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

Westwick Square Cooperative,
Petitioner,

v

MTT Docket No. 269704

City of Wayne,
Respondent.

Tribunal Judge Presiding
Victoria L. Enyart

ORDER GRANTING PETITIONER'S MOTION TO AMEND

ORDER SEVERING 2011 TAX YEAR

ORDER ASSIGNING 2011 TAX YEAR DOCKET NO. 418176

FINAL OPINION AND JUDGMENT

The Tribunal, having given due consideration to the Motion and the file in the above-captioned case, finds:

1. The Tribunal issued a Proposed Opinion and Judgment on April 21, 2011. The Proposed Opinion and Judgment states, in pertinent part, "[t]he parties have 20 days from date of entry of this Proposed Opinion and Judgment to file any written exceptions to the Proposed Opinion and Judgment."

2. Neither party has filed exceptions to the Proposed Opinion and Judgment.

3. On June 30, 2011, Petitioner filed its Motion to Amend to include the 2011 tax year. Respondent has not filed a response to Petitioner's Motion.

4. Petitioner's Motion to Amend to include the 2011 tax year will be treated as a new filing. That is, because this case was pending as of the 2011 March Board of Review, but considering that no proofs were provided for the 2011 tax year, Petitioner will not be required to show attendance at the March Board of Review but will be required to file a new petition under MTT Docket No. 418176, with the appropriate filing fee, within 28 days of the entry of this Order.

5. The Tribunal adopts the Proposed Opinion and Judgment as the Tribunal's final decision in this case. See MCL 205.726.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that Petitioner's Motion to Amend to include the 2011 tax year is GRANTED.

IT IS FURTHER ORDERED that tax year 2011 is SEVERED and assigned MTT Docket No. 418176.

IT IS FURTHER ORDERED that Petitioner, within 28 days of the entry of this Order, shall file with the Tribunal and serve on Respondent its 2011 Entire Tribunal petition for the subject parcel referencing MTT Docket No. 418176 and a copy of this Order.

Failure to comply with this Order will result in the dismissal of Docket No. 418176. See TTR 247.

MICHIGAN TAX TRIBUNAL

Entered: July 19, 2011 By: Victoria L. Enyart

* * *

STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
MICHIGAN TAX TRIBUNAL

Westwick Square Cooperative,
Petitioner,

v

City of Wayne,
Respondent.

Tax Tribunal
MTT Docket No. 269704

Administrative Law Judge Presiding
Thomas A. Halick

PROPOSED ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

On October 29, 2010, Respondent filed a Motion for Summary Disposition and a brief in support.

On November 8, 2010, Petitioner filed an Answer and a Brief in Opposition to Respondent's

Motion for Summary Disposition

Facts not in Dispute

1. Respondent assessed the subject parcels for each year at issue.

2. The subject property is a 320-unit housing complex on 28 acres. The property's parcel identification number is 55-023-99-0011-000.

3. The subject property was constructed, financed, and is operated as a nonprofit housing cooperative under Section 221(d)(3) of the National Housing Act. The subject was constructed between 1967 and 1969.

4. The subject property was subject to regulatory agreements between Petitioner and the Department of Housing and Urban Development, which impose restrictions that make the housing affordable to persons with low and moderate incomes. At the present time, the subsidized mortgages are paid in full and no regulatory agreement is in effect. The property is now operated as a private cooperative for residents with low to moderate incomes. Petitioner offers no evidence to challenge the property's true cash value for years during which the regulatory agreements are expired.

5. Petitioner offers the same methodology as the petitioner in *Forest Hills Cooperative, Inc v City of Ann Arbor*, MTT Docket No. 277107, which here produces similar values per unit, which were found to be unreasonable and not reflective of "true cash value" within the meaning of MCL 211.27(1) in *Branford Towne Houses Cooperative v City of Taylor and County of Wayne*, MTT Docket No. 90502. In the event that Petitioner seeks to offer testimony regarding adjusting the capitalization rate to account for the restricted rents, this presents the same issue as in *Roseville Townhouses v Roseville*, MTT Docket No. 269701 [Proposed Order Granting Motion to Dismiss entered March 3, 2011].

6. Petitioner offers the same witness in this case, Ernest Gargaro, as in *Forest Hills*. That witness is not an appraiser and is not qualified to testify to an opinion of value.

7. Petitioner's valuation disclosure is not an appraisal.

8. Petitioner's alleged true cash values vary widely from year to year.

9. The current assessments indicate a TCV for both parcels (combined) ranging from $3,874,920 in 1999 to $8,156,000 in 2006 through 2009. This translates to an average value per unit (disregarding differences in the units) ranging from approximately $11,000 to $23,000 per unit.

Standard for Summary Disposition

A motion for summary disposition under MCR 2.116(C)(10) tests the factual support of a claim. The Tribunal must consider the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted or filed in the action to determine whether a genuine issue of any material fact exists requiring trial. *Spiek v Dep't of Transportation*, 456 Mich 331; 572 NW2d 201 (1998). When determining whether there is a genuine issue of any material fact, the admissible evidence must be viewed in the light most favorable to the non-moving party. *Heckman v Detroit Chief of Police*, 267 Mich App 480; 705 NW2d 689 (2005). A court may not make findings of fact or weigh credibility when deciding the motion. *In Re Handleman*, 266 Mich App 433 (2005). If the "affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay." MCR 2.116(I)(1).

Law and Analysis

This case is factually and legally indistinguishable from several cases recently decided or pending before the Tribunal. The petitioners in this recent series of cases involving regulated nonprofit housing cooperative properties are represented by the same law firm, and the legal issues, evidence, and the appraisal theories are substantively identical. Proposed Orders granting summary disposition have been entered in several of these similar cases. See, *Hanover Grove Cooperative v City of Fraser*, MTT Docket No. 277142 [Proposed Order Granting Partial Summary Disposition on the valuation issue], *Roseville Townhouses v City of Roseville*, MTT Docket No. 269701 [Proposed Order Granting Motion to Dismiss], *Forest Hills Cooperative, Inc v City of Ann Arbor*, MTT 277107 [Proposed Opinion and Judgment].

Respondent cites *Branford Towne Houses Coop v City of Taylor,* unpublished opinion per curiam of the Court of Appeals issued April 19, 2007 (Docket No. 265398), which affirmed the Tribunal's ruling denying relief under similar facts and law.

Here, Petitioner relies upon its theory that a regulated nonprofit housing cooperative property *must* be valued using the income approach only, with actual, restricted rents and actual expenses used to calculate net operating income. Established appellate case law and Tribunal decisions have rejected the use of the income approach to determine the true cash value of a regulated nonprofit housing cooperative property. *Branford Towne Houses Coop v City of Taylor,* unpublished opinion per curiam of the Court of Appeals issued April 19, 2007 (Docket No. 265398). *Georgetown Place Co-Op v City of Taylor,* MTT Docket No. 89960 [entered 2-17-95], upheld by *Georgetown Place Co-Op v City of Taylor*, 226 Mich App 33 (1998). *Kensington v Township of Milford*, MTT Docket No. 119850 (1998). *Carriage House Co-op v City of Utica*, MTT Docket No. 64618 (1986). *Carriage House Cooperative v City of Utica,* 172 Mich App 144; 431 NW2d 406 (1988). Also see *Meadowlanes Limited Dividend Housing Ass'n v City of Holland*, 437 Mich 473; 473 NW2d 636 (1991) [no particular approach is mandated for subsidized housing].

The only notable difference in post-*Forest Hills* cases is that Petitioner has suggested that the restricted, net operating income produces a reliable indication of value if the overall capitalization rate is adjusted appropriately. This approach was rejected by this hearing officer in the Order Granting Respondent's Motion to Strike in *Eastwick Square Townhouse Cooperative v City of Roseville*, MTT Docket No. 269883:

> Respondent's motion to strike the testimony of Dan Tomlinson is granted on the grounds that the testimony is irrelevant. TTR 283(1), MRE 401 and 402. It is determined as a matter of law that Petitioner's income approach is not relevant to the determination of the true cash value of a nonprofit housing cooperative. The net income of a federally regulated nonprofit housing cooperative is not a reliable indicator of the property's true cash value. Therefore, testimony offered in support of a capitalization rate is irrelevant and inadmissible. For the same reasons, Respondent's Motion to Strike Petitioner's Income Valuation Approach Documents is granted. *Id*.

Starting with MCL 211.27(1), when determining the "true cash value" or "usual selling price" of property, the assessor "shall consider" all the relevant, enumerated factors, including the "present economic income," which is defined in subsection (4) as the market income that the subject property would be expected to earn by comparison to income of similar income-producing properties. The definition in subsection (4) provides guidance to the assessor to use market income and that "actual income generated by the lease is not the controlling indicator of its true cash value in all cases." The actual income may be proven to be consistent with the market and appropriate in certain cases, but the actual income is not "controlling."

MCL 211.27(1) states that the assessor shall consider "present economic income of *land* if the land is being farmed or *otherwise put to income producing use*. . . ." [Italics added]. The italicized language states the principle that the income approach applies to "income producing" property. The statute also refers to "present economic income of *structures*, including farm structures." With regard to land, the legislature specified that "present economic income" is relevant where the land is "put to income producing use." It is recognized that the income method applies only to property of a type that would be purchased by an investor for its income-producing potential. Furthermore, subsection 27(4) plainly defines "present economic income" in the context of "leased or rented property." *There is nothing in the language of MCL 211.27(1) or (4) that indicates that the income approach is appropriate when determining the true cash value of property that would not be purchased by an investor for its income-producing capacity.*

Section 27(1) does not require any particular approach for any type of property. Obviously, all of the enumerated items are not relevant to all property. For example, the "quality and value of

standing timber" is irrelevant to most property.

As applied to "leased or rented property" the term "present economic income" means the "ordinary, general, and usual economic return realized from the lease or rental of property negotiated under current, contemporary conditions between parties equally knowledgeable and familiar with real estate values." MCL 211.27(4). In appraisal terms, this means "market income" rather than "actual income" received from a leased or rented property. "Market income" means the rents that are typically charged for similar, competitive properties. The income approach requires the use of market rents.

Prior to the enactment of MCL 211.27(4), the Supreme Court had interpreted "present economic income" as it appears in section 27(1) to mean "actual income" in the context of a long term lease of commercial, income-producing property, *where the lease was negotiated at market rates at its inception, but the rents did not adjust to current market conditions, and were below market for the years at issue. CAF Investment Co v State Tax Comm,* 392 Mich 442, 221 NW2d 588 (1974) *(CAF I),* and *CAF Investment Co v Saginaw Twp,* 410 Mich 428, 302 NW2d 164 (1981) *(CAF II*).

Petitioner's claims are grounded upon its interpretation of the following sentence in italics that appears in MCL 211.27(4):

> (4) As used in subsection (1), "present economic income" means for leased or rented property the ordinary, general, and usual economic return realized from the lease or rental of property negotiated under current, contemporary conditions between parties equally knowledgeable and familiar with real estate values. The actual income generated by the lease or rental of property is not the controlling indicator of its true cash value in all cases. This subsection does not apply to property subject to a lease entered into before January 1, 1984 for which the terms of the lease governing the rental rate or tax liability have not been renegotiated after December 31, 1983. *This subsection does not apply to a nonprofit housing cooperative subject to regulatory agreements between the state or federal government entered into before January 1, 1984. As used in this subsection, "nonprofit cooperative housing corporation" means a nonprofit cooperative housing corporation that is engaged in providing housing services to its stockholders and members and that does not pay dividends or interest upon stock or membership investment but that does distribute all earnings to its stockholders or members*. MCL 211.27(4) [Relevant part - Italics added].

As indicated in *Forest Hills*, this hearing officer is not persuaded by Petitioner's theory under MCL 211.27(4). The fact that a panel of the Court of Appeals, which included Judges Zahra (now a Justice of the Michigan Supreme Court), Bandstra, and Owens, unanimously and unequivocally rejected that theory in *Branford* is persuasive. *Branford Towne Houses Coop v City of Taylor,* unpublished opinion per curiam of the Court of Appeals issued April 19, 2007

(Docket No. 265398). The most straightforward reading of this provision is that the definition of "present economic income" found in 27(4) does not apply to a nonprofit cooperative housing corporation. It does not mandate the income approach for a nonprofit, non-income-producing property. The reasoning of the Court of Appeals in *Branford* is persuasive:

> Branford claims that the tribunal erred in failing to value the subject property using the income capitalization method based on actual income. We disagree.
>
> While the phrase "present economic income" is defined in MCL 211.27(4) "for leased or rented property," Branford, as a "nonprofit housing cooperative" is excluded from this definition. Branford, however, argues being excluded from MCL 211.27(4) as a nonprofit housing cooperative indicates that the Legislature intended its true cash value be assessed pursuant to the definition of "present economic income" as stated in *CAF Investment Co v. State Tax Comm*, 392 Mich. 442, 221 NW2d 588 (1974) *(CAF* I), and *CAF Investment Co v. Saginaw Twp*, 410 Mich. 428, 302 NW2d 164 (1981) *(CAF* II), which would be based on Branford's actual income.
>
> We reject Branford's claim that actual income must be used to assess the subject property as without merit. There is no indication that by excluding nonprofit housing cooperatives from MCL 211.27(4) the Legislature intended their true cash values be assessed pursuant to the definition of "present economic income" as stated in *CAF I* and *CAF II.* The most that can be gleaned from MCL 211.27(4) is that the Legislature either intended to clarify that nonprofit housing cooperatives were not "leased or rented property" under MCL 211.27(4), or that nonprofit housing cooperatives were not the form of "leased or rented property" to which the definition of "present economic income" in MCL 211.27(4) applied.
>
> Further, MCL 211.27(1) does not require assessment based on a particular valuation method. MCL 211.27(1) states that, "in determining the true cash value, the assessor shall also *consider* the advantages and disadvantages of ... present economic income of structures (Emphasis added). "Consider" is commonly defined as "to think carefully about, esp. in order to make a decision; contemplate; ponder." Random House Webster's College Dictionary, 2 ed. Case law verifies that no particular valuation method is required for real property assessments. Even the cases on which Branford heavily relies, *CAF I* and *CAF II*, state that: "there may be such facts, peculiar to the circumstances under consideration, as would indicate that the income capitalization approach is too speculative to be a reliable indicator of valuation. In such circumstances the tax assessor may base his assessment upon a more reliable method of valuation." *CAF* I, *supra,* at 456; *CAF* II, *supra,* at 461. *Branford Towne Houses Coop v City of Taylor,* unpublished opinion per curiam of the Court of Appeals issued April 19, 2007 (Docket No.

265398).

Petitioner misinterprets the exception for leases in effect and negotiated prior to 1984 (in circumstances such as *CAF*) as evidence that the legislature intended the same treatment for non-income-producing, nonprofit housing cooperatives. The better view is simply that the definition in MCL 211.27(4) does not apply to a *nonprofit housing cooperative* because the income approach does not apply. Or, as the court pointed out, nonprofit housing cooperatives are not "rented or leased property," and therefore, the income approach is inapplicable.

Petitioner believes that its interpretation is supported by legislative history following the Supreme Court's rulings in the *CAF* cases in 1974 and 1981. Those cases involved land owned by C.A.F Investment Company that it leased to S.S. Kresge Company in 1963 for a 20-year term. The lease was negotiated at market rates in 1963. The 20-year lease could be extended for three 5-year renewal options at the same rental. As of 1971, the lease rates were no longer favorable to the lessor, but were considerably below market. If the lessor sold his leased fee interest in this investment property, the buyer would take the property subject to the long term lease with the below market rents locked in. *CAF Investment Company v Michigan State Tax Commission*, 392 Mich 442; 221 NW2d 588 (1974). This case is commonly referred to a *CAF I*.

There was no dispute in the *CAF* cases that the property was investment property that would be purchased based on its income-producing capacity. The question was how the income approach should be applied, not whether it should be applied. The Court based its decision on the fact that the CAF-Kresge lease was negotiated at market rates at the inception and later turned out to be unfavorable to the lessor. Had that not been the case, actual rents would not be an appropriate measure for determining net income. The below-market rates were not implemented to reduce the value for tax purposes or otherwise lacking in economic substance.

> "Consideration" of the various factors may well indicate that the application of some or all enumerated factors is inappropriate. For example, in the event lease rental . . . were not arrived at on the basis of arms length bargaining or in other respects had no relationship to 'usual selling price', as statutorily defined, it would be appropriate for the taxing authority to ignore lease rental as a component of valuation. It is only because in this case the record indicates that long term lease rental fairly reflects economic circumstances at the outset of the lease term and bears a demonstrable relations to true cash value that we require its consideration. *CAF I*, fn 6.

If Petitioner were correct that the law espoused in the *CAF* cases applies here, "it would be appropriate for the taxing authority to ignore the lease rental as a component of valuation." *CAF I*. *CAF* cannot be read to control the assessment of a nonprofit housing cooperative. The reasoning in the *CAF* cases is entirely dependent upon the property's status as income-producing investment property that was subject to an arms length (albeit ultimately unfavorable) long term

lease. In our case, the subject property is not income-producing investment property. The subject is not "rented or leased." The carrying charges paid by the members are not rents, and were not negotiated or established at market rates. The carrying charges are intended to cover debt service, operating expenses, reserves, and property taxes, with no profit after these items are accounted for. The net operating income calculated for the income approach would often equal the expenses that are not included in the NOI calculation: debt service and property taxes. The property is more like owner-occupied condominium units than a rental apartment complex. The above quote from *CAF I* proves that, even if Petitioner were correct that the 1982 and 1983 amendments (1983 PA 254) preserved the law under *CAF* for nonprofit cooperatives, by no means do the *CAF* cases hold that the income approach is appropriate for cooperatives. There is no motivation for the cooperative to control expenses or maximize gross rents so as to produce a profit. There is no demonstrable relationship between the NOI of a nonprofit housing cooperative and the true cash value of the property.

In determining which approach is most reliable in appraising property, the first principle is to select the method that a potential purchaser would most likely rely upon to determine a price that he or she would pay for the subject property. This requires a determination of the property's highest and best use. It is concluded that the subject property's highest and best use is its current use.

The valuation method chosen must reflect the behavior and motivations of buyers in the subject's market. "Income-producing real estate is typically purchased as an investment, and from an investor's point of view earning power is the critical element affecting property value." Appraisal Institute, *The Appraisal of Real Estate* (Chicago: 12th ed, 2001), p 471. The income method in its various forms "consider anticipated future benefits and estimate their present value." *Id*. The income method should be applied to simulate investor motivations. *Id*., 473. There is no evidence that the subject property or any unit in the subject property would be acquired by an investor for its income-producing capacity or for investment purposes. It is concluded that the income approach is not applicable to the subject property.

To the extent that the Proposed Opinion and Judgment in *Forest Hills* suggests that the income approach has probative value as applied to a non-profit cooperative, that discussion is not consistent with the Tribunal's prior rulings in *Georgetown*, *Kensington*, and *Branford*.

In *Colonial Square Cooperative v Ann Arbor*, MTT Docket No. 46435 (1982), the Tribunal approved of the use of actual income and expenses with a capitalization rate developed from "a mortgage constant (based on the 3%, 40 year mortgage) plus the actual tax cap rate." *Id*. The decision in that case was issued October 22, 1982, prior to *Meadowlanes v Holland*, 437 Mich 473; 473 NW2d 636 (1991). *Colonial Square* was not appealed, nor was it cited in the Tribunal's decision in *Branford Towne Houses Cooperative v City of Taylor*, MTT Docket No. 90502. The approach in *Colonial Square* (MTT Docket No. 46435) was stated to be based on *Congresshills Apartments v Township of Ypsilanti*, 128 Mich App 279; 341 NW2d 121 (1983), which involved

the valuation of a subsidized apartment complex (not a cooperative). In *Congresshills*, the Court of Appeals rejected the Tribunal's use of the income approach (restricted income) with an "absurdly low" capitalization rate in an effort to adjust for the federal interest subsidy. (Some of the reasoning in *Congresshills* is no longer viable after *Meadowlanes*.) Despite the rejection of the "low cap rate" in *Congresshills*, the Tribunal, in *Colonial Square* (MTT Docket No. 46435) adopted an income approach by Terrell R. Oetzel, MAI, which used actual income, actual expenses, and a capitalization rate that consisted of the mortgage constant plus the actual tax cap rate (which produced a cap rate similar to that used by Respondent in this case). Although the parties and the Tribunal assumed that the use of the income approach in *Congresshills* was also applicable to a nonprofit cooperative, that assumption cannot be sustained after consideration of subsequent Tribunal decisions. The reasoning of *Colonial Square Cooperative v Ann Arbor*, MTT Docket No. 46435, is subject to question, where the case refers to the nonprofit association as an "investor." This case has not been followed by the Tribunal.

In *Pinelake Housing Cooperative v City of Ann Arbor*, 159 Mich App 208; 406 NW2d 832 (1987), the Court of Appeals upheld the income approach using actual income, actual expenses, and a market capitalization rate, for a section 236 cooperative. *Pinelake* applied to years 1981-1984. Although 1983 PA 254 (which enacted MCL 211.27(4)) was given immediate effect on December 29, 1983, and applied to 1984 assessments, *Pinelake* does not mention MCL 211.27(4). Petitioner has argued that *Pinelake* represents the proper approach after the *CAF* cases, and that the exception in MCL 211.27(4) means that this approach must be followed today. However, the reasoning of *Pinelake* was rejected by the Supreme Court's 1991 decision in *Meadowlanes. Pinelake* rests in part on the erroneous premise that the interest subsidy was an intangible asset that could not be valued for property tax purposes. Petitioner argues that *Pinelake* reflects the valuation methodology in effect after *CAF*, and that 1983 PA 254 preserves the *Pinelake* approach. The problem with this position is that it fails to take into account the Supreme Court's ruling in *Meadlowlanes*, which undercut the reasoning of *Pinelake*. Also, the *Pinelake* approach considers the negative influences upon value related to restricted rents, but fails to consider the contribution to value of the subsidized mortgage and other positive value influences related to a section 236 cooperative. Furthermore, the Tribunal has not followed *Pinelake* in subsequent cases.

The case of *Village Townhouses Cooperative v City of Lansing*, MTT Docket No. 110370, was heard by the Tribunal on December 6, 1989, and supplemental evidentiary proceedings were held on September 29, 1993. The subject property was a 221(d)(3) nonprofit housing cooperative subject to regulatory agreements for 20 years into the future. The tax years at issue were 1987, 1988, and 1989. Interestingly, the proposed opinion in that case rejected all three traditional approaches to value and relied upon a "hybrid variant of the market approach" in accordance with other authorities that had approved "some form of mortgage-equity technique." These mortgage-equity techniques had been rejected by *Meadowlanes* as of the date the Tribunal's Final Opinion and Judgment was issued. The Proposed Opinion applied pre-*Meadowlanes* law. The reasoning of that Proposed Opinion was not followed by the Tribunal and is contrary to

appellate case law.

Georgetown Place Cooperative v City of Taylor, 226 Mich App 33; 572 NW2d 232 (1997), is a published, post-*Meadowlanes* case involving a nonprofit housing cooperative that was subsidized and regulated by HUD under section 221(d)(3), including a 3% (effective rate) mortgage over a 40-year term. The Tribunal issued its decision in *Georgetown* in 1995. It was determined that a 30% discount must be applied to the value indicated by the sales comparison approach to adjust for the lack of marketability due to the HUD restrictions. The sales comparison approach considered sales of physically similar "federally subsidized apartment complexes." The 30% discount was based on expert testimony, which was supported by studies of the lack of marketability of the stock of closely held corporations. The 30% discount was held to apply to the tax years at issue in that case, 1984 through 1994. The adjusted prices indicated a price per unit of $19,000 as of 1983. The Tribunal agreed with both parties "that the income approach is not an accurate assessment of TCV due to the nature of the property as a nonprofit cooperative." *Georgetown Place Cooperative v City of Taylor*, MTT Docket No. 89960.

The Tribunal did not merely rule that the income approach was "not an accurate assessment of TCV" *under the facts of that case*, but ruled that the income approach is not accurate for any nonprofit cooperative. In *Georgetown*, neither party raised an issue regarding MCL 211.27(4), which was in effect during the tax years at issue.

Kensington v Township of Milford, MTT Docket No. 119850 (1998), is a post-*Meadowlanes*, post-*Georgetown* case in which the Tribunal rejected use of any income approach for a regulated nonprofit housing cooperative. Hearing officer James R. Neumann's proposed opinion held that "Respondent's modified market approach as correlated with his other approaches produces a reasonable estimate of true cash value. . . ." In reviewing exceptions filed by the petitioner, the Tribunal adopted the hearing officer's conclusions. **However, the Tribunal found that the hearing officer *erred* by relying upon the income approach "to correlate the modified market approach" because the income approach produces an "unreasonable estimate of value."** The Tribunal held that it was error for the hearing officer to place any weight whatsoever upon the income approach. The Tribunal applied the "discounting method used in *Georgetown* – 30% discount rate deduced from the analogous relationship between closely held corporations and HUD 221(d)(3) cooperative housing. . . ." A close reading of both the proposed and final opinions in *Kensington* indicates that there was no evidence or testimony introduced in that case to support the 30% discount rate. *Kensington* involved tax years 1988 through 1995, which were also years involved in *Georgetown*. The property in *Kensington* was a section 236 property. The Tribunal held that "the Kensington Heights project is prohibited from earning a profit. The property cannot be sold, in its entirety, during the 40-year term of the mortgage." The income approach was not merely ruled to be flawed, but the Tribunal held that the hearing officer erred in relying upon it to any extent. This case is also significant for the proposition that the same valuation principles apply to a section 236 property as for a 221(d)(3) property. *Kensington* was not appealed.

In *Knollwood Country Club v Township of West Bloomfield*, MTT Docket Nos. 238636 and 259512 (2002), the Tribunal held the income approach is not applicable to a nonprofit private equity country club, which consisted of a golf course, club house, and other improvements. In *Knollwood*, the Tribunal rejected the sales approach due to lack of sales of nonprofit country clubs. The Tribunal also rejected the income approach based on the following reasoning:

> Petitioner's utilization of the income approach when valuing a non-profit private equity golf and country club where the parties have stipulated that the property's highest and best use as improved is the continued use of its present use as a non-profit private equity golf and country club is flawed where Petitioner assumes that the property and improvements will be sold to a purchaser whose motivation is to make as much profit off of the club as he can until the club sells its memberships out (October 15, 2001 Tr. at pp.144-145) and is rejected by the Tribunal. This Tribunal stated in *Warwick Hills Golf and Country Club v Grand Blanc Township*, MTT Docket No. 225492: 'The Tribunal next turns to the income approach. In that regard, the Tribunal finds the application of this approach to be subjective and speculative given the fact that the property is operated as a non-profit corporation existing for the pleasure of its members. As indicated by Petitioner, it is not the mission of Warwick to make a profit.' Petitioner's general manager testified in this matter in almost identical terms that it was not the mission of Knollwood to make a profit. Having concluded that Petitioner's utilization of the income approach is flawed when attempting to ascertain true cash value of a non-profit private equity golf and country club, the Tribunal next turns to and considers Petitioner's valuation using the cost approach. *Knollwood Country Club, supra.*

The above rationale is relevant to our case involving a nonprofit housing cooperative. After rejecting the sales and income approaches in *Knollwood*, the Tribunal determined the TCV by the cost approach. (There was sufficient evidence of vacant land sales that sold for use as golf courses to estimate that land value used in the cost approach).

Branford Towne Houses Co-Op v City of Taylor, MTT Docket No. 90502 (2005), is the Tribunal's most recent final opinion pertaining to the valuation of a nonprofit housing cooperative. That case adopted the approach approved by the Tribunal and the Court of Appeals in *Georgetown.* At issue were tax years 1984 through 2002. *Branford* relied heavily upon *Georgetown*, which involved tax years 1984 to 1994. In *Branford*, there was expert testimony regarding discounting for lack of marketability, although the Tribunal rejected the expert's specific method and rate of discount, and rather applied the 30% discount approved in *Georgetown.*

Therefore, these cases indicate that in 1995, the Tribunal determined that the sales comparison

approach, using sales of subsidized apartments, with a discount for lack of marketability was the appropriate method for valuing a section 221(d)(3) nonprofit cooperative, specifically rejecting the income approach. *Georgetown.*

Although MCL 221.27(4) has been in effect in its current form since 1984, no case addressed that provision in a nonprofit housing cooperative valuation case until *Branford*. As discussed above, the Court of Appeals upheld the Tribunal's decision in *Branford.* The court fully considered and unequivocally rejected Petitioner's interpretation of MCL 211.27(4). The court provided its own detailed analysis rejecting Petitioner's arguments pertaining to MCL 211.27(1) and (4).

Petitioner's claim rests completely upon its erroneous interpretation of MCL 211.27(1) and (4). Petitioner offers no other evidence to challenge the accuracy of the assessments, which were established by the cost less depreciation approach, with total depreciation estimated at "35% good" for the 2011 tax year, as indicated on the property record cards that are in the case file. Therefore, there is no evidentiary basis upon which the Tribunal could render an "independent determination of value," other than to affirm that the assessments were established by methods approved by the State Assessor's Manual (MCL 211.10e). The cost approach has been approved under similar circumstances. *Knollwood, supra*. Also, see *Forest Hills, supra*. There is no competent evidence that the assessments exceed 50% of fair market value.

Upon review of the motions, legal briefs, documentary evidence, and pleadings, and being fully informed of the premises, it is determined that Petitioner has failed to demonstrate the existence of a genuine issue of material fact. MCR 2.116(10). Furthermore, the legal theory upon which Petitioner's case rests fails to state a claim upon which relief may be granted. MCR 2.116(8). Under such circumstances, "the court shall render judgment without delay." MCR 2.116(I)(1).

PROPOSED JUDGMENT

IT IS ORDERED that Respondent's motion for summary disposition is GRANTED and this appeal is DISMISSED.

IT IS FURTHER ORDERED that the parties shall have 20 days from date of entry of this Proposed Order to file exceptions and written arguments with the Tribunal consistent with Section 81 of the Administrative Procedures Act (MCL 24.281). The exceptions and written arguments shall be limited to the matters addressed in the motion. This Proposed Order, together

with any exceptions and written arguments, shall be considered by the Tribunal in arriving at a final decision in this matter pursuant to Section 26 of the Tax Tribunal Act (MCL 205.726).

MICHIGAN TAX TRIBUNAL

Entered: April 21, 2011 By: Thomas A. Halick