Wal-Mart Stores East LP,
Petitioner,

v

Big Rapids Township,
Respondent.

MICHIGAN TAX TRIBUNAL

MOAHR Docket No. 20-002393

Presiding Judge
Steven M. Bieda

FINAL OPINION AND JUDGMENT

The Tribunal issued a Proposed Opinion and Judgment (POJ) on October 21, 2022. The POJ states, in pertinent part, "[t]he parties have 20 days from date of entry of this POJ to notify the Tribunal in writing, by mail or by electronic filing, if available, if they do not agree with the POJ and to state in writing why they do not agree with the POJ (i.e., exceptions)."

On November 9, 2022, Petitioner filed exceptions to the POJ.[1] In the exceptions, Petitioner states the true cash value (TCV) adopted in the POJ is erroneous due to the adoption of an incorrect highest and best use (HBU) for the subject. Specifically, Petitioner contends that the POJ's conclusion of HBU as "continued use for commercial purposes as a free-standing owner-occupied retail building" is erroneous as a matter of law as well as the adoption of a wrong legal principal. Petitioner contends that the descriptor "owner-occupied" is not a valid use because HBU describes what is physically done at the real estate. Petitioner also contends this interpretation of HBU is incorrect because it allows the property's ownership to affect its TCV in contrast to several precedential decisions. Petitioner states that the weight of some comparable sales was not appropriate because of the erroneous HBU.

Respondent has not filed exceptions to the POJ or a response to Petitioner's exceptions.

The Tribunal has considered the exceptions and the case file and finds that the Administrative Law Judge properly considered the testimony and evidence submitted in the rendering of the POJ but partially erred in the decision. More specifically, the parties agree that the subject property is owner-occupied. In establishing the subject's HBU, the POJ indicates that the parties' evidence supports a HBU of the subject as an

[1] On January 18, 2023, Petitioner filed a Motion requesting that the Tribunal permit it to amend its exceptions. Petitioner sought leave to amend the exceptions due to erroneous citations, and the amended exceptions removed those references. On January 20, 2023, the Tribunal issued an Order granting Petitioner's Motion.

"owner-occupied freestanding retail building."[2] Petitioner contends that it is inappropriate to designate the owner occupancy as part of the HBU, and based on *The Appraisal of Real Estate*,[3] the Tribunal finds that Petitioner has shown good cause to modify that portion of the POJ to indicate the subject's HBU as of tax day was continued use as a freestanding retail building.

Notwithstanding the correction of the HBU, Petitioner has not demonstrated that the POJ erred in the weighing of the comparable sales as a result. The Tribunal shall give respectful deference to the finder of fact in the weighing of the evidence. While consideration of owner-occupancy status is not appropriate in establishing the HBU, it is appropriate in the evaluation of comparable sales. Petitioner has not demonstrated any legal error in the POJ's reliance on a sale matching those terms. Further, as stated in the POJ, the Tribunal finds that Petitioner's unsupported location adjustments are a rational basis for giving less weight to Petitioner's sales. Despite the factually correct phrase being errantly included in the HBU, examination of the record finds no basis for any further modification of the value conclusion based on the POJ's thorough and rational examination.

Given the above, Petitioner has shown good cause to justify the modifying of the POJ.[4] As such, the Tribunal modfies the POJ, as indicated herein, and adopts the modified POJ as the Tribunal's final decision in this case.[5] The Tribunal also incorporates by reference the Findings of Fact and Conclusions of Law contained in the POJ, as modified herein, in this Final Opinion and Judgment. As a result:

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

Parcel Number: 54-05-016-015-500

Year	TCV	SEV	TV
2020	$9,217,800	$4,608,900	$4,374,584

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

Parcel Number: 54-05-016-015-500

Year	TCV	SEV	TV
2020	$6,510,000	$3,255,000	$3,255,000

[2] POJ at p 21.
[3] "The concept of highest and best use relates to what is done physically with real estate, and use of physical land should not be confused with the motivations of owners or users." *The Appraisal of Real Estate*, Appraisal Institute (Chicago: 15th ed, 2020) at p. 311.
[4] See MCL 205.762.
[5] See MCL 205.726.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the officer charged with maintaining the assessment rolls for the tax year(s) at issue shall correct or cause the assessment rolls to be corrected to reflect the property's true cash and taxable values as finally provided in this Final Opinion and Judgment within 20 days of the entry of the Final Opinion and Judgment, subject to the processes of equalization.[6] 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%, (xi) after December 31, 2020, through June 30, 2022, at the rate of 4.25%, (xii) after June 30, 2022, through December 31, 2022, at the rate of 4.27%, and (xiii) after December 31, 2022, through June 30, 2023, at the rate of 5.65%.

This Final Opinion and Judgment resolves the last pending claim 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

[6] See MCL 205.755.

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: January 25, 2023
bw

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

Wal-Mart Stores East LP,
Petitioner,

MICHIGAN TAX TRIBUNAL

v

MOAHR Docket No. 20-002393

Big Rapids Township,
Respondent.

Presiding Judge
Peter M. Kopke

PROPOSED OPINION AND JUDGMENT

INTRODUCTION

Petitioner filed this appeal disputing the property tax assessment levied by Respondent against Parcel No. 54-05-016-015-500 for the 2020 tax year. Michael B. Shapiro, Esq. and Daniel L. Stanley, Esq. represented Petitioner and Eric D. Williams, Esq. represented Respondent.

A video hearing was commenced on October 19, 2021 and continued on October 20, 2021 and October 21, 2021. Petitioner's witness was Laurence Allen, MAI.[1] Respondent's witnesses were Douglas C. Adams, MAI and David Kirwin, Assessor.[2]

Based on the evidence (i.e., testimony and admitted exhibits) and the case file,[3] the Tribunal finds that true cash value ("TCV"), state equalized value ("SEV"), and

[1] Mr. Allen was offered and admitted as an expert witness without objection. See Transcript (TR) at 30-40.
[2] Mr. Adams was offered and admitted as an expert witness without objection. See TR at 192-195. Mr. Kirwin was offered and admitted as an expert witness without objection. See TR at 453-456.
[3] P-1 and P-4 were offered and admitted without objection. See TR at 40-43 and 380-388. See TR at 44 (i.e., "appraisal page numbers rather than the . . . exhibit page numbers"). R-4 was offered and admitted without objection. See TR at 195-197. R-1 was offered and admitted despite an objection. See TR at 456-460. As for the objection, R-1 is a public record. Although R-1 has a value conclusion based on a mass appraisal or cost approach, R-1 also indicates a land value of $2,317,200 based on a front foot rate of $1,250 and a depreciated cost of improvements of $6,900,600 based, in part, on an economic condition factor (ECF) of 0.545. Respondent did not, however, submit or offer the land sales study underlying the front foot rate utilized or the ECF analysis underlying the ECF utilized. As such, R-1 represents an incomplete cost approach. See TR at 453 and 456-462. In that regard, both parties indicated that they were **not** relying on a cost approach in the valuation of the property at issue. See TR at 21, 77-79, 203-205, 487, and 507-509.

taxable value ("TV") of Parcel No. 54-05-016-015-500 for the 2020 tax year is as follows:

Year	TCV	SEV	TV
2020	$6,510,000	$3,255,000	$3,255,000

FINDINGS OF FACT

The following facts were proven by a preponderance of the evidence (i.e., testimony and admitted exhibits) and concern only the evidence and inferences found to be significantly relevant to the legal issues involved:[4]

1. The subject property (i.e., Parcel No. 54-05-016-015-500) consists of land and improvements located at 21400 Perry Avenue, Big Rapids, MI in Mecosta County.[5]
2. The property is owned by Wal-Mart Real Estate Business Trust.[6] Further, there was no transfer of the property's ownership during the 2019 tax year.[7]
3. The property has no deed restrictions and is classified as commercial real.[8] The property is also zoned as HI-Highway Interchange.[9]
4. The subject land area is irregularly shaped and consists of approximately 30.37 acres or 1,322,917 square feet.[10]
5. The subject building is an owner-occupied freestanding retail building consisting of 207,544 square feet and used by Petitioner as a Walmart Supercenter (i.e., a "big box" store).[11]
6. The property's assessed value ("AV") and TV as established by Respondent's 2020 March Board of Review are $4,608,900 and $4,374,584, respectively.[12]
7. Petitioner claims that the property's TCV is $4,360,000 as of December 31, 2019, based on their sales comparison approach, $4,180,000 based on their income

[4] The Tribunal has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to these findings.
[5] In addition to the pleadings, the parties' April 5, 2021 and April 8, 2021 prehearing statements, and the July 14, 2021 Prehearing Conference Summary, see P-1 at 1-2 and 29, R-1, and R-4 at 2. See also Mr. Allen's April 5, 2021 letter to Petitioner (P-1 at "Page 3 of 15").
[6] See P-1 at 6 and R-4 at 2 and 6.
[7] See P-1 at 6, R-1, and R-4 at 6.
[8] See R-1, and R-4 at 18. See also TR at 88, 89, 90, 92, 110-111, 124, and 220-221.
[9] See P-1 at 1, 6, and 54-55. See also R-4 at 2 and 34.
[10] See P-1 at 2 and 29 and R-4 at 2 and 18.
[11] Although there was a discrepancy regarding the building's square footage (i.e., 207,504 versus 207,711 square feet), Mr. Allen testified that he relied on the "architectural plans for Wal-Mart," while Mr. Adams testified that did not measure the building and relied instead on what the assessor had. The basis for the adoption of the above-noted square footage is discussed in more depth herein. See P-1 at 1 and 33 and R-1 at 2 and 19-20. See also TR at 64, 195-196, and 198-199.
[12] See the pleadings, the parties' April 5, 2021 and April 8, 2021 prehearing statements, the July 14, 2021 Prehearing Conference Summary, P-1 at 56 and R-1.

approach; and, $4,290,000 based on their cost approach.[13] Petitioner also claims that the "reconciled" TCV for the 2020 tax year is $4,320,000.[14]

8. Respondent claims that the property's TCV is $9,250,000 as of December 31, 2019, based on their sales comparison approach and $8,050,000 based on their income approach.[15] Respondent also claims that the 'reconciled" TCV for the 2020 tax year is $8,950,000.[16]
9. The property's highest and best use for the tax year at issue is its continued use for commercial purposes as a free-standing owner-occupied retail building.[17]
10. The instant market was increasing for the tax year at issue.

PROCEDURAL MATTER

Prior to Petitioner's opening statement, there was a discussion regarding whether Petitioner would be allowed to call Mr. Adams as an adverse witness in Petitioner's case-in-chief relative to Mr. Adams' preparation of a valuation disclosure for Respondent (i.e., his expert report).[18] Notwithstanding the discussion regarding the authority to call Mr. Adams as an adverse witness and the Tribunal's prior practices regarding the calling of such witnesses, Respondent's valuation disclosure had not been admitted and could not be offered for admission by Petitioner.[19] As such, Mr.

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[13] See P-1 at 68-107, 108-122, and 123-142.
[14] See P-1 at 4 and 143-144. See also Mr. Allen's April 5, 2021 letter to Petitioner (P-1 at "Page 4 of 157").
[15] Mr. Adams did not prepare a cost approach. See R-4 at 77. See also R-4 at 36-58 and 59-76.
[16] See R-4 at 77-78.
[17] See P-1 at 64-66 and R-4 at 34-35. See also TR at 42, 70, 125-126, 211-212.
[18] See TR at 4-16 and 28, which provides, in pertinent part, that:

> **Mr. Shapiro**: The Petitioner's appraisal - - excuse me, Respondent's appraisal and testimony will include both facts which are undisputed **and which support** Mr. Allen's value conclusion, which we will not be allowed to bring out **in advance** of Mr. Allen's - -
> **Judge Kopke**: Mr. Shapiro, you know, you're misleading the record . . . . [b]ecause you will be allowed to bring that out because you will be allowed to cross-examine Mr. Adams.
> **Mr. Shapiro**: My statement was - -
> **Judge Kopke**: To the extent that you are making - - that's the second statement you've made indicating you will not be allowed to bring out something and neither of those statements is true.
> **Mr. Shapiro**: My statement is we will not be able to bring out **in support of** Mr. Allen's conclusion **prior to** Mr. Allen's testimony. Due to various errors Respondent's appraiser's concluded value is grossly inflated and legally irrelevant.

[19] See TR at 197. See also the unpublished opinion *per curiam* issued by the Michigan Court of Appeals in *Lozano v Detroit Medical Center* on December 2, 2008 (Docket No. 279087), which provides, in pertinent part, that:

> Although MRE 611 provides the trial court with discretionary authority to control the order in which permissible testimony is presented, **it does not serve as a mechanism for**

Adams would also have been required to testify during Respondent's case-in-chief for purposes of admitting that valuation disclosure resulting, to some extent, in duplicative testimony. Further, valuation cases can present complex fact-based issues, particularly "big box store" cases like the instant case, and the orderly presentation of evidence (i.e., Petitioner's case-in-chief then Respondent's case-in-chief) benefits both the Tribunal and the appellate court, if necessary, in "the ascertainment of the truth."[20] As a result, the calling of Mr. Adams to testify as an adverse witness about his expert report would have result in the needless consumption of time and an ineffective presentation of evidence.[21] Although the "arbitrary" time limit imposed in *Barksdale* was found to be an abuse of discretion because it was "an outcome falling outside the range of principled outcomes," Petitioner was not precluded from examining or, more appropriately, cross-examining Mr. Adams. Rather, Petitioner was merely required to wait until Mr. Adams' expert report was actually admitted into evidence to obtain testimony from Mr. Adams to "support" Petitioner's case-in-chief. In that regard, the case was originally scheduled for four hearing days and was completed in under two and a half days with Mr. Shapiro having the opportunity to fully and completely cross-examine Mr. Adams regarding his expert report "in support of Mr. Allen's value conclusion."[22] Finally, Mr. Shapiro did indicate that Respondent had no objection to the calling of Mr. Adams as an adverse

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> **allowing a party to secure testimony that the party is not otherwise permitted to present**. While plaintiff certainly would be entitled to cross-examine defendants' expert witnesses once called by defendant, **he had no legal right to compel the testimony of defendants' experts as part of his own case-in-chief**, see *Klabunde, supra* at 282, **or to call defendants' experts as adverse witnesses**. Accordingly, MRE 611 does not provide a basis for upholding the trial court's decision. [Emphasis added.]

Although *Lozano* is an unpublished opinion and, as such, is not precedential or, more specifically, "precedentially binding," such opinions can provide guidance. See TTR 215, MCR 7.215(C)(1), and *Cox v Hamilton*, 322 Mich App 292, 307-308; 911 NW2d 219 (2017).

[20] By way of example, see the recently issued unpublished opinion *per curiam* by the Court of Appeals in *Menards, Inc v City of Escanaba* on February 10, 2022 (Docket No. 354900).

[21] See TTR 215 and MRE 611(a), which provides that "[t]he court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) **avoid needless consumption of time**, and (3) protect witnesses from harassment or undue embarrassment." [Emphasis added.] See also *Barksdale v Bert's Marketplace*, 289 Mich App 652, 657; 797 NW2d 700 (2010).

[22] See TR 266-439 and 447-452. See also TR at 333-334.

witness and Mr. Williams admitted that he had not intended to object.[23] Mr. Williams did, however, also state that:

> I frankly agree, Judge, that **it will be more efficient** to proceed with the Petitioner offering their exhibits, testimony, expert and following only with Respondent then putting in Doug Adams and his appraisal in Respondent's case in chief. I think you're right. I think that's much more efficient. [Emphasis added.]

ISSUES AND 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.[24] In that regard, the Michigan Legislature has, as directed by the Constitution, 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.[25]

In its review of that definition, the Michigan Supreme Court has determined that "true cash value" is synonymous with "fair market value."[26]

As for the Tribunal, the Tribunal must find a property's true cash value in determining a lawful property assessment.[27] The Tribunal is not, however, bound to accept either of the parties' theories of valuation.[28] Rather, 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.[29]

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[23] The fact that the opposing party does or does not object is, for the most part, irrelevant, as the "exercise of reasonable control over the mode and order of interrogating witnesses and presenting evidence" by the Tribunal is mandatory (i.e., "shall"). See also *Phillips v Deihm*, 213 Mich App 389, 402; 541 NW2d 566 (1995) ("[u]nder MRE 611, a trial court has **broad power** to control the manner in which witnesses are called" (citations omitted)). [Emphasis added.] Further, see TR at 15.
[24] See Const 1963, art 9, sec 3.
[25] See MCL 211.27(1).
[26] See *CAF Investment Co v Michigan State Tax Comm*, 392 Mich 442, 450; 221 NW2d 588 (1974).
[27] See MCL 205.737(1). See also *Alhi Dev Co v Orion Twp*, 110 Mich App 764, 767; 314 NW2d 479 (1981).
[28] See *Teledyne Continental Motors v Muskegon Twp,* 145 Mich App 749, 754; 378 NW2d 590 (1985).
[29] See *Meadowlanes Ltd Dividend Housing Ass'n v Holland,* 437 Mich 473, 485; 473 NW2d 636 (1991).

Further, a proceeding before the Tribunal is original, independent, and de novo[30] and the Tribunal's factual findings must be supported by competent, material, and substantial evidence.[31] In that regard, "substantial evidence must be more than a scintilla of evidence, although it may be substantially less than a preponderance of the evidence."[32]

Additionally, "the petitioner has the burden of proof in establishing the true cash value of the property."[33] "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."[34] 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."[35]

As recognized by Michigan courts, 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.[36] The market approach is, however, the only valuation method that directly reflects the balance of supply and demand for property in marketplace trading.[37] Nevertheless, 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.[38] Regardless of the approach selected, the

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[30] See MCL 205.735a(2).
[31] See *Antisdale*, *supra* at 277 and *Dow Chemical Co v Dep't of Treasury*, 185 Mich App 458, 462-3; 462 NW2d 765 (1990).
[32] See *Jones & Laughlin Steel Corp v City of Warren*, 193 Mich App 348, 352-3; 483 NW2d 416 (1992).
[33] See MCL 205.737(3).
[34] See *Jones & Laughlin*, *supra* at 354-5.
[35] See MCL 205.737(3).
[36] See *Meadowlanes*, *supra* at 484-85; *Pantlind Hotel Co v State Tax Comm*, 3 Mich App 170, 176; 141 NW2d 699 (1966), *aff'd* 380 Mich 390 (1968).
[37] See *Jones & Laughlin*, *supra* at 353 (citing *Antisdale*, *supra* at 276 n 1).
[38] See *Jones & Laughlin*, *supra* at 353 (citing *Antisdale*, *supra* at 277 and *Teledyne Continental Motors v Muskegon Twp*, 163 Mich App 188, 193; 413 NW2d 700 (1987), *lv den* 429 Mich 889 (1987)).

value determined must represent the usual price for which the subject property would sell.[39]

The Tribunal is also required to consider the "highest and best use" of property in determining the property's true cash value, as that concept is "fundamental" to such determinations, as "[i]t recognizes that the use to which a prospective buyer would put the property will influence the price which the buyer would be willing to pay….[further,] [l]and is appropriately valued 'as if available for development to its highest and best use, that most likely legal use which will yield the highest present worth.'"[40] In that regard, "highest and best use" of property is shaped by the competitive forces within the market where the property is located, and it provides the support for a thorough investigation of the competitive position of the property "in the minds of market participants."[41] Additionally, highest and best use analysis strongly influences the choice of comparable sales in the sales approach. Only properties with the same or similar highest and best uses are suitable for use as comparable sales.[42] "If the property being appraised is a single site, not a site whose use depends on assemblage with other sites, the highest and best use of the site alone is analyzed as it currently exists by itself. If the property being appraised consists of multiple sites as though sold in one transaction, the highest and best use analysis considers them as one large site."[43]

Finally, the Tribunal is further required to determine the subject property or properties' taxable values for the tax years at issue.[44]

Here, Petitioner claims that "[t]his case involves the determination of a lawful assessment of a subject real property freestanding big-box store for a single tax year, the 2020 tax year as of December 31, '19."[45] Petitioner also claims, among other things, that:

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[39] See *Jones & Laughlin*, *supra* at 353 (citing *Meadowlanes*, *supra* at 485).
[40] See *Edward Rose Bldg Co v Independence Twp*, 436 Mich 620, 633; 462 NW2d 325 (1990).
[41] See Appraisal Institute: *The Appraisal of Real Estate* (2013, 14th ed) at 331.
[42] See *The Appraisal of Real Estate*, *supra* at 345.
[43] See *The Appraisal of Real Estate*, *supra* at 334.
[44] See MCL 205.737(1). See also MCL 211.27a(2).
[45] See Petitioner's Opening Statement – TR at 17-29. See also the Petition, Petitioner's Prehearing Statement, the Prehearing Summary, and TR at 41, 43, and 480-481.

1. “There are more than a dozen big-box retailers in Michigan with hundreds of similar big-box store properties.”
2. “The subject big-box store property is a result of piecemeal construction ten years apart. That piecemeal construction was made 28 and 18 years prior to the valuation date, in 1991 and in 2001.”
3. “We respectfully submit that the lawful subject property’s true cash value as of 12/31/19 is $4,320,000, which equates to $21 per square foot.”
4. “It is undisputed based on the appraisals that the contested assessment exceeds 50 percent of true cash value.”
5. “Testimony and evidence in this case will be largely duplicative which the Tribunal has heard and seen many times before.”
6. “For more than a decade the final, un[-]appealed Tribunal decisions involving determination of true cash value of the fee simple interest in big-box stores like the subject property concluded to the true cash value based upon primarily or entirely on the sales comparison approach, using sales of other fee simple interests in big-box store properties. Petitioner's case will explain how the true cash value of big-box store properties should be made consistent with Michigan law and numerous prior final decisions by the Tribunal; that is, final, unappealable decisions by the Tribunal.”
7. “Location is a key factor affecting the true cash value of the fee simple interest in big-box store properties.”
8. “The subject property is located in Big Rapids Township, Mecosta County, Michigan. Big Rapids is a small town in Mecosta County in western Michigan's Lower Peninsula. **The subject area has a relatively small population**; that is, **a low population density with low median household income, low consumer, average consumer spending**, compared to the state and the location of many sale and rent comparables used by the appraisers. In short, **the subject property’s true cash value is adversely impacted by its location**. Loss in value attributable to location; that is, factors external to the property reflects external obsolescence.” [Emphasis added.]
9. “As of December 31, 2019[,] the subject property’s existing use is retail.”
10. “**Wal-Mart is the owner and** also the **occupant of the subject property**. **Wal-Mart developed the subject property for its business purpose to reflect its business image for use in making retail sales**. Wal-Mart did not develop the subject property to sell or lease the property to another party.” [Emphasis added.]
11. “[**B**]**oth Petitioner’s appraiser and Respondent’s appraiser concluded to a value giving greatest consideration to the sales comparison approach** in reaching true cash value conclusions for the subject property.” [Emphasis added.]
12. “**Both the quantity and quality of the information used to value the fee simple interest in the subject property by the sales comparison approach are superior to that of the income approach**. Unleased big-box store properties are **not** typically purchased by investors to lease such properties in the marketplace. Thus, each appraiser gave secondary [] and considerably less

consideration to the income approach in reaching his value conclusion." [Emphasis added.]

13. "**Respondent's appraiser acknowledges that the cost approach is not relevant** to an appraisal of the decades-old subject property store fee simple interest in concluding to true cash value, and, therefore, he did **not** even prepare a cost approach to value. **The Petitioner agrees**. Petitioner's appraiser similarly gave the cost approach simply no -- no consideration in reaching his final value conclusion." [Emphasis added.]
14. "Petitioner's appraised true cash value of approximately $21 per square foot is based primarily on the sales of the fee simple interest in other big-box stores. Respondent's valuation is approximately $43 a square foot, which exceeds every fee simple interest big-box property sale property reported by the two appraisers in this case."
15. "Respondent's appraisal provides facts which supports Petitioner's appraisal in several respects. However, we will not be able to bring those facts to the attention of the Tribunal to limit the examination that would otherwise take place with Mr. Allen. In any event, there are several differences due to various factors. **The primary factor is Respondent's appraiser failed to value the subject property's fee simple interest by giving no weight to fee simple interest sales**, **instead relying on leased fee sales**." [Emphasis added.]
16. "Respondent's appraiser further distorted his sales comparison approach by clearly erroneous adjustments. Respondent's appraiser also disregarded evidence of rent agreed to for existing big-box store properties and instead relied upon rents agreed to pursuant to build-to-suit leases for properties not yet in existence and also non-big-box store properties."
17. "It is undisputed at issue here is the fee simple interest in the subject property."
18. "Petitioner's appraisal contains valuations that were properly prepared, making a logical application of available data. Respondent's appraisal is fatally flawed based on reliance on leased fee sales, erroneous adjustments and rents not established pursuant to leases of existing big-box store properties."
19. "Freestanding big-box stores are built for a specific user and are never built on a speculative basis. They were never built to thereafter be sold or leased in the market. The reason freestanding big-box stores are not built on a speculative basis to be thereafter sold or leased is that no profit could reasonably be expected from the construction of the subsequent sale or lease upon completion of construction."
20. "Like all freestanding big-box stores, **the subject improvements are designed and constructed for a specific retailer's retail business and to fit that specific retailer's model and image**. Big boxes are, as the name implies, simply big-box stores that could be used by multiple different retailers. However, **the market tells us a buyer of the fee simple interest of a big-box store is going to reimage the property**. Each big-box store retailer has its own business image, a desired store layout and design and facade, flooring and lighting, location of restrooms, et cetera. Each big-box store retailer wants a store to fit its model and not another retailer's image." [Emphasis added.]

21. “The logical reasonable expectation is that the fee simple interest in the subject property if it were sold, although suitable for retail use by many users, changes would be made to fit the buyer's image. That loss in value for the sold store property and the difference in value between an unleased big-box store and one that is leased even at market rent are due to multiple factors.”
22. “This loss in difference in value is attributable to factors including the difficulty of obtaining financing for the acquisition of a store that is not leased and not occupied and the multiple risks associated with finding a tenant, a holding period, and the cost to reimage the property. Because such obsolescence exists in the market that loss in value must be reflected as a matter of law and the concluded true cash value of big-box store properties.”
23. “Petitioner's evidence will include comparable sales which reflect the prices paid for comparable properties. Mr. Allen’s testimony will include making logical application of available market data to reach a lawful conclusion of the subject property's -- the subject property for retail use.”

In that regard, Petitioner further claims that:

1. “The subject real property is a single tax parcel that consists of approximately 30.37 acres of land, with a land-to-building ratio of 4.07 to one, excluding the 11 acres of non-developable land.” [Emphasis added.]
2. “As to the gross building area, the 207,544 square feet versus 205,711 square feet, a difference of less than 1 percent, obviously Respondent's claimed area is more favorable to Wal-Mart and if used would result in a lower valuation. At least a lower valuation than concluded to by Mr. Allen . . . .

   Allen’s higher gross building area is based on an architectural drawing[,] and we believe is more likely to be accurate than the gross building area used by Respondent. There's no definitive answer to the question but we believe that is the best evidence.” [Emphasis added.]
3. “**The appraisers are in agreement the subject building's effective age was 20 years as of the valuation date**.” [Emphasis added.]
4. “The Court of Appeals repeatedly held when the subject property is owner-occupied it must be valued vacant and available. See Menards versus Escanaba, Lowe's versus Marquette Township and Lowe’s versus Grandville.

   Respondent’s appraisal is legally erroneous and irrelevant because in the approaches used it fails to value the subject property vacant and available. **In both approaches utilized by Respondent’s appraiser, Adams, he values the subject property as if the subject property were subject to a nonexistent, hypothetical lease rather than vacant and available. He also admitted that had he valued the property vacant and available his value conclusions by each approach would be lower than they were**.

Now, in the testimony Mr. Adams was torn. He was torn in his cross-examination for admitting that he valued the property not vacant and available to try to do what he could do for the township by claiming it was valued vacant and available. Ultimately on redirect he readily admitted that his income approach was valued subject to a hypothetical lease and not vacant and available and tried to claim that his sales comparison approach was [] valued vacant and available. Yet on recross-examination in about 30 seconds he admitted that was not true. **He admitted that both properties, both approaches were valued based upon the same premise; that is, the property being occupied and not vacant and available**." [Emphasis added.]

5. "Mr. Adams testified that the holding period could be up to 36 months, for a sale of the subject property or even a lease of the subject property as if vacant on the valuation date. Mr. Allen's adjustment, based upon modification costs, was not based on 36 months but, rather, 12 months."
6. "Respondent's cross-examination and Adams' rebuttal focus on three criticisms of Allen's appraisal, each of which has been demonstrated and proven to be a bogus claim . . . .

   Number one, as a rebuttal witness in rebuttal testimony Adams gave a rather incredible and obviously false story about Allen's income approach valuation relating to property taxes.

   He claimed an error of $500,000. And if I turn to page 116 of Allen's appraisal . . . . he has potential gross income and then he has operating expenses. What this witness has said is, I'm going to take away $129,000 for potential gross income, I'm going to take away $129,000 from the expenses, and that's all I'm going to look at and somehow, I'm going to get an increase of $40,000 or something in income.

   Now, if you take away something from the top number and you take away the same amount from the bottom number and you perform the subtraction how does he believe that anyone in the world would think you're going to get a different number? In fact, what happened was, ultimately, although he denied it at first . . . he admitted his error, he admitted Mr. Allen is right. If you look at the page, it is so obvious. The $129,000 of income is reduced by 5 percent. 5 percent is $6,450. If you then increase the capitalization rate from 9.12, as Mr. Adams testified, you get the exact same number. The testimony was rather incredible.

   On cross-examination, and again by way of rebuttal, there was discussion of **Mr. Allen's Portage comparable**, showing a difference in adjusted value of $5 per square foot. **It's significant to remember that this is Mr. Allen's highest adjusted comparable sale**. **And the difference was explained both in cross and rebuttal based upon Mr. Allen's adjustment for location, which is** . . . is **true**. **That accounts for the primary difference**. Slight difference in terms of

land-to-building ratio, which should have been accounted for, but we'll avoid that for a moment.

The difference in location was demonstrated on cross-examination. **In every respect the comparable was superior to the subject property**. Mr. Allen testified to multiple factors, including a submarket analysis based upon leases and vacancy. **Based on the very limited analysis made by Respondent's appraiser** . . . **he concluded that the subject was superior to the comparable**. Yet when we looked at the components of what he viewed in every single respect regardless of how far you went out in his analysis, the comparable was superior to the subject.

Finally, in terms of the three things that they focused on most in challenging Mr. Allen's appraisal was Mr. Allen's use of the Holland Township comparable, Mr. Allen's comparable number 4. Unlike the Portage comparable that we just discussed, which formed the upper limit of indicated value in Mr. Allen's appraisal, the Holland Township comparable provided the lower limit indicated value. In other words, all the others were in the range between the two.

The claim was that this was an improper comparable, in the cross-examination. In fact, that was the focus of the entire cross-examination was that his comparable wasn't and shouldn't be used and is not comparable. Yet Mr. Adams use the exact same comparable in his December 31, [2018] appraisal of the Grand Haven Wal-Mart store, another big-box superstore, which was half the age of the subject property and in a superior location to that of the subject property. There's no explanation why Respondent would attempt to impeach Mr. Allen's use of that comparable when their own appraiser used it for a far superior property than that at issue here." [Emphasis added.]

7. "In addition, in the Grand Haven appraisal prepared by Mr. Adams, he used the Muskegon comparable, which he did not use to value the subject property. Again, the Grand Haven property being a superior property in terms of both age and location, which Mr. Adams readily admitted to.

   Using that comparable to value the subject property, using the adjustments we walked through by Mr. Adams indicated an . . . adjusted value of $26 per square foot. Using Mr. Allen's location adjustment instead results in a value by Mr. Allen of $23.29 a square foot. There's no explanation rather than the obvious one as to why Mr. Adams did not use that comparable in valuing the subject property. It is also significant that in the Grand Haven appraisal Mr. Adams' concluded value by the sales comparison approach for a superior property, virtually identical in size, half the age of the subject in a superior location was $35 a square foot. Yet here, by ignoring these comparables and giving the weight to these leased fee sales, he concluded to a value of $45 per square foot, approximately 30 percent greater for a property that is twice as old and in an inferior location."

8. “Respondent's appraiser, Adams, utilized eight comparable sales: four fee simple sales and four leased fee sales. His . . . leased fee sales were sales 5 through 8. He made no analysis whatsoever as to the market rent of those leased fee sales.

   He placed greatest reliance on two of those leased fee sales, those sales being located in Ohio and those sales having never been inspected by him. There's no adjustment for property rights, no adjustment to reflect the fee simple interest in the property.” [Emphasis added.]
9. “His comparable number 4, **a comparable that both parties used**, a property in Portage, approximately within five miles of Western Michigan and Kalamazoo College . . . . **With respect to that property, there is a** . . . **big difference in location**. We agree, it’s a big difference in location, and once again, we went through each and every component of the analysis made by Mr. Adams, which demonstrated that the comparable was a superior location to that of the subject property.

   And again, the difference is one of location. You make that location adjustment[,] and you get virtually identical adjusted values for Mr. Allen and Mr. Adams based upon that forming the upper limit of the range 4 that Mr. Allen identified in his appraisal.” [Emphasis added.]
10. “He also made . . . made a 5 percent land-to-building ratio, which if he utilized the developable land, **neither property having surplus land or excess land**, the adjustment . . . would have been essentially nothing. They were very close. 4.07 versus 3.82, yet he made a plus 5 percent adjustment for that, relying upon the gross land-to-building ratio, ignoring the fact that it included undevelopable land.” [Emphasis added.]
11. “[**F**]**or the market conditions adjustment, the parties are essentially in agreement, 2 to 3 percent a year**. **With respect to the age adjustment**, the parties are **in agreement**, 1 percent per year. With respect to the size difference, **Mr. Allen testified that although in general the larger the size the lower the value per square foot, he didn't find that true with respect to big-box stores and therefore he made no downward adjustment**. Mr. Adams made slight downward adjustments for that fact. With respect to the land-to-building ratio we've already discussed the fact that Adams' appraisal adjustments were inflated because he based it upon total gross building area rather than usable building area. And in fact, Mr. Allen testified that he did not make an adjustment based upon the fact that there was no excess land or surplus land.” [Emphasis added.]
12. “In terms of the location difference, Mr. Adams’ location adjustment was based on very limited information, two of which . . . were certainly relevant, population and average – or[] median household income. But it was also based upon a nonsensical analysis based upon population to big-box 5 stores. But even making that nonsensical analysis and not viewing the total retail square footage, his analysis showed that his adjustments were in error. And we went through . . .- several of those comparable sales to illustrate the point.

And perhaps even more significantly is that Adams failed to consider significant factors. He failed to consider traffic counts, he failed to consider what those traffic counts are. **On a ring road in Portage he may not have as much traffic, but the people there aren't going to work, they're not going to the office, they're not taking their kids to school. They're there to shop, they're retail shoppers**.

He also failed to consider . . . the retail submarket; that is, the rental rates and vacancies. Certainly[,] the retail rates of the rental market are going to be substantial evidence as to the location. He also made no analysis or consideration of average consumer spending.

On the other hand, **Mr. Allen utilized ten comparables** . . . . **which averaged $21.54 per square foot**, with a range of approximately 13 to $33 per square foot as indicated values. **One comparable they used as the same**: **Portage**. Another comparable, Holland Township, is one that Mr. Adams agrees is a valid comparable. He used it in the Grand Haven appraisal. Another Allen comparable is the Muskegon comparable, again used by Adams in another appraisal. These comparables support Mr. Allen's value conclusion. Two of them were excluded in this appraisal by Mr. Adams.

Go to the adjustments made by Mr. Allen in his comparables. Significant adjustments are market conditions. Again, there's no disagreement by the parties; Mr. Adams[']' testimony supports Allen's testimony. Age adjustment, once again, Adams' testimony supports Allen's testimony . . . . [The] location adjustment made by Allen is spelled out with respect to the various features for the Tribunal or any reader of the report to easily review." [Emphasis added.]

13. "If you go to page 97 of Mr. Allen's appraisal -- first, actually go to page 86. One thing you have to do is understand the nature of the traffic counts. **On page 86 of Mr. Allen's appraisal, he identifies the traffic counts not based upon the road that the ring road is on or adjacent to but based upon the mall road and institution as shown on page 86**.

    He then goes to the traffic counts reported on page 97, and what does he do? Respondent says . . . that he didn't adjust for this**.** That's absolutely false. If you take a look at the adjustments based upon arterial attributes, including visibility and traffic counts, you see the adjustments at the bottom. At the bottom of the page he makes plus adjustments of number 1, number 2, number 3, number 6, 21 number 8 and number 10. In short, he makes a plus adjustment of six of the comparables." [Emphasis added.]
14. "Respondent's counsel [] said that Mr. Allen didn't properly take into account visibility when he made the adjustment. **He did state it incorrectly in his appraisal**, **but Mr. Allen testified he did make the proper adjustment based on visibility**. All you have to do is look at page 97 and look at the . . . comparison of visibility. And when he compares the visibility attributes he treated

the subject property as similar to or inferior to the comparables. So his statement that he considered it wrong is just refuted by the record." [Emphasis added.]

15. "In terms of location adjustment, well, location adjustment speaks for itself. Mr. Allen went on and compared the comparables in the same areas as the subject, and the farther out you go the less of the primary area it is. And we testified -- there's been testimony to that by Mr. Adams. We've gone through all of the -- the submarket analysis is going to tell the difference. What are the rents of the submarket analysis? That's going to tell you the difference. That's a key locational factor.

    Mr. Allen analyzed that on page 99 of his appraisal. He analyzed what are the asking rents in the market and what are the vacancies? That's going to account for -- wherever you draw from it's going to be accounted for. And he made an adjustment based on that factor; Respondent's appraiser made none. Didn't even consider it."

Respondent, on the other hand, claims that they are relying "exclusively" on Mr. Adams' "appraisal of the subject property with values that are vastly different from that . . . presented by the Petitioner." Respondent also claims or, more appropriately, states that:

> "With regard to Respondent's proofs through the appraiser, Doug Adams, **the single biggest point that I want to make at the outset is that we believe the market area that affects the subject property is inaccurately described by Petitioner**. It's more accurately described by Doug Adams. **It's a 30-mile radius and it substantially alters the entire analytical framework of both Petitioner's appraisal and Respondent's appraisal**. It permeates everything for the analysis."[46] [Emphasis added.]

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[46] Respondent also stated that:

> . . . **both appraisers** observed, recognized, acknowledged that this Big Rapids market, whether it's described as Mecosta County, the City of Big Rapids or Big Rapids Township, this immediate neighborhood consists of or includes four big-box stores. **There's no indication that this area of limited or lower median income with double the spending that's projected is in any sort of market stress or that this subject site would be going on the market at reduced rates for all those costs**, which I agree, Mr. Shapiro is right, this thing goes on the market there will be those costs for changing it over . . . .
>
> **But the reality of this market is that it is much stronger than what we've described**. Those four 4 big-box stores are there and Wal-Mart by history has been there for 30 years, 20 of which []as a super center, one of the larger stores over 200,000 square feet in the state. This market is **not** how they've analyzed it or maybe . . . more accurately we don't think they've analyzed the market for this site correctly.

In that regard, Respondent further claims that:

1. “Acknowledging that [Mr. Adams’] testimony was contradictory under cross-examination . . . Respondent suggests that Mr. Adams' sales comparison analysis can be recognized and should be recognized and given the probative weight it deserves according to the independent review by the Tribunal, the judge.”
2. “The market for extra large big-box stores like the Wal-Mart in Big Rapids Township, over 200,000 square feet, is at least somewhat difficult to analyze due to the small number of good comparable sales. In explanation, sales that are not leased fee sales. We acknowledge that. The fee simple sales of big-box retail stores are of and from or within failed or declining big-box retail market sites . . . . These declining sites are in those that are highly competitive for the big-box retail stores or in declining local retail markets for the big-box stores. Those are the sales we work with. The appraisers identified and analyzed comparable sales and relied on the sales comparison approach to value the subject property. And the Tribunal is likely to rely on the sales comparison approach, at least primarily, as well. **Both appraisers identified the Menards sale in Portage as a comparable fee simple sale of a big-box retail store in Michigan**. This sale is a microcosm of the valuation issue before the Tribunal.

   This was Mr. Allen's comp number 8, from which he came up with or derived and adjusted square foot price or value of 33.67. **It was Mr. Adams' comp number 4**, which was adjusted upward to 38.93. Mr. Shapiro spent a good deal of time going over these . . . .

   With regard to this particular sale there’s been several statements about locational adjustments and that this particular comp was superior. And there were just a couple of things that I wanted to point out. So if we look at Mr. Allen's . . . summary table of the comps, page 101, and just look at . . . the traffic counts from the subject property, the 29.87 to this particular sale, **it looks like the traffic count for Mr. Allen's comp number 8 is 13,443 versus 20,987**. That's all it is. But it is not, as suggested by Petitioner, it is not superior, at least in traffic count for location to the subject site**.** Maybe they missed it. I doubt it. **But if it's really true that this comp is superior in all respects to the subject property, I guess lower traffic counts is superior**? **I doubt it**.

Again, it doesn't change the basic facts, but I believe it does change how you analyze the comparable sales and the sales comparison approach. And when you do that and you factor these additional factors in and view it **with the higher spending here that's documented by Mr. Allen**, then Mr. Adams' adjustments on the comps, again in the microcosm of what we're talking about, is **more persuasive, more accurate** than Petitioner’s.” [Emphasis added.]

But this is, in part, why Respondent suggests there should be closer attention paid to this particular comp, because we believe the analysis of this particular comp demonstrates a market analysis weakness in Petitioner's claims, appraisals and analysis. Because obviously that Menards store comp number 8 was in some kind of a declining market or situation or an overly competitive one that resulted in a sale.

And his traffic count is significantly lower than the subject property. If we look across, just for a moment, the traffic counts in the Petitioner's comps we can see that sale 1 is a traffic count substantially lower than the subject property, sale 2 is a traffic count substantially lower than the subject property, sale 4 is slightly above, sale 5 is significantly above, sale 6 is less than a third of the traffic count of the subject property. Sale 7, substantially above, better than three times, almost four times the traffic count of the subject property. Pardon me. The Menards sale obviously substantially below. Sale 9 is triple. Sale 10 somewhat below, 30 percent or so below the traffic count for the subject property.

So this is not just . . . a little anomaly. Because this is contrasted with multiple references by Petitioner's . . . appraiser to the income in the area and the implied spending in the area, which I characterized a couple times. But apparently I mischaracterized it, according to Mr. Shapiro as being low. But just a couple of points about how Mr. Allen addressed this overall.

Page 13, quote, [t]he estimated average consumer spending in Mecosta County is also much lower than that of . . . Michigan -- approximately 27 percent less and the nation approximately 35 percent less.

So part of his analysis is that there is much lower estimated average consumer spending in Mecosta County. Mecosta County is where this property is located. **This property is located**, however, **on the far** [**western**] **edge of Mecosta County** . . . **right next to the expressway**. **So** . . . **the market area for this property is largely defined by its location on the intersection of these main roads, the highways, 131 and 24 Perry Avenue, which also happen**[s] **to be M-20** . . .

And so this market analysis that's used by Mr. Allen understates the market for this site that is the site for retail traffic and the actual spending in the area. And that's not addressed anywhere in his appraisal, and it's not addressed by Petitioners in any way. They just used this as setting the backdrop for this being a site which is going to be inferior to all the comps because of the market and the spending. We suggest it isn't, as much as they seem to claim."[47] [Emphasis added.]

[47] In that regard, Respondent also stated that:

3. “We offer some conclusions regarding Mecosta County. One bullet point -- again I’m quoting – county’s population and number of households are both small, have historically grown slightly and are reason[ably] expected to grow slightly at least [at] rates between . . . those of the state and nation. He notes elsewhere that there’s some growth expected to be in Mecosta County greater than the state average.

   Then he goes on, [t]he county's median household income is much lower than that of Michigan and the United States . . . . Anyway, the county's, Michigan's, and the nation's median household incomes are projected to grow with Mecosta County's MHHI, and that’s some kind of a typo -- projected to grow again -- projected to grow at a slightly larger rate than that of the state and that of the nation. Maybe there is a little more positive growth here than what is otherwise acknowledged or reflected.

   Then the next one, [t]he county's average spending is much lower than that of Michigan and the United States. Okay. That implies that the spending in this particular market is much lower than that of Michigan and the United States. It doesn't say that, but that's the implication.

   Page 22, the bottom, the median household income figures and poverty level in Big Rapids -- it doesn't say whether it’s the city or the township or the county now. But we'll just use it for what it is. The median household income figures and property -- poverty level in Big Rapids are **adversely affected by the student population of Ferris State**, which is located within the city. It doesn't explain what that means, adversely affected for the negative. Sounds like it means these must be lower, even than what they look like. Still looks like he’s saying it’s lower.

If you look at this one particular comp and you look at the sales approach and you look at this data about the market and then you look back at that sales comp, when you make those locational adjustments you're going to make them **upward, not downward**.

And that sale comp with this data I believe . . . indicates for the Tribunal how this case can be analyzed and decided. The same analysis applies, without walking through each one of Mr. Allen's comps, which are **admittedly better** in that those are fee simple comps, **we don't disagree on that**.

Meaning Respondent . . . agrees the fee simple sales comps are the way to go. We have one in which they both analyzed it. There's really **not much difference** in how they're analyzed **other than this topic that I'm talking about for the local market**. And the traffic count, which **suggests** . . . the subject site’s **superior with regard to that retail spending**, **its location**, **the market area that it served and the traffic count**.

These are all not easy facts to grasp, but they're **readily discernable** from the data you've been given from both appraisers, frankly primarily on this point from Mr. Allen.” [Emphasis added.]

Page 24, the bottom, [f]urther, the MSA is inferior to the State of Michigan in terms of median household income and average consumer spending." [Emphasis added.]

4. "Page 26 we have an aerial photo of subject neighborhood. The primary surface transportation artery for the subject neighborhood is Perry Avenue, Business 131 5 and M-20 highway. Primary highway is U.S. 131, the expressway, which travels north and south and you get a blowup of it. **So you can see the site is located on one highway with the expressway immediately adjacent to the west**, which also Mr. Allen said has low visibility, low visibility. He says it two or three times. **He says later when he testified that that was really an error**. But there's . . . **no adjustment** to anything because of that correction of the error.

   And if you were to just read . . . the whole appraisal where he says in a couple places that the site has low visibility, then I'll just take you to it. Page 29, visibility. The subject site visibility is from Perry Avenue. The following is the traffic count along this road near the subject. The subject has below average visibility for big-box retail development. **He says that's wrong**. Okay. **We agree**, **he was wrong**. But I think it is part of how he was wrong with regard to this local market.

   Taking a look at page 30 of Mr. Allen's appraisal, [c]onclusion of site's functional adequacy. Overall, the subject site is considered below average. It has average access and shape but below average visibility. And a large portion of the undeveloped land is much lower topographically than the developed portion of the subject site.

   These factors, one of which was below-average visibility, reduce the overall subject site's functional utility as a commercial site. Okay. So if he's right, these factors, including below average visibility, if they really reduce the overall subject site's functional utility as a commercial site how can that be if it's really not below average visibility? He said he didn't do it. Meaning, I guess, that he meant it when he said it and he wrote it, but he doesn't mean it anymore because he said it was an error. But there's no adjustment anywhere or he didn't tell us how it makes a difference if it doesn't." [Emphasis added.]
5. "And if you go to the next page, the subject site sketch that they provided shows up in the northern quarter of the property, storm water detention, designed in by the architects, large chunk of the ground. Maybe this is the part of the site that Mr. Allen says is not available to be used, meaning this land which was apparently set aside and is functioning as storm water detention for the site is not available to be used any other way.

   Well, I would agree, except it is already being used in support of the site as improved. It was designed in by the architects. So I'm not sure that [] analysis of the land-to-building ratio correctly characterizes the use of that part of the property as storm water detention for the site as developed. There wasn't much

testimony on it or anything about it, so I . . . can't testify about it. But I can point it out to the Tribunal."

6. ". . . if we go again to the addenda to Mr. Allen's appraisal that he never addresses in his appraisal, we can see page 148 from the table he provided that the projected spending in this retail market, it's specific to retail . . . is 175,596,000. **The actual retail spending was 350 million**. **Double** . . . **what's projected based on the median income, the population, all of the factors that Mr. Allen utilized to describe this market as, I guess, inferior to all the comps**.

   That analysis is flatly contradicted by his own data. And it isn't contradicted by 10 percent. You can do the math any way you want, but their analysis of the spending power at this site, the retail trade at this site, **the market for this site is grossly understated**. That permeates the whole framework of their analysis. It isn't . . . a catastrophic sort of thing, it is just one more piece of data that you fit into the whole picture." [Emphasis added.]
7. "With regard to . . . Mr. Allen's site or comp that came up in the Menards-Port Huron Township Tax Tribunal case, Docket No. 14-001953 . . . [that] comparable sold for 16.90 per square foot, the lowest dollar per square foot amount other than rurally located comparables. Mr. Allen testified that the adjusted sale price of the property indicates that it is an outlier, and the Tribunal [found] the testimony persuasive.

   It doesn't necessarily mean it's an outlier in this case, I recognize that, but that's just too telling of . . . a valuation . . . for me to ignore it." [Emphasis added.]

Prior to addressing the parties' claims, the first step in the valuation process requires the Tribunal to determine the property's highest and best use. In that regard, Petitioner's appraiser, Mr. Allen, concluded that the property's highest and best use "as if vacant" "would be to hold for "future build-to-suit retail development" and "as if improved" is "its use as a retail use" and provided an analysis in support of said conclusions.[48] As for Respondent, Respondent's appraiser, Mr. Adams, concluded that the property's highest and best use "as if vacant" would be for "future development that would be consistent with current zoning and "as if improved" is for "continued big box retail use" and also provided an analysis, albeit limited analysis, in support of said conclusions.[49] In that regard, the testimony and admitted evidence not only indicates

[48] "Whenever a market value opinion is developed, highest and best use analysis is necessary." See Appraisal Institute: *The Appraisal of Real Estate*, (15th ed, 2020) at 34.
[49] See P-1 at 64-66 and R-4 at 34-35. See also TR at 42, 70, 125-126, 211-212.

that there was no deed restriction impairing the property's use as of the relevant tax day, but also supports the appraisers' continue use determinations for the property as an owner-occupied freestanding retail building, as said use is legally permissible, physically possible, financially feasible, and maximally productive.[50]

With respect to Petitioner's claims, Petitioner's market evidence consisted of an appraisal (i.e., P-1) and testimony by Petitioner's appraiser, Laurence Allen, in support of that appraisal. Although the appraisal or, more specifically, Mr. Allen considered all

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[50] See *The Appraisal of Real Estate*, *supra* at 33-35 and 317-318. In that regard, the Michigan Court of Appeals stated relative to such properties in *Menards, Inc v City of Escanaba*, 315 Mich App 512, 524-526; 891 NW2d 1 (2016) that:

> . . . in assessing TCV, the property "must be assessed at its highest and best use," Huron Ridge, 275 Mich App at 33; 737 NW2d 187, which, in this case, is as an **owner-occupied freestanding retail building**. Deed restrictions that limit the ability of prospective buyers to use the comparable properties for the subject property's HBU necessarily limit, if not eliminate, the willingness of those buyers to purchase the restricted property. **Those who would be interested in buying the property with restrictions would need to make modifications to convert the building from retail to something else**, like industrial use. Given the need to convert, the buyers would necessarily pay a lower price. [Emphasis added.]

The Court of Appeals also stated in response to the "remand" decision in *Menards* that:

> This Court previously held that competent, material, and substantial evidence did **not** support the Tax Tribunal's findings regarding the true cash value of petitioner's property because there was insufficient record evidence regarding the effect of deed restrictions on comparable sales. *Menards, Inc*, 315 Mich App at 532. This Court ordered that the **tribunal consider** the effect of the deed restrictions on remand, **and not to use** comparable sales **if it was not able to reliably adjust the comparable properties**. *Id.*
>
> Following remand, the tribunal opined that the weight of the evidence suggested that deed restrictions had a neutral market value, and that a market analysis provided following remand showed that deed-restricted properties sold for 12% more than unrestricted properties. However, the tribunal ultimately determined that "reliable data to adjust the value of the comparables **if sold for the subject property's** [**highest and best use**] was not provided."
>
> The tribunal complied with this Court's instruction by accepting additional evidence regarding the effect of deed restrictions on comparable sales**.** It ultimately determined that it could not reliably adjust the value of comparable sales, which was an outcome this Court specifically contemplated. Additionally, **because the tribunal did not rely on deed-restricted comparable sales**, **any error in its findings did not affect the outcome of this case**.
>
> [Emphasis added.]

Finally, see the unpublished opinion *per curiam* issued by the Court of Appeals in *Menards, Inc v City of Escanaba*, on February 10, 2022 (Docket No. 354900).

three recognized approaches to value, he "concluded" that his sales comparison approach provided "a reliable value estimate" and relied on that approach as his "primary indicator of value."[51] In that regard, Mr. Allen also stated that "[t]he fact that the subject property was owner-occupied and unleased as of the retrospective date of value leads to more weight being given to the sales comparison approach." As for his income capitalization and cost approaches, Mr. Allen stated that:

1. "The income approach for a fee simple valuation is **concluded to be less reliable** than a sales comparison approach **due to the many more variables that are necessary to estimate including** market rent, vacancy, operating expenses, capitalization rates and stabilization costs. **For this analysis**, **the income approach is considered less reliable than the sales comparison approach**."[52] [Emphasis added.]
2. "As illustrated in the cost approach, there is significant amount[s] of obsolescence associated with the subject building improvements. **Considering this large amount of depreciation, considering that this approach is not utilized by buyers and sellers in the marketplace for a property like the subject and considering the reliance on the income approach in concluding the obsolescence**, the cost approach is **given less consideration than** the other approaches in our reconciliation."[53] [Emphasis added.]

As for Mr. Allen's income and cost approaches, Petitioner also stated that:

1. It is undisputed that the sales comparison approach follows the market evidence that best reflects the attributes of the subject property. **The sales comparison approach is the most direct method of valuation that reflects the balance of supply and demand**.

   It is also undisputed that the sales comparison approach is the most appropriate approach to valuing the subject property due to its direct tie to the marketplace. Accordingly, both Petitioner's appraiser and Respondent's appraiser concluded to a value **giving greatest consideration to** the sales comparison approach in reaching true cash value conclusions for the subject property.[54] [Emphasis added.]

2. **Both the quantity and quality of the information used to value the fee simple interest in the subject property by the sales**

[51] See P-1 at 67 and 143.
[52] See P-1 at 143.
[53] See P-1 at 143.
[54] See TR at 20-21.

> **comparison approach are superior to that of the income approach**. Unleased big-box store properties are **not** typically purchased by investors to lease such properties in the marketplace. Thus, each appraiser gave secondary conversation and considerably less consideration to the income approach in reaching his value conclusion.[55] [Emphasis added.]

3. Respondent's appraiser acknowledges that the cost approach is not relevant to an appraisal of the decades-old subject property store fee simple interest in concluding to true cash value, and, therefore, he did not even prepare a cost approach to value. The Petitioner agrees. Petitioner's appraiser similarly gave the cost approach simply no -- no consideration in reaching his final value conclusion.[56]

Based on Petitioner's statements, as supported by Mr. Allen's testimony, and a review of Petitioner's approaches, the Tribunal concurs with Petitioner's position that the sales comparison approach is the most appropriate approach to value the subject property given (i) that such properties (i.e., big-box stores) are not, as indicated by both parties, typically purchased by investors, (ii) the quantity and quality of information provided in the sales comparison approach, which is, as correctly indicated by Petitioner, superior to the information provided in the income approach (i.e., many estimated variables), and (iii) the difficulty in estimating depreciation or obsolescence based on the age and condition of the building.

With respect to Mr. Allen's sales comparison approach, Mr. Allen utilized 10 sales – one from 2014, one from 2015, three from 2016, four from 2018, and one from 2019.[57] After adjusting for "property rights transferred," "financing terms," "conditions of sale," "market conditions," "arterial attributes," "demographic attributes," "retail submarket," and "age/condition",[58] Mr. Allen determined a concluded value per square foot of $21.00 for the tax year at issue based upon adjusted sale prices per square foot ranging from $12.86 to $33.67.[59] Of the sales:

1. Comparable Nos. 1, 2, 4, 5, 6, and 10 were purchased for multi-tenant use.[60]

[55] See TR at 21.
[56] See TR at 21.
[57] See P-1 at 68–107.
[58] See P-1 at 91-100 and 101.
[59] See P-1 at 102-107.
[60] See P-1 at 71, 73, 77, 79, 81, and 89.

2. Comparable No. 3 consists of two parcels, "one of which is leased from the Jackson County Airport." In that regard, the purchaser or:

> "Farm & Fleet acquired the fee simple interest in one parcel and the leased fee interest in the second parcel, which includes the building. The price paid to Sears was $2.54M and Farm & Fleet **assumed** the rights to the existing land lease. The building is located on 10.77 acres of leased land. The original land lease expired in 2018[] but contained 7 more extensions for 10 years each. In 2018, the annual rent payment for the land lease is $24,300 per year."[61] [Emphasis added.]

3. Comparable No. 7 was purchased subject to a deed restriction.[62]
4. Comparable No. 8 was purchased, repaired (i.e., roof-top HVAX units and PVC system), reimaged as a "Blain's store," and expanded from 81,569 square feet to "approximately 109,000 SF."[63]
5. Comparable No. 9 "was purchased by U-Haul for use as a showroom for selling moving and packing supplies as well as trucks and trailer rentals . . . . [and] the building will be built out to include approximately 1,200 climate-controlled, mini-storage rooms."[64]

As a result, Comparable No. 8 is, despite having the highest adjusted price per square foot, the only reliable indicator of value among the sales comparables provided by Mr. Allen.[65] More specifically, Comparable No. 8 is the only property that was, like the subject, an owner-occupied freestanding building with no deed restriction utilized for retail purposes both before and after the sale date and as of the tax date at issue. In that regard:

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[61] See P-1 at 75.
[62] See P-1 at 83.
[63] See P-1 at 85.
[64] See P-1 at 87.
[65] Mr. Allen's "Indicated Market Value/SF" or price per square foot for Comparable No. 8 is $33.67 per square foot. Said price per square foot **may**, however, **be** incorrect depending on Mr. Allen's rounding, which he did not explain. More specifically, Mr. Allen's calculated "Sale Price/SF" of $34.33 appears at first blush to be based on the rounding of $34.326 (i.e., 2,800,000 SF/81,569 SF = 34.3267663) **up**, while Mr. Allen's calculated "Adjusted Sale Price/SF" of $36.04 appears to be based on the rounding of $36.0465 (i.e., 34.33 x 1.05 = 36.0465) **down**. In that regard, see *The Appraisal of Real Estate*, *supra* at 602 provides that "[a] point estimate should be rounded to reflect the degree of precision that an appraiser can associate with the particular opinion of value." No matter the degree of precision being associated with the particular opinion of value, rounding each step (i.e., Sale Price/SF, Adjusted Sale Price/SF, and Indicated Market Value/SF) will skew the ultimate opinion of value, particularly if the rounding is not consistent.

1. Comparable Nos. 1, 2, 4, 5, 6, and 10 were, as indicated above, purchased with the intent to convert the buildings to multi-tenant use and that intent would have impacted the negotiated sales price of those comparables.[66]
2. Comparable No. 3 was, as indicated above, a sale of two parcels – one fee simple purchase and one leasehold purchase – that was not adjusted by Mr. Allen on the basis of property rights.[67] Rather, Mr. Allen capitalized the annual rent payment at a rate of 8% to determine an estimated value of "approximately $300,000" that was "added to the price paid to Sears of $2.54M for a total compensation paid of $2.48M."[68] Although the lease is a long-term lease (i.e., approximately 70 years), the subject, unlike this comparable, consisted of the land and improvements together (i.e., no leasehold). Further, the capitalization of the annual rent was, unfortunately, only supported by testimony and that testimony was insufficient to determine whether the comparable was "reliably adjusted" to reflect the comingled purchase price.
3. Comparable No. 7 sold with a deed restriction and Mr. Allen 5% adjustment was not properly supported. In that regard, Mr. Allen indicated that the comparable's "covenant deed does not appear to affect the purchase price paid for this property" based on interviews with the "sale participants" (i.e., brokers and grantors) and yet relied on "two national big box studies" that were not offered or admitted and, according to Mr. Allen, provided divergent opinions (i.e., "an average downward effect of 6%" and "no downward effect on price").[69] As such, the Tribunal is, given the evidence provided, unable to determine whether the value impact of the deed restriction on the purchase price for Comparable No. 7 was "reliably adjusted," which justifies the non-consideration or use of that comparable in this case.
4. Comparable No. 9 was purchased for showroom and retail purposes with the intent to "built out to include approximately 1,200 climate-controlled, mini-storage rooms" that would have also likely impacted the negotiated sales price of the comparable.

With respect to Comparable No. 8 (the "Portage" comparable), which Respondent's appraiser also selected for comparison purposes (i.e., Respondent's Comparable No. 4).[70] The appraisers further agreed on at least one of the adjustments to that comparable (i.e., a positive five percent adjustment for changing market conditions from the date of that sale to the tax day at issue).[71] As for the other adjustments, Mr. Allen

[66] Although Comparable No. 5 was purchased by Kroger and utilized by Kroger as a Kroger Marketplace, "Kroger is utilizing approximately 140,000 [square feet]" of the building's total square footage of 174,758 with the remaining square footage of 34,758 "being marketed for lease." See P-1 at 79.
[67] See P-1 at 91. See also P-1 at 101.
[68] See P-1 at 83.
[69] See P-1 at 91-92.
[70] See P-1 at 85-86 and 101. See also R-4 at 64 and 69.
[71] See P-1 at 101 and R-4 at 69.

adjusted the Portage comparable by a positive 10% or 1.100 for "Arterial Attributes," a negative 10% or 0.900 for "Demographic Attributes," a negative 15% or 0.850 for "Retail Submarket Analysis," and a positive 11% or 1.110 for "Age/Condition"; while Mr. Adams adjusted the Portage comparable by a positive 10% for "Location," a positive 10% for "Age (Years)," and a negative 12% for "Building Size."[72] In reviewing these adjustments, it should be noted that Mr. Allen's total adjustment for "Location" consists of a combination of his adjustments for "Arterial Attributes," "Demographic Attributes," and "Retail Submarket Analysis."[73] Said combination does, unfortunately, overstate the

[72] See P-1 at 101 and R-4 at 69.
[73] See TR at 106-110, which provides that:

Q. Is there on factor element of comparison that you have found that most often has the greatest impact on the selling price per square foot of the fee simple interest in big-box store properties?
A. Yes, there is.
Q. And what is that factor?
A. Location.
Q. In making the location adjustment did you do so based on more than one broad category?
A. Yes.
Q. Identify for us each of your location adjustment broad categories.
A. The **three categories** I used in making the location adjustments were the **arterial attributes, the demographic attributes, and the submarket characteristics**.
Q. And where are those location adjustment categories discussed in your sales comparison approach section?
A. On pages 97, 98, and 99.
Q. What did you consider as it relates to **arterial attributes**?
A. **Considered access, visibility and traffic counts**.
Q. Did you discuss the relevant factors relating to arterial attributes on page 97 of your appraisal?
A. Yes.
Q. To avoid duplication I'll ask you about the specific factors when we get to your adjustment grid, but as part of the appraisal process did you gather demographic information for both the subject and each of your comparable sales?
A. Yes.
Q. Did you do so for different distances from the subject property?
A. Yes.
Q. What **demographic statistics** did you conclude to be the most meaningful for the subject property as far as radius?
A. Well, **five-mile radius is the typical radius that retailers look at in making the site selection decision, but I also looked at a ten-mile radius, which extends the market sometimes into other market areas**.
Q. Generally describe the demographic chart on page 98.
A. On page 98 I take -- I show certain demographic characteristics for the subject and the ten comparables, including both for a five-mile and ten-mile radius, **the**

value impact of the difference in location between the subject and the Portage comparable for “retail submarket” purposes. More specifically, the subject is located “less than ½ mile” from US-131, which is a major north-south highway in Michigan (i.e., “its location in Big Rapids Township is next to a highway interchange”).[74] The property also has direct access and visibility off Perry Avenue, which is the “primary surface

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population, the number of households, the median household income, the average household spending, the spending power, the population growth, over five years -- population growth over the next five years.

Q. In terms of population density, how many of your comparables were superior to the Big Rapids location within a five-mile radius?
A. I believe eight of the comparables had higher population within a five-mile radius.
Q. And within a ten-mile radius, how many of the comparables were superior to Big Rapids, as it relates to population?
A. Within a ten-mile radius all ten had higher population than the subject area.
Q. Within a five-mile radius how many of your comparables had greater median household income in the subject area?
A. All ten had a higher median household income in the subject area.
Q. Within a ten-mile radius how many of your comparables had superior median household income to that of the subject?
A. All of -- all of the comparable sales had higher median household income in the subject market area.
Q. Within a five-mile radius how many of your comparables had superior average household spending in comparison to the subject property?
A. . . . **Within a five-mile 14 radius all ten of the comparables had higher average household spending in the subject area**.
Q. And within a ten-mile radius how many of your ten comparables had higher average household spending?
A. **Within a ten-mile radius all ten comparables had a higher average household spending**.
Q. And what conclusion did you reach as to your comparables as to demographics, in terms of being superior, inferior, or whatever?
A. I treated eight of the ten as superior and two of the ten as being equal.
Q. Explain to us your **submarket analysis** discussed on page 99 of your appraisal, Mr. Allen.
A. The submarket analysis looks at the **average retail rents within the market area for the comparables as well as the subject property**. It also looks at **average retail vacancy in the subject area in the comparable locations**. And then looks at -- **and the effective rent that factors in the asking rents and the vacancy to compare to the subject area**.
Q. How many of your ten comparables did you conclude to be similar to the subject property in this regard?
A. I concluded two of them to be similar to the subject property in this regard.
Q. And is number 2 -- I see number 3 is listed as similar. What's the other one that's similar?
A. Number 2, it says it's superior but it was treated as similar. So there's an error on number 2 in terms of the word "superior". It should be "similar". And no plus or minus adjustment was made to that comparable.

[74] See P-1 at 12 and 26, 27, 29, and 54.

transportation artery for the subject neighborhood."[75] With respect to the Portage comparable:

> "This location is within the **primary retail district** in Kalamazoo County, **which includes** the Crossroads Mall. The property is **located behind** the Crossroads Mall, on the west side of the mall, **away from** Westnedge Avenue, the **main commercial road** in the neighborhood."[76] [Emphasis added.]

Although the subject is "next to a highway interchange" and the Portage comparable is located "away from . . . the main commercial road in the neighborhood," the main commercial road or Westnedge Avenue is an exit off I-94 (i.e., a highway interchange), which is a major east-west highway, and the mall is located approximately 1.5 miles south of that interchange. Further, the mall is, as indicated above, a regional mall, which would clearly benefit the Portage comparable in comparison to the subject.[77] Said benefit would, however, be offset, to some extent, by the access and visibility issues relating to its location on the west side of the mall away from "the main commercial road in the neighborhood." The Portage comparable is, like the subject, also impacted by colleges or universities and student housing (i.e., Kalamazoo College, Kalamazoo Valley Community College, and Western University). Those colleges or universities and student housing are, however, located within a 10-mile radius of the comparable, while the university (i.e., Ferris State University) and student housing impacting the subject are located within a five-mile radius of the subject.[78] As such, the demographics favor the Portage comparable, as supported by Mr. Allen's extensive analysis. Said analysis or data does, however, also raise questions as to actual retail submarket impact on the subject given the unexplained difference between retail potential and retail sales with retail sales significantly exceeding the retail potential suggested by Mr. Allen's five to

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[75] See P-1 at 26, which also provides that "Perry Avenue/M-20 extends east/west through the neighborhood and provides access to US-131 and extends east to Mt. Pleasant." See also P-1 at 29.
[76] See P-1 at 85.
[77] Although on-line sales are clearly impacting malls throughout the United States, no evidence was provided to indicate that "The Crossroads" has been significantly impacted by such sales, particularly given its status as a regional mall. See P-1 at 63.
[78] Both Kalamazoo College and Western University are located on the north side of the City of Kalamazoo, while the Portage comparable is located on the City's south side with the City on the north side of I-94 and the comparable on the south side of I-94. As for Kalamazoo Valley Community College, that college is located on the west side of the City, north of I-94.

10-mile radiuses.[79] As a result, the evidence supports a slight reduction in Mr. Allen's cumulative location adjustment from a negative 15% or 0.850 to a negative 10% or 0.900 to account for the "unexplained difference" noted above. With respect to the property's age/condition, Mr. Allen adjusts the Portage comparable by a positive 11% or 1.110, while Mr. Adams adjusts the comparable by a positive 10%. Although the adjustments are similar, Mr. Allen's adjustment is deemed to be a more reliable indicator of value given the past renovation of the property and Mr. Allen's inspection of the building in March 2021.[80] Finally, the Tribunal has in other "big box" cases heard testimony that adjustments for "Building Size" are unnecessary if the size of subject and comparables are at least 80,000 square feet. No such testimony was, however, presented in this case, which is problematic given the inverse relationship of commercial square footage (i.e., the smaller the square footage, the greater the price per square foot versus the larger the square footage, the lesser the price per square foot). In that regard, Mr. Allen stated that

> "Except for Sale 8, no adjustments for capital expenditures after the sale are necessary for any of the sales in this set of comparable because the changes made to these comparables reflect the specific remodeling and renovations that the buyer chose to for its specific retail operation in the property, but the changes weren't items necessary for the retail use of these properties."[81]

Sale 8 or, more specifically, the Portage comparable was, however, not only "reimagined (i.e., remodeled and renovated) but also expanded, which suggests "grander plans" (i.e., intent at the time of purchase) and a required adjustment for capital expenditures that supports the square footage adjustment indicated by Mr. Adams of a negative 12%.[82]

Given the above, Mr. Allen's sales approach is, with the exception of the Portage comparable, also an unreliable indicator of value. More specifically, Mr. Allen's Portage

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[79] The Tribunal agrees with Respondent that the subject has an expanded retail submarket, which is consistent with the treatment of such properties in northern Michigan markets (i.e., destination stores) for both residents and vacationers, particularly given the proximity of the property to a major north-south highway and highway interchange.
[80] See P-1 at 3.
[81] See P-1 at 91.
[82] See R-4 at 69. See also R-4 at 64 and 72.

comparable is, as revised from an "Indicated Market Value/SF" of $33.67 to $31.37, a reliable indicator of value and clearly meets Petitioner's burden of going forward.[83]

In that regard, Respondent's market evidence consisted of the property's record card; testimony by Respondent's assessor, David Kirwin, in support of the mass appraisal or cost approach reflected by that record card; an appraisal; and testimony by Respondent's appraiser, Douglas C. Adams, in support of that appraisal. As for its cost approach, Respondent testified but did not, as indicated above, offer the land sales study underlying the front foot rate reflected on the record card and utilized to calculate the property's land value or the economic condition factor (ECF) analysis underlying the ECF reflected on the record card and utilized to adjust the depreciated cost of the improvements to their market value.[84] As such, R-1 represents, despite Mr. Kirwan's testimony, an incomplete cost approach and, as a result, an unreliable indicator of

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[83] See MCL 205.737(3) (i.e., "[t]he petitioner has the burden of proof in establishing the true cash value of the property"). See also *Jones & Laughlin*, *supra* at 352-353 (i.e., "competent, material, and substantial evidence") and 354, which provides, in pertinent part:

> The tribunal correctly noted that the burden of proof was on petitioner, MCL § 205.737(3); MSA § 7.650(37)(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**. *Kar v Hogan,* 399 Mich 529, 539-40, 251 NW2d 77 (1976); *Holy Spirit Ass'n For the Unification of World Christianity v Dep't of Treasury,* 131 Mich App 743, 752; 347 NW2d 707 (1984). [Emphasis added.]

[84] With respect to land sales studies by local units of government, see STC Commission Bulletin No. 14 of 2019, which provides, in pertinent part:

> Please be advised that the above sale study dates [i.e., April 1, 2017 through March 31, 2019 and October 1, 2018 through September 30, 2019] are **not** the same as the valuation date used in appeals **before the Michigan Tax Tribunal**. Evidence presented in a Tax Tribunal appeal **should reflect the value of the property as of tax day** (December 31). This means that sales occurring after March 31, 2019 and September 30, 2019 should still be considered and included when submitting evidence in a Tax Tribunal appeal **involving the 2020 tax year**. [Emphasis added.]

As for the required ECF analysis, Respondent did not indicate whether the ECF was based on dated sales and, if so, whether the dated sales were re-costed to ameliorate the impact of the new cost manual. In that regard, the use of the new cost manual resulted in a substantial increase in the cost of improvements, as it "captured new value" given the increase in construction costs from the effective date of the old cost manual (i.e., prior to 2004) to the effective date of the new cost manual (i.e., 2014 effective for the 2019 tax year). More specifically, the use of dated sales costed under the old manual and utilized to support an ECF applied to the depreciated costs of improvements costed under the new Manual can artificially inflate or deflate the depreciated cost of the improvements resulting in an unreliable indicator of their market value.

value.[85] Mr. Kirwan's testimony regarding his measurement of the subject building with a wheel and the inaccuracies resulting from such measurements particularly with changing topography did, however, support the adoption of Petitioner's building measurement based on Mr. Allen's inspection and reliance on architectural plans, as said evidence is, under the circumstances of this case, a more reliable indicator of building size than the wheel measurement of that building.[86]

With respect to the appraisal, Mr. Adams considered only two of the three recognized approaches to value – income and sales.[87] As for the cost approach, Mr. Adams stated that:

> Due to the age of the improvements, the difficulty in estimating the subject's physical and external obsolescence, the lack of large, local area land sale comparables that could be used to accurately estimate the subject's site value, and the availability of sales and rental data, **it is felt that the cost approach would not produce a reliable indication of value and will not be developed in this report**.[88] [Emphasis added.]

In that regard, Mr. Adams also stated that:

1. "As properties like the subject, under a fee simple analysis, are **occasionally purchased** by investors . . . for their income producing capabilities, the income capitalization approach is **given some consideration** in the final estimate of true cash value."[89] [Emphasis added.]
2. "As **the sales comparison approach is a preferred valuation method for** valuing the fee simple estate of a retail property like the subject **the conclusions of this approach are given the greatest weight** in the . . . final estimate of true cash value."[90] [Emphasis added.]

As for Mr. Adams' income approach, both parties gave the most weight to their individual sales comparison approaches and some weight to their individual income approach because such properties are "occasionally purchased" for investment purposes. The Tribunal has, however, reviewed Respondent's approaches and finds that the sale comparison approach is, as indicated above, the most appropriate

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[85] See TR at 460-462.
[86] See P-1 at 1 and 32-33 and R-4 at 2, 6, 19, 47, 69. See also TR at 64,195-196, 198-199, 462-463, and 469-471.
[87] See R-4 at 77. See also TR at 203-205.
[88] See R-4 at 36 and 77.
[89] See R-4 at 36-58 and 77.
[90] See R-4 at 59-76 and 77.

approach to value the subject property under the circumstances of this case given that such properties are not typically purchased by investors and that the quantity and quality of information provided in the sales comparison approach is superior to the information provided in either income approach.

With respect to Mr. Adams's sales comparison approach, Mr. Adams utilized eight sales – two from 2017, one from 2018, two from 2019, two from 2020, and one from 2021. After adjusting for "property rights conveyed, terms of sale, date of sale, location, age, quality/condition, size of building, and other characteristics of the improvements,"[91] Mr. Adams determined a concluded value per square foot of $45.00 for the tax year at issue based upon adjusted sale prices per square foot ranging from $24.40 to $57.91.[92] In that regard, Mr. Adams stated that:

> "After considering the above mentioned adjustments, the adjusted range per square foot of the comparables was $24.40 to $57.91 with a median of $36.14 and an average of $39.18. **Least weight was given to** comparables 1, 2, and 3 **as these all sold for alternative uses**. **Most weight was given to** comparables 5 and 6 **as they are similar in use and location** to the subject. **Although they are leased, the leases are short term and are similar to fee simple sales**. **Secondary weight is given to** comparables 4, 7, and 8 **as they are similar uses to the subject**. **Although sales 7 and 8 have longer term leases**, adjustments were made to compensate for the lease terms. Based on this analysis, it is estimated that the value of the subject is $5.00 per square foot." [Emphasis added.]

As for the individual comparables:

1. Comparable No. 1 was purchased and converted to self-storage after significant remodeling.[93]
2. Comparable Nos. 2 and 3 were converted to industrial use after purchase. Further, Comparable No. 2 was also sold subject to deed restrictions unlike the subject and no reliable evidence was provided to allow the Tribunal to determine the value impact of the deed restrictions.[94]
3. Comparable No. 3 was acquired for industrial use.[95]
4. Comparable No. 4 is the Portage comparable discussed above (i.e., Mr. Allen's Comparable No. 8).[96]

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[91] See R-4 at 70-76.
[92] See R-4 at 76.
[93] See R-4 at 61 and 70.
[94] See R-4 at 62 and 71.
[95] See R-4 at 63 and 72.
[96] See R-4 at 64 and 72-73.

5. Comparable Nos. 5, 6, 7, and 8 were leased when purchased and not owner-occupied like the subject.[97] Comparable No. 5 also included as part of the purchase price an escrow of $400,000 to cover the cost of needed HVAC replacement. While Comparable Nos. 6 and 8 were located in Ohio and not inspected by Mr. Adams.

Given the above, Mr. Adams' sales approach is, with the exception of the Portage comparable, also an unreliable indicator of value. More specifically, the shared Portage comparable (Petitioner's Comparable No. 8 and Respondent's Comparable No. 4) is, as also indicated above, a reliable indicator of value, as revised from an "Indicated Market Value/SF" of $38.93 to $31.37. As result, the Tribunal concludes that the Portage comparable (i.e., Mr. Allen's' Comparable No. 8 and Mr. Adams' Comparable No. 4), as revised utilizing the discussed combination of adjustments by both appraisers and the building's square footage as determined by Petitioner, is the only reliable indicator of value offered by either party and provides "the most accurate valuation under the circumstances."[98]

Based upon the findings of fact and conclusions of law, the Tribunal concludes that the subject property's TCV and TV for the tax year at issue is as listed in the Introduction Section of this Proposed Opinion and Judgment (POJ).

PROPOSED JUDGMENT

This is a proposed decision and not a final decision.[99] As such, no action should be taken based on this decision. After the expiration of the time period for the opposing party to file a response to the exceptions, the Tribunal will review the case file, including the POJ and all exceptions and responses, if any, and:

1. Issue a Final Opinion and Judgment (FOJ) adopting the POJ as the final decision.
2. Issue an FOJ modifying the POJ and adopting the Modified POJ as the final decision.
3. Issue an Order vacating the POJ and ordering a rehearing or such other action as is necessary and appropriate.

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[97] See R-4 at 65-68 and 73-76.
[98] See *Jones & Laughlin*, *supra* at p 353.
[99] See MCL 205.726.

EXCEPTIONS

This POJ was prepared by the Michigan Office of Administrative Hearings and Rules. The parties have 20 days from the below "Date Entered by Tribunal" to notify the Tribunal and the opposing party in writing, by mail or by electronic filing, if they do not agree with the POJ and to state in writing why they do not agree with the POJ (i.e., exceptions). Exceptions are limited to the evidence submitted prior to or at the hearing and any matter addressed in the POJ. There is no fee for filing exceptions.

The opposing party has 14 days from the date the exceptions were mailed to that party to file a written response to the exceptions.[100]

A copy of a party's written exceptions or response must be sent by mail or electronic service, if agreed upon by the parties, to the opposing party and proof must be submitted to the Tribunal that the exceptions or response were served on the opposing party.

Exceptions and responses filed by *facsimile* will not be considered.

Entered: October 21, 2022 By Peter M. Koglar
pmk

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

[100] See MCL 205.762(2) and TTR 289(1) and (2).