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

J.C. Penney,
Petitioner,

v MTT Docket No. 453898

City of Grandville, Tribunal Judge Presiding
Respondent. David B. Marmon

FINAL OPINION AND JUDGMENT

INTRODUCTION

Petitioner, J.C. Penney, appeals ad valorem property tax assessments levied by Respondent, City of Grandville, against Parcel No. 41-17-29-151-014 for the 2013 and 2014 tax years. Laura M. Hallahan, Attorney of Hallahan & Associates, P.C., represented Petitioner, and Adam J. Brody, Attorney of Varnum LLP, represented Respondent. The subject property is a J.C. Penney store, which is one of the anchors of the Rivertown Crossing Mall. Petitioner is asking for a significant reduction in assessment, while Respondent's valuation concludes that the subject is greatly under assessed.

A hearing on this matter was held on January 26, 27, 28 and February 11, 2015. Petitioner called Laureen Birdsall, MMAO IV, (Respondent's contract assessor) and Jumana Judeh, MAI (Respondent's valuation witness) as adverse witnesses, and John Widmer, MAI as its valuation witness. Respondent's witnesses were its contract assessor Laureen Birdsall, and Jumana Judeh as its valuation witness.

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

Parcel No.	Year	TCV	SEV	TV
41-17-29-151-014	2013	$5,600,000	$2,800,000	$2,800,000
41-17-29-151-014	2014	$5,800,000	$2,900,000	$2,844,800*

*Increase for taxable value limited under MCL 211.27a to the 2013 value multiplied by the Consumer Price Index.

SUMMARY OF PARTIES'S CONTENTIONS:

Year	TCV on roll	SEV on roll	TV
2013	$5,805,400	$2,902,700	$2,902,700
2014	$5,805,400	$2,902,700	$2,902,700

Year	Petitioner's contention of TCV	Petitioner's Contention of SEV	Petitioner's Contention of TV
2013	$3,250,000	$1,625,000	$1,625,000
2014	$3,400,000	$1,700,000	$1,651,000

Year	Respondent's revised TCV Contention*	Respondent's revised SEV Contention*	Respondent's revised TV Contention*
2013	$8,600,000	$4,300,000	$2,902,700
2014	$9,000,000	$4,500,000	$2,949,143

* In its closing argument, Respondent asked that the assessment be affirmed, rather than its appraiser's value be adopted.[1]

PETITIONER'S ADMITTED EXHIBITS

P-1 Appraisal report of John Widmer

P-2 Appraisal report of Jumana Judeh

P-3 Transcript of evidentiary proceedings in *Meijer v. City of Grandville*, MTT Docket No. 450295 held August 5, 2014

P-4 Deposition Transcript of Laureen Birdsall in *Target Corp. v. City of Grandville*, MTT Docket No. 451957 held September 30, 2014.

P-6 Judeh work file

P-7 Trade Area Map of subject property

P-8 Boulder Group net lease market report, Q4 2013

P-9 Rent roll for Southfield Plaza

SUMMARY OF PETITIONER'S CASE

Petitioner began its case by first calling Respondent's witnesses as adverse witnesses. The first witness called was Laureen Birdsall. Through Birdsall, Petitioner established that

[1] Tr 4 p. 822

Respondent had entered into past consent judgment, with Sears in the same mall for 2009 through 2012, where the assessment remained flat, while the assessment for Petitioner increased slightly throughout that same period. Further, Birdsall conceded that Respondent's appraisal for the subject for 2013 and 2014 is almost double the true cash value.[2] Birdsall also conceded that a stand-alone building cannot be substituted for an anchor department store in a superregional mall.[3] As to the cost approach found on the record card, Birdsall testified that no functional obsolescence was stated, but that the overridden values used because of previous Tribunal settlements take functional obsolescence into account.[4] On reexamination by Mr. Brody, counsel for Respondent, Birdsall testified regarding ongoing development being "a thriving retail corridor . . . booming, thriving growing."[5]

Petitioner next called Jumana Judeh as an adverse witness, and cross examined her for close to 10 hours over 2 days. Judeh testified that she has only appraised one other anchor store for a superregional mall, the Macy's in the same mall. She has also appraised large retail stores.[6] Judeh admitted that she did not personally inspect sales comparables that she chose and relied upon that were located in California and Florida.[7] She testified that in preparing her appraisal, she was not adhering to the most recent Tax Tribunal and Court of Appeals decisions.[8] Judeh testified that she concluded that the highest and best use of the property as vacant is as a retail store.[9] She conceded her highest and best use found retail usage financially feasible, even though her Cost Approach to value concludes that it would cost more to construct a building for retail use than the income that can be generated.[10]

Regarding her cost approach, Judeh testified that none of her land sales were anchor sites at a superregional mall.[11] Regarding her sales approach, Judeh testified that two of the seven properties she considered were in Florida, and three were in California. She admitted that she did not use any Michigan sales in her final conclusion of value under the sales approach. Two of

[2] Tr 1 p. 29
[3] Tr 1 p. 48
[4] Tr 1 p. 61
[5] Tr 1 p. 84
[6] Tr 1 p. 93-95
[7] Tr 1 p. 107
[8] Tr 1 p. 112
[9] Tr 1 p. 135-136
[10] Tr 1 p. 138
[11] Tr 1 p. 146

those properties were located in California, and one of the California sales was encumbered by a lease.[12] She placed the most weight on a sale of a store in Columbus, Ohio, a free standing store in a development. She testified that for each of her improved sales comparables, the trade area radius is different, and each is defined by the owner of that particular mall. Judeh admitted that the trade area for the subject is beyond a 10 mile radius, yet her determination of average (or median) income came from within a 3 mile radius.[13] She testified that her Comparable 4 in Orange, California is in a lifestyle center,[14] and sold in a leased fee transaction, rather than a fee simple.[15] While Judeh testified that the lease was at market, her work file indicated that the lease was long term, and below market.[16]

Regarding Sales Comparable 5 from Columbus, Ohio, relied upon by Ms. Judeh, counsel was able to point out inconsistencies between its use in the appraisal of the subject, and Judeh's use of it in appraising Macy's, in Rivertown Crossing. Inconsistencies included the size and condition of the Ohio comparable. Ms. Judeh also admitted that the trade area demographics for Comparable 5 were based upon 2017 projections.[17] Counsel also unearthed in Judeh's work file a summary sheet from Integra Realty Resources Inc. that states in relevant part, "[d]ue to their extraordinary motivations as the owner of the mall, the sale circumstances doesn't meet the definition of market value."[18]

As to Judeh's Sales Comparable 6, located in Palmdale, California, also relied upon under her sales comparison approach, Judeh admitted that the +10% condition adjustment to this comparable was based upon $2,000,000 paid after acquisition by the buyer, but that an unspecified portion of those costs went to reimaging the property. Petitioner also brought out that the seller had filed for bankruptcy in 2009, and was liquidating all stores. Further, the comparable was partitioned after sale, with the new owner using only 55,000 out of 95,000+ square feet of the comparable.[19] For Comparables 5 and 7, Judeh indicated in her appraisal that although both those comparables are in California, they each had a similar trade area with the

[12] Tr 1 p. 189-190
[13] Tr 1 p. 206-210
[14] Tr 2 p. 271
[15] Tr 2 p. 257
[16] R-2 p. 000663
[17] Tr 2 p. 279-279
[18] R-2 p. 000737
[19] Tr 2 p. 300-302

subject. Petitioner elicited from Judeh that the trade areas for each comparables went out to different distances than the subject, or each other.[20]

Regarding Judeh's income capitalization approach, she conceded that none of her rental comparables were attached to a superregional mall.[21] Regarding rental comparables 1, 2, 4 and 5, she agreed that "it would be a safe assumption" that Kohl's entered into a build-to-suit lease and all of the comparable leases were entered into prior to 2007.[22] Of the 6 rental comparables chosen, only Comparable 6 is an anchor store in a regional mall, and it was not used in Judeh's reconciliation of value under the income approach.[23] Comparable 2 is a double net lease, rather than triple net.[24] Of the 6 rental comparables, Judeh relied upon the Kohl's comparables, which were the three highest rent comparables, and which she admitted were likely to be build-to-suit properties. As to the derivation of her capitalization rate, Judeh admitted that the mortgage constant she used in part in calculating the rate was derived from a mortgage amortization period of 23 and a half years for 2013 and 28 years for 2014, while commercial mortgages are generally amortized over 15 to 20 years.[25] Judeh also conceded, after much prodding, that the 14 store sales appearing in her appraisal that she used to derive a cap rate were not anchor stores in a regional or superregional mall, but were either big box, or otherwise free standing stores. [26] As to Judeh's reliance upon Realty Rate surveys found in The Boulder Group publication in establishing her capitalization rate, Judeh answered as follows to Petitioner's question:

> Q. Okay. Ms. Judeh, you rely on these sources for purposes of deriving capitalization rate for the subject, and it's your testimony here today that you don't know how they gather the information? Is that your testimony? Yes or no?
> A. Yes.
> Q. And not withstanding that you don't know how they gather the information, you think it is prudent to rely upon that – those sources in determining your capitalization rate for the subject property? Yes or no?
> A. Yes. That was one of my benchmarks, absolutely.[27]

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[20] Tr 2 p. 302-313
[21] Tr 2 p. 326
[22] Tr 2 p. 328-336 Later in the day, she was confronted with her own handwritten note in her work file, (R-2 p. 2232) which states, "build-to-suit" regarding two Kohl's stores used as rental comparables. Tr 2, p 384
[23] Tr 2, p. 340-356
[24] Tr 2 p. 344
[25] Tr 2 p. 377-379
[26] Tr 2 p. 398-401
[27] Tr 2 p. 403-404

Petitioner's final witness was John R. Widmer, MAI. Widmer testified that he had appraised many anchors at superregional malls including Target at Northland and J.C. Penney at Briarwood Mall and Lakes Mall.[28] He testified that in superregional malls, there is no value to the in-line stores without the anchor stores. Further, in the development of a regional mall, anchors are used to draw customers to the in-line portion of the mall. By giving land to the anchors, the value of the in line stores is enhanced.[29] He testified that the cost approach was inapplicable to this assignment because "the degree of difficulty in quantifying obsolescence relating to an anchor is so substantial and so subjective it renders its usability senseless."[30] He also testified that market participants do not rely upon the cost approach. Widmer also opined that the new retail development near Rivertown Crossing Mall may result in cannibalization of sales, as many of the stores offer very similar products to the anchor department stores.[31] He testified that in-line stores pay a higher rental rate than anchors.[32] He opined that where a cost approach to value is higher than an income approach to value, there is an issue as to the financial feasibility of the highest and best use.[33] Widmer testified that he is valuing properties as "vacant and available," pursuant to recent Court of Appeals decisions, and the jurisdictional exception provision under USPAP.[34] Widmer also testified that he had appraised Respondent's rental comparables #3, a Burlington Coat Factory in Southfield, Michigan. He testified that Burlington's lease was a gross lease, rather than a triple net lease.[35]

Regarding the income approach, Widmer testified as to natural break points as a means of determining the reasonableness of rent. He testified that typically, the break point in a lease for J.C. Penney has been between 2.5% - 3% of sales per square foot, with the average being 2.7%.[36]

Widmer prepared an appraisal with two approaches, sales and direct capitalization. He testified that he relied mostly on the income approach because "[t]here is just not a lot of good information out there to establish sufficient sampling of sales . . . ."[37] Widmer concluded his

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[28] Tr 3 p. 470
[29] Tr 3 p. 473-474
[30] Tr 3 p. 476
[31] Tr 3 p. 498-499
[32] Tr 3 p. 500
[33] Tr 3 p. 505
[34] Tr 3 p. 524-526
[35] Tr 3 p. 530-531
[36] Tr 3 p. 540-54
[37] Tr 3 p. 557-558

direct examination by testifying that he weighed the income approach 85% while the sales approach accounted for 15% of his reconciliation of values. When asked on redirect regarding the 15% weight given to the sales approach, Widmer testified:

> I deemed it to be very questionable at the onset, but to not weight it at all renders its inclusion somewhat even more suspect, so if you include it, you present evidence that does exist for that property type.[38]

RESPONDENT'S ADMITTED EXHIBITS

R-1	Judeh appraisal
R-2	Judeh work file
R-4	Property Transfer Affidavit for subject
R-7	Widmer work file
R-15	SEC form 8K filed by J.C. Penney in 2013
R-16	J.C. Penney mortgage
R-17	Harper Woods Record Card

SUMMARY OF RESPONDENT'S CASE

Respondent offered testimony by its contract assessor, appraiser, Jumana Judeh. Judeh narrated the extensive retail development taking place around Rivertown Crossing. She testified that J.C. Penney at the subject is one of the highest performing stores in the state. She testified that the demand for retail in the immediate area of the subject is so great that its supply cannot keep up.[39] While testifying concerning her own sales approach, she testified that the J.C. Penney store listing in Dearborn and used by Widmer was in a dying mall.[40] She testified that the same is true of Northland Mall, where Widmer found another sales comparable.[41]

Respondent extensively cross examined John Widmer. Regarding Widmer's income approach, Respondent challenged his 20% adjustment of rental comparables for functional utility based upon the subject being a two story building, even though it is attached to a 2 story mall.[42] Respondent also challenged Widmer's use of the J.C. Penney store in Eastland Mall as a rental

[38] Tr 4 p. 760
[39] Tr 2 p. 429-438
[40] Tr 2 p. 440
[41] Tr 2 p. 441
[42] Tr 4 p. 702-709

comparable, built in 1957 and currently under distress.[43] Cross examination brought out that all of Respondent's rental comparables were in inferior malls.[44] Respondent also questioned Widmer's use of a 225 basis point risk factor in the developed capitalization rate.[45]

Respondent also offered the testimony of Laureen Birdsall as a rebuttal witness to John Widmer. Birdsall testified as finding a Property Transfer Affidavit (Exhibit R-4) concerning the sale in 2006 of Parisian to Bonstores for $16,400,000.[46] Per the affidavit, both the buyer and seller were under common control. Birdsall also attempted to testify as to conversations she had with another appraiser, regarding his conversations with certain principals involved with certain sales. The Tribunal sustained Petitioner's objection regarding hearsay, and held that Ms. Birdsall who is not a licensed appraiser in the state of Michigan could not offer her critique of Mr. Widmer, who is a licensed appraiser.[47] Importantly, Birdsall was not able to testify from personal knowledge in offering a rebuttal.[48] The Tribunal also sustained Petitioner's objections to R-6, a mortgage appraisal prepared by Cushman and Wakefield, which Respondent was going to have Birdsall testify to.[49]

FINDINGS OF FACT

1. The subject property, 3774 Rivertown Parkway SW, is used as an anchor store in the Rivertown Crossing Mall, a superregional mall located in Kent County, Michigan.
2. Per Petitioner's calculations, based upon blue prints of the subject, the subject contains 105,792 square feet of leasable area.
3. J.C. Penney purchased the 6.98 acre pad in the mall upon which the subject property sits for $1.00 per acre.
4. Jumana Judeh found the highest and best use of the subject, as vacant, is as retail.
5. Both appraisers agreed that the highest and best use of the property as improved is as an anchor store in a superregional mall.

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[43] Tr 4 p. 709-710
[44] Tr 4 p. 710-729
[45] Tr 4 p. 730-732
[46] Tr 4 p. 778-781
[47] Tr 4 p. 783-787
[48] Tr 4 p. 786-787
[49] Tr 4 p. 789-790

6. Judeh's cost approach relied upon land sales of property that were not used as indoor mall anchor stores.
7. Judeh's cost approach does not account for the change in finish that any new retailer would insist upon as part of its branding as an anchor store in the subject property space.
8. Judeh's sales approach value was calculated using three sales, two of which, (Comparables 4 and 6) are properties in southern California.
9. The third sale upon which Judeh placed the most weight, (Comparable 5) was from Columbus Ohio, but per her work file, was not considered an arm's length transaction by the appraiser from whom she received information regarding this sale.
10. Widmer's sales comparables came from distressed malls, such as Northland Mall in Southfield, Fairlane Mall in Dearborn, and a bankrupt mall in Ohio.
11. Widmer's sales were heavily adjusted with cumulative adjustments ranging from, 66% to 216.4%, and gross adjustments from 91% to 219.2%
12. Judeh's income approach relied upon leases for stores which were build-to-suit, and entered into years before the subject date.
13. Judeh's income approach also relied upon in-line stores, and did not include anchors of an indoor mall.
14. Widmer's rental comparables came from inferior malls.
15. Widmer adjusted each of his comparables by -20% for "overall utility" to account for the subject being a two story building, despite the fact it is attached to a two story mall.
16. Judeh's cap rate was based in part on mortgages that were for periods in excess of 20 years.

CONCLUSIONS OF LAW

The assessment of real and personal property in Michigan is governed by the constitutional standard that such property shall not be assessed in excess of 50% of its true cash value. See MCL 211.27a.

> The legislature shall provide for the uniform general ad valorem taxation of real and tangible personal property not exempt by law except for taxes levied for school operating purposes. The legislature shall provide for the determination of true cash value of such property; the proportion of true cash value at which such property shall be uniformly assessed, which shall not . . . exceed 50 percent. . . . Const 1963, art 9, sec 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 "[t]he concepts of 'true cash value' and 'fair market value' . . . are synonymous." *CAF Investment Co v Michigan State Tax Comm*, 392 Mich 442, 450; 221 NW2d 588 (1974).

"By provisions of [MCL] 205.737(1) . . . , the Legislature requires the Tax Tribunal to make a finding of true cash value in arriving at its determination of a lawful property assessment." *Alhi Dev 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. *Teledyne Continental Motors v Muskegon Twp,* 145 Mich App 749, 754; 378 NW2d 590 (1985). "It is the Tax Tribunal's duty to determine which approaches are useful in providing the most accurate valuation under the individual circumstances of each case." *Meadowlanes Ltd Dividend Housing Ass'n v Holland,* 437 Mich 473, 485; 473 NW2d 636 (1991). In that regard, the Tribunal "may accept one theory and reject the other, it may reject both theories, or it may utilize a combination of both in arriving at its determination." *Jones & Laughlin Steel Corp v City of Warren*, 193 Mich App 348, 356; 483 NW2d 416 (1992).

A proceeding before the Tax Tribunal is original, independent, and de novo. MCL 205.735a(2). The Tribunal's factual findings must be supported "by competent, material, and substantial evidence." *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, supra* at 352-353.

"The petitioner has the burden of proof in 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 Steel Corp, supra* at 354-355. However, "[t]he assessing agency has the burden of proof in establishing the ratio of the average level of assessments in relation to true cash values in the assessment district and the equalization factor that was uniformly applied in the assessment district for the year in question." 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. *Meadowlanes, supra* at 484-485; *Pantlind Hotel Co v State Tax Comm*, 3 Mich App 170, 176; 141 NW2d 699 (1966), aff'd 380 Mich 390 (1968). "The market approach is the only valuation method that directly reflects the balance of supply and demand for property in marketplace trading." *Jones & Laughlin Steel Corp, supra* at 353 (citing *Antisdale v City of Galesburg*, 420 Mich 265; 362 NW2d 632 (1984) at 276 n 1). The Tribunal is under a duty to apply its own expertise to the facts of the case to determine the appropriate method of arriving at the true cash value of the property, utilizing an approach that provides the most accurate valuation under the circumstances. *Antisdale, supra* at 277.

Regardless of the valuation approach employed, the final valuation determined must represent the usual price for which the subject would sell. See *Meadowlanes Ltd Dividend Housing Ass'n v Holland,* 437 Mich 473, 485; 473 NW2d 636 (1991).

The subject property is an anchor store at Rivertown Crossing Mall, a superregional indoor shopping mall. Both appraisers concluded that its current use is its highest and best use. The issue before the Tribunal is how best to value this type of property. As pointed out by John Widmer, anchor stores are generally used by mall owners as a draw for customers for their in-line stores. To attract anchors, the property is either sold to them at a discount, as occurred in the present case, or is given lower rents. In fact, Petitioner paid only a dollar an acre for the subject plat, and built the building itself. A problem in using the sales approach is that anchor store sales are uncommon. In the present case, Respondent's appraiser did not use a single Michigan sale in her final determination of value via that approach. Although Widmer included a sales approach, he had only one Michigan sale, and one Michigan listing to use as sales comparables. All of Widmer's sales comparables were very heavily adjusted. As Widmer's sales approach also showed, albeit inadvertently, malls in which anchor stores have left, tend to have high vacancies among their in-line stores. It is not clear as to whether a vacant anchor causes other stores to go vacant, or whether the same economic factors cause both the in-line and anchor vacancies.

Another challenge in valuing an anchor store mall space is that different retailers will want their own finish as part of any sale. For example, it is hard to imagine a store such as Nordstroms reusing J.C. Penney's layouts and finishes. Accordingly, one of the conceptual difficulties in appraising an anchor store via the cost approach is that the building's finish, which adds much to its value under the cost approach, is likely to be removed if sold to another anchor tenant, and is therefore of no value in exchange. As Michigan values property for property tax purposes as its "usual selling price under MCL 211.27, rather than "value in use," the high cost of a store's finish cannot be counted towards its usual selling price.[50]

The third major approach to value is the income approach, which converts a store's market rate net income into a value. The problem with this approach is that often, anchor stores own their stores, or rent them pursuant to a "build-to-suit" arrangement. Again, anchor stores are likely to receive advantageous rents to attract them to the mall, so market rates are likely to be lower than non-mall rates. Accordingly, rent comparables are also hard to find, and are likely to be lower when the store is a mall anchor, as opposed to a free standing building.

The Tribunal is unable to use the property's current assessment as a basis for determining the property's true cash value. As was testified to by Respondent's contract assessor, Laureen Birdsall, the value on the record card was derived from prior tax appeals and the consent judgments that settled those matters. Rather than the product of a genuine cost approach, the values on the roll are a result of a compromise by both parties to end previous litigation. Nor was the property record card urged upon the Tribunal by Respondent as evidence of value, other than in Respondent's closing argument, which asked that the assessment be affirmed.[51]

Respondent's appraiser, Jumana Judeh, presented three approaches to value. Unlike John Widmer for Petitioner, Judeh used and relied upon the cost approach. In fact, she relied in part upon the cost approach in her final reconciliation, and put no weight on the income approach. For both tax years, Judeh's conclusion of value under the cost approach was significantly higher than the values under her other two approaches. The Tribunal does not accept Judeh's cost

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[50] The Tribunal has so held, affirmed by the Court of Appeals in the cases of big box stores. See *Lowe's Home Centers, Inc v Marquette Twp*, unpublished opinion per curiam of the Court of Appeals, issued April 22, 2014 (Docket Nos. 314111 and 314301), and *Lowe's Home Center, Inc. v Grandville*, unpublished opinion per curiam of the Court of Appeals, issued December 30, 2014 (Docket No. 317986)

[51] As pointed out by Petitioner's counsel, it was telling that Respondent did not urge the Tribunal to adopt its appraiser's opinion of value

approach as a reliable approach for following reasons. The first element in a reliable cost approach is the land value. While Judeh had land sales of retail property literally across the street from the subject, those sales were of outlet buildings for a tire store, a credit union, or other free standing stores. While instructive in showing that the neighborhood continues to enjoy robust development of retail, those land sales are for a different highest and best use. None were for an enclosed mall's anchor store. Land Sale #1 was sold and developed into a Belle Tire store; Land Sale # 2 was also an out lot for Meijers. Land Sale #3 was a Meijer store. Land Sale #4 was also an out lot in the same mall. Land Sale # 5 was developed into a Cabela's. Land Sale # 6 was developed into a credit union. None of the stores occupying these land sales would be an appropriate usage of the subject property. With the exception of Land Sale #3 and #5, the land sales were less than half the size of the subject. While Land Sale # 3 and # 5 are similar in land size, neither store would likely serve as an anchor to a regional mall, or a superregional mall.

Even if the Tribunal were to accept the land value for properties in a strip mall, as opposed to an enclosed superregional mall, the fundamental problem in using the cost approach for this type of property is estimating functional obsolescence. As Widmer testified, and Judeh conceded, a new retailer moving into an anchor store would rarely, if ever, keep the same interior. The reason for this is a national chain of the type that is typically an anchor store is going to have its own interior consistent with its branding, and consistent with its merchandising model. Therefore, Judeh's 0% adjustment for functional and external obsolescence is simply not credible. Further, as buildings under the cost approach are estimated by Marshall Swift on the basis of the type of materials and quality of those materials, a sale to a hypothetical buyer who will rip out the installed finish makes it all the more difficult to determine a reliable cost for the improvements. Finally, the Tribunal doubts that market participants would ever rely upon the cost approach in buying the subject property. For all of these reasons, the Tribunal determines that the cost approach presented by Jumana Judeh is an unreliable indicator of value for the subject property.

Both appraisers used the sales comparison approach. However, there was a dearth of data concerning sales in Michigan. As explained below, the Tribunal holds that the sales approaches as presented by both appraisers are unreliable. Respondent's sales approach initially used 7 sales comparables. Judeh's Comparable Sale #1, Sale # 4 and Sale #6 are California properties, while Sales # 2 and #3 are Florida properties. Judeh admitted that she never visited any of these comparables. Further, it was demonstrated that her criteria for choosing these comparables via the population and household income in the trade area differed from mall to mall. Rather than using a set criterion across the board such as 5 miles out, or a 12 minute drive time, Judeh used each mall's definition of a trade area. This methodology calls into question her selection criteria; especially since six out of seven of her comparables are thousands of miles away from the subject, in different regions of the country. There was no evidence whatsoever that the market for anchor stores in southern California, or central Florida is at all similar to Grandville, Michigan. Moreover, Judeh's adjustment for location varied from 0% to 10%. The Tribunal is unconvinced that with or without adjustments, the sales in California or Florida are a substitute for a sale in the greater Grand Rapids area. The fact that Judeh was not familiar with the California or Florida market, has never visited the comparables, and nevertheless, used these comparables with nary an adjustment for economic characteristics renders these comparables as non-reflective of the worth of the subject.

Judeh did use one sale from the Midwest, her Comparable #5 in Columbus, Ohio. However, Judeh's work file showed a description of this sale from another appraisal, which apparently, was her source of information for this comparable. That particular page out of her work file came from Integra Realty Resources and states:

> Glimcher Realty Trust, owns the mall and purchased the property [a closed Sears store] to have control over its future use. Due to their extraordinary motivations as the owner of the mall, the sale circumstances doesn't [sic] meet the definition of market value.[52]

Clearly, the shopping mall owner had very specific motivations for purchasing the failed Sears store that another retailer would not have. Having an empty anchor, or an anchor that does not draw customers to the in-line stores, is an extra motivation found only in the mall owner, rather than an uninterested party. Accordingly, the Tribunal agrees that the sale for Comparable #5 is not arm's length, and not a reliable indicator of the usual selling price. As none of these sales are acceptable, the Tribunal places no weight on Judeh's sales comparable approach, which she primarily relied upon in determining her true cash value for the subject.

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[52] R-2 p. 000737

John Widmer also prepared a sales approach to value. At the outset, Widmer conceded that his sales approach was not very reliable. A look at his comparables immediately calls this approach into question. While Judeh can be accused of failing to adequately adjust her California and Florida sales for the subject's Midwestern location, Widmer can be faulted for picking comparables that required extreme adjustments. His Comparable #1 was a Michigan sale; a former J.C. Penney store in the old Northland Mall in Southfield, which was sold to a church. Clearly, a church is a different highest and best use than an anchor store. Other than perhaps on Easter Sunday, it is hard to imagine that a church would draw customers to support the mall's in-line stores. The adjustments Widmer made to this sale were accumulative 216%, and 219% gross, including a 25% adjustment for location, and a 90% economic adjustment. As Widmer's adjustments are over twice the actual sales price, the adjusted price is two parts appraiser judgment to one part data. When adjustments reach this magnitude, it is obvious that the comparable is not a substitute for the subject. While the adjustments themselves to his Sales Comparable #1 are massive in their size, it is also possible that 219% is not a big enough adjustment. Here, the appraiser is attempting to adjust the sale of a former store in a dying mall to a store in a very active mall. The Tribunal finds that the schism between these two properties cannot be bridged by adjustments.

Widmer's second comparable at Fairlane Town Center suffers from the same maladies as his Comparable #1. There was testimony that Fairlane is also a dying mall.[53] Widmer's adjustments at 66% cumulative and 91% gross are also beyond any reasonable amount to suggest that the two properties are comparable. Add to this equation the fact that Comparable #2 is not an actual sale, but only a listing, and it is clear that no weight can be placed on Petitioner's Sales Comparable #2.

Widmer's Sales Comparable #3, a former Dillard's Store and Sales Comparable #4, an Elder Beerman store are anchors in the same mall, Towne Mall Galleria in Middletown, Ohio. Respondent's examination of Widmer pointed out that Towne Mall was deemed a dead mall in 2008, and the entire mall sold for $850,000 in October, 2012.[54] Once again, Widmer attempted

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[53] Judeh testified that Fairlane is located less than a mile from her office, and is a dying mall, having downgraded its products, and having lost Sax Fifth Ave as a tenant, and the hotels surrounding it are on the verge of bankruptcy. Tr 2 p. 440

[54] Tr 3 p. 673-676

to mask the stench of a property sale in a dead or dying mall with massive adjustments. For Sales Comparable #3, Widmer cumulatively adjusted the sale by 73.5%, with gross adjustments of 124.8%. For Sales Comparable #4, he cumulatively adjusted the sale by 89.8% with gross adjustments of 143.3%. The precision of these numbers belie the fact that less than half of the adjusted price is data based, rather than judgment based. As with Sales Comparable #1 at Northland, or Sales Comparable #2 at Fairlane, it is unclear that these large adjustments are enough to equate the price of an anchor space in a healthy, vibrant mall, with that of a mall that is either swirling, or has gone down the drain. The Tribunal finds that no amount of adjustment between these comparables makes these properties a viable substitute for the subject, or even a rough predictor of the usual selling price of the subject in tax years 2013 and 2014. It is noteworthy that Mr. Widmer himself gave this approach any weight at all, justifying his use by essentially stating that since he went through the trouble of preparing the approach, he had to give it some weight, (albeit only 15%) in order to justify its taking up space in his appraisal.

Having found that Respondent's cost approach, and both parties' sales approaches are unreliable measures of the subject's true cash value, the Tribunal is left with the direct capitalization income approach. Ms. Judeh testified that she placed no weight on her income approach in her final reconciliation because the store was owner occupied. The Tribunal will not place any weight on Judeh's income approach for other reasons. The most important reason is that four of her rental comparables were leases entered into as part of a "build-to-suit" arrangement. Rental comparables 1, 2, 4, and 5 were Kohl's stores in Genoa Township, Frenchtown Township, Orion Township, and Shelby Township. Judeh grudgingly testified that "it would be a safe assumption" that Kohl's entered into a build to suit lease.[55] Later in the day, she was confronted with her own handwritten note in her work file, (R-2 p. 2232) which states, "build-to-suit" regarding two Kohl's stores used as rental comparables.[56] These same comparables were also rejected by the Tribunal in *Macy's v. City of Grandville*,[57] where the build date and lease date were in very close proximity. Judeh testified that even though these leases were likely to be build-to-suit leases, she was told by a broker that the lease rate was market rate. The Tribunal finds that a hearsay statement allegedly made by a broker regarding

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[55] Tr 2 p. 328-336
[56] Tr 2, p 384
[57] *Macy's v. City of Grandville,* Docket No. 436564 (March 24, 2014)

the lease rate being the market rate cannot overcome the fact that a build-to-suit arrangement inherently takes into account the owner's recovery of the cost to build. Presenting these rental rates, bolstered by hearsay broker testimony is not enough to unscramble the elements that go into the rental rate. Further, none of the rental comparables used by Judeh were from agreements entered into during the appropriate time period. All of her rental comparables were entered into pre-2007; a year which featured the start of a world-wide economic calamity. Judeh's rental comparables 3 and 6 involved Burlington Coat factory stores in Southfield and Kalamazoo. Both of these comparables featured pre-2007 leases. Comparable 3 was entered into in 1999. There was also evidence presented that Rental Comparable 3 was not a triple net lease, but was double-net, rendering its rental rate not comparable to the other triple net leases. More fundamentally, the Burlington Coat Factory stores are not anchor stores in an enclosed mall, which generally, are given a break in rental rate to attract an anchor store, which will attract business for the in-line stores. Accordingly, the Tribunal rejects Judeh's rental comparables, from which her conclusions are reached.

The Tribunal also rejects Judeh's income capitalization rate. As she admitted under examination by Petitioner, her cap rate was based in part on a mortgage constant for loans between 20 and 30 years in length. Per Widmer's testimony, 30 year mortgages are not the norm for commercial properties. Rather, such loans are usually 15-20 years in length. More importantly, she testified that she did not know how her sources for a cap rate gathered their information. [58]

Widmer prepared and primarily relied upon the direct capitalization approach as well in this appraisal assignment. The rentals used by Widmer can also be criticized as coming from inferior malls. The three comparables relied upon by Widmer are Rental Comparables 2, 3 and 4. Rental # 2 is the Hobby Lobby store in the Adrian Mall, in Adrian, Michigan. Widmer admitted that the Adrian Mall was a "class D" mall,[59] while the subject is rated class A-.[60] Widmer testified that he adequately adjusted for this difference. Rental Comparable #3 was the T.J. Maxx store in the former Centerpointe Mall in Grandville. Widmer admitted that this mall

[58] Tr 2 p. 398-401
[59] Tr 4 p. 716-718
[60] Tr 4 p. 729

was rated a Class C+.[61] Centerpointe Mall was eventually "de-malled" and turned into a lifestyle center. The final comparable used by Widmer in his determination of gross rent under his income approach was Rental Comparable #4, a vacant Sears store in Benton Harbor. Widmer answered that he would not be surprised that Orchards Mall was listed on the website, deadmalls.com.[62] Widmer made significant positive adjustments to these comparables in an effort to equate their respective rental rates with the subject. Despite the fact that Rental Comparable #3 is in a dying mall, the rental rate was the highest among the three rents used in Widmer's calculation of potential gross income. While all of the mall rentals are far inferior to the subject, the only data that is market based comes from these three comparables. If the Tribunal were to accept all of Widmer's adjustments on rental comparables 2, 3 and 4, the adjusted values for each comparable is $3.62 for comparable #2, $4.02 for comparable #3 and $4.51 for comparable #4. However, the Tribunal is troubled by Widmer's negative utility adjustment.

Widmer's mostly positive adjustments to thee comparables were offset by a -20% adjustment for utility. Widmer testified that the subject's lack of utility was based upon the store being a two story building, whereas the comparables were one story. The Tribunal rejects this adjustment. While perhaps a free standing store would suffer from a lack of utility compared to a one story store, the Tribunal is unconvinced that a two story anchor suffers from any lack of utility when it is attached to a two story mall. On the contrary, a one story anchor would suffer from lack of utility if located in the subject mall, because it would lack access to the mall from the second floor. Removing this -20% adjustment renders the following adjusted rents per square foot: Comparable #2 $5.25, Comparable #3, $5.72 and Comparable #4, $4.51. The Tribunal finds that because of the superiority of the subject, its rent falls at the high end of this range at $5.70.

The Tribunal accepts Widmer's calculation of square footage at 105,792. Multiplying $5.70 by 105,792 produces a potential gross income of $603,014. Also accepting Widmer's underlying vacancy rate of 5.0 % ($30,150) and collection loss of 0.5% ($3,015) renders an effective gross income of $569,849. The Tribunal also accepts Widmer's operating expenses of 2% of effective gross income for a management fee, which Respondent's appraiser also used,

[61] Tr 4 p. 721
[62] Tr 4 p. 725-726

which works out to $11,397 for a management fee. The Tribunal also accepts Widmer's calculation of 5 cents per square foot for General and Administrative expenses ($5,289) and 20 cents per square foot for capital reserve, ($21,158). The total expenses add up to $37,884. This figure is less than the expenses used by Ms. Judeh in her income approach. Subtracting the expenses of $37,884 from the effective gross income of $569,849 leaves a sum of $532,005 as the subject's net operating income, ("NOI"). To obtain a market value result under the Direct Capitalization approach, NOI is to be divided by the income capitalization rate. Here, Widmer developed a cap rate of 9.25%, which the Tribunal accepts. Widmer did not load his cap rate with one half property taxes of the millage rate as is commonly done. Instead, he treated property taxes as an expense and performed an iteration, based upon his determination of the property's true cash value. He then treated that value as a pass through, along with insurance and common area maintenance, which was reimbursed by the hypothetical tenant under this approach. To simplify this calculation, the Tribunal has eliminated Widmer's operating recovery income from the revenue portion of the calculation, and eliminated real estate taxes, insurance and common area maintenance as corresponding expenses. Both Judeh and Widmer treated the pro forma income and expenses as resulting from a triple net lease. However, under a triple net lease, the building owner is still responsible for property taxes that are not paid. To account for this, one half of the millage rate is multiplied by the vacancy and collection loss rate and added to the cap rate. Multiplying the 2013 millage rate of .0524945 x ½ x .055 vacancy and collection loss = .0014. Adding this load to Widmer's cap rate of 9.25% results in a loaded cap rate of 9.39%. Dividing NOI of $532,005 by the loaded cap rate of .0939 renders a product of $5,665,651, or $5,600,000 rounded as the true cash value for 2013. For 2014, Widmer developed a lower cap rate of 9.00%. Loading this cap rate with the millage of .0536520 divided by 2, multiplied by the vacancy and collection loss rate of .055 gives a loaded rate of .09147. Using the same NOI for 2014 produces a value of $5,816,165, or $5,800,000 rounded.

The Tribunal finds, based upon the Findings of Fact and the Conclusions of Law set forth herein, that the subject property's TCV, SEV, and TV for the tax years at issue are as stated in the Introduction section above.

JUDGMENT

IT IS ORDERED that the property's state equalized 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 20 days of the entry of the Final Opinion and Judgment, subject to the processes of equalization. See MCL 205.755. To the extent that the final level of assessment for a given year has not yet been determined and published, the assessment rolls shall be corrected once the final level is published or becomes known.

IT IS FURTHER ORDERED that the officer charged with collecting or refunding the affected taxes shall collect taxes and any applicable interest or issue a refund within 28 days of entry of this Final Opinion and Judgment. If a refund is warranted, it shall include a proportionate share of any property tax administration fees paid and penalty and interest paid on delinquent taxes. The refund shall also separately indicate the amount of the taxes, fees, penalties, and interest being refunded. A sum determined by the Tribunal to have been unlawfully paid shall bear interest from the date of payment to the date of judgment, and the judgment shall bear interest to the date of its payment. A sum determined by the Tribunal to have been underpaid shall not bear interest for any time period prior to 28 days after the issuance of this Final Opinion and Judgment. Pursuant to MCL 205.737, interest shall accrue (i) after December 31, 2009, at the rate of 1.23% for calendar year 2010; (ii) after December 31, 2010, at the rate of 1.12% for calendar year 2011; (iii) after December 31, 2011, and prior to July 1, 2012, at the rate of 1.09%; and (iv) after June 30, 2012, through June 30, 2015, at the rate of 4.25%.

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

By: David B. Marmon

Entered: April 10, 2015