RMKB Holdings LLC,
Petitioner,

v

City of Chelsea,
Respondent.

MICHIGAN TAX TRIBUNAL

MOAHR Docket No. 20-000974

Presiding Judge
Christine Schauer

FINAL OPINION AND JUDGMENT

INTRODUCTION

Petitioner, RMKB Holdings LLC, appeals ad valorem property tax assessments levied by Respondent, City of Chelsea, against Parcel No. 06-06-13-381-002 for the 2020 tax year. H. Adam Cohen, Attorney, and Jason C. Long, Attorney, represented Petitioner, and Laura M. Hallahan, Attorney, and Seth A. O'Loughlin, Attorney, represented Respondent.

A hearing on this matter was held beginning on September 27, 2021 and ending on September 29, 2021. Petitioner's witnesses were, Karl Christen, Principal of RMKB Holdings LLC, and Kevin Kernen, Appraiser. Respondent's sole witness was John Widmer, Appraiser.

Based on the evidence, testimony, and case file, the Tribunal finds that the true cash value (TCV), state equalized value (SEV), and taxable value (TV) of the subject property for the 2020 tax year are as follows:

Parcel Number: 06-06-13-381-002

Year	TCV	SEV	TV
2020	$2,400,000	$1,200,000	$1,200,000

PETITIONER'S CONTENTIONS

Petitioner contends that given the lack of ice arena comparable sales and the lack of financial data from other ice arenas operating in Michigan, the income approach using the historical financial data of the subject property is the best valuation method in this case and its conclusion of TCV for the subject property of $1,880,000 is the accurate TCV of the subject property. Petitioner contends that their use of historical financial information for the subject property mirrors what buyers in the marketplace would do to make a buying decision. Petitioner further claims that Respondent's comparable sales approach is legally invalid because it uses comparable properties that are zoned differently than the subject property and therefore cannot have a similar highest and best use as the subject, thereby failing the legally permissible test.

PETITIONER'S ADMITTED EXHIBITS

P-1 Photographs of the subject property
P-2 Aerial map of Interflood
P-3 Petitioner's Valuation Disclosure
P-4 City of Chelsea zoning map
P-5 City of Chelsea zoning ordinance, Ch. 4

PETITIONER'S WITNESSES

Karl Christen

Karl Christen testified as the owner representative of the subject property real estate and the businesses located at the subject property which features an ice-arena known as the Arctic Coliseum.

Kevin Kernen

Kevin Kernen was admitted as an expert in real estate appraisal and testified to the process he followed to conduct the appraisal and his conclusions contained in the

appraisal of the subject property he prepared for this case, which was entered into evidence as Petitioner's P-3.

RESPONDENT'S CONTENTIONS

Respondent contends that the subject property is relatively unique; however, the proper application of the sales approach to valuation is possible even without other ice arena sales available for use as comparable properties but that the cost approach is the most effective method to value the subject property due to the constraints on available information. After a reconciliation of their sales comparison and cost approach conclusions, Respondent contends that the subject property has a TCV of $4,900,000. Respondent claims that Petitioner's use of the income approach using only data from the historical financials (in-place income and expenses) of the subject property and valuing it as a going concern predicates the value on the success or failure of the going concern and not the value of the real estate.

RESPONDENT'S ADMITTED EXHIBITS

R-1 Respondent's Valuation Disclosure

RESPONDENT'S WITNESS

John Widmer

John Widmer was admitted as an expert in real estate appraisal and testified to the process he followed to conduct the appraisal and his conclusions contained in the appraisal of the subject property that he prepared for this case, which was entered into evidence as Respondent's R-1.

FINDINGS OF FACT

The Tribunal's Findings of Fact concern only evidence and inferences found to be significantly relevant to the legal issues involved; the Tribunal has not addressed every piece of evidence or every inference that might lead to conflicting conclusion and has rejected evidence contrary to those findings.

1. The subject property is a 9.29-acre parcel classified as commercial improved, located at 501 Coliseum Drive, Chelsea, Michigan, and is improved with a building known as the Arctic Coliseum.
2. The building on the subject property was built in 2000 specifically as an arena with two separate ice rinks.[1]
3. The building on the subject property is a 73,356 square-foot, one-story class C and S structure consisting of insulted panels above an eight-foot masonry base and features a 16-foot story height and a mezzanine of 10,450 square feet.
4. Petitioner purchased the subject property in 2004 for about $3 million, which included the real estate, business interest, personal property, and back taxes.[2]
5. A restaurant/bar, named the Artic Breakaway, was added to the mezzanine level of the building in 2008.[3]
6. The Artic Coliseum (building) features two separate ice rinks with spectator seating, a fitness center, a concession stand, a restaurant/bar, and a pro shop.
7. The Artic Coliseum has one exterior overhead door and no loading docks.[4]
8. Karl Christen is the owner (managing member) of RMKB Holdings LLC (Petitioner).[5]
9. Petitioner owns the land and improvements on the subject property.
10. The Arctic Coliseum ice rinks are operated by IceOnSale, a C-corporation wholly owned by Karl Christen.[6]
11. The Arctic Breakaway restaurant is operated by RMKB II, an LLC wholly owned by Petitioner. [7]
12. The pro shop located in the Arctic Coliseum was leased to D&D Hockey for $1,000 per month as of December 31, 2019.[8]
13. Karl Christen and his wife personally financed the purchase of the subject property and the cost to add the restaurant and hold a series of loans with Petitioner (RMKB Holdings LLC), RMKB II, and IceOnSale, which together owe

[1] Transcript (Tr), Day 1, at 29
[2] Tr, Day 1, at 81.
[3] Tr, Day 1, at 42.
[4] Tr, Day 1, at 33-34.
[5] Tr, Day 1, at 15
[6] Tr, Day 1, at 17.
[7] Tr, Day 1, at 26
[8] Tr, Day 1, at 44.

them approximately $4.5 million. These loans are collateralized by the subject property.[9]

14. Both Petitioner's and Respondent's appraisals concluded that the highest and best use of the subject "as vacant" was to hold for future development, and "as improved" was continued use as an ice arena.
15. Both Petitioner's and Respondent's appraisals developed an opinion of value based on the "as improved" highest and best use.
16. Petitioner's appraisal characterized the subject property as a special use property that was constructed for specific use as an ice arena.[10]
17. Petitioner's appraisal did not include the cost approach or sales comparison (market) approach.
18. Petitioner's appraisal contained a Summary of Ice Rink Sales which listed 13 ice rink sales throughout the Midwest and northeastern United States between September 2016, and January 2020. The sale prices represented purchases of the going concerns and not just the real estate.
19. Petitioner's appraisal developed the income approach to conclude a TCV for the subject property of $1,880,000 as of December 31, 2019.
    a. Petitioner's income approach first developed the market value of the total assets of the business (MVTAB), also knowns as "going concern" value, and then deducting the non-realty portions of personal property and business intangibles.[11]
    b. All of Petitioner's income analysis data is from the actual 2016, 2017, 2018 and 2019 financials for the subject property and included income and expenses from RMBK Holdings LLC (Petitioner) and IceOnSale, and rental income from the pro shop leased to D&D Hockey and the restaurant operated by and RMBK II.
20. Respondent's appraisal did not include the income approach.
21. Respondent's appraisal developed the sales comparison approach and the cost approach and reconciled them to conclude a TCV for the subject property of $4,900,000 as of December 31, 2019.
22. Respondent's cost approach concluded a TCV for the subject property of $6,440,000 as of December 31, 2019.
    a. Respondent's cost approach used six land sales in the land analysis portion concluding a value of $1.70 per acre ($490,000) as the land value.
    b. Respondent's cost approach used the Marshall Valuation System (MVS) with allowable modifiers in determining the building and site improvement replacement costs new using an average to good quality, class C and class S, ice skating rink and an average quality, class C and class S restaurant to conclude a replacement cost new (RCN) of $9,415,128 for the building and $646,173 for the site improvements. Indirect costs of 1%, ($100,613) were applied.

[9] Tr, Day 1, at 67.
[10] Tr, Day 1, at 98-99.
[11] Tr, Day 1, at 162-163, 171.

c. Respondent's cost approach reported using 30% incurable depreciation for the building by reconciling 40% straight-line depreciation with 23% curvilinear depreciation to conclude $3,766,051 of incurable depreciation. However, the actual amount of depreciation applied ($3,766,051) was 40% of the RCN.[12]
d. Respondent's cost approach used 75% incurable depreciation for the site improvements using an economic life of the improvement of 20 years and an effective age of 15 to conclude $484,630 of incurable depreciation.
e. Respondent's cost approach applied no functional obsolescence and no external obsolescence.

23. Respondent's appraisal used five comparable sales in their sales approach which were adjusted to conclude an adjusted unit price range of $47 to $76 per square foot, with an average of $60.75 per square foot. $59.98 per square foot was utilized to reach Respondent's appraisal conclusion of a TCV for the subject of $4,400,000 using the sales approach.
    a. Respondent's comparable sale one was zoned I-1, Light Industrial.
    b. Respondent's comparable sale two was zoned RD, Research Development.
    c. Respondent's comparable sale three was zoned I-2, Light Industrial.
    d. Respondent's comparable sale four was zoned C-2, General Commercial.
    e. Respondent's comparable sale five was zoned I-2, Light Industrial.
    f. The subject property is zoned as C-2, General Commercial.
    g. Within Respondent's sales comparison grid, no use/zoning adjustments were made to any of its five comparable sales.[13]

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 TCV.[14]

> 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.[15]

The Michigan Legislature has defined TCV to mean:

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[12] Respondent's Exhibit R-1, at 53.
[13] Id. at 62.
[14] See MCL 211.27a.
[15] Const 1963, art 9, sec 3.

> 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.[16]

The Michigan Supreme Court has determined that "[t]he concepts of 'true cash value' and 'fair market value' . . . are synonymous."[17]

"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."[18] The Tribunal is not bound to accept either of the parties' theories of valuation.[19] "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."[20] 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."[21]

A proceeding before the Tax Tribunal is original, independent, and de novo.[22] The Tribunal's factual findings must be supported "by competent, material, and substantial evidence."[23] "Substantial evidence must be more than a scintilla of evidence, although it may be substantially less than a preponderance of the evidence."[24]

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[16] MCL 211.27(1).
[17] *CAF Investment Co v Michigan State Tax Comm*, 392 Mich 442, 450; 221 NW2d 588 (1974).
[18] *Alhi Dev Co v Orion Twp*, 110 Mich App 764, 767; 314 NW2d 479 (1981).
[19] *Teledyne Continental Motors v Muskegon Twp,* 145 Mich App 749, 754; 378 NW2d 590 (1985).
[20] *Meadowlanes Ltd Dividend Housing Ass'n v Holland,* 437 Mich 473, 485; 473 NW2d 636 (1991).
[21] *Jones & Laughlin Steel Corp v City of Warren*, 193 Mich App 348, 356; 483 NW2d 416 (1992).
[22] MCL 205.735a(2).
[23] *Dow Chemical Co v Dep't of Treasury*, 185 Mich App 458, 462-463; 462 NW2d 765 (1990).
[24] *Jones & Laughlin Steel Corp, supra* at 352-353.

"The petitioner has the burden of proof in establishing the true cash value of the property."[25] "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."[26] 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."[27]

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.[28] "The market approach is the only valuation method that directly reflects the balance of supply and demand for property in marketplace trading."[29] 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 TCV of the property, utilizing an approach that provides the most accurate valuation under the circumstances.[30] Regardless of the valuation approach employed, the final valuation determined must represent the usual price for which the subject would sell.[31]

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[25] MCL 205.737(3).
[26] *Jones & Laughlin Steel Corp, supra* at 354-355.
[27] MCL 205.737(3).
[28] *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).
[29] *Jones & Laughlin Steel Corp, supra* at 353 (citing *Antisdale v City of Galesburg*, 420 Mich 265; 362 NW2d 632 (1984) at 276 n 1).
[30] *Antisdale, supra* at 277.
[31] See *Meadowlanes Ltd Dividend Housing Ass'n v Holland*, 437 Mich 473, 485; 473 NW2d 636 (1991).

The parties in this case agreed that the subject property, an ice arena known as the Arctic Coliseum, presented a difficult appraisal project as both claimed there were no appropriate ice arena properties to use as comparable sales and little to no market data was available regarding market rents or income and expenses of other owner-operated ice arenas. Nonetheless, all three approaches to value were represented in this case. Petitioner developed only the income approach while Respondent developed both the sales comparison and cost approaches to value the subject property. However, each approach resulted in very different value conclusions.

Highest and best use was another area where the parties found some agreement. Both appraisers determined that the highest and best use as vacant was to hold for future commercial development but that in terms of the highest and best use as improved, the existing use represents the highest and best use of the subject property. Petitioner's appraiser specifically indicated and developed his value conclusion based on the existing use of the subject as an ice arena; however, Respondent's appraiser simply specified that use of the existing building was ultimately his opinion of the highest and best use of the subject property. The Tribunal finds that "as improved" is the highest and best use for the subject property because the existing building is in good condition, has been functioning as an ice arena since it was first constructed twenty years ago, and continues to operate as an ice arena producing a modest net operating income.

Petitioner's case revolved around the testimony of the owner representative of the Arctic Coliseum, Karl Christen, and their appraiser, Kevin Kernen. As described by both during testimony, three different but related entities are operating at the Arctic Coliseum including RMKB LLC (Petitioner) who owns the real estate, RMKB II LLC,

which operates the restaurant, Arctic Breakaway, at the subject property, and IceOnSale, a C-Corporation solely owned by Mr. Christen that operates the ice rental operation. The entity known as RMKB II is fully owned by Petitioner (RMKB) and all three entities are controlled by Mr. Christen who testified as follows:

> Q. And what is RMKB II?
> A. RMKB II is an LLC that operates the restaurant, Arctic Breakaway, that's on the second floor of the Arctic Coliseum.
> Q. How does RMKB II generate its revenue?
> A. Sell food, beverages, a banquet hall where we have parties, and that's pretty much it.
> Q. Okay. And is RMKB II -- and when I say "two," I mean Roman numerals -- also related to the Petitioners RMKB that owns the real property?
> A. Yes. It's an LLC that is wholly owned by RMKB --
> Q. Okay. So RMKB, RMKB II and IceOnSale are all related entities owned and controlled by you.
> A. That's correct.[32]

In addition to the three entities controlled by Mr. Christen, a pro shop located within the subject property is leased to and is operated by an unrelated party, D & D Hockey, for $1,000 per month.

In Petitioner's appraisal, Mr. Kernen rejected the cost and sales approaches to valuation and relied solely on the income approach to reach his value conclusion for the subject property. In his appraisal report, Mr. Kernen stated the following:

> The sales comparison approach and the cost approach were considered but not applied. The cost approach was not applied due to the difficulty in accurately estimating depreciation, specifically obsolescence, as well as the fact that investors typically rely on the income producing potential and not a cost basis in determining the value of this property type. The sales comparison approach was not performed due to the wide-ranging variables that go into a market participant purchasing an ice arena; for example, the amount of revenue the arena can generate going forward, and amenities included in the sale. Based on this it was determined the income capitalization approach is most appropriate; however, we note a

[32] Tr, Day 1, at 26.

> summary of market sales is presented in the sales comparison approach section as a check for reasonableness of the income capitalization approach conclusion.[33]

In developing their income approach, Petitioner's appraiser used actual income and expense data for 2016 through 2018 for RMKB (Petitioner) and IceOnSale combined. No actual income and expense data from RMKB II, the entity operating the restaurant, was included because Mr. Kernen instead treated the restaurant as if it were leased to a third-party operator and estimated an in-house rental income based on a percentage of gross sales method.[34] Lease income from the pro shop was included in the data as in-house rental income.

"Any property or property interest that has the potential to generate income can be valued using the income capitalization approach."[35] Mr. Kernen clearly believes that the subject property is producing income, or has the potential to produce income, because the only approach to value he developed in this case was the income capitalization approach. Further, Mr. Kernen provided several years of historical income and expense data for the entities operating at the subject property that illustrated positive Net Operating Income (NOI). However, in his testimony, Mr. Christen, the owner of the subject property, was very evasive regarding whether the subject property was an income-producing property. Mr. Christen testified that as owners of the subject property who both work in some capacity for the Arctic Coliseum, neither he nor his wife receive compensation for working there nor do they draw an income. He instead

[33] See Petitioner's Exhibit P-3, at 6.
[34] Id. at 48.
[35] *The Appraisal of Real Estate* (15th ed, 2020), 414.

characterized any profit from the operations at the Arctic Coliseum as being earmarked to debt service. Mr. Christen testified as follows:

> Q. And there are three entities – by "entities", I mean business, corporate entities that operate at the subject property; is that correct?
> A. That's correct.
> …
> Q. Do you receive any money from any of those three entities at the subject property?
> A. Well, from time to time there's some distributions associated with that. Like at the end of the year, we'll apply it to a loan. But as far as a salary or anything, no. Just like a normal owner does.
> Q. Okay. So you don't receive any money, not a single cent, from the operation of the subject property despite you owning the subject property; is that what you're saying?
> A. No, I didn't say that.
> Q. Okay. So then you are compensated in some way for your ownership of the subject property; is that a fair statement?
> A. I wouldn't call it compensation, sir.
> Q. Okay. So do you receive U.S. currency as the owner of the subject property?
> A. Occasionally we'll end up with a little bit of money at the end of the year, and then it's applied to a loan that is outstanding against the property.[36]

Later in his testimony, Mr. Christen stated that the loan he referred to applying money to at the end of the year was collateralized by the subject property and that he and his wife were the holders of the approximately $4.5 million loan.[37]

The Tribunal finds that Petitioner was less than straightforward in their presentation of whether the subject property was an income-producing property or purchased by the owner for some other purpose. "Income-producing real estate is typically purchased as an investment, and from an investor's point of view earning power is the critical element affecting property value."[38] The Tribunal is not persuaded

[36] P-3, at 59–60.
[37] See Tr, Day 1, p 69 at 20 – 25, and p 70 at 1 – 4.
[38] *The Appraisal of Real Estate* (15th ed, 2020), 413

that the value conclusion of subject property based on Mr. Kernen's appraisal relying on the income-capitalization approach is actually the market value of the property but instead may be the investment value.

> An important distinction is made between market value and investment value. Investment value is the value of a property to a particular investor (or class of investors) based on the investor's specific requirements. Investment value may coincide with market value, [ ], if the client's investment criteria are typical of buyers in the market.[39]

The Tribunal is not persuaded that Mr. Christen's investment requirements are the same as typical buyers in the market as of the date of valuation.

In concluding the TCV for subject property, Mr. Kernen first established a going concern value for the business operating at the subject property which included multiple related legal entities plus one lease relationship and then extracted the fee simple value by subtracting the personal property value and intangible value (the liquor license). Mr. Kernen's use of the actual historical financials for the subject property as the only data for establishing a projected NOI to be capitalized to determine the TCV of the subject property, is highly questionable given Mr. Christen's investment motivation. Moreover, however, the Tribunal is not persuaded by Petitioner's income approach because Mr. Kernen provided absolutely no market data to support that the actual historic income and expenses for the subject property are what the market would expect.[40]

> To develop an opinion of market value with the income capitalization approach, an appraiser must be certain that all the data and forecasts used are market-oriented and reflect the motivations of a typical investor who would be willing to purchase the property as of the effective date of the appraisal. A particular investor may be willing to pay a price different

[39] *Id.* at 416
[40] See Tr, Day 1, p 225 at lines 18-25, and p 226 at lines 1-6.

> from market value, if necessary, to acquire a property that satisfies other investment objectives unique to that investor.[41]

For the reasons discussed above, the Tribunal finds that Petitioner's income approach is not reliable evidence in determining the TCV for the subject property.

In his appraisal report, Mr. Kernen did not include a discussion regarding his consideration of the cost approach. During testimony, Mr. Kernen stated his reasons for not developing the cost approach as follows:

> So from a cost approach perspective, you know, one key factor is looking at the age of a property, and this property is approximately 20 years old as of the valuation date. So there's a large amount of **physical depreciation associated with the property**, which there can be a lot of subjectivity in determining that depreciation. On top of that – and, really, I probably should have started with this – is, as I mentioned before, in doing a valuation, you really want to **apply similar approaches that investors are applying when they're looking at this type of property**. And looking at a cost-based determination of value is not something that typical investors of a 20-year-old ice arena are going to undertake. And then, lastly, from a profitability standpoint – and within ice arena, there's a lot of **external obsolescence** that needs to be considered and associated with … the fact that the subject is located in … a semirural area – there's just a lot of factors that would indicate external obsolescence, and that can be very challenging and subjective to determine what that appropriate number is. And all of that just makes the cost approach extremely speculative and I deemed not to be reliable in this valuation.[42] [Emphasis added.]

The Tribunal is puzzled as to why Mr. Kernen did not develop the cost approach as at least a check against the reasonableness of his income approach, after claiming there were no sales or income and expense data from the market to utilize in his income approach. "If sale and rental data for comparable properties is not available, current market indications of the depreciated cost of an existing building (or the cost to acquire

[41] *The Appraisal of Real Estate* (15th ed, 2020), 416.
[42] Tr, Day 1, at 114 – 115.

and refurbish the building) would be the best reflections of market thinking, and thus, market value."[43]

While also not developing a sales approach, Mr. Kernen did discuss his consideration of this approach in his appraisal report before rejecting it. In the Sales Approach section of the report, Mr. Kernen included a Summary of Ice Rink Sales containing 13 sales of ice rink properties, largely in the states surrounding Michigan (Midwest) plus some from the Northeast region of the United States, between September 2016, and January 2020,[44] and claimed that these raw sales were supportive of his value conclusion using the income approach,[45] in which he initially concluded a Market Value of the Total Assets of the Business (MVTAB). Other statements in Mr. Kernen's report regarding these 13 sales lead the Tribunal to question why at least a few of these ice arena sales could not have been developed into a sales comparison approach for the subject. Mr. Kernen called these properties "comparables" and wrote the following:

> The sales represent the MVTAB of the properties that traded from September 2016 through January 2020. Further, these properties were acquired for continued ice arena operations. Overall, the comparables indicate a wide range in price per sheet and do not provide a clear indication of value. As shown, the reported price per sheet ranges from $500,000 to $2,345,000, with an average of $1,346,590 per sheet. Some of the differences in value can be attributed to location and accessibility, amenities offered, market conditions, age and condition, and date of sale. Circumstances surrounding a sale, including availability and terms of financing, tax considerations, potential revenue, the motivations of a buyer or seller, or a particular deal structure can result in disparities between sale prices and pure market value.… In practice, it is virtually impossible

[43] *The Appraisal of Real Estate* (15th ed, 2020), 530.
[44] See P-3 at 43 -44.
[45] Id. at 43, which states in pertinent part, "The value indicated in the forthcoming income capitalization approach for the subject's MVTAB is $2,200,000, which equates to a value of $1,100,000 per ice sheets. Since the concluded MCTAB falls within the range shown [in the Summary of ice Rink Sales], the sales presented are supportive of the MVTAB conclusion from the income capitalization approach."

> to quantify the appropriate adjustment factors with an acceptable degree of accuracy due to the number and complexity of required adjustments.[46]

The Tribunal finds that Mr. Kernen's description of the 13 sales above and their need for adjusting to be more like the subject property is the essence of the definition of a sales comparable approach. In fact, according to *The Appraisal of Real Estate,*

> Comparative analysis of properties and transactions focuses on similarities and differences that affect value, called *elements of comparison*, which may include variations in property rights, financing terms, conditions of sale, market conditions, locational influences, and physical characteristics, among others. Appraisers examine market evidence using paired data analysis, trend analysis, statistics, and other recognized and accepted techniques to identify which elements of comparison within the data set of comparable sales are responsible for value differences.[47]

Mr. Kernen indicated that he had at least some information about some of the 13 sales[48] but chose not to develop a sales comparison approach as a check against his income approach because he claimed there were no appropriate sales in the market for comparison. Rather, he relied on the raw sales prices for the 13 properties. The Tribunal is not persuaded that the sales summary as presented is a valid check of reasonableness for Petitioner's conclusion from the income approach any more than it is a valid sales comparison approach. However, this list of ice arena sales provides at least some bracket of values for the sale of ice arenas as going concerns.

Respondent's appraiser, Mr. Widmer, considered all three approaches to value but did not develop the income-capitalization approach and stated the following in his appraisal report:

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[46] P-3 at 43.
[47] *The Appraisal of Real Estate* (15th ed, 2020), 351.
[48] See P-3 at 43, where Mr. Kernen sates the following: "Further information regarding the sale transactions are included in our work file."

> With regards to an Income Approach valuation, a primary concern in the appraisal of this type [of] property is the lack of rental data within the marketplace. In this instance, attempts were made to locate leases or offering of similar ice skating facilities, but no applicable transactions were available. Correspondingly, the Income approach has been excluded in this appraisal.[49]

As stated in relation to the exclusion of Petitioner's income approach, the Tribunal finds that the lack of market data makes an income approach inappropriate here and therefore, finds Mr. Widmer's exclusion of it was appropriate.

Mr. Widmer developed the cost approach and sales comparison approach to reach Respondent's reconciled conclusion of $4,900,000 as the TCV of the subject property by weighting the cost approach conclusion at 25% and the sales comparison approach conclusion at 75%.

The cost approach starts with the estimation of market value of the vacant land. In Respondent's cost approach, Mr. Widmer used six comparable land sales to determine his land value contention of $1.70 per square foot. While the net adjustments range of the six land sales was great, three of the comparable sales stood out as being more like the land of the subject property based on the adjustment amounts: land sale comparable two with 16.4% net adjustments and 25.9% gross adjustments, land sale four with -13.2% net adjustments and 28.5% gross adjustments, and land sale five with -25% net adjustments and 25% gross adjustments. Of these, comparable two is most similar in size to the subject but is 11 miles away in the Dexter Business and Research Park which resulted in a positive 15% adjustment for external influences and use/zoning. Comparable sales four and five are significantly smaller than the subject

[49] Respondent's Exhibit R-1, at 14.

and were each adjusted by a negative 15% for that fact but are located near the subject property although have different zoning which each was also adjusted to reflect.

Petitioner argued that several of Mr. Widmer's land comparable sales were too small for it to be physically possible to build the Arctic Coliseum upon and thereby were invalid comparable properties as they failed the highest and best use test for physical possibility.[50] However, the Tribunal finds that land sales comparable properties used in establishing a land value estimate in a cost approach are not strictly subject to a highest and best use compatibility test as Petitioner suggests. While Petitioner is correct that properties with the exact highest and best use make the best comparable sales, it has been established in this case that such properties are not available in the market. As is stated in *The Appraisal of Real Estate*, "..., the most comparable sales would have the same or **similar** highest and best use." [Emphasis added.][51] As has been asserted by Respondent's appraiser, Mr. Widmer, the building on the subject property has characteristics similar to buildings used for light industrial use more so than for commercial retail.

> Q. And looking at the property overall, do you believe it has features you would expect to find at a commercial property?
> A. It does from the standpoint that it is an ice rink, it has a restaurant, it has concessions, it has a fitness center. From the standpoint of a commercial property, as in retail, no.
> Q. And based on your review of the property and the features you just testified to; did you reach a conclusion regarding the type of building located on the site – on the subject property?
> A. Yes.
> Q. And what is that conclusion, sir?
> A. Well, it's an ice rink that offers [ ] similar structural characteristics as an industrial building.[52]

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[50] See Tr, Day 3, at 592-593 (pdf p 60-61).
[51] *The Appraisal of Real Estate* (15th ed, 2020), 338.
[52] Tr, Day 2, at 382-383 (pdf p 102-103).

For these reasons, the Tribunal rejects Petitioner's argument that Mr. Widmer's land sales comparable properties are inappropriate. Further, to argue that the size of the land sale comparable parcels disqualified them is likewise not persuasive. "Among generally similar sales, size may be less important as an element of comparison than date and location."[53]

> The objective of sales comparison is to select the most comparable sales and then adjust the comparable sales for differences that cannot be eliminated within the selection process. Elements of comparison may include property rights, financing terms, conditions of sale (motivation), expenditures immediately after purchase, market conditions (changes over time), location, physical characteristics, economic characteristics, available utilities, and zoning. The physical characteristics of a parcel of land include, but are not limited to, **its size**, shape, frontage, topography, soil conditions, location, and view.[54] [Emphasis added]

Overall, the Tribunal finds that Mr. Widmer's reconciled land value of $1.70 per square foot used in his cost approach is reasonable and supported.

Mr. Widmer continued his cost approach using Marshall Valuation Service (MVS) to conclude the land improvement and building replacement costs. As mentioned above, Mr. Whitmer viewed the physical attributes of the building at the subject property as that of a light industrial building with the bottom half constructed of masonry block and the upper portion constructed with steel panels. Utilizing MVS, Mr. Widmer determined the building replacement cost using these parameters along with appropriate modifiers and multipliers was $9, 415,128 and land improvement cost was $646,173. Indirect/soft costs of $116,965 for real estate taxes and financing fees were added to conclude a total replacement cost new (RCN) of $10,178,266. The Tribunal

[53] *The Appraisal of Real Estate* (15th ed, 2020), 341.
[54] *Id.* at 339-341.

finds that Mr. Widmer properly calculated the replacement cost for the building and land improvements and Petitioner did not argue that Mr. Widmer inappropriately applied MVS in his RCN conclusion. However, the final step of the cost approach, determining and applying depreciation, was not as straightforward. Petitioner claims that Mr. Widmer did not adequately account for depreciation due to external obsolescence in his cost approach which resulted in a value conclusion of $6,440,000 which was much higher than the conclusions with the other approaches utilized in this case.

Mr. Widmer considered both straight-line depreciation and curvilinear depreciation in reconciling to a 30% incurable physical depreciation estimate for the building and straight-line depreciation of 75% for the land improvements. However, when verifying the dollar amount of depreciation applied, the Tribunal finds that Mr. Widmer actually used 40% depreciation rather than 30% as he claims[55].

In his report, Mr. Widmer said the following regarding external obsolescence:

> This component is defined as "a loss of value caused by negative externalities, i.e. factors outside a property."[56] The southeast Michigan economy in general has impacted all sectors of the real estate market. This factor has adversely impacted the economics of most property relative to achieving desired returns on the cost of new construction for most property types. A determination of whether an external impact would exist will be considered in the **Reconciliation of Market Value** section of this appraisal.[57]

As stated above, Mr. Widmer clearly expresses that external obsolescence is a factor in most property types. However, as was argued by Petitioner, Mr. Widmer did not even mention external obsolescence affecting the building component in the

[55] R-1, at 53.
[56] Appraisal Institute, *The Dictionary of Real Estate Appraisal* (5th Ed, 2010), 632.
[57] R-1, at 54.

Reconciliation of Market Value section of his report. Instead, Mr. Widmer stated, "While there was no external obsolescence quantified, the land component did account for contemporary market conditions."[58] However, this single statement does not address the external impacts on the value of the building. "External factors frequently affect the value of both land and building components of property, but land is not affected by any of the forms of depreciation (i.e., physical deterioration, functional obsolescence, or external obsolescence)."[59]

As such, Mr. Widmer did not account for any external obsolescence. This omission casts doubt on the reliability of Mr. Widmer's value conclusion using the cost approach. Further, the fact that the result of the cost approach was inconsistent with the other approaches (much higher), bears out Petitioner's argument that there is external obsolescence present at the subject property that has not been considered in Mr. Widmer's cost approach. Although Mr. Widmer's land value analysis was accepted by the Tribunal as reliable, the Tribunal is not persuaded that there is no external obsolescence affecting the value of the building. Therefore, the Tribunal finds that the conclusion of Mr. Widmer's cost approach in determining the TCV for the subject property is not reliable.

The remaining valuation evidence in this case is Respondent's sales comparison approach.

> Typically, the sales comparison approach provides a credible indication of value for commercial and industrial properties suited for owner occupancy, i.e., properties that are not purchased primarily for their income-producing characteristics. These types of properties are generally suitable for

[58] R-1, at 63.
[59] *The Appraisal of Real Estate* (15th ed, 2020), 593.

> application of sales comparison because similar properties are commonly bought and sold in the same market.[60]

With the highest and best use of as improved and given that the building is currently in use as an owner-operated ice arena, the sales comparison approach would normally provide a good indication of the TCV for the subject property. As was discussed earlier in this opinion however, the parties asserted that they were unable to find sales of similar ice-skating rinks in southeast Michigan. In describing his choice of comparable sales, Mr. Widmer states:

> With the absence of ice skating rink comparable sales, as a means of establishing market value, research was conducted [of] the sale of larger, **owner-user** light industrial buildings, and while there were limited sales within the subject's sub-market, a sampling of five (5) recent transactions were selected, offering a reasonable level of comparability with regards to physical and economic characteristics of the subject improvements excluding the ice rink and restaurant build-out.[61] [Emphasis added]

Petitioner's argument against the comparable sales used by Mr. Widmer in his market approach centered around highest and best use incompatibility and whether the highest and best use identified by Respondent (and Petitioner) for the subject would be legally permissible at the comparable properties. The zoning of all comparable sales used by Mr. Widmer, except comparable four, was different than the C2 zoning of the subject property and he made no adjustment for this fact. Petitioner argued that the subject property should not be compared to light industrial properties because they have a different highest and best use than has been established for the subject property. Petitioner contends that to make these industrial properties more like the subject at its highest and best use, Mr. Widmer should have analyzed the cost of

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[60] *Id*. at 354.
[61] R-1, at 56.

renovating the subject to accommodate an industrial use, or vice versa, the cost to convert the comparable sale properties to ice rink use and applied an appropriate adjustment to the comparable sales.[62] Petitioner also argued that an adjustment for use/zoning should have been applied. Petitioner went so far as to suggest that Mr. Widmer's sales comparison approach is legally invalid and would be stricken from evidence as a matter of law under a Daubert[63] challenge by a Federal Court or the Michigan Court of Appeals. The Tribunal rejects this legal argument especially given that Petitioner had no objection to Mr. Widmer's admission as an expert in real estate appraisal or the admission of his appraisal.

The Tribunal finds that Mr. Widmer's use of comparable properties with buildings of construction similar to the building on the subject property is the next best thing to using ice rink properties, provided that proper adjustments are applied.

> The basic elements of comparison that should be considered in sales comparison analysis are as follows:
> - Real property rights conveyed (e.g., fee simple estate, leased fee, leasehold)
> - Financing terms (e.g., All cash, market financing, seller financing, special or typical terms)
> - Conditions of sale (e.g., short sale, bank-owned real estate [REO], private estate, relocation, 1031 tax-free exchange, or other atypical motivations)
> - Expenditures made immediately after purchase (e.g., new roof, **renovation costs**)

[62] See Tr, Day 3, at 537–541 (pdf p 5-9).

[63] The Daubert standard has been incorporated in MRE 702. The Supreme Court in *Gilbert v Daimler-Chrysler*, 468 Mich 883, 661 NW2d 232 (2003), states "MRE 702 [provides] the factors that a court may consider in determining whether expert opinion evidence is admissible. "It . . . [is] the court's fundamental duty of ensuring that *all* expert opinion testimony—regardless of whether the testimony is based on 'novel' science—is reliable." In that case, "the faux 'medical' opinion of an individual who lacked any medical education, experience, training, skill, or knowledge became the linchpin of plaintiff's case and unmistakably affected the verdict." In the present case, there is no question. Respondent's appraiser is qualified by education, experience, training, skill, and knowledge to perform an appraisal. Further, the Tribunal is satisfied that both the testimonial and documentary evidence provided is not only based on sufficient facts and data, but also is the product of reliable principles and methodologies, which were reliably applied to the specific facts of this case.

- Market conditions (e.g., changes in supply and demand or other causes of price changes)
- Location (e.g., neighborhood, interior lot, waterfront, arterial street)
- Physical characteristics (e.g., size, shape, soils, access, construction quality, condition)
- Economic characteristics (e.g., expense ratios, lease provisions, management, tenant mix)
- Legal characteristics (e.g., **zoning/use requirements**, environmental regulations, building codes, flood zones, differences in highest and best use)
- Non-reality components of value (e.g., personal property, furniture, trade fixtures, and equipment [FF&E], franchises, trademarks). [Emphasis added] [64]

While Mr. Widmer considered all these categories of adjustments, he chose not to apply any adjustments for expenditures which would need to be made for renovations to install ice rinks at the comparable properties immediately after purchase nor for use/zoning. In his report, Mr. Widmer stated, "While each property may have been subject to arbitrary renovations, there was no deferred maintenance noted, and there will be no adjustments required for this factor."[65] Regarding use/zoning, Mr. Widmer noted in his report,

> The problem with this item relates directly to the fact, for a comparable to qualify as relevant, it should possess a similar if not the same highest and best use. When comparable transactions are scarce, it may sometimes be necessary to consider modification for this factor. For this sample of comparables, there will be no adjustment necessary for this component.[66]

Even though no quantitative adjustment was made by Mr. Widmer, the Tribunal finds that Mr. Widmer could have made a qualitative adjustment for the use/zoning factor as his set of comparable sales was chosen specifically because sales of ice arena properties were not only scarce but non-existent according to both appraisers in

[64] *The Appraisal of Real Estate* (15th ed, 2020), 362-365.
[65] R-1, at 59-60.
[66] Id. at 61.

this case. While Petitioner did not quantify what a suggested adjustment amount should be, the Tribunal finds Petitioner's argument is persuasive that adjustments for the different use/zoning of the comparable properties should have been applied in the comparable sales used in its Respondent's market approach. Further, the Tribunal finds Petitioner's argument persuasive that Mr. Widmer failed to address the need and estimated cost to either demolish the ice rinks and accoutrements to accommodate an industrial use at the subject or to convert the industrial comparable properties via the installation of ice rinks and the required building infrastructure required for the rinks as he should have. Even leaving aside the issue of the prohibition for industrial use under the subject property's zoning classification, by choosing comparable sales that were industrial properties, Mr. Widmer should have adjusted for this "conversion" factor in his sales comparison approach.

Because Mr. Widmer used industrial zoned comparable sales with buildings improved for industrial use and applied no adjustments for these factors, the Tribunal finds that Respondent's sales comparison approach is not reliable evidence in determining the TCV of the subject property.

The Tribunal finds that the parties each submitted severely flawed approaches to value and that neither party's conclusions were based on reliable evidence. And, while not as reliable of evidence as the Tribunal would like to have available to base its determination upon, the Summary of Ice Rink Sales presented in Petitioner's appraisal is the only evidence that provides any data regarding the sales of ice rink properties other than the subject. From Petitioner's sales, a reasoned qualitative analysis is attainable to derive an independent

determination of market value for the subject property. Further, after studying the 13 sales presented, the Tribunal finds there are three sales of ice arena properties with a very similar amount of square footage to the subject and featuring two sheets of ice, sales one, two, and thirteen.[67] The two most recent sales, one and two, are located in New Jersey but are the most recent sales with 2019 and 2020 sale dates. Sale 13, however, was a Michigan sale, although older (from 2016) which likely requires some qualitative consideration of changed market conditions. Since nothing more is really know about these sales, other than they were all going concern sales, the Tribunal finds that weighing the Michigan sale more than the two New Jersey sales is appropriate and results in a going concern value for the subject of $2,700,000. Then, based on Petitioner's stated value of the personal property portion of the subject of $295,000 and intangible value of $25,000[68], the Tribunal subtracted $320,000 from the going concern value to reach the TCV for the subject property of $2,380,000. Therefore, the TCV for the 2020 tax year is $2,400,000 (rounded) with a resulting SEV/AV of $1,200,000.

Regarding the TV for 2020, MCL 211.27a provides that a property's TV is the lesser of the property's SEV or capped TV, and a property's capped TV is, absent a transfer of ownership, determined mathematically by taking into consideration the prior tax year's TV, physical losses to the property, the lesser of the rate of inflation or 5%, and physical additions to the property, including

[67] See P-3, at 43.
[68] Id. at 58.

omitted property (i.e., property not previously assessed). Since there was not a transfer of property nor any losses or additions, the calculation using 1.9% inflation factor and the 2019 TV results in a capped TV of $1,283,684, more than the SEV. Therefore, the 2020 TV for the subject property is $1,200,000, equal to its SEV.

The Tribunal finds, based upon the Findings of Fact and the Conclusions of Law set forth herein, that there was no persuasive evidence provided in this case that either Petitioner's contention nor Respondent's contention were correct, and the Tribunal relied upon the only evidence regarding the sales of ice arenas, raw data contained in Petitioner's appraisal, and chose sales of buildings housing ice rinks similar in size to the subject upon which to base the TCV. The Tribunal was not provided the assessor's record card for the subject but used the BOR approved values as a check of reasonableness upon the Tribunal's decision in this case. The subject property's TCV, SEV, and TV for the tax year at issue are as stated in the Introduction section above.

JUDGMENT

IT IS ORDERED that the property's SEV and TV for the tax year 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, 2013, through June 30, 2016, at the rate of 4.25%, (ii) after June 30, 2016, through December 31, 2016, at the rate of 4.40%, (iii) after December 31, 2016, through June 30, 2017, at the rate of 4.50%, (iv) after June 30, 2017, through December 31, 2017, at the rate of 4.70%, (v) after December 31, 2017, through June 30, 2018, at the rate of 5.15%, (vi) after June 30, 2018, through December 31, 2018, at the rate of 5.41%, (vii) after December 31, 2018 through June 30, 2019, at the rate of 5.9%, (viii) after June 30, 2019 through December 31, 2019, at the rate of 6.39%, (ix) after December 31, 2019, through June 30, 2020, at the rate of 6.40%, (x) after June 30 2020, through December

31, 2020, at the rate of 5.63%, and (xi) after December 31, 2020, through June 30, 2022, at the rate of 4.25%.

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

APPEAL RIGHTS

If you disagree with the final decision in this case, you may file a motion for reconsideration with the Tribunal or a claim of appeal with the Michigan Court of Appeals.

A motion for reconsideration must be filed with the Tribunal with the required filing fee within 21 days from the date of entry of the final decision. Because the final decision closes the case, the motion cannot be filed through the Tribunal's web-based e-filing system; it must be filed by mail or personal service. The fee for the filing of such motions is $50.00 in the Entire Tribunal and $25.00 in the Small Claims Division, unless the Small Claims decision relates to the valuation of property and the property had a principal residence exemption of at least 50% at the time the petition was filed or the decision relates to the grant or denial of a poverty exemption and, if so, there is no filing fee. You are required to serve a copy of the motion on the opposing party by mail or personal service or by email if the opposing party agrees to electronic service, and proof demonstrating that service must be submitted with the motion. Responses to motions for reconsideration are prohibited and there are no oral arguments unless otherwise ordered by the Tribunal.

A claim of appeal must be filed with the Michigan Court of Appeals with the appropriate filing fee. If the claim is filed within 21 days of the entry of the final decision,

it is an “appeal by right.” If the claim is filed more than 21 days after the entry of the final decision, it is an “appeal by leave.” You are required to file a copy of the claim of appeal with filing fee with the Tribunal in order to certify the record on appeal. The fee for certification is $100.00 in both the Entire Tribunal and the Small Claims Division, unless no Small Claims fee is required.

By _____

Entered: February 7, 2022
vs

PROOF OF SERVICE

I certify that a copy of the foregoing was sent on the entry date indicated above to the parties or their attorneys or authorized representatives, if any, utilizing either the mailing or email addresses on file, as provide by those parties, attorneys, or authorized representatives.

By: Tribunal Clerk