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

Dundee Riverfront, LLC,

Petitioner,

v

MTT Docket No. 387968

Dundee Township,

Respondent.
_____/

Tribunal Judge Presiding
Paul V. McCord

ORDER DENYING RESPONDENT'S MOTION
TO DISMISS FOR LACK OF EVIDENCE

FINAL OPINION AND JUDGMENT

Jahn F. Landis (P64666), for Petitioner
Michael Miletti, Assessor, for Respondent

I. INTRODUCTION

We are asked in this case to value an incomplete four-story commercial building stalled in the final steps of construction. Sitting on the banks of the River Raisin and prone to flooding, the Subject sits as a vacant shell with no buyers or tenants willing to take on the risks that the Subject presents. Petitioner filed this case on May 11, 2010, asserting that the Subject in its then (and current) condition was worthless. Petitioner later revised its contention of value based on its proofs, claiming that the Subject's true cash value for the 2010 tax year likely did not exceed $420,000. For the 2010 tax year, Respondent assigned, by method of assessment, an indicated true cash value to the Subject of $1,372,140. After a half day evidentiary hearing held on October 24, 2012, in Dimondale, Michigan, we

must decide: (1) whether Respondent is entitled to a directed verdict in its favor; it is not, and (2) the Subject's usual selling price as of December 31, 2009; it is $856,540.

II. JUDGMENT

For the tax year at issue, we hold that the true cash value of Petitioner's property, its state equalized (SEV) and taxable (TV) values, are as follows:

Parcel No. 5842-040-582-00			
Year	TCV	SEV	TV
2010	$856,540	$428,270	$428,270

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

After hearing and observing the witnesses who testified at the evidentiary hearing, allowing for the Tribunal to assess credibility, and having further considered the exhibits submitted by the parties, the arguments presented by counsel, and applying the governing legal principles, the Tribunal makes the following independent findings of fact and conclusions of law[1] set forth below in memorandum form. See MCL 205.751(1) ("A decision and opinion of the tribunal . . . shall be in writing or stated in the record, and shall include a concise statement of facts and conclusions of law, stated separately . . ."); see also MCL 24.285.

IV. FINDINGS OF FACT

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 MCL 24.285. The findings of fact are set forth in narrative form based on the Tribunal's conclusion that it is the most

[1] To the extent that a finding of fact is more properly a conclusion of law, and to the extent that a conclusion of law is more properly a finding of fact, it should be so construed.

expeditious manner of proceeding where there are few disputes about facts and the main focus of the controversy is the valuation of the Subject for the tax year at issue.

1. Assessment

The Subject Property is identified on Respondent's assessment roll by Parcel No. 58-42-040-582-00. The indicated true cash value of the Subject by method of mass appraisal together with the state equalized value (SEV), assessed value (AV), and taxable value (TV), for Dundee Township, were as follows:

Year	TCV	SEV	AV	TV
2010	$1,372,140	$686,070	$686,070	$674,211

For the tax year at issue, the Subject was classified, for ad valorem tax purposes, as "commercial" real property. As discussed in more detail below, Respondent's assessment of the Subject was developed through the means of modified cost less depreciation approach to value using the *Michigan Assessor's Manual* published by the State Tax Commission as a guide.

2. The Subject Property

The Subject is described as an irregularly shaped (roughly triangular) 0.80 acre lot, with a 28,488 square foot four-story mixed-use building located thereon. The Subject is adjacent to the boardwalk and gazebo along the River Raisin. The Subject Building is situated toward the front of the site facing W. Monroe Street (M-50), with the rear and westerly side of the building facing the River Raisin. Petitioner purchased the Subject site for $105,000 in April of 2004. A small automobile dealership sat on the site prior to Petitioner's acquisition of the Subject.

Petitioner began construction of the Subject Building in 2006. At conception, the Subject building was designed as a mixed-use

retail/office/residential project. Specifically, the Subject offered ground floor retail space with the upper floors, the second and third floors, providing office space. The fourth floor was designed to accommodate four condominium units. The Subject building sits on a raised basement that provides garage parking to accommodate 14 vehicles. In addition, surface parking at the Subject can accommodate an additional 40 vehicles. Access to garage parking is through an automatic roll-up garage door located on the west side of the Subject building and at the lowest site elevation. Each of the Subject's four floors and the lower level parking area contain approximately 7,565 gross square feet.

Construction of the Subject building stopped sometime in 2007; the site improvements (parking lots, exterior lighting, landscaping), the exterior and first floor interior lobby were completed with no additional work done since that time. For the tax year at issue and through the date of hearing in this matter, Subject remains in a state of partial completion, essentially a shell building. Petitioner has invested more than $4 million into the Subject.

3. Zoning

The Subject is zoned "B-1" or central business district. Permitted uses within B-1 zoning are as follows:

> Intended to be limited to a size and scale that is compatible with the historic character of the downtown and the surrounding residential neighborhoods. The district allows for a mixture of uses with the intent of maintaining retail on the first floor, with residential and offices on the upper floors. Special use permits would be required for alternate uses. P-2, at 15.

There are no pending or prospective zoning changes and it is not likely that Subject's zoning can be changed. See P-2, at 15. Further, there are significant

restrictions on development due to the Subject's location within the River Raisin floodplain and recurring high water on the Subject.

4. Flooding

The Subject lies largely below the 100-year floodplain high water mark of the River Raisin. Given the Subject's location and elevation within the River Raisin floodplain, the Subject experiences periodic annual flooding, resulting in the submergence of almost the entire site. During these periods of episodic flooding, the water level at the site rises to the level at W. Monroe Street, which is toward the front of the Subject building. At flood stage, the garage parking under the Subject building and virtually all of the surrounding surface parking is entirely submerged, rendering the Subject building practically inaccessible. For example, during 2011, there was no available parking for six or seven days, with limited parking for two weeks. Before, during, and after the tax year at issue, the Subject has experienced flooding from the adjacent river, which has caused functional deficiencies to the site. See Ex P- 1.

Paul Hefflebower, one of the owners, testified that during Petitioner's due diligence period when it was in the process of acquiring the Subject, Petitioner was made aware of only one instance of flooding at the site, dating back to 1986. Petitioner hired a consulting engineer regarding site and construction of the Subject building. Construction began in late 2006. The Subject site was formerly on higher ground; however, it was excavated to make way for the existing building, placing it below the floodplain. P-2, at 27. The first instance of flooding occurred sometime in 2007 after construction had commenced. Mr. Hefflebower stated that it usually floods once per year, but in one year, there were two instances of flooding. Petitioner ultimately filed suit against its consulting engineer for negligent design; that matter settled out of court for an undisclosed sum.

Petitioner eventually hired the C2AE engineering firm out of Lansing, Michigan, to perform an engineering study of the Subject and the necessary flooding remediation measures. By letter, C2AE offered its summary of costs to remediate the flooding condition at the site and protect the building constructed thereon. C2AE estimated remediation costs of $650,000. This estimate does not include the cost of any required approvals by the Michigan Department of Environmental Quality (the DEQ). Nor does the estimate include any additional work that may be required by the DEQ, such as compensating fill and wetland mitigation, which could require purchasing a compensating site dedicated as wetlands.

5. *Petitioner's Efforts to Sell or Lease the Subject*

Prior to construction, Petitioner had pre-leased space within the Subject building. Petitioner secured letters of intent from several interested tenants for the Subject building. A physician and pharmacy intended to lease space on the first floor, and three other businesses intended to occupy space on the upper floors. All these potential tenants backed out once the flooding occurrence became apparent in 2007. Petitioner engaged two commercial real estate firms to lease space in the building for the past several years. Petitioner attempted to lease space at $17 per square foot plus the standard finishes. At all times relevant, these efforts have been fruitless, with no leases being entered into, rendering the Subject vacant as of the relevant tax day. Petitioner has also attempted to sell the Subject. The initial asking price was around $5.8 million, which was later reduced to about $5.2 million. After this price reduction, Petitioner entered into negotiations with a potential purchaser, but a sale transaction never developed.

6. Petitioner's Value Evidence

Petitioner's expert, Kenneth Blondell, determined a value for the Subject as set forth in his appraisal admitted as Petitioner's Exhibit 2. Mr. Blondell rendered opinions of value for tax years 2011 and 2012, although only tax year 2010 is at issue in this appeal. Petitioner's expert indicated that the appraisal, after minor correction, reflects a market value of the Subject Property of $440,000 for the 2011 tax year and $450,000 for the 2012 tax year. Mr. Blondell did not render an opinion of value as to the relevant valuation date for the 2010 tax year in his appraisal. At hearing, Mr. Blondell opined that the value of the Subject, as of December 31, 2009, would likely be 3 percent to 5 percent higher than that indicated in his appraisal.

Petitioner's expert opined that, given the market stigma associated with the Subject's periodic flooding, no commercial buyer or tenant would have any interest in a building such as the Subject. He stated that the problem for potential retail tenants who would occupy the Subject's first floor is the extent to which both the Subject site and building floods during certain periods of time, as it eliminates both the garage and most of the surface parking, rendering the Subject at times virtually inaccessible. The lack of building access and adequate parking during flooding periods renders the Subject not usable for its intended use as a commercial building, according to Petitioner's expert. As the Subject has remained a shell building with largely open floor plates, Mr. Blondell concludes that this condition opens the Subject to convert/adapt to an alternated use – specifically a 15-unit apartment building. Mr. Blondell envisions moving the tenant garaged parking from the lower level to the Subject building's first floor, which would allow for 14 parking spaces, or less than one parking space per unit. To follow through with this plan, the existing first floor, which was originally

designed to accommodate the building's lobby and commercial retail space, would need to be reinforced from below with enough structural support for cars to be parked there. A new automatic access door, large enough to permit cars to enter and exit, would need to be cut into the east side of the Subject Building in order to access the indoor parking together with a ramp to the first floor from the street, protected by a retaining wall. Finally, the remaining three floors, which contain approximately 21,300 square feet, would need to be finished out into 15 loft-style rental apartment units of approximately 1,100 square feet each. Petitioner's expert opined that the rough cost to convert the Subject in the manner described, together with the necessary structural engineering, would be $577,950.

Mr. Blondell prepared both a sales comparison approach and an income approach. Both approaches are premised on his belief that the highest and best use of the Subject would be as a 15-unit apartment building, with approximately 1,100 square feet per unit. The sales comparison approach in the appraisal contained four apartment sales that occurred between December 2009 and August 2011. The number of units ranged from 4 to 45, with a sale price per unit ranging from $55,556 to $80,000. Mr. Blondell arrived at an indicated value per unit of $70,000, which, when applied to the proposed 15-unit Subject, equates to a value of $1,050,000 if completed. Mr. Blondell then applied the $577,950 planned cost to complete the building and a $40,000 lease-up cost, which covers the commission to show the building to prospective tenants.

For the income approach, Mr. Blondell testified that he looked at rental comparables and what he believed would be a market rent and then applied that to the Subject as a 15-unit apartment building, with additional application of expenses and a tax loaded cap rate. Mr. Blondell testified that the millage rate for 2011 in his report was listed incorrectly under his income approach section and should be

5.60326, not 6.41294. The appraisal then applies a 50% assessment ratio, which would equal 2.80163%. The total tax loaded cap rate is thus 11.05163%. This would result in a potential value via the income approach of $1,060,504, if the Subject was completed as the envisioned apartment building.

7. Cost-Less-Depreciation Approach

Respondent offered its modified cost-less-depreciation analysis as prescribed by the State Tax Commission and contained in its assessment records in support of its conclusion of the Subject's value for the tax year at issue. Petitioner's expert testified that while he considered the cost approach, he did not develop the approach because he did not believe that the market would pay the likely higher amount indicated by the cost approach. For the 2010 tax year, Respondent determined a true cash value of $1,372,140. Respondent's valuation, as reflected on the property record card, breaks the value computations into three parts: (1) land value; (2) land improvements; and (3) building value.

(1) Land value

The Subject is valued at 0.80 acres at a rate of $235,224. A 75% adjustment was applied to this rate, which equates to a total land value of $141,134.

(2) Land improvements

The Subject is assessed for 20,082 square feet of asphalt paving, at a rate of 1.61 and application of a county multiplier of 1.43 and 97% good. The resulting value is $44,848. The Subject is also assessed for five lighting units used to illuminate the parking lot at a rate of $1,765 per light, valued at 91% good. This results in a value of $8,031. The total value of the land improvements assessed for 2010 was $52,879.

(3) Building value

Respondent concluded that the building contains 28,488 gross square feet. For the 2010 tax year, the cost new estimate of $2,618,046 was derived after application of the county multiplier of 1.43. The building is indicated to have an effective age of five years. The depreciated cost of the building was concluded to be $2,356,241, reflecting a physical depreciation rate of 90% good. Respondent concluded that an additional 50% depreciation was warranted as the subject was merely a shell building. Respondent did not take into account that the Subject lies in a floodplain, experiences annual flooding, suffers market stigma from this condition, or any functional obsolescence from this condition in its assessment. After application of the economic condition factor of 1.0, the indicated market value of the building by method of mass appraisal was $1,178,120.

V. CONCLUSIONS OF LAW

1. *Respondent's Motion to Dismiss for Lack of Evidence*

Before addressing the true cash or market value of the Subject for the single tax year at issue, we first address Respondent's Motion to Dismiss for Lack of Evidence at Hearing brought at the close of Petitioner's case-in-chief. Respondent reasons that it is entitled to a dismissal because neither the testimony of Petitioner's valuation expert nor his supporting documentary evidence reaches a value conclusion for the tax year at issue.

In determining whether to grant such a motion, we must examine the evidence presented up to the time of the motion in the light most favorable to the non-moving party, grant that party every reasonable inference, and resolve any conflict in the evidence in that party's favor to decide whether a question of fact existed. See *Sparks v Luplow*, 372 Mich 198; 125 NW2d 304 (1963). A motion for involuntary dismissal is appropriately granted after the presentation of Petitioner's

proofs where the Tribunal is satisfied that, on the facts and the law, Petitioner has shown no right to relief. *Id.;* see also MCR 2.504(B)(2).

Ultimately, the value of property is a question of fact. See *Edward Rose Bldg Co v Independence Twp*, 436 Mich 620, 638; 462 NW2d 325 (1990). Petitioner has the burden of proving the assessment of the Subject is excessive by establishing the true cash value of the Subject. MCL 205.737(3); *President Inn Props LLC v Grand Rapids*, 291 Mich App 625; 806 NW2d 342, 347 (2011). In deciding valuation cases, we often look to the opinions of experts. See TTR 283(3). To this end, our rules generally make the submission of an appraisal or documents supporting the contended value together with supporting expert valuation testimony a practical requirement. See TTR 252(1) and 283(3). Nevertheless, the Legislature provided a somewhat liberal standard regarding the admission of evidence. See MCL 205.746(1) And, controlling appellate authority instructs that the Tax Tribunal should be permissive in the admission of "relevant"[2] evidence of the fair market value of property subject to an appeal, even where that evidence is not determinative. *Professional Plaza, LLC v City of Detroit*, 250 Mich App 473, 476; 647 NW2d 529 (2002). Further, MCL 205.746(1) and TTR 283(4) permit lay witness testimony in the form of opinions or inferences by incorporating MRE 701. Consequently, an appraisal that does not necessarily speak as to the applicable valuation date and alternative methods of proof, including certain lay witness testimony, is admissible in support of a party's claim.

[2] Any evidence can be "relevant" where that evidence would tend to affect, or be probative of, the market value of the property as of a specific date, to the extent that the evidence would tend to show or have affected the price that a willing buyer would have offered for the property. See, e.g., *Michigan Dept of Transp v Tomkins*, 270 Mich App 153; 715 NW2d 363 (2006). Where evidence of a comparable sale, or in this case an entire appraisal, is offered to establish the value of property, we may, in our discretion, admit or exclude it considering such factors as time of the transaction, the size, shape and character of the comparable properties, and whether there has been any enhancement or depression in value. It makes no difference whether the transactions referenced in the latter occurring appraisal occurred before or after the relevant valuation date, so long as it is not too remote a period of time and the properties are reasonably comparable. See *Detroit/Wayne County Stadium Authority v Drinkwater, et al*, 267 Mich App 625, 648-649; 705 NW2d 549 (2005).

Here, reasonable minds could differ regarding the best evidence of value. While Petitioner's appraisal evidence does not speak to the value of the Subject as of the relevant tax day, it does document the continual flooding of the Subject by the River Raisin. Further, both the testimony of Petitioner's owner, Mr. Hefflebower, and that of its expert were sufficient to support a conclusion that the Subject suffers significant functional obsolescence due to flooding during the tax year at issue. As a result, Petitioner has been unable to either lease or sell the Subject either during the tax year at issue or thereafter. Respondent did not challenge Petitioner's evidence of flooding, nor does it appear that Respondent even disputes this fact. Further, Respondent's assessor admitted that while the assessment of the Subject took into account the building's unfinished state of construction, it did not take into account any functional obsolescence due to flooding. See MCL 211.27(1) (providing, among other things that in determining true cash value for assessment purposes, an assessor is required to consider ". . . the advantages and disadvantages of location . . ."). Viewing this evidence in the light most favorable to Petitioner as the non-moving party, granting Petitioner every reasonable inference and resolving any conflicts in the evidence in its favor, this evidence could support a finding that Petitioner's property was worth less than that indicated by the assessment and, as a result, Petitioner would be entitled to some relief on its claim.[3] We also point out that although not conclusive, Petitioner's evidence was, in this light, sufficient to meet its burden of going forward with the evidence. As a result, Respondent had the burden of going

[3] While evidence of a significant condition affecting the marketability of property may not be conclusive as to the ultimate issue of fair market value, whether such evidence should factor into a determination of a property's true cash value is not a categorical question of law but a simple question of relevance: Does the proposed evidence assist the Tribunal in ascertaining facts of consequence to the determination of the case? See MRE 401. The question to be asked in a valuation case "is whether the admission of the evidence would make more or less probable the proposition that the property had a certain fair market value on a given date?" In the circumstance of this case, and in light of Respondent's admission, such offered evidence is sufficient as far as Petitioner meeting its burden of production.

forward with its evidence supporting its claim as to the market value of the property. See *Great Lakes Div of Nat'l Steel Corp v Ecorse*, 227 Mich App 379, 409-410; 576 NW2d 667 (1998). Accordingly, Respondent's Motion to Dismiss for Lack of Evidence is denied.

2. Valuation

In placing a value on the Subject, we begin our analysis with the now well-established principle that a "property's assessed valuation on the tax rolls carries no presumption of validity." *President Inn Props LLC*, 291 Mich App at 640. Where, as here, Petitioner produced sufficient evidence to meet the burden of coming forward with evidence, we are obligated to make an independent determination of the Subject's true cash value for the tax year at issue. *Id*. at 631. In this regard, we must give consideration of the evidence adduced on behalf of both parties and conclude this matter based on a fair preponderance of the evidence, that it is "more likely than not" that the true cash value of Petitioner's property is less than that as established on the assessment rolls. See MCL 205.735(2); See generally, *ProMed Healthcare v City of Kalamazoo*, 249 Mich App 490, 495; 644 NW2d 47 (2002).

In deciding valuation cases, we often look to the opinions of expert witnesses. The Tribunal has wide discretion when it comes to accepting valuation testimony and appraisal evidence. See *President Inn Props*, 291 Mich App at 639. The Tribunal is under no obligation to accept the valuation figures or the approach to valuation advanced by either party. *Id.*, citing *Teledyne Continental Motors v Muskegon Twp*, 145 Mich App 749, 754; 378 NW2d 590 (1985). The Tribunal may accept or reject a party's valuation theory in total, or may pick and choose the portions to adopt. *Meadowlanes*, at 485-486. The witness's testimony is weighed in light of his or her qualifications, knowledge of the Subject and relevant market,

and with proper regard to all other credible evidence in the record. See *President Inn Props, supra* at 640. The Tribunal, however, is not required to quantify every possible factor affecting value. See *Southfield Western, Inc v Southfield*, 146 Mich App 585, 590; 382 NW2d 187 (1985). Regardless of the valuation approach employed, the final value determination must represent the usual price for which the subject property would sell. *Meadowlanes* at 485-486.

At the center of the parties' disagreement as to the true cash value is their apparent disagreement over the highest and best use of the Subject. Petitioner argues that given the Subject's persistent flooding, the highest and best use is as residential rental real estate – an apartment building, whereas Respondent essentially maintains that it is as its intended current use, as a mixed-use commercial and residential property.

3. Highest and Best Use

The true cash value of property must be evaluated considering the property's highest and best use. *Huron Ridge, LP v Ypsilanti Twp*, 275 Mich App 23, 27-28; 737 NW2d 187 (2007). Highest and best use means "the most profitable and advantageous use the owner may make of the property even if the property is presently used for a different purpose or is vacant, so long as there is a market demand for such use." *Detroit/Wayne Co Stadium Auth v Drinkwater, Taylor & Merril, Inc*, 267 Mich App 625, 633; 705 NW2d 549 (2005), quoting SJI 2d 90.09, now M Civ JI 90.09. And the concept also recognizes that the use to which a prospective buyer would put the property will influence the price which the buyer would be willing to pay.[4] *Edward Rose Bldg Co v Independence Twp*, 436 Mich

[4] Technically, in order for a use to qualify as the property's highest and best use, a use must satisfy four criteria: "legally permissible, financially feasible, maximally productive, and physically possible." *Detroit v City of Detroit Plaza Ltd Partnership*, 273 Mich App 260, 285; 730 NW2d 523 (2006). A legally permissible use is either currently allowed or most probably allowable under applicable laws and regulations. In other words, what uses of the Subject site are permitted by zoning, deed restrictions, environment restrictions, and government restrictions? A use is

620, 633; 462 NW2d 325 (1990). While highest and best use can be any realistic, objective potential use of the property, we note that the use to which the property is currently being put is indicative of the use to which a potential buyer would put the property, absent proof to the contrary. See MCL 211.27(1) (penultimate sentence); see also *Lionel Trains, Inc v Chesterfield Twp*, 224 Mich App 350, 352; 568 NW2d 685 (1997) (citing MCL 211.27(1), the Court of Appeals rejected the taxpayer's "claim that under the law the use of ... [personal] property may not be considered when determining true cash value"); *Fairplains Twp v Montcalm Co Bd of Comm'rs*, 214 Mich App 379; 542 NW2d 897 (1995)(observing that the next to last sentence of MCL 211.27(1) "[i]ndicates that the Legislature recognized that use may influence value"); *Teledyne Continental Motors v Muskegon Twp*, 163 Mich App 188, 192; 413 NW2d 700 (1987) ("[i]n determining true cash value, the assessor must consider the 'existing use' of property. MCL 211.27(1). However, this does not preclude consideration of other potential uses"); and *Safran Printing Co v Detroit*, 88 Mich App 376, 382; 276 NW2d 602 (1979) ("[n]ormally, existing use may be indicative of the use to which a potential buyer would put the property and is, therefore, relevant to the fair market value of the property."). As a consequence, the determination of a property's highest and best use is a key element to a proper valuation and is vital to the conclusion of a property's true cash value. Highest and best use is the foundational basis for the application of each of the three recognized approaches to value; it informs the methods to be applied, and drives the selection of comparable properties and the weight to be assigned. As an

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considered financially feasible where the ability of a property to generate sufficient income to support the use for which it was designed. Among those uses that are physically possible and legally permissible, which uses will produce a net return to the owner? Maximally productive refers to the condition that the selected use must yield the highest value of the possible uses. The inquiry posits which use will produce the highest net return or the highest present worth. Finally, any potential use must be physically possible given the size, shape, topography, and other characteristics of the existing improvement and site or in terms that are more common: What uses of the Subject building are physically possible?

opinion of value is only as good as the facts and reasoning which form the basis of that opinion, an opinion of value where highest and best use determination is materially flawed is entitled to little weight.

In deciding whether the Subject as a 15-unit apartment building is its highest and best use, the main question we are faced with is whether it is reasonable to conclude that a hypothetical willing buyer would considered the Subject for such a use. The preponderance of the evidence informs us that they would not. Petitioner's argument that conversion of the Subject into a 15-unit apartment building was the Subject's highest and best use is, inter alia, conditioned on: (1) the market would support an additional 15 apartment units and (2) the conversion of the ground floor to parking and the upper floors into apartment units. We address each separately.

(1) Demand

Petitioner's expert opined that, given the flooding condition at the Subject, there is no demand for the Subject based on its intended design as mixed-use commercial building. While we may tend to agree with that conclusion as evidenced by the withdrawal of the Subject's committed tenants, failure to secure a buyer, and long period of vacancy, we question whether Petitioner's alternate highest and best use, converting the Subject to 15-unit apartment building, is reasonable. Petitioner's expert testified that while he did not perform a formal demand study, after checking occupancy levels with local apartments in the area, he concluded there was sufficient demand to absorb an additional 15 rental units. While the market may very well have the capacity to accommodate another 15 rental units, it strikes us as implausible that a mixed-use building so affected by flooding and the resulting market stigma would now somehow find market acceptance as an apartment building. Where, as here, an asserted highest and best

use differs from current use, the use must be reasonably probable and have real market value. See *Detroit/Wayne Co Stadium Auth v Drinkwater, Taylor & Merril, Inc*, 267 Mich App 625, 637; 705 NW2d 549 (2005) (considering the application of doctrine of assemblage to determine the highest and best use of property in the context of a case involving an evaluation of prospective uses for condemned property). Any proposed use that "depend[s] upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable" are to be excluded from consideration. *Id.* at 638 quoting *Olson v United States*, 292 US 246, 257 (1934). Regardless, we do not decide whether Petitioner's opinion regarding demand for the Subject – following conversion – was reasonable because Petitioner's argument fails as to its second required condition, the physical conversion of the Subject.

(2) Conversion

Petitioner's expert estimated that the rough cost to convert the Subject in the manner described, together with the necessary structural engineering, would be $577,950. Given the scope of work, necessary engineering and approvals, and extensive renovations, we are simply not persuaded by this cost estimate. Consequently, without sufficient data or meaningful analysis, we question whether conversion to this specific use is financially feasible.

Our doubts as to the financial feasibility of the proposed conversion aside, it appears that Petitioner's hypothetical alternative highest and best use may not be physically possible in the first place. While it is certainly well within the realm of possibility that the second, third, and fourth floors of the Subject, all of which are essentially shell spaces, can be built out into apartment units, Mr. Blondell offered during his testimony that even after the structural modifications are made, the first floor may not be strong enough to hold cars.

We also point out that Petitioner's expert did not adequately address in his alternative highest and best use analysis whether or not the use would be legally permissible. If the highest present utilization of the site or property is not allowed under the current zoning, and if there is a reasonable probability that a change in zoning is obtainable, these conditions can be considered in the highest and best use determination. The appraiser, however, is obligated to disclose fully all pertinent factors relating thereto, including the time and expenses involved in the change, and the risk that the zoning change may not be granted. Appraisal Institute, *The Appraisal of Real Estate* (Chicago, 13th ed, 2008), p 282. Petitioner's expert disclosed the permitted use under B-1. While the Subject conforms to this zoning under its present permitted and intended designed use, it does not appear that the current zoning would permit, without a variance, parking on the first floor and all residential rental above.

Petitioner could have presented evidence demonstrating the possibility of a change in the applicable zoning ordinance, or of obtaining a variance to allow the suggested highest and best use of the property, but chose not to do so. There is simply no credible evidence before the Tribunal that conversion of the Subject to all residential rental use, permitted parking on the first level or that the converted property contained an adequate number of parking spaces was within a "reasonably possible" chance of being permitted, other than the speculation of Petitioner's appraiser that "this would require a lot of approvals from the city." Tr 30.

There are other factors, in addition to zoning, that have a bearing upon the legal use of property. Private restrictions, building codes, and environmental regulations, to name a few, that may preclude many possible highest and best uses. *The Appraisal of Real Estate,* p 281. The fact that the Subject lies in the floodplain of the River Raisin also impacts the legal use of the property. Petitioner's expert

indicates that a more intense use on the Subject site is prohibited, as the elevation of the site is largely below the floodplain high water mark.

Petitioner touches on the fact that certain work within the floodplain requires the approval of the Army Corps of Engineers and the Michigan Department of Environmental Quality. For the most part, Petitioner's evidence only deals with reasons for rejecting the designed current use. There is extensive testimony describing the Subject, detailing the physical and functional inadequacies of the Subject, particularly problems of substantial periodic flooding, and elaborating on the fact that had Petitioner been aware of this condition, it is unlikely that the Subject would have been built in the first instance. None of this evidence, however, deals with the issue of the reasonable likelihood that multi-story residential rental construction would be permitted in a flood zone in which the Subject is located. When questioned specifically concerning whether his opinion of converting the Subject to an apartment building would conform to the township's zoning, Mr. Blondell stated that the township zoning requires more than one parking space per unit, but that he believed the planned highest and best use would meet the requirements because the other surface parking (approximately 40 spaces) would still be there. This statement contradicts his previous testimony regarding the lack of surface parking for up to seven days, and the limited surface parking available for almost two weeks. [5]

In the end, we find that Petitioner did not produce sufficient evidence of the applicable zoning and/or other restrictions or, if such restrictions in fact exist, whether or not the necessary variances and approvals could be obtained. We are left to speculate on this issue, which we refuse to do. Petitioner's conclusion as to

[5] This statement also belies the credibility of the proposed conversion of the first floor into garaged parking. Assuming this is the case, why then would it be necessary to incur the expense and construction of converting the first floor into garage parking?

highest and best use failed to adequately consider whether the use was legally permissible on the relevant tax day. See *Warwick Hills Golf & Country Club v Grand Blanc Twp*, 11 MTTR 281 (Docket No. 225492, March 27, 2001).

Finally, in arriving at his conclusion of the highest and best use of the Subject, Petitioner's appraiser overlooks the fact that, when dealing with *improved* property, three use potentials exist: (1) the present improvements are demolished and the land is used for other purposes, (2) the present improvements are retained without substantial physical or operational change, and (3) the present improvements are retained but with significant change in the physical property or its management. See *The Appraisal of Real Estate*, p 287.

Petitioner's expert did not address whether the Subject building should be demolished – whether the cost to demolish would have been more or less than the cost to cure. Instead, in rather conclusory fashion, Petitioner's expert states in his report that the value of the existing improved property exceeds the value of the site as if vacant. See P-2, at 31. This conclusion stems in part, we infer, from his estimated cost to convert, which we do not find credible. We are simply not convinced by the appropriate standard of proof that Petitioner's conclusion in this regard is appropriately devised and adequately supported. Nor does it appear Petitioner's expert considered whether the cost of installing a retaining wall and other flooding remediation measures, as credibly testified to by Mr. Hefflebower for an approximate cost of $650,000, was so high that the highest and best use was not its current use.

In sum, the testimony at hearing, together with the Petitioner's expert report, establishes that converting the Subject to a 15-unit apartment building was neither reasonably possible nor would be legally permitted. The Tribunal further wonders whether it is even physically possible, financially feasible, or even the maximally

productive use. Petitioner's alternative highest and best use was, at best, nothing more than speculation and conjecture. The Tribunal finds that a further review of Petitioner's sales and income analysis for the Subject is unnecessary, as the appraisal does not reasonably or reliably estimate the value of the Subject, but merely speculates to a value based on an alternate apartment building use that has not been established to be feasible or legally permitted. We turn to the question of the Subject's value utilizing Respondent's cost approach data.

4. Cost Approach

We find, under the facts of this case, that the cost approach provides the most accurate indicator of the Subject's "usual selling price." The premise of the cost approach assumes that the market value of a building, such as the Subject, can be related to its cost. This is because the cost approach assigns a value to the Subject based on the assumption that a knowledgeable buyer would pay no more for a property than the cost to acquire a similar site and build a similar structure of equivalent desirability, or in this instance, similar state of construction. See *The Appraisal of Real Estate*, p 377. That estimate is then adjusted for the subject's depreciation [*Id*. at 378] and relates to the loss of a building's market value over time from all causes: physical deterioration, functional obsolescence (such as changes in market desired layouts, level of insulation, energy efficiency, etc.), and external obsolescence (such as, for example, adverse market conditions). The cost approach is generally accurate for new construction, as well as property that has a small market [*Id*. at 382] but is particularly helpful in estimating the value of a partially completed structure. These factors make the cost approach an appropriate method for valuing the Subject in this case.

Moreover, we note that the cost approach reflects market thinking because buyers and sellers relate value to cost. Buyers tend to judge the value of an

existing property not only by considering the prices paid for similar properties but also by comparing the costs to build a similar substitute. As a result, the Tribunal finds that primary reliance should be placed on the cost approach in this instance because it yields the most accurate determination of the value of the property under appeal. See *Antisdale v City of Galesburg*, 420 Mich 265, 277; 362 NW2d 632 (1984).

Respondent's value evidence develops a modified cost-less-depreciation analysis by application of the mass appraisal guidelines prescribed by the State Tax Commission in the form of its Michigan Assessor's Manual. Respondent was required to utilize the manual in preparing its assessment of the Subject for the tax years at issue. See MCL 211.10e. Cost estimates and data are collected statewide and furnished to assessors by the Michigan State Tax Commission (STC). The STC publishes annual guidance to assessors to adjust these cost factors for local conditions. Cost factors are most often utilized by applying a cost per square foot for particular classes of property with additional expenses for particular features such as sprinklers. We find the data presented on Respondent's property record card to be helpful.

For the 2010 tax year, Respondent's assessor estimated the land value of the Subject lot to be $141,134. Petitioner did not challenge Respondent's land valuation. Using the Michigan Assessor's Manual as a guide and the computer software developed therefrom, Respondent's assessor further estimated that the cost new of the Subject building would, as a fully completed commercial building, be $2,618,046. Of course, the Subject was not 100% complete as of the relevant tax day at issue. Respondent depreciated the subject building at 90% good and then applied an additional depreciation factor of 50% to account for the fact that the Subject's interior, as of the relevant tax day, was substantially incomplete.

This equates to an estimated cost to complete the Subject as designed of $1,178,120. Because the Subject's interior was not complete, the Subject did not possess the functional utility of a completed building as assumed in the cost calculation of the *Assessor's Manual*. Accordingly, the estimated cost to complete represents an item of functional obsolescence, albeit curable.

As previously discussed, however, Respondent failed to consider that Subject has multiple issues when looking at its mass appraisal, in particular flooding. Accordingly, the true cash value placed on Subject via Respondent's method of assessment is not what the market would pay for a problem property like Subject. Respondent's modified cost-less-depreciation computations are flawed in this respect and needs to be modified. Given these circumstances, the Tribunal finds that the modified economic age-life method is appropriate for valuing the Subject property. This method takes into account the known cost to cure the curable items of depreciation, including physical and functional. This method "mirrors what typical purchasers consider when deciding on whether to invest in a property." *The Appraisal of Real Estate*, p 422. Here, Petitioner's owner credibly testified that the cost to construct a water containment system (retaining wall) was estimated to be $650,000. Again, this item is an estimate of the cost to cure an element of functional obsolescence.

Applying the modified economic age-life method, the cost to cure the functional items – the lack of interiors in this case – is estimated from Respondent's property record card to be 50% of the total cost new, or $1,178,120. The cost to build the water retention system is $650,000, for a total cost to cure of $1,828,120. This sum is then subtracted from the Subject's replacement cost new as of the relevant tax day at issue or $2,618,046 as of December 31, 2009. Using this analysis, an appraiser would then arrive at a percentage, lump-sum deduction

that covers all incurable items by applying the ratio of the effective age to total economic life to the cost of improvements minus all curable physical and functional obsolescence estimated as of the effective appraisal date. The Subject building has an economic life of 53 years. See *Michigan Assessor's Manual* (2003), VOL II, Appendix A, Reducing Balance Depreciation Table: Commercial and Industrial, p 1. Petitioner's expert estimated the life of the building at 40 years. Petitioner, however, offered no support for this contention and the Tribunal is not persuaded that the Subject has an economic life of 40 years. Respondent's property record card reflects an effective age of 5 years as of December 31, 2009. In applying this modified economic age-life method, we recognize that when curable items are cured, the structure's remaining economic life may increase and/or the effective age may decrease. The computations are outlined as follows:

Modified economic age-life method

Replacement cost new	$2,618,046
Less: physical and functional curable items	($1,828,120)
Replacement costs less curable items	$789,926
Effective age (years)	5 years
Total economic life (years)	53 years
Ratio	(5/53)
	0.094339
Replacement cost less curable items	$789,926
Depreciation	($74,520)
Depreciated value of improvements	$715,406
Site value	$141,134
Indicated value	$856,540

VI. CONCLUSION

Having carefully considered this case in totality, the Tribunal finds that the true cash or market value of the subject property for the 2010 tax year is $856,540. It is clear from the testimony on record and the admitted exhibits that the valuation evidence presented by both parties is flawed and neither, standing by itself, provides a reliable indicator from which we could find the usual selling price of the Subject. Instead, we have found that Respondent's data from its cost-less-depreciation evidence coupled with Petitioner's evidence as to cost to cure the flooding at the Subject and using the modified economic age-life method provides the most reliable indicator of value under the circumstances of this case.

In reaching the holdings in this opinion, we have considered all arguments for contrary holdings, and have rejected all arguments not discussed as without merit or irrelevant. To reflect the foregoing,

IT IS SO ORDERED.

IT IS FURTHER ORDERED that Respondent's Motion to Dismiss for Lack of Evidence is DENIED.

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 special assessment 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, 2009, at the rate of 1.23% for calendar year 2010, (ii) after December 31, 2010, at the rate of 1.12% for calendar year 2011, (iii) after December 31, 2011, and prior to July 1, 2012, at the rate of 1.09% for calendar year 2012, (iv) after June 30, 2012, and prior to January 1, 2013, at the rate of 4.25%, and (v) after December 31, 2012, and prior to July 1, 2013, at the rate of 4.25%.

This Opinion resolves all pending claims and closes this case.

MICHIGAN TAX TRIBUNAL

By: Paul V. McCord

Entered: December 06, 2012