determine market rents. (Transcript, Vol. 1, pp. 31 – 42)

Laurence G. Allen

Laurence G. Allen, MAI, is a commercial and industrial real estate appraiser licensed in the State of Michigan and was qualified as an expert in the appraisal of commercial real property, including big-box retail stores. Mr. Allen testified that he prepared an appraisal in conformance with the Uniform Standards of Professional Appraisal Practice (“USPAP”) for the fee simple interest in the parcel that is the subject of this appeal for the 2009, 2010, 2011, and 2012 tax years. Mr. Allen further testified that: (i) he has appraised a number of big-box stores, including Wal-Mart, Meijer, Home Depot, Lowes, and Kohl’s retail stores, (ii) of all retail properties, big-box stores have the lowest selling prices per square foot, (iii) determining the true cash value of a property for property tax appeal purposes in Michigan requires the appraiser to determine the value-in-exchange rather than the value-in-use, (iv) because the determination of the value of a property subject to a specific lease in place may reflect the specific terms of the lease or the specific credit of the tenant, the property’s fee simple interest, not the leased fee interest, should be valued, (v) the sale of the leased fee interest in the subject property in March 2011 did not provide him relevant information because it was a leased fee sale based on build-to-suit contract rent, (vi) deteriorating economic conditions in Michigan and the U.S. beginning in 2008 adversely affected big-box discount stores, (vii) the highest and best use of the subject property, as improved, is retail

use, (viii) he determined the market value of the subject property based on it being leased at market rent at the time of sale, (ix) with build-to-suit leases such as the subject property, the owner or landlord pays for the cost of construction and, prior to construction, negotiates a lease based on the anticipated cost of construction plus a profit, (x) a purchaser of the fee simple interest in a discount store typically modifies the store for their use, reconfigures it for a new tenant, or demolishes the store to rebuild a store that best fits their business plan, (xi) he considered all three approaches to value, but ultimately gave the sales comparison approach and the income approach equal weight and gave no weight to the cost approach, (xii) because the subject property has a lease in place, he did not deduct the cost of leasing the property in applying the income approach to value, and he adjusted the comparable sales upward for the cost of putting a tenant in place in applying the market approach to value, (xiii) in applying the market approach to value, he identified five comparable sales (all of which were vacant at the time of sale) and twelve comparable listings of fee simple interests, five of which ultimately sold in 2011 and 2012, (xiv) listings are significant because they “represent the upper limit of price for a property” (Transcript, Vol. 1, p. 138), (xv) he did not use leased fee comparable discount store sales or listings in his market approach because such stores are sold with build-to-suit leases rather than market leases, (xvi) he was not able to identify any leased fee sales with market rent in place, (xvii) market

conditions and location are the most important differences in explaining sale price differences, and age and condition are less important factors, (xviii) he determined the Kohl's store in Kochville Township to be more valuable than the Kohl's store in Frenchtown Township because of the Kochville Township location, (xix) his income approach determined market rent for the property,¹ with allowances made for vacancy, credit loss, and operating expenses, (xx) he identified seven build-to-suit leases, eleven net leases of existing big-box retail space, and six rental offerings, (xxi) triple-net rents were used because "most of the leases in a big-box store are on a triple-net basis" (Transcript, Vol. 1, p. 160), (xxii) he developed his capitalization rate in applying the income approach using the band-of-investment technique, investment surveys, and market-derived capitalization rates for retail properties, and (xxiii) the Best Buy property located in Flint Township, that was identified by Respondent's appraiser as a comparable sale, was subject to a lease at the time of sale and was offered for sublease. (Transcript, Vol. 1, pp. 103 – 233; Vol. 2, pp. 105 - 106)

RESPONDENT'S CONTENTIONS

Respondent contends that the true cash, assessed, and taxable values it

¹ Mr. Allen's income approach is based on the present economic income of the property pursuant to Michigan law and present economic income is based on market rents. Mr. Allen contends that present economic income could mean contract rent only if the rent was negotiated in the market under current market conditions and reflective of market rent as of the valuation date. (Transcript, Vol. 1, pp. 156, 157)

determined for the subject property for the tax years at issue should be decreased for tax years 2009 – 2011 and substantially increased for 2012 based on the value conclusions made by its appraiser, who primarily utilized the income approach, supported by the sales comparison approach. Specifically, Respondent contends that: (i) its appraiser correctly determined the true cash values of the subject property for the tax years at issue by valuing the property's leased fee interest, (ii) in applying the income approach to value, it is appropriate, pursuant to MCL 211.27(4), to consider contract rents in certain cases, (iii) the range of contract rents for other build-to-suit big-box retail stores established by Respondent's appraiser support the contract rent of \$7.15 per square foot originally negotiated by Petitioner and the owner of the subject property, (iv) the rental rate of \$7.15 renegotiated by Petitioner and the owner of the subject property in 2011 reflects market rent, (v) Petitioner's appraiser erroneously ignored the rental rates negotiated by the owner of the subject property and Petitioner in making his determination of the subject property's true cash value, and (vi) the substantial increase in the true cash value of the subject property from 2011 to 2012 is primarily a result of the renegotiation of the lease with Petitioner in 2011.

(Transcript, Vol. 1, pp. 235 – 237; Vol. 2, pp. 157 – 173)

As determined by Respondent's appraiser, the TCV, SEV, and TV for the subject property for the tax years at issue should be:

PARCEL NUMBER	YEAR	TCV	SEV	TV
18-13-4-34-4008-001	2009	\$6,000,000	\$3,000,000	\$2,978,145
18-13-4-34-4008-001	2010	\$5,700,000	\$2,850,000	\$2,850,000
18-13-4-34-4008-001	2011	\$5,500,000	\$2,750,000	\$2,750,000
18-13-4-34-4008-001	2012	\$7,250,000	\$3,625,000	\$2,824,250

RESPONDENT'S ADMITTED EXHIBITS

R-3 2012 assessment records for the subject property.

R-5 Appraisal Report by Appraisal Advisory Group dated August 30, 2012.

R-9 Aerial view of Bay Road and Tittabawassee Road corridor.

RESPONDENT'S WITNESS

Alan L. Johns

Alan L. Johns, MAI, is a General Appraiser licensed in the State of Michigan and was qualified as an expert in the appraisal of commercial real property, including big-box retail stores. Mr. Johns testified that: (i) he prepared an appraisal of the subject property (excluding the mezzanine) to determine the true cash value of its leased fee interest for the 2009 through 2012 tax years, (ii) his appraisal was prepared consistent with USPAP standards, (iii) he determined the highest and best use of the subject property, as improved, to be single-user retail, (iv) he determined the true cash value of the subject property using the income and market approaches to value, (v) he gave the most weight to the income approach, with support from the market approach, (vi) in applying the income approach to

value, he relied upon the lease rents negotiated between Petitioner and the owner of the subject property, supported by seven other build-to-suit leases, including four additional Kohl's stores, (vii) in determining a capitalization rate for the income approach, the reduced risk associated with a quality tenant in place such as Kohl's (including its goodwill and trade name) is a factor, (viii) he determined a capitalization rate based on the band-of-investment technique, national surveys, and sales information from his market approach, (ix) in applying the income approach for the 2012 tax year, he reduced his capitalization rate by 2.5% as a result of the new lease entered into between Kohl's and the new owner of the subject property, and (x) in applying the market approach, he identified eleven sales of leased fee interests² and adjusted these sales quantitatively for market conditions and qualitatively for location, age, size, land-to-building ratio, function, and economic characteristics. (Transcript, Vol. 1, pp. 42 – 102, 239 – 259; Vol. 2, pp. 4 – 103)

FINDINGS OF FACT

1. The subject property consists of an 8.31 acre parcel located in the Township of Kochville, Saginaw County, Michigan, improved with a single-story

² Although Respondent's appraiser identified the sale of a former Best Buy property located in Flint, Michigan, as the sale of a fee simple interest (Transcript, Vol. 2, p.12), Petitioner's appraiser testified that this sale was the sale of a leased fee interest (Transcript, Vol. 2, p. 105, 106).

commercial building, with a total area of approximately 80,700 square feet and a storage mezzanine with 6,273 square feet.

2. The subject building was constructed in 1994. The owner of the land developed the site and constructed the subject building to Petitioner's specifications, and then leased the subject property to Petitioner.
3. Petitioner entered into a twenty-year lease of the subject property in 1994 at a rate of \$7.16 per square foot. The lease was renegotiated in January 2011, continuing the same rental rate for another twenty years.
4. The leased fee interest in the subject property was sold in March 2011 for a net allocated price of \$7,637,000.
5. The subject property was assessed for the tax years at issue as follows:

PARCEL NUMBER	YEAR	TCV	SEV	TV
18-13-4-34-4008-001	2009	\$6,371,800	\$3,185,900	\$2,978,145
18-13-4-34-4008-001	2010	\$6,457,400	\$3,228,700	\$2,969,210
18-13-4-34-4008-001	2011	\$5,895,000	\$2,947,500	\$2,947,500
18-13-4-34-4008-001	2012	\$5,328,200	\$2,664,100	\$2,664,100

6. The subject property is zoned B-2, Commercial, Community and Regional Retail.
7. The highest and best use of the subject property, as improved, is retail use.
8. Economic conditions in the State of Michigan and in Saginaw County deteriorated beginning in late 2008.

9. Neither appraiser determined the true cash value of the subject property using the cost approach.
10. Respondent's appraiser determined the highest and best use of the subject property, as improved, to be single-user retail use.
11. Respondent's appraiser determined the true cash value of the leased fee interest in the subject property.
12. In determining the true cash value of the subject property for the tax years at issue, Respondent's appraiser gave the most weight to the income approach, with secondary weight given to the sales comparison approach.
13. In applying the income approach to value, Respondent's appraiser relied on the \$7.15 per square foot contract rent applicable to Petitioner's lease of the subject property.
14. To confirm that the subject's contract rent was reflective of the market for similar build-to-suit leases, Respondent's appraiser identified eight properties with build-to-suit contract rents in place (including the subject property and four other Kohl's properties).
15. In applying the income approach, Respondent's appraiser made no adjustments for vacancy and collection loss based on the current market.
16. In applying the income approach, Respondent's appraiser concluded that expenses of 1.4% for insurance, 1% for management fees, and 3.5% for

replacement reserves were appropriate.

17. In applying the income approach, Respondent's appraiser primarily determined a capitalization rate based on (i) comparable sales identified in his market approach, (ii) a band-of-investment methodology, and (iii) national survey information derived from RealtyRates.com.
18. For the 2012 tax year, Respondent's appraiser reduced his capitalization rate from 10% to 7.5%.³
19. In applying the market approach, Respondent's appraiser identified eleven sales of leased fee interests, adjusted each comparable sale for differences in market conditions, location, physical characteristics, size, age, condition, quality, and economic characteristics.
20. For 2009, three of the four comparable sales identified by Respondent's appraiser were less than 37,000 square feet in size, and the other comparable sale was approximately 110,000 square feet in size.
21. For 2009, Respondent's appraiser determined a value per square foot of \$72.50 for the subject property based on adjusted square foot values for the four comparable sales of \$53.82, \$66.31, \$160.57, and \$162.03.
22. For 2010, three of the four comparable sales identified by Respondent's

³ Respondent's appraiser explained that the basis for the substantial reduction in the capitalization rate for 2012 was the reduction in risk based on the renegotiation of the Kohl's lease. (Transcript, Vol. 1, p. 101; Vol. 2, pp. 23, 31)

appraiser were 38,000 square feet or less, and the other comparable sale was approximately 133,000 square feet.

23. For 2010, Respondent's appraiser determined a value per square foot of \$70 for the subject property based on adjusted square foot values for the four comparable sales of \$44.90, \$54.44, \$87.15, and \$172.12.

24. For 2011, two of the five comparable sales identified by Respondent's appraiser were 38,000 square feet or less, and the other three comparable sales were approximately 124,000 square feet or greater.

25. For 2011, Respondent's appraiser determined a value per square foot of \$70 for the subject property based on adjusted square foot values for the five comparable sales of \$45.52, \$55.30, \$58.42, \$70.58, and \$88.31.

26. For 2012, the sizes of the five comparable sales identified by Respondent's appraiser ranged from approximately 38,400 square feet to 124,000 square feet.

27. For 2012, Respondent's appraiser determined a value per square foot of \$90 per square foot for the subject property based on adjusted square foot values for the five comparable sales of \$59.00, \$71.28, \$95.42, \$114.98, and \$150.98.

28. Petitioner's appraiser determined the true cash value of the fee simple interest in the subject property for the tax years at issue.

29. Petitioner's appraiser gave equal weight to the sales comparison approach and the income approach in determining the true cash values of the subject property for the tax years at issue.
30. In applying the sales comparison approach, Petitioner's appraiser identified five comparable sales, each a sale of the fee simple interest in a vacant former big-box store, with dates of sale ranging from May 2004 to July 2012, and also identified 12 comparable listings of the fee simple interest in vacant big-box stores pertinent to the 2009 – 2012 tax years.
31. Petitioner's comparable #1 is a former Super K property located in Dearborn, Michigan. This property is 18.1 acres and is improved with a commercial building of 192,000 square feet constructed in 1993. This property sold for \$9.65 million in January 2006 to Wal-Mart, which converted the former Super K to a Wal-Mart retail store.
32. Petitioner's comparable #2 is a former Target property located in Holland Township, Michigan. This property is 5.96 acres and is improved with a commercial building of 80,953 square feet constructed in 1990. This property sold for \$2.35 million in May 2004 to a private investor who planned to convert the building to multiple tenants.
33. Petitioner's comparable #3 is a former Target property located in Kentwood, Michigan. This property is 7.99 acres and is improved with a commercial

building of 103,086 square feet constructed in 1989. This property sold for \$7.1 million in November 2005 to Value City Furniture, who used approximately 68,000 square feet of space and leased the remaining space to Buy Buy Baby.

34. Petitioner's comparable #4 is a former Wal-Mart property located in Frenchtown Township, Michigan. This property is 14.42 acres and is improved with a commercial building of 124,631 square feet constructed in 1992. This property sold for \$2.765 million in December 2009 and is subject to a covenant deed restricting some types of future retail use of the property.

35. Petitioner's comparable #5 is a former Circuit City property located in Kochville Township, Michigan. This property is 10.02 acres and is improved with a commercial building of 94,284 square feet constructed in 1985. This property sold for \$2,634,520 in July 2012 to Cabela's.

36. Petitioner's appraiser adjusted each comparable sale for sequential adjustments (market conditions) and cumulative adjustments (size, location, age, and condition).

37. For 2009, Petitioner's appraiser determined an adjusted value per square foot of five comparable sales in the range of \$23.32 to \$39.05 per square foot. Using this range, Petitioner's appraiser determined a value of \$38 per

square foot was appropriate for the subject property.

38. For 2010, Petitioner's appraiser determined an adjusted value per square foot of the same five comparable sales in the range of \$18.52 to \$30.65 per square foot. Using this range, Petitioner's appraiser determined a value of \$30.50 per square foot was appropriate for the subject property.
39. For 2011, Petitioner's appraiser determined an adjusted value per square foot of the same five comparable sales in the range of \$17.78 to \$29.12 per square foot. Using this range, Petitioner's appraiser determined a value of \$29.00 per square foot was appropriate for the subject property.
40. For 2012, Petitioner's appraiser determined an adjusted value per square foot of the same five comparable sales in the range of \$16.89 to \$27.66 per square foot. Using this range, Petitioner's appraiser determined a value of \$27.50 per square foot was appropriate for the subject property.
41. Petitioner's appraiser increased the calculated true cash value of the fee simple interest in the subject property for each tax year by "estimated leasing commissions" in the range of approximately 6% to 7% of the value of the fee simple interest.
42. In applying the income approach, Petitioner's appraiser identified eleven comparable triple-net leases of existing big-box retail space with an adjusted range of \$1.43 to \$6.00 per square foot (and six lease offerings) to determine

a market rental rate of \$5.50 per square foot for 2009, \$5.25 per square foot for 2010, \$5.00 per square foot for 2011, and \$4.75 per square foot for 2012.

43. Petitioner's appraiser identified seven build-to-suit leases of big-box stores reflecting adjusted lease rates in the range of \$6.16 per square foot to \$12.25 per square foot (including lease rates of \$6.16 per square foot for a Kohl's store in Fort Gratiot, Michigan, \$7.29 per square foot for a Kohl's store in Monroe, Michigan, and \$9.55 for a Kohl's store in Green Oak Township, Michigan) to show that "build-to-suit" leases represent rents for proposed buildings, but do not represent rents that are achievable for existing buildings.
44. Petitioner's appraiser applied a 7.5% vacancy rate to anticipated rental income based on Saginaw County and Michigan vacancy levels as surveyed by CoStar Property.
45. Petitioner's appraiser utilized market and survey information to determine appropriate operating expenses.
46. In concluding to capitalization rates of 9.75% for 2009 and 2012 and 10.25% for 2010 and 2011, Petitioner's appraiser reviewed band-of-investment methodology, investment surveys, and market information before determining that investment survey information provided the best information.

APPLICABLE LAW

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

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

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

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

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

Under MCL 205.737(1), the Tribunal must find a property's true cash value in determining a lawful property assessment. See *Alhi Development Co v Orion Twp*, 110 Mich App 764, 767; 314 NW2d 479 (1981). The Tribunal is not bound to accept either of the parties' theories of valuation. See *Teledyne Continental Motors v Muskegon Twp*, 145 Mich App 749, 754; 378 NW2d 590 (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. See *Meadowlanes Ltd Dividend Housing Ass'n v City of Holland*, 437 Mich 473, 485-486; 473 NW2d 636 (1991).

A proceeding before the Tax Tribunal is original, independent, and de novo. MCL 205.735a(2). The Tribunal's factual findings are to be supported by competent, material, and substantial evidence. See *Antisdale v City of Galesburg*, 420 Mich 265, 277; 362 NW2d 632 (1984); *Dow Chemical Co v Dep't of Treasury*, 185 Mich App 458, 462-463; 462 NW2d 765 (1990). "Substantial evidence must be more than a scintilla of evidence, although it may be substantially less than a preponderance of the evidence." *Jones & Laughlin Steel Corp v City of Warren*, 193 Mich App 348, 352-353; 483 NW2d 416 (1992).

"The petitioner has the burden of establishing the true cash value of the property" MCL 205.737(3). "This burden encompasses two separate concepts: (1) the burden of persuasion, which does not shift during the course of the hearing, and (2) the burden of going forward with the evidence, which may shift to the opposing party." *Jones & Laughlin* at 354-355. However, "[t]he assessing agency has the burden of proof in establishing the ratio of the average level of assessment in relation to true cash values in the assessment district and the equalization factor that was uniformly applied in the assessment district for the year in question."

MCL 205.737(3).

The three most common approaches to valuation are the capitalization of income approach, the sales comparison or market approach, and the cost-less-depreciation approach. See *Meadowlanes* at 484-485; *Pantlind Hotel Co v State Tax Commission*, 3 Mich App 170; 141 NW2d 699 (1966), aff'd 380 Mich 390 (1968). The market approach is the only appraisal method that directly reflects the balance of supply and demand for property in marketplace trading. See *Antisdale*. 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. See *Antisdale* at 277.

CONCLUSIONS OF LAW

Unlike most valuation appeals presented at the Tribunal, the primary focus of this case is not on the mechanics of the respective appraisals (e.g., which appraiser better supported comparable sales, which appraiser's analysis of capitalization rate was better supported, etc.); instead, the parties' contentions in this case fundamentally differ regarding the property interest to be valued, which leads to substantially different value conclusions.⁴

⁴ In his closing, although he attacked the credibility of Respondent's appraiser, Mr. Shapiro focused primarily on Michigan statute and case law that, for ad valorem taxation purposes,

Respondent contends that because Petitioner leases the subject property pursuant to a long-term net lease, the true cash value of the subject property must be determined by valuing the leased fee interest in the property, and said value is affected by Petitioner being the user of the property, including Petitioner's trade name, reputation, and goodwill. Thus, Respondent's appraiser essentially relied on an income approach to value utilizing contract rents (supported by a market analysis of rents found in other build-to-suit net lease arrangements), with no vacancy and collection loss, and minimal expense adjustments given the net-lease structure and a capitalization rate based on extracted rates from comparable sales of leased fee interests and survey information.⁵ (Transcript, Vol. 2, p. 39)

Respondent's appraiser supports his income approach with a sales comparison approach that identifies eleven sales of leased fee properties, with appropriate adjustments made for location, conditions of sale, market conditions, and physical characteristics.⁶

requires the valuation of the fee simple interest in property based on market information. In his cross-examination of Petitioner's appraiser, and in his closing statement, Mr. Concannon focused primarily on Mr. Allen's alleged failure to follow USPAP standards in the preparation of his appraisal, his history of primarily representing petitioners before the Tribunal, and his valuation of the fee simple interest in the property rather than the leased fee interest, and devoted only a few general questions to Mr. Allen's assumptions and conclusions in applying his income and market approaches to value.

⁵ Respondent's appraiser testified that the capitalization rate for the subject property contemplates the contract rent in place as well as Kohl's as a tenant. (Transcript, Vol. 1, p. 101, Vol. 2, pp. 23, 31)

⁶ Although Respondent's appraiser consistently applied the income and market methods to

Petitioner contends, however, that Michigan law is clear that it is the fee simple interest in the property that must be valued when determining the “usual selling price” or the true cash value of that property. Further, in appraising property for ad valorem taxation purposes in Michigan, its value-in-exchange must be valued rather than its value-in-use.⁷ Here, consistent with his understanding of the law in Michigan, Petitioner’s appraiser determined the true cash value of the subject property by valuing the fee simple interest in the property subject to a lease in place at market rents.⁸ Petitioner’s appraiser distinguishes the leased fee interest and the fee simple interest, concluding that valuing the leased fee interest would

determine the true cash value of the subject property for each of the tax years at issue, Respondent’s counsel seemed to argue during his closing that because the lease was amended in 2011, “there might be a different analysis when you deal with tax year 2012” (Transcript, Vol. 2, p. 162) because the “rent was reduced from the extension rates.” (Transcript, Vol. 2, p. 171)

⁷ Petitioner correctly states that the true cash value of the subject property is based on value inherent in itself and is not affected by who owns it. The Michigan Supreme Court held in *Edward Rose Bldg Co v Independence Twp*, 436 Mich 620, 640-641; 462 NW2d 325 (1990): “The uniformity requirement of the Michigan Constitution compels the assignment of values to property upon the basis of the true cash value of the property and *not upon the basis of the manner in which it is held*. Noticeably absent from the statutory definition of ‘cash value’ and those enumerated factors which an assessor must consider is any reference to the identity of the person owning an interest in the property or whether there are other parcels which are owned by the same taxpayer. MCL 211.27. In other words, *ownership is not a germane consideration in determining value*: (Emphasis added.) ‘The Constitution requires assessments to be made on property at its cash value. This means not only what may be put to valuable uses, but what has a *recognizable pecuniary value inherent in itself, and not enhanced or diminished according to the person who owns or uses it.*’” (Emphasis in original.) See also *First Federal Savings & Loan Ass’n of Flint v City of Flint*, 415 Mich 702; 329 NW2d 755 (1982), where the Michigan Supreme Court concluded that “the Constitution and the General Property Tax Act require that property tax assessment be based on market value, not value to the owner.”

⁸ Petitioner’s appraiser did not use leased fee discount stores subject to in-place contract rent for a specific tenant in applying the sales comparison approach because he could find no leased fee sales with market rents in place. (Transcript, Vol. 1, pp. 137, 224)

require consideration of a specific lease contract with a specific tenant in place, while valuation of a fee simple interest requires an analysis of the market.

In valuing the subject property's fee simple interest subject to a lease at market rent, Petitioner's appraiser equally relied on the market and income approaches. In applying the market approach, Petitioner's appraiser identified five sales⁹ (and twelve listings, four of which subsequently sold) of vacant big-box stores, adjusted the sales price upward for the cost of putting a tenant in place because of the lease in place, and further adjusted the comparable sales for market conditions, location, age, and property rights. In applying the income approach, Petitioner's appraiser determined market rent (rather than contract rent),¹⁰ made an allowance for vacancy, credit loss, and operating expenses, and capitalized the net operating income at an overall capitalization rate. Petitioner's appraiser identified eleven leases (and six lease offerings) of existing big-box retail stores, adjusted these lease rates for tenant improvement allowances, if applicable, further adjusted these lease rates for vacancy, credit loss, and operating expenses, including

⁹ Petitioner's appraiser testified that a purchaser of a vacant big-box store will modify the store for their own use, lease the store and reconfigure it for a new tenant, or demolish the store and rebuild a store that best fits their business plan. (Transcript, Vol. 1, pp. 128, 129)

¹⁰ Petitioner's appraiser states that build-to-suit leases are typically higher than market leases for an existing store building because "[t]he build-to-suit rents that are rents for properties to be constructed are typically higher because they reflect all the custom features of the building for that particular user, whereas like a normal market rent doesn't reflect the custom features that were built for a specific user reflects the basic characteristics of the property." (Transcript, Vol. 1, pp. 158, 159)

management fees and replacement reserves,¹¹ and then applied a capitalization rate determined by analyzing investor surveys, band-of-investment technique, and capitalization rates derived from single-tenant retail building and center sales.

Whether characterized as valuing a leased fee interest or fee simple interest with market rent in place, or valuing contract rent or market rent, or value-in-use or value-in-exchange, the primary task before the Tribunal in this case is to decide whether contract rents, based on build-to-suit leases, should be controlling in determining the true cash value of the subject property or whether market information, including market rents for second generation retail space, is the appropriate measure of true cash value.¹²

MCL 211.27(1) provides, in part, that in determining the value of a property the “present economic income” of a property must be considered.

¹¹ The cost of leasing property was not deducted because there is a lease in place.

¹² MCL 211.27(1) states: “As used in this act, ‘true cash value’ means the usual selling price at the place where the property to which the term is applied is at the time of the assessment, being the price that could be obtained for the property at private sale, and not at auction sale except as otherwise provided in this section, or at forced sale.” “‘Market value’ is described as the most probable price, as of a specified date, in cash, or in terms equivalent to cash, or in other precisely revealed terms, for which the specified property rights should sell after reasonable exposure in a competitive market under all conditions requisite to a fair-sale, with the buyer and seller each acting prudently, knowledgeably, and for self-interest, and assuming that neither is under undue duress.” Appraisal Institute, *The Appraisal of Real Estate*, (Chicago: 13th ed., 2008), p. 23. “‘Value in exchange’ is described as the estimated amount for which a property should exchange on the date of valuation between a willing buyer and a willing seller in an arm’s-length transaction after proper marketing wherein the parties had each acted knowledgeably, prudently, and without compulsion.” *Id.* “‘Value in use’ is described as the value of a property assuming a specific use, which may or may not be the property’s highest and best use on the effective date of the appraisal. Value in use may or may not be equal to market value but is different conceptually.” *The Dictionary of Real Estate*, (Chicago: 5th ed., 2010), p. 206.

In *CAF Investment Co v Saginaw Twp*, 410 Mich 428; 302 NW2d 164 (1981),¹³ the Michigan Supreme Court concluded that the Tribunal's failure to use actual income as the basis of its capitalization of income in valuing taxpayer's property constituted reversible error.

In part, because of the Supreme Court's holding in *CAF II*, the Michigan legislature revised the existing statute in 1982 by adding MCL 211.27(4), which provided that:

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 cash value in all cases.* (Emphasis added.)

Subsequent to the addition of section (4) to MCL 211.27, the Court of Appeals reiterated the holdings in the two *CAF* cases, where the tax years at issue preceded the addition of MCL 211.27(4), but acknowledged that the provisions of MCL 211.27(4) may have yielded a different result if the tax years at issue were subject to the statutory change.

There is nothing in either Supreme Court opinion to suggest that present economic income should not be based on actual income. . . . In both *CAF I* and *CAF II*, the Supreme Court acknowledged that actual rent may not always be appropriate to the determination of the present

¹³ The second of two *CAF* cases, commonly referenced as *CAF II*; see also *CAF Investment Co v Michigan State Tax Comm*, 392 Mich 442; 221 NW2d 588 (1974).

economic income of a particular parcel of property. However, the Court made clear that exceptions to actual rent valuations should be premised on a finding that actual rent is either too speculative or does not reflect an accurate picture of a property's fair market value. . . . *While we realize that the Michigan Legislature has recently amended the General Property Tax Act in response to the Supreme Court's decisions in CAF I and CAF II, these amendments were not in effect for the tax years involved in the instant case and we thus do not consider the effect of such legislation on the tribunal's valuation of the true cash value of petitioner's office parcel. Uniroyal, Inc v. City of Allen Park, 138 Mich App 156, 161-162; 360 NW2d 156 (1984) (Emphasis added.)*

Further, in *Fifty-nine Seventy-three Corp v City of Detroit*, unpublished opinion per curiam of the Court of Appeals, issued July 24, 1998 (Docket No. 202520), the Court of Appeals stated that while the *CAF I* and *CAF II* cases held that present economic income of property subject to a long-term lease could be calculated based on actual rental income from that property, “the Legislature later abrogated the effect of this decision by redefining ‘present economic income’ for leased properties . . . requiring the use of market rental rates in the valuation of leased property.”

In *Amurcon/Ridgewood Vista v Leoni Twp*, unpublished opinion per curiam of the Court of Appeals, issued March 7, 1997 (Docket No. 192485), slip op at 2, the Court of Appeals did consider what the Legislature was attempting to accomplish in adding MCL 211.27(4):

MCL 211.27(4); MSA 7.27(4) does not preclude the use of actual rents in calculating cash value. This provision specifically provides

that actual income generated by a lease or rental of property is not to be ‘the controlling indicator of its cash value in all cases.’ From the Legislature’s use of the qualifying phrase ‘in all cases,’ it can be inferred that the Legislature did not intend to preclude the consideration of actual rents in the value determination process *when the circumstances of the particular case warrant such consideration.* (Emphasis added.)

In this case, the Court of Appeals held that actual rents generated by subsidies constituted “circumstances” warranting such consideration.

Similarly, in *Palace Sports & Entertainment, Inc v City of Auburn Hills*, unpublished opinion per curiam of the Court of Appeals, issued June 21, 2012 (Docket Nos. 294051, 294185), slip op at 6, 10, the Court of Appeals held that while MCL 211.27(4) provides that actual income generated by a lease in place is not “the controlling indicator of its true cash value in all cases,” it may be controlling in certain cases, such as in the instant case where “[a]mple evidence reflects that the property’s highest and best use involved its current use as an arena that hosted the Pistons, other sports teams, and entertainment events, and that the Palace received significant income from its lease agreement with the Pistons.”

Further, in *Royal Industrial Center v Twp of Royal Oak*, unpublished opinion per curiam of the Court of Appeals, issued February 8, 2002 (Docket No. 225361), slip op at 1, the Court of Appeals held that in determining “present economic income” pursuant to MCL 211.27(4), “the Tribunal was expressly authorized to consider the value of the leases in place in determining the true cash value of

petitioner's property.”

Finally, in *Troy Technology Park v City of Troy*, unpublished opinion per curium of the Court of Appeals, issued July 25, 1997 (Docket No. 193934), the Court of Appeals affirmed the Tribunal's acceptance of the parties' valuation of the leased fee interest rather than the fee simple interest because the leased fee interest value was higher. Simply, the Court was asked to determine whether the higher value (using the income approach), based on existing leases, continued occupancy, and market rent was appropriate or a lower value based on the property being vacant and available for sale. The Court of Appeals affirmed the Tribunal's determination that a property valuation must include the present value of the leases in place.

Therefore, the Tribunal finds that the Court of Appeals generally interprets the statute to require the use of market rents except where unusual circumstances would dictate otherwise. See *J C Penney Co, Inc v City of Ann Arbor*, unpublished opinion per curium of the Court of Appeals, issued March 11, 2010 (Docket No. 288536). The Tribunal concludes that, pursuant to MCL 211.27(4), the sentence “[t]he actual income generated by the lease or rental of property is not the controlling indicator of its cash value *in all cases*,” (Emphasis added.), implies that application of actual rental income or contract rents may be appropriate in some cases. However, the Tribunal further finds that, consistent with the line of cases

discussed above, except in unusual circumstances, the appraiser of a property subject to a long-term net lease must appraise the fee simple interest in the property subject to a lease in place at market rents. Further, the Tribunal finds that it is also important to consider the language in MCL 211.27(4) that requires that “present economic income” means, in part, rents negotiated “under current, contemporary conditions.” The Tribunal finds that this language is clear and unambiguous, as it specifically requires that rents, used in applying the income method, reflect current market conditions as of the applicable assessment date and do not reflect rents negotiated several years prior to the applicable assessment date, based on the property owner’s recovery of the cost to construct a build-to-suit building plus profit.

Further, the Tribunal has consistently held that where a property is subject to a lease in place, the fee simple interest in the property must be valued rather than the leased fee interest.¹⁴ See *Brighton Mall v City of Brighton*, 20 MTTR 384 (Docket No. 360623, December 13, 2011).

In *Meritax, LLC v City of Richmond*, ___ MTTR ___ (Docket No. 425425, October 18, 2012), the Tribunal held that:

¹⁴ Fee simple estate is “the absolute ownership unencumbered by any other interest or estate, subject only to the limitations imposed by the governmental powers of taxation, eminent domain, police power and escheat.” *The Dictionary of Real Estate Appraisal*, p. 78. Leased fee interest is “a freehold (ownership interest) where the possessory interest has been granted to another party by creation of a contractual land-lord-tenant relationship (i.e., a lease).” *The Dictionary of Real Estate Appraisal*, p. 111.

Respondent's selected comparables were all sales of properties subject to leases in place, otherwise known as sale-leaseback or leased fee transactions. Payments in such transactions are not predicated on market rent, however, but rather upon the amount the business can afford to pay based on its operations. . . . In utilizing these comparables to develop its income and sales comparison approaches to value, Respondent distorts in an upward fashion the value of the subject property and also demonstrates a serious lack of understanding of basic appraisal process. . . . Although Respondent purports to value the subject property in fee simple, the Tribunal concludes, in light of the above, that it is instead valuing the leased fee interest of the same."

The Tribunal reiterated its position that the fee simple interest is the appropriate property interest to be valued in determining the true cash value of a property for purposes of ad valorem taxation in *Home Depot USA, Inc v Twp of Breitung*, ___MTTR___ (Docket No. 366428, December 26, 2012), where the Tribunal states:

Although Respondent purports to value the subject property in fee simple, the Tribunal concludes, in light of the above, that it is instead valuing the leased fee interest of the same. Respondent's appraiser determined the highest and best use of the property as improved to be its current use as a home improvement store, but testified that his valuation of the subject property was directly affected by the fact that Home Depot was the user of the property. The subject property was built for The Home Depot and continues to be used as such. The Tribunal is not looking for the value of a Home Depot, however, but rather the value of a commercial big-box building. Petitioner's selected comparables were vacant and available at the time of sale. The Tribunal finds that these sales best represent the fee simple interest in the subject property. Vacant and available at the time of sale is not an alien term; an appraiser's analysis of exchange value must account for this eventuality. . . . Again, Respondent's selected comparables were all sales of properties subject to leases in place,

otherwise known as sale-leaseback or leased fee transactions. Payments in such transactions are not predicated on market rent, however, but rather upon the amount the business can afford to pay based on its operations. Accordingly, sale-leasebacks are not true sales, but are more in the nature of a financing tool similar to a mortgage. [citations omitted.]

In *Lowes v Marquette Twp*, ___MTTR___ (Docket No. 385768, December 13, 2012), the Tribunal again concluded that where the subject property was built for Lowe's, and continues to be used as such, the Tribunal is not looking for the market value of a Lowe's property but the market value of a big-box building. The Tribunal further stated that the appraisal assignment requires the appraiser to value the subject property as if sold, available to be leased at market rent for the fee simple interest. The Tribunal further concluded that a value determination based on contract rents constituted a value-in-use determination. Investor-to-investor sales are a function of the lease rent amount, terms, and tenant, not the market value of the real estate. This type of transaction is considered a leased fee.

Further, in *Forest Hills Coop v City of Ann Arbor*, 20 MTTR 50 (Docket No. 277107, July 1, 2011), the Tribunal held (citing *Branford Towne Houses Coop v City of Taylor*, unpublished opinion per curium of the Court of Appeals, issued April 19, 2007 (Docket No. 265398)), that MCL 211.27(4) provides that actual income generated by a lease is not the controlling indicator of true cash value.

In *Rite Aid Corporation v Delhi Charter Twp*, 13 MTTR 404, 412 (Docket

No. 277889, October 5, 2004), the Tribunal again held that market rents must be considered in applying the income approach to value a property subject to lease; however, a long-term lease in place may be a “significant factor to be considered in determining what a third party could expect to receive in rent on the open market.”

Finally, in *Redford Square Assoc, Ltd v Twp of Redford*, ___MTTR___ (Docket No. 362195, May 29, 2012), the Tribunal concluded that a tenant-occupied building should be valued as a fee simple interest subject to existing leases at market rents, which is precisely how Petitioner’s appraiser valued the subject property using the income approach.

Not surprising, much has been written regarding the substantive issues of this case. Respondent relies on *The Appraisal of Real Estate, supra*, in support of its position that the Tribunal must value the leased fee interest in the subject property:

The lessor’s interest in a property is considered a leased fee interest regardless of the duration of the lease, the specified rent, the parties to the lease, or any of the terms in the lease contract. A leased property, even one with rent that is consistent with market rent, is appraised as a leased fee interest, not as a fee simple interest. Even if the rent or the lease terms are not consistent with market terms, the leased fee interest must be given special consideration and is appraised as a leased fee interest. *The Appraisal of Real Estate*, p. 114.

However, this general distinction between leased fee and fee simple interest does not address the essential issue of this case (i.e., MCL 211.27(4) specifically

requires the use of market rents except in unusual circumstances).

Petitioner also relies on *The Appraisal of Real Estate* to support its position that the value of the fee simple interest in the subject property must be determined for ad valorem tax purposes. For example, at page 447, *The Appraisal of Real Estate* states that a lease never increased the market value of real property rights to the fee simple estate. Further, “federal or state law often requires appraisers to value leased properties as fee simple estates, not leased fee estates (e.g., for eminent domain and ad valorem taxation).” And, at page 450, it states that “investment value is the value of a certain property use to a particular investor. Investment value may coincide with market value . . . if the client’s investment criteria are typical of successful buyers in the market.” “Market value is objective, impersonal, and detached. Investment value is based on subjective, personal parameters. To develop an opinion of market value with the income capitalization approach, the appraiser must be certain that all of the data and forecasts used are market-oriented and reflect the motivations of a typical investor who would be willing to purchase the property as of the effective date of the appraisal.” Finally, at page 453, market rent is referred to as economic rent. “Rent for vacant or owner-occupied space is usually estimated at market rent levels and distinguished from contract rent in the income analysis. In fee simple valuations, all rentable space is estimated at market rent levels. In a leased fee analysis, current contract

rents defined by any existing leases are used for leased space, and income for vacant space is estimated at market rent.”

The issues facing the Tribunal in this case are also articulated in an article entitled *You Can't Get the Value Right if you get the Rights Wrong* by David C. Lennhoff, MAI, SRA, writing in *The Appraisal Journal*, Winter 2009. Mr. Lennhoff discusses the difficulty in appraising single-tenant, built-to-suit commercial real estate where the appraiser is required to value the fee simple interest in the property. Recognizing that such properties, if sold, would sell as leased fees, with rents well above the market rent, Mr. Lennhoff concludes that to determine the value of the fee simple interest, such property must be valued under the assumption that they are vacant and available. “The purchase-related appraisal involves an opinion of how much an informed purchaser would pay for the property as encumbered by the lease. The appraisal for . . . tax purposes, however, usually calls for an opinion of the market value of the fee interest. The specific question then is, if this property, which was custom built for this particular occupant’s needs, were on the market for the typical exposure time and available to be leased or occupied, how much would an informed purchaser be willing to pay for it?” *Id.*

Distinguishing “value-in-use” and “value-in-exchange”, Lennhoff concludes that a property that has been custom built for the current occupant will

usually have a value-in-use that is higher than the property's market value, as value-in-use is a function of the current use, "regardless of the property's highest and best use." *Id.*

The rent for a custom-built commercial property is routinely higher than the rent for space that is not specifically designed for a tenant. A build-to-suit lease is simply not representative of the amount for which the real property would sell if it were vacant and available to be leased.

In applying a market approach, the appraiser should find "sales of second-generation uses of these properties If these sales are not distress sales and share the same highest and best use as the subject if vacant and available to be leased, then they will provide credible evidence of the subject's market value."¹⁵

Id.

Based on Michigan statute and case law, and giving some minimal

¹⁵ Mr. Lennhoff's article is cited in *In re Prieb Properties, LLC*, 47 Kan App 2d 122, 132-133; 275 P3d 56 (2012), which stated, in answer to the question "Are Build-to-Suit Rental Rates Reflective of Market Value", "[b]efore consulting various authoritative sources on this question, we take a common-sense approach to the problem: What is the nature of a build-to-suit lease? We suggest that such a lease is essentially a financing agreement between a lessor and lessee, and the rental rates therein are based in large part upon the revenue needed to amortize the investment required for the required construction – plus a measure of profit – over the lease term or extensions thereof. Accordingly, when one takes a snapshot view of rental rates at any time during a lease, these rates are not reflective of market rent, but rather just reflective of the rate required in that specific situation to continue an agreed revenue stream to amortize the lessor's investment, subject to a host of financial risks. In other words, contract rents in a build-to-suit lease are not designed to amortize an investment made at the outset and may vary dependent on factors that are unrelated to the real estate market thereafter."

consideration to positions taken in *The Appraisal of Real Estate* and by Mr. Lennhoff, the Tribunal finds that it is appropriate to determine the true cash value of the subject property for the tax years at issue by applying the income and market approaches to the fee simple interest in the subject property where these approaches to value take into consideration market rents in place. Simply, the Tribunal finds that it must determine the market value of a big-box retail store available for rent or sale and not the market value of a property subject to a build-to-suit lease to Kohl's, which takes into consideration the long-term lease to Kohl's as well as the credit worthiness of Kohl's as the long-term tenant of the property. Therefore, the Tribunal gives no weight to Respondent's appraisal, which essentially determined the true cash value of the subject property based on an income approach that applied contract rents paid by Kohl's, Kohl's' existing use of the subject property, and the creditworthiness of Kohl's as the long-term tenant in place - a methodology that the Tribunal finds violates Michigan law (where unusual circumstances are absent).¹⁶

¹⁶ The Tribunal also finds the testimony of Respondent's appraiser to lack credibility. Throughout the hearing, Respondent's appraiser was clearly reluctant to give specific answers to questions from Petitioner's counsel, was inconsistent in his testimony, and was shown to be inconsistent in his appraisal methodology. Further, the Tribunal finds it incredible that Respondent's appraiser could conclude that the true cash value of the subject property could increase by almost \$2 million or 32% from December 31, 2010, to December 31, 2011, given the economic conditions experienced in Saginaw County and in the State of Michigan. To essentially support this substantial increase in the value of the subject property by reducing the capitalization rate from 10% to 7.5% (thereby resulting in an increase in value in excess of 30%)

In this regard, the Tribunal has reviewed the market and income analysis of Petitioner's appraiser and finds that Petitioner's conclusions of value are adequately supported by its appraisal evidence. The Tribunal again notes that Respondent's cross-examination of Petitioner's appraiser focused primarily on the appraiser's failure to value the leased fee interest in the property and his purported failure to follow USPAP standards in the preparation of his appraisal and did not attempt to discredit the substance of Petitioner's appraiser's market conclusions. Here, Petitioner's appraiser correctly distinguished the differences between fee simple and leased fee ownership of the subject property, concluding that the true cash value of the subject property must be determined by analyzing the subject property as available for sale or lease on the applicable assessment dates. See MCL 211.2(2). Further, the Tribunal finds that Petitioner's appraiser has provided credible support and analysis for his determination of the true cash value of the subject property for the applicable assessment dates using both the income and market approaches to value.

The Tribunal finds that, in consideration of the above, awarding costs to Petitioner is not appropriate. MCL 205.752 states that "[c]osts may be awarded at the discretion of the tribunal." The Tribunal implemented this statute in its

because of the reduced risk associated with Kohl's as a long-term tenant, is not only illogical, but clearly violates the Tribunal's understanding of applicable Michigan statute and case law barring unusual circumstances.

procedural rule TTR 145. This rule allows the Tribunal to order costs be remunerated to a prevailing party of a decision or order. See TTR 145(1). The rule itself, however, provides no guidelines or criteria by which the Tribunal is to measure whether costs should be awarded. In *Aberdeen of Brighton, LLC v City of Brighton*, unpublished opinion per curiam of the Court of Appeals, issued October 16, 2012 (Docket No. 301826), the respondent contended that the Tribunal “may only award costs under TTR 145 if the requesting party shows good cause or the action or defense was frivolous.” *Id.* at 5. The Court held that the language of TTR 145 is unambiguous and its plain language indicates that a prevailing party may request costs and does not indicate that a showing of good cause or a frivolous defense is necessary.

In support of its request for an award of costs, Petitioner contends that “Respondent’s failure to value the subject property based on that thirty year-old and well-known and fundamental law is inexcusable. Certainly Kohl’s should not have to bear the ultimate cost for Kochville’s total blunder and refusal to recognize applicable law.” (Transcript, Vol. 1, p. 30) Although Petitioner is clearly the prevailing party in this matter, the Tribunal finds that the law is not as clear as Petitioner contends, and that even though the Tribunal found Respondent’s appraiser’s testimony and appraisal to be less than credible, Respondent and its appraiser presented a case that required the Tribunal to carefully research

controlling statutes, case law, and literature focusing on the subject of whether reliance on contract rents, where an existing long-term net lease is in place, is appropriate absent unusual circumstances.

The Tribunal finds, based upon the Findings of Fact and the Conclusions of Law set forth herein, that Petitioner has proven by a preponderance of the evidence that the subject property is assessed in excess of 50% of market value. The subject property's true cash values (TCV), state equalized values (SEV), and taxable values (TV) are as stated in the Introduction section above.

JUDGMENT

IT IS ORDERED that the property's assessed and taxable values for the tax years at issue are MODIFIED as set forth in the Introduction section of this Final Opinion and Judgment.

IT IS FURTHER ORDERED that the officer charged with maintaining the assessment rolls for the tax years at issue shall correct or cause the assessment rolls to be corrected to reflect the property's true cash and taxable values as finally shown in this Final Opinion and Judgment within 90 days of the entry of the Final Opinion and Judgment, subject to the processes of equalization. See MCL 205.755. To the extent that the final level of assessment for a given year has not yet been determined and published, the assessment rolls shall be corrected once the final level is published or becomes known.

IT IS FURTHER ORDERED that the officer charged with collecting or refunding the affected taxes shall collect taxes and any applicable interest or issue a refund as required by this Order within 28 days of the entry of this Order. If a refund is warranted, it shall include a proportionate share of any property tax administration fees paid and of penalty and interest paid on delinquent taxes. The refund shall also separately indicate the amount of the taxes, fees, penalties, and interest being refunded. A sum determined by the Tribunal to have been unlawfully paid shall bear interest from the date of payment to the date of judgment and the judgment shall bear interest to the date of its payment. A sum determined by the Tribunal to have been underpaid shall not bear interest for any time period prior to 28 days after the issuance of the Tribunal's order. Pursuant to 1995 PA 232, interest shall accrue (i) after December 31, 2008, at the rate of 3.31% for calendar year 2009, (ii) after December 31, 2009, at the rate of 1.23% for calendar year 2010, (iii) after December 31, 2010, at the rate of 1.12% for calendar year 2011, (iv) after December 31, 2011, and prior to July 1, 2012, at the rate of 1.09% for calendar year 2012, and (v) after June 30, 2012, and prior to July 1, 2013, at the rate of 4.25%.

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

MICHIGAN TAX TRIBUNAL

By: STEVE H. LASHER

Entered: February 22, 2013