

STATE OF MICHIGAN  
DEPARTMENT OF ENERGY, LABOR & ECONOMIC GROWTH  
MICHIGAN TAX TRIBUNAL

Chuck E. Cheese,  
Petitioner,

v

MTT Docket No. 337394

Charter Township of Flint,  
Respondent.

Tribunal Judge Presiding  
Stuart Trager

**OPINION AND JUDGMENT**

**INTRODUCTION**

This real property tax valuation case came before the Michigan Tax Tribunal for hearing on August 17, 2009 in Lansing, Michigan. Petitioner was represented by Randall P. Whately, Attorney at Law. Peter E. Goodstein, Attorney at Law, represented Respondent, Flint Township. At issue is the true cash value of the subject property, known as Chuck E. Cheese in Flint Township. The tax years at issue are 2007, 2008, and 2009. The property is classified for taxation purposes as commercial real property. The average level of assessment for each tax year in question is 50%.

Each party offered testimony and documentary evidence. Petitioner's Exhibit P-1 was admitted into evidence. Respondent's Exhibits R-1 through R-20 and Exhibits R-22 through R-35, and R-39 were admitted into evidence.

**PROCEDURAL HISTORY**

The 2007 property tax assessments were based on Respondent's estimate of the true cash value (TCV) of the subject property as of December 31, 2006. Petitioner appeared before the March

2007 Board of Review for Flint Township to protest the true cash value (TCV), state equalized value (SEV), and taxable value (TV) of the subject property. The Board of Review denied the relief requested and affirmed the tax assessments. On May 31, 2007 Petitioner filed a petition with the Tribunal alleging that Respondent erred in its assessment of TCV, SEV, and TV for the 2007 tax year. Respondent filed a timely answer. The Tribunal granted Petitioner’s motions to add the subsequent tax years 2008 and 2009.

Petitioner's counsel, just prior to the scheduled hearing, moved to withdraw the petition as to tax years 2007 and 2008 because they could not produce a value witness as to 2007 and 2008.

Respondent's counsel objected to withdrawing tax years 2007 and 2008, because Respondent had been put through the expense of preparing valuations for tax years 2007 and 2008 and because Respondent’s 2009 value was based on its 2007 and 2008 appraisals.

**PARTIES' CONTENTIONS OF ASSESSED AND TRUE CASH VALUES**

Petitioner contends that the property is assessed in excess of 50% of its true cash value.

Respondent contends that the property is assessed at 50% of its true cash value.

Petitioner’s Contentions of TCV, SEV and TV for the tax years at issue are as follows:

**Parcel Number:** 07-27-100-022

Year	TCV	SEV	TV
2007	\$1,400,000	\$700,000	\$700,000
2008	\$1,400,000	\$700,000	\$700,000
2009	\$1,350,000	\$675,000	\$675,000

Respondent's Contentions of TCV, SEV and TV for the tax years at issue are as follows:

**Parcel Number:** 07-27-100-022

Year	TCV	SEV	TV
2007	\$1,953,200	\$976,600	\$976,600
2008	\$1,959,800	\$979,900	\$979,900
2009	\$1,873,000	\$936,500	\$936,500

**TRIBUNAL'S CONCLUSIONS OF ASSESSED AND TRUE CASH VALUE**

The Tribunal concludes that the true cash value and revised assessments of the subject property are as follows:

**Parcel Number:** 07-27-100-022

Year	TCV	SEV	TV
2007	\$1,953,200	\$976,600	\$976,600
2008	\$1,959,800	\$979,900	\$979,900
2009	\$1,873,000	\$936,500	\$936,500

**PETITIONER'S EVIDENCE, APPRAISAL AND EXPERT TESTIMONY**

Jack Jason Johns

Petitioner's sole witness was Jack Jason Johns, a Michigan State Certified Appraiser.

He indicated that he was engaged to prepare the tax year 2009 appraisal at the beginning of June 2009. He was engaged to determine the true cash value of the fee simple interest of the subject property for tax year 2009, as of December 31, 2008.

Mr. Johns testified that the highest and best use of the subject facility was as a commercial retail establishment, the same as the current use. Mr. Johns asserted that a restaurant was synonymous with a commercial real estate establishment. However, he distinguished between a sit-down restaurant and the subject property because the subject property at 10,300 square feet is super adequate for a sit-down restaurant by a factor of 50% to 65%. Also a full sit-down restaurant

will have grills, fryers, stoves, and ovens that would require additional plumbing and substantially stronger underground drains to accommodate dishwashers and a more robust fire suppression system.

Respondent objected to the discussion of super adequacy as being beyond the ambit of the 2009 appraisal. Petitioner responded that the line of testimony was to support Petitioner's 2009 appraisal conclusion that the highest best use was as a commercial retail establishment by distinguishing the subject property from a sit-down restaurant. The subject property has a three compartment sink and a walk-in cooler, but it does not have any fryers, stoves, ovens or dishwashers. There was an "on wheels" pizza oven and a portable conveyer style electric pizza oven. Food service was provided on disposable plates and utensils. A full-service restaurant would have the fixtures and equipment in place.

Mr. Johns considered all three approaches for valuation and used the income capitalization approach and the sales comparison approach. He did not use the cost approach, because typically buyers and sellers give little credence to the cost approach and it would be difficult to estimate the depreciation.

Mr. Johns testified as to the income approach, indicating that initially he will look to comparable market rentals compared to the subject and conclude a market rental rate. He would then determine the gross potential income, along with a factor for vacancy and collection loss, which would yield effective gross income. Then he would deduct operating expenses to derive net operating income and divide that by a capitalization rate to determine true cash value.

Petitioner's rental comparable #1, Advance Auto Parts, was a freestanding block building, located at 1431 W. Bristol Rd, Flint, 9900 square feet. Mr. Johns' unit of comparison was the square footage rental rate. Comparable #1 had a per square foot rental rate of \$15.90. Mr. Johns made a 15% upward adjustment for location and a 10% downward adjustment for age and condition, concluding a value of \$16.70 per square foot.

Comparable #2, Aaron's Rental, located at 4261 Miller Rd, Flint, is a 6000 square foot, block building, which had a reported rental rate of \$10.43 per square foot. Mr. Johns made a downward adjustment of 5% because it was smaller than the subject property, and an upward adjustment of 10% for quality and appeal and a downward adjustment of 5% because the building had been recently renovated.

Comparable #3, Sleep Doctor Mattress Store, located at 3304 S. Linden Rd, Flint, is a 5,069 square foot, block building. Mr. Johns gave this property a 15% upward adjustment because the location was inferior to the subject, and a 5% downward adjustment based on size, and a 10% adjustment, because the subject is superior. He concluded for comparable #3 an adjusted value of \$15 per square foot.

Based on these three comparables, he determined an average rental rate of \$14.04 per square foot. He asserted that the rent being paid for the subject property as of December 31, 2008, on a square-foot basis was \$17.69. However, he was advised in January of 2009 that the current

rental rate would be, as of May 1, 2009, \$15.53 per square foot. He concluded for the purposes of the appraisal that market rent would be \$15.50 per square foot for gross rent.

Mr. Johns multiplied the square footage times \$15.50 per square foot and factored in a 10% collection loss, which yielded an effective gross income of \$143,685. Then he deducted market expenses, including management fees and reserves for capital improvements or replacement of durable items. He concluded a market management fee of 3% or \$4,311. He calculated reserves based on \$.20 per square foot. After adding in landlord expenses due to vacancy he determined total expenses of \$13,697 and determined a net operating income of \$129,988.

For the capitalization rate, Mr. Johns relied on the band of investment technique based on current financing conditions in the marketplace and the expected returns on debt equity. He talked to lenders in the marketplace and was advised as to the typical lending terms that would be given, loan-to-value ratios, and interest rates. He amortized the dollar amounts to determine a mortgage constant, .0912. He multiplied this times a loan-to-value ratio of 75%, and factored in an equity ratio for the remaining 25% based on investor expectations of returns on an asset such as the subject property and calculated that an investor would want an 11% return on their 25% equity, because of the risk inherent in the subject property.

Mr. Johns also consulted the Korpacz Investor Survey, which indicated for institutional grade properties a capitalization rate range of 6% to 10%. However, he does not believe that the subject property is institutional grade because, based on his experience, he does not believe that a real estate investment trust, or a private fund, or a pension fund would want to invest in the subject property.

Mr. Johns concluded a capitalization rate of 9.6%. However, he used 9.25%, because he did not want to be overly conservative with a higher cap rate and because he relied on the investor survey.

Mr. Johns concluded, based on the income approach, a true cash value of \$1,405,000.

Mr. Johns' testimony then turned to the sales comparison approach for determining true cash value. The basic premise is the principle of substitution, which is finding recent comparable sales in the marketplace that are good substitutes for the subject property, and then making adjustments to those comparables in order to compensate for the differences between the comparable properties and the subject property. Based on the comparables, Mr. Johns determined a price per square foot and applied it to the square footage of the subject property.

Petitioner's market comparable #1, Aaron's Rental, was the same as Petitioner's rental comparable #2, a 6000 square foot, block building, located at 4261 Miller Rd. Flint. The unadjusted sales price per square foot for comparable sale #1 was \$143.84. He made a time adjustment for the June 1, 2007 sale assuming that prices would decline at 1% per month or 12% annually. He did not make any adjustment for location, but he did make an adjustment for size. Given that the property is smaller and with economies of scale, he believed a downward adjustment was warranted. He also made a downward adjustment for this comparable based on age and condition. He concluded a square foot adjusted sales price of \$117.95.

Petitioner's market comparable #2, which sold February 13, 2007, is a former Chi-Chi's restaurant, located at 2408 Austin Parkway, Flint Township, comprising 10,446 square feet. Mr. Johns on direct examination, acknowledged that he did not make a time adjustment for this sale. He asserted that the adjustment should be a downward 23%. He did not make an adjustment for location. However, he stated there would be a positive adjustment of 10% for age and condition because this comparable is in much worse condition than the subject property. Mr. Johns calculated the adjusted square foot value for market comparable #2 and determined a value of \$107.90 per square foot.

Market comparable #3, is Metro PCS, a freestanding 3794 square foot, block building located at 3423 Miller Rd., Flint, which sold September 12, 2008 with a per square-foot price of \$164.73. Mr. Johns made a negative time adjustment of 4%. However, no adjustment was made for location, although a size adjustment of 15% was made, yielding a negative adjustment of 17% and an adjusted sale price of \$131.26 per square foot.

He concluded, comparing all the comparables, a per square foot price of \$125, which would yield a fair market value for the property as of December 31, 2008 at \$1,290,000. Giving equal emphasis to the income approach and the market approach, he concluded a value of \$1,350,000.

Cross examination of Mr. Johns commenced with counsel questioning the basis for Mr. Johns' determination of value declines in the real estate market, focusing on the vicinity of the subject property. Mr. Johns indicated that it had been over 12 years since he had had direct experience with sales in Flint Township.

Given that the subject property was purchased May 6, 2006 for \$2,025,000, Mr. Johns acknowledged that it was an error to indicate in his appraisal that there were no transactions for the subject property within the last 36 months. He also acknowledged that USPAP Standards Rule 1-5(b) required that all sales in the last three years be analyzed. But he did not believe that this was a substantial error pursuant to USPAP Standards Rule 1-1(d).

Mr. Johns indicated the property is owned by Himaloy, but he has not met any of the owners or partners of Himaloy. Mr. Johns acknowledged that Petitioner Chuck E. Cheese is a publicly traded company. He indicated that the definition of a fee simple title is absolute ownership, unencumbered by any other interest or estate, subject only to the limitation imposed by the government powers of taxation, eminent domain, police power and escheat; Dictionary of Real Estate Appraisal (4<sup>th</sup> ed).

Mr. Johns admitted he did not perform a land value analysis for the subject property as vacant, even though this is required by the Appraisal Institute in the text of The Appraisal of Real Estate.

Petitioners' rent comparable #1, Advanced Auto, sold in May 2007 for \$2,186,319, but Mr. Johns did not use it as a sale comparable.

Respondent's counsel, noting that the parties had stipulated that the highest and best use was a restaurant, questioned why Mr. Johns did not use as comparables, restaurant sales in the vicinity of the subject property. Mr. Johns responded that he would agree with the stipulation if the

subject property was a full-service restaurant with all the equipment and the entire infrastructure to support that equipment.

**RESPONDENT'S EVIDENCE, APPRAISAL, AND EXPERT TESTIMONY**

Mark MacDermaid

Respondent's sole witness was Mark MacDermaid, a State Certified Level 3 Appraiser, and part owner of Landmark Appraisal Company. He has performed all of the commercial property valuations in Flint Township since 1980 or 1981. In addition he has performed a review of 3000 commercial properties in the city of Flint and all of the commercial and industrial properties in the city of Fenton and the city of Grand Blanc.

Mr. MacDermaid described the subject property as being a limited service restaurant, comprising 10,400 square feet. He had performed the real estate portions of the 2007/2008 and 2009 appraisals for the subject property. He used all three methods for real property valuation in performing the appraisals.

The cost approach values were based on the Marshall Swift manual, which were converted to Equalizer values through the State Tax Commission manual. Mr. MacDermaid compared the cost derived values to the actual sale of the parcel and market values.

Mr. MacDermaid's December 31, 2006 appraisal began with valuing the vacant land. Initially, he noted that there was 1650 front footage on Miller Road, which was adjusted to 259 footage based on the ratio of the actual front footage to the depth of the parcel. The land value analysis

was based on sales that occurred in the commercial district of Flint Township, which are Miller Rd., Linden Road and Corunna Road. The vacant land value was determined to be \$740,192.

He established that the highest and best use of the subject property as vacant land would be as a restaurant or as retail or some other commercial use.

Mr. MacDermaid used five market comparables for vacant land that were in the Flint Township business district. He also performed a highest and best use analysis as improved of the subject property and determined that use to be a restaurant.

Mr. MacDermaid analyzed the leases and vacancy rates for the restaurants on Miller Rd. in the Flint Township business district and determined a vacancy rate of 4.9%. He testified that there was over 126,000 square feet of restaurant space on Miller Rd. and of that, 6200 square feet were vacant. Mr. MacDermaid testified that the subject lease rental rates were not above market.

Mr. MacDermaid testified as to the cost basis of the improvements to the subject property as of December 31, 2006. He calculated the replacement cost of the building portion of the improvements at \$948,953, based on the STC manual. The replacement cost was adjusted by the economic condition factors study (ECF). The value of the land, \$740,192 and the value of the parking and landscaping, \$135,000, and the replacement cost of the building \$948,953, totaled \$1,953,203 under the cost approach. The cost value as of December 31, 2007 was \$1,959,710. This increase was based on a change in the ECF and a change in the county multiplier.

Mr. MacDermaid determined that the overall rate of capitalization at 7.9%, for the subject property when it was purchased. The capitalization rate for properties on the restaurant list ranged from 6.9% to 9.2%, and he used an overall rate of capitalization of 8%.

Mr. MacDermaid then testified as to the valuation of the subject property as of December 31, 2008. He again used all three methods of valuation. He used the STC manual adjusted by the ECF and added the estimated value of the land and the improvements.

Mr. MacDermaid verified the income for the income valuation method, but he was not comfortable with all of the lease rates shown on his 2009 appraisal. In particular Mr. MacDermaid was not comfortable with the lease with the highest rent, Red Robin Restaurant, because upon examination of the lease he determined that the landlord and tenant were related parties. However, this does not change Mr. MacDermaid's opinion of value, because the value is supported by the other leases. He performed another vacancy analysis and determined that the vacancy from the prior study is down. In other words, the restaurant vacancy rate in Flint Township is decreased from 2008 to 2009. Also the ECF was lower for restaurants in 2009.

Mr. MacDermaid, determined the 2009 highest and best use for the property as vacant was still as a restaurant, and that the land value was \$740,192. For the building cost approach, he again used the STC manual, and the value after being adjusted by the ECF was \$997,756. This yielded a total value of \$1,872,948, which value is lower because the ECF was lower.

Mr. MacDermaid also performed a sales study for tax year 2009, but did not use all of the same sales that he used for 2007/2008. He added Moe's Southwest BBQ and he removed two sales,

Bennigan's and Mr. Brown, because the restaurants are now closed. Mr. MacDermaid also reanalyzed the capitalization rate for 2009. His conclusions are based on a gross rent of \$17.52 per square foot, times a square footage of 10,400 square feet; a 5% vacancy rate, yielding an effective gross income of \$173,077; with expenses totaling 8% or \$12,981, yielding a net operating income of \$160,096; and with a capitalization rate of 8% yields an income based TCV of \$1,883,500.

Mr. MacDermaid was then asked to testify regarding Petitioner's appraisal.

Petitioner's sales comparable #2, a vacant Chi-Chi's restaurant, had suffered a considerable amount of damage because of deferred maintenance. There were numerous roof leaks, and the building was being used by the homeless. There was no power in the building. The new buyers were planning to use the site to build a Harley-Davidson dealership and they hope to salvage the frame of the building. Mr. Johns had indicated that the location was good, but Mr. MacDermaid indicated because traffic patterns were congested, that ingress and egress was poor.

Mr. Johns indicated that the original use of Petitioner's sales comparable #3 was as a convenience store. However Mr. MacDermaid testified that it was originally a jewelry store and that the owner was ill and had to retire and close the store, and Mr. MacDermaid believes the sale may have been under duress. Further Mr. MacDermaid indicated that the building had a mortgage on it and that it had been vacant for some period of time.

Cross examination of Mr. MacDermaid commenced starting with Respondent's valuation of the subject property as of December 31, 2006. The conclusion of true cash value as of December 31,

2006 was \$1,953,203, and the conclusion of true cash value for December 31, 2007, was \$1,959,710. The SEV as of December 31, 2006 for the subject property was \$976,600 and \$979,900 as of December 31, 2007.

He testified that real estate values in Flint Township for tax years 2004 and 2005 were flat.

There was some lowering of values in 2006 and 2007, with the values starting to go down at the end of 2006, but that this did not happen with all types of commercial properties. Mr.

MacDermaid testified that he believed the current lease rental rates reflected the sale price of the subject property.

### **FINDINGS OF FACT**

The subject property, commonly known as Chuck E. Cheese, is located at 3489 Miller Road, in Flint Township, in Genesee County. The property was purchased by the current owner, Himaloy, on May 5, 2006 for \$2,025,000.

The Tribunal finds that the structure on the subject property is 10,400 square feet. Although Petitioner's appraisal for tax year 2009 indicates that the structure is 10,300 square feet, Respondent's property record cards including sketch of the property indicates 10,400 feet. Respondent's records are deemed by the Tribunal to be more probative and persuasive.

Although Petitioner had originally filed a petition with the Tribunal for the 2007 tax year, and Petitioner requested and was granted leave to add tax years 2008 and 2009, Petitioner did not submit any probative evidence for the hearing in this matter (an unsigned undated "valuation

disclosure” as of December 31, 2006, indicating a value based on income, of \$1,451,791, had been submitted July 25, 2008; however, this document was neither offered or formalized for submittal for the hearing; and, given its sketchy data, would not have been admitted). On the other hand, Respondent’s evidence, the 2007/2008 appraisal based on the three value approaches, supports the un-rebutted values on the property record. Therefore, the Tribunal finds the values as assessed for the subject property for tax years 2007 and 2008 are as assessed and on the tax rolls.

As to highest and best use, the record indicates that the parties had stipulated that the highest and best use was as a restaurant. However, Mr. Johns ignored the stipulation by indicating that the subject property should be treated as a retail facility, because he believed that the structure was super adequate as a restaurant, and because it did not have the appurtenances and plumbing for a full service sit-down restaurant. Notwithstanding this assertion, the Tribunal finds based on all the evidence and testimony submitted that the highest and best use of the subject property is as a restaurant.

Mr. Johns testified he did not perform valuation on the cost approach, because property is not bought and sold based on the cost approach. He also indicated that the cost approach was problematic because depreciation was difficult to determine, but this assertion was contradicted in his market rental analysis where he depreciated his rental comparable #1 downward for age and condition.

Mr. MacDermaid used all three methods of valuation. For the cost approach, he determined values for tax years 2007, 2008 and 2009. The 2009 value based on the cost was, after adjustment by the ECF, \$1,872,948. The 2009 cost value included a land value of \$740,192.

Mr. Johns' income approach was based on three comparables, none of which were restaurants. Instead they were an auto parts store, a retail rental store and a mattress store. Based on these three comparables, he determined an average rental rate of \$14.04 per square foot. This was compared to the rent of the subject property, \$17.69, which he adjusted to \$15.50 based on the assertion of third persons that the actual rate was adjusted in January 2009 to \$15.53 per square foot. He multiplied the square footage, 10,300 square feet times \$15.50 per square foot and factored in a 10% collection loss, which yielded an effective gross income of \$143,685. Then he deducted market expenses, including management fees and reserves for capital improvements or replacement of durable items. He concluded a market management fee of 3% or \$4,311. He calculated reserves based on \$.20 per square foot. After adding in landlord expenses due to vacancy, he determined total expenses of \$13,697, and a net operating income of \$129,988. For the capitalization rate, Mr. Johns relied on the band of investment technique based on current financing conditions in the marketplace and the expected returns on debt equity. He talked to lenders in the marketplace and was advised as to the typical lending terms that would be given, loan-to-value ratios, and interest rates. He amortized the dollar amounts to come up with a mortgage constant, .0912. He multiplied this times a loan-to-value ratio of 75%, and factored in an equity ratio for the remaining 25% based on investor expectations of returns, on an asset such as the subject property, and calculated that an investor would want an 11% return on their 25% equity, because of the risk inherent in the subject property.

Mr. Johns also consulted the Korpacz Investor Survey, which, for institutional grade properties, indicated a capitalization rate ranging from 6% to 10%. However, he does not believe that the subject property is institutional grade, because based on his experience, he does not believe that a real estate investment trust or a private fund, or a pension fund would want to invest in the subject property. He concluded a capitalization rate of 9.6%. However, he used 9.25%, because he did not want to be overly conservative with a higher cap rate and because he relied on the investor survey. Mr. Johns concluded, based on the income approach, a true cash value of \$1,405,000.

Mr. MacDermaid's 2009 income approach was based on his analysis of tax years 2007/2008. He analyzed the leases and vacancy rates for the restaurants on Miller Rd. in the Flint Township business district and determined a vacancy rate of 4.9%. Mr. MacDermaid testified that there was over 126,000 square feet of restaurant space on Miller Rd. and of that, 6200 square feet were vacant.

Mr. MacDermaid testified that the subject lease rental rates were not above market.

He verified the income for the income valuation method, but he was not comfortable with all of the lease rates shown on his 2009 appraisal. In particular, Mr. MacDermaid was not comfortable with the lease with the highest rent, Red Robin Restaurant, because upon examination of the lease he determined that the landlord and tenant were related parties. However this does not change Mr. MacDermaid's opinion of value, because the value is supported by the other leases. He performed another vacancy analysis and determined that the vacancy from the prior study is

down. In other words, the restaurant vacancy rate in Flint Township is decreased from 2008 to 2009. Also the ECF was lower for restaurants in 2009. The Tribunal adopts Respondent's income approach as being the more probative and persuasive than Mr. Johns' income determination. This is based on a gross rent of \$17.52 per square foot, square footage of 10,400 square feet, 5% vacancy rate, yielding an effective gross income of \$173,077; with expenses totaling 8% or \$12,981, yielding a net operating income of \$160,096 and a capitalization rate of 8%, yields a value of \$1,883,500.

Petitioner's sales market comparable #1, Aaron's Rental, was the same as Petitioner's rental comparable #2, a 6000 square foot, block, retail building located at 4261 Miller Rd. The unadjusted sales price per square foot for comparable sale #1 was \$143.84. Mr. Johns made a time adjustment for the June 1, 2007 sale assuming that prices would decline at 1% per month or 12% annually. He did not make any adjustment for location, but he did make an adjustment for size. Given that the property is smaller and with economics of scale, he believed a downward adjustment was warranted. He also made a downward adjustment for this comparable based on age and condition. He concluded a square foot adjusted sales price of \$117.95.

Petitioner's market comparable #2, which sold February 13, 2007 is a former Chi-Chi's restaurant, located at 2408 Austin Parkway, Flint Township, comprising 10,446 square feet, Mr. Johns on direct examination, acknowledged that he did not make a time adjustment for this sale. He asserted that the adjustment should be a downward 23%. There would not be an adjustment for location. However, there would be a positive adjustment of 10% for age and condition because this comparable is in substantially worse condition than the subject property. Mr. Johns

calculated the adjusted square foot value for market comparable #2 and determined a value of \$107.90 per square foot.

Market comparable #3, Metro PCS, a freestanding 3794 square foot, block building located at 3423 Miller Rd., Flint, which sold September 12, 2008, with a per square-foot price of \$164.73.

Mr. Johns made a negative time adjustment of 4%. However, no adjustment was made for location, although a size adjustment of 15% was made, yielding a negative adjustment of 17% and an adjusted sale price of \$131.26 per square foot.

Mr. Johns concluded, comparing all the comparables, a per square foot price of \$125, which would yield a fair market value for the property as of December 31, 2008 at \$1,290,000. Giving equal emphasis to the income approach and the market approach, he concluded a value of \$1,350,000.

However, as to the validity of Petitioner's market sales comparables, the Tribunal notes that testimony indicated that Petitioner's sales comparable #2, a vacant Chi-Chi's restaurant, had suffered a considerable amount of damage because of deferred maintenance. There were numerous roof leaks, and the building was being used by the homeless. There was no power in the building. The new buyers were planning to use the site to build a Harley-Davidson dealership and they hope to salvage the frame of the building. Also, although Mr. Johns had indicated that the location was good, Mr. MacDermaid indicated because traffic patterns were congested, that ingress and egress were poor.

Mr. Johns indicated that the original use of Petitioner's sales comparable #3, was as a convenience store. However, Mr. MacDermaid raised questions as to whether or not this was an arm's-length transaction. He testified that it was originally a jewelry store and that the owner was ill and had to retire and close the store, and Mr. MacDermaid said the sale may have been under duress and not an arm's length sale. Mr. MacDermaid indicated that the building had a mortgage on it and that it had been vacant for some period of time.

The Tribunal finds that Petitioner's appraisal and analysis under the income or market sales approaches to be neither probative nor persuasive to rebut the presumption given to the values as indicated on the tax rolls. Petitioner has not met the requisite burden of proof.

Mr. MacDermaid also performed a sales study for tax year 2009, but did not use all of the same sales as the 2007/2008 study. He added Moe's Southwest BBQ and he removed two sales, Bennigan's and Mr. Brown, because the restaurants are now closed. Mr. MacDermaid's tax year 2009 market sales valuation was based on six comparables, all of them restaurants with sale dates ranging from November 2004 to February 2009, with the sale price per square foot ranging from \$298 to \$160.49, and an adjusted sale price per square foot ranging from \$133 to \$218. He concluded a square foot rate of \$190, which with 10,400 square feet yields a TCV of \$1,976,000, based on the market approach. The values determined by Respondent are supported by the purchase price, \$2,025,000, in May 2006. The Tribunal finds that the evidence and testimony provided by Respondent as to the 2009 TCV to be probative and persuasive. Based on all the evidence and testimony the Tribunal concludes that the 2009 TCV is as indicated on the Flint Township tax rolls.

### **Costs**

Respondent, in its post hearing brief, advised the Tribunal that Respondent was put through unnecessary expense in defending this matter. Respondent's counsel makes two arguments for the award of costs against Petitioner. The first argument is for the cost of preparation for the defense of the 2007/2008 tax years. The second argument is based on Petitioner's appraiser having a lack of knowledge in the Flint Township area and thus not being in compliance with USPAP.

#### **Cost for defense of 2007/2008 tax years**

Petitioner filed the instant matter May 31, 2007 appealing the valuation for tax year 2007. Pursuant to a Tribunal scheduling order entered February 1, 2008, a valuation disclosure was due July 25, 2008. An undated, unsigned, one-page "valuation disclosure" purporting to be based on the income approach ostensibly for the subject property, indicating a value of \$1,451,791 was filed by Petitioner. No analysis or supporting data was provided to support the one page summary. Subsequently, prior to the scheduled hearing, Petitioner's counsel indicated a desire to withdraw the appeal for 2007 and 2008; however, Respondent's counsel did not consent unless the 2009 appeal was also withdrawn. Apparently Petitioner was not able to produce an expert to support the "valuation disclosure" as submitted on July 25, 2008. In addition, Petitioner filed motions to add tax years 2008, filed May 27, 2008, and tax year 2009, filed May 7, 2009. Petitioner submitted a witness list April 18, 2008 indicating that Daniel J. Tomlinson, MAI, among others, would be an expert witness. On May 9, 2008, Petitioner submitted an amended witness list that indicated that J. Michael Clarkson and Michael Skorija might testify as to the

value of personal property. On June 26, 2008, Petitioner filed its second amended witness list that added Anthony Sanna, MAI, as an expert witness. On the other hand, Respondent had prepared and submitted a valuation disclosure for tax years 2007 and 2008. As to Petitioner's lack of an appraiser, Petitioner's post hearing brief contained an affidavit signed by Anthony Sanna, indicating that because Petitioner did not wish to pay the full cost of a full appraisal service, in accordance with USPAP rules and regulations, Mr. Sanna was not retained. The Tribunal finds that Mr. Sanna's affidavit does not provide good cause for Petitioner not providing a value witness, and that Petitioner did not adequately prepare for tax years 2007 and 2008.

Further, the Tribunal finds that Petitioner's counsel, by filing a motion to add tax year 2008 and failing to follow through in preparation for tax year 2008, is also non-compliant with MCR 2.114(D).

MCR 2.114 provides:

(D) Effect of Signature. The signature of an attorney or party, whether or not the party is represented by an attorney, constitutes a certification by the signer that

(1) he or she has read the document;

(2) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and

(3) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(E) Sanctions for Violation. If a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees. The court may not assess punitive damages.

(F) Sanctions for Frivolous Claims and Defenses. In addition to sanctions under this rule, a party pleading a frivolous claim or defense is subject to costs as provided in MCR 2.625(A)(2). The court may not assess punitive damages.

The Tribunal further finds that Petitioner did not comply with TTR 205.1101(m), because the purported “valuation disclosure” was not adequate to provide documentary or other tangible evidence in a property tax appeal upon which a party relies in support of the party's contentions as to the true cash value of the subject property or any part thereof, and which contains the party's value conclusions and data, valuation methodology, analysis, or reasoning in support of the contention. In other words, the 2007/2008 “valuation disclosure” Petitioner submitted, would not have passed muster, if it had been offered for the hearing. Therefore, the Tribunal finds that Respondent is entitled to costs as billed by Mr. MacDermaid for the preparation of the appraisal for tax years 2007/2008.

Respondent’s second argument for costs is that Mr. Johns, Petitioner's expert witness, was not sufficiently aware of the particulars of the subject market, and did not endeavor to become sufficiently knowledgeable of the subject market, which is highlighted by Mr. Johns’ lack of awareness that the subject property had been purchased in May 2006. In addition, Respondent points to the inapplicable nature of the market and income comparables chosen by Mr. Johns. The Tribunal finds that these alleged oversights go to the weight of the evidence, and the allegations are not sufficient to support a finding of professional non-compliance with USPAP and MCL 339.2605, and that they are not a sufficient basis for costs.

### **CONCLUSIONS OF LAW**

As used in the General Property Tax Act, “true cash value” means 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. MCL 211.27(1).

A proceeding before the Tax Tribunal is original, independent, and de novo. MCL 205.735(1). “The petitioner has the burden of establishing the true cash value of the property....”MCL 205.737(3); MCL 211.27(1); *Meadowlands Limited Dividend Housing Ass’n v City of Holland*, 437 Mich 473, 483-484; 473 NW2d 363 (1991). “This burden encompasses two separate concepts: (1) the burden of persuasion, which does not shift during the course of the hearing; and (2) the burden of going forward with the evidence, which may shift to the opposing party.” *Jones and Laughlin Steel Corp v City of Warren*, 193 Mich App 348; 483 NW2d 416 (1992), citing: *Kar v Hogan*, 399 Mich 529, 539-540; 251 NW2d 77 (1976); *Holy Spirit Ass’n for the Unification of World Christianity v Dept of Treasury*, 131 Mich App 743, 752; 347 NW2d 707 (1984).

“True cash value” is synonymous with “fair market value.” *CAF Investment Co v State Tax Comm*, 392 Mich 442, 450; 221 NW2d 588 (1974). The Michigan Supreme Court, in *Meadowlanes, supra*, held that the goal of the assessment process is to determine “the usual selling price for a given piece of property.” In determining a property’s true cash value or fair market value, Michigan courts and the Tribunal recognize the three traditional valuation approaches as reliable evidence of value. See *Antisdale v Galesburg*, 420 Mich 265; 362 NW2d 632 (1984).

The three most common approaches to valuation are the capitalization of income approach, the sales comparison or market approach, and the cost-less-depreciation approach. *Meadowlanes*, at

484-485; *Pantlind Hotel Co v State Tax Comm*, 3 Mich App 170; 141 NW2d 699 (1966), aff'd 380 Mich 390 (1968); *Antisdale*, at 276. The Tribunal is under a duty to apply its own expertise to the facts of the case to determine the appropriate method of arriving at the true cash value of the property, utilizing an approach that provides the most accurate valuation under the circumstances. *Antisdale*, at 277.

Under MCL 205.737(1), the Tribunal must find a property's true cash value in determining a lawful property assessment. *Alhi Development Co v Orion Twp*, 110 Mich App 764, 767; 314 NW2d 479 (1981). The Tribunal may not automatically accept a respondent's assessment but must make its own finding of fact and arrive at a legally supportable true cash value. *Pinelake Housing Cooperative v Ann Arbor*, 159 Mich App 208, 220; 406 NW2d 832 (1987); *Consolidated Aluminum Corp v Richmond Twp*, 88 Mich App 229, 232-233; 276 NW2d 566 (1979). The Tribunal is not bound to accept either of the parties' theories of valuation. *Teledyne Continental Motors v Muskegon Twp*, 145 Mich App 749, 754; 377 NW2d 908 (1985). 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. *Meadowlanes*, at 485-486; *Wolverine Tower Associates v City of Ann Arbor*, 96 Mich App 780; 293 NW2d 669 (1980); *Tatham v City of Birmingham*, 119 Mich App 583, 597; 326 NW2d 568 (1982).

In this case, the Tribunal concludes that the law and appraisal practice favor the application of the income approach to this income producing rental property. *Northwood Apartments v City of Royal Oak*, 98 Mich App 721; 296 NW2d 639 (1980); *Eversdyk v City of*

*Wyoming*, 10 MTT 664 (1999), MTT Docket No. 195925. “The capitalization-of-income method has been described as the most appropriate method for evaluating the TCV of income-producing property.” *First City Corp v Lansing*, 153 Mich App 106, 116 (1986). Apparently, Respondent relied primarily on the cost approach, which gave a value of \$1,872,940, which in turn was supported by the value determined through Respondent's market approach, \$1,976,000, and the value determined through Respondent's income approach, \$1,883,500. Also, Respondent notes this value is supported in the market by the purchase of the subject property in May 2006 for \$2,025,000.

Based on all the testimony and evidence provided, the Tribunal determines that the TCV, based on market value for 2009, is \$1,976,000. Further, the Tribunal determines that the 2009 TCV based on the income approach is \$1,883,500 and \$1,872,948 based on the cost approach.

Reconciling these values, the Tribunal concludes a value of \$1,872,948, which supports the true cash value, as indicated in the townships tax rolls and found in “Tribunal’s Conclusions of Assessed and True Cash Value” section of this Opinion and Judgment.

Further, the Tribunal finds that Petitioner did not adequately prepare or prosecute its claim for tax years 2007/2008, and that Petitioner is in violation of MCR 2.114 and TTR 205.1101(m) and that Respondent is entitled to the costs of preparing the appraisal for tax years 2007/2008.

**JUDGMENT**

IT IS ORDERED that the subject property's true cash value, assessed and taxable values for 2006, 2007, and 2008 are those shown in the "Tribunal's Conclusions of AV and TV" section of this Opinion and Judgment.

IT IS FURTHER ORDERED that the officer charged with collecting or refunding the affected taxes shall collect taxes and any applicable interest or issue a refund as required by the Final Opinion and Judgment within 90 days of the entry of the Final Opinion and Judgment. If a refund is warranted, it shall include a proportionate share of any property tax administration fees paid and of penalty and interest paid on delinquent taxes. The refund shall also separately indicate the amount of the taxes, fees, penalties, and interest being refunded. A sum determined by the Tribunal to have been unlawfully paid shall bear interest from the date of payment to the date of judgment and the judgment shall bear interest to the date of its payment. A sum determined by the Tribunal to have been underpaid shall not bear interest for any time period prior to 28 days after the issuance of this Final Opinion and Judgment. Pursuant to MCL 205.737, interest shall accrue (i) after December 31, 1995, at a rate of 6.55% for calendar year 1996, (ii) after December 31, 1996, at a rate of 6.11% for calendar year 1997, (iii) after December 31, 1997, at a rate of 6.04% for calendar year 1998, (iv) after December 31, 1998, at the rate of 6.01% for calendar year 1999, (v) after December 31, 1999, at the rate of 5.49% for calendar year 2000, (vi) after December 31, 2000, at the rate of 6.56% for calendar year 2001, (vii) after December 31, 2001, at the rate of 5.56% for calendar year 2002, (viii) after December 31, 2002 at the rate of 2.78% for calendar year 2003, (ix) after December 31, 2003, at the rate of

2.16% for calendar year 2004, (x) after December 31, 2004, at the rate of 2.07% for calendar year 2005, (xi) after December 31, 2005, at the rate of 3.66% for calendar year 2006, (xii) after December 31, 2006, at the rate of 5.42% for calendar year 2007, and (xiii) after December 31, 2007, at the rate of 5.81% for calendar year 2008, and (xiv) after December 31, 2008, at the rate of 3.31% for calendar year 2009 and (xiv) after December 31, 2009, at the rate of 1.23% for calendar year 2010.

IT IS FURTHER ORDERED that Respondent's request for taxation of costs and attorney fees is partially GRANTED AND RESPONDENT IS AWARDED costs as billed by Respondent's appraiser for the preparation of the appraisal for tax years 2007/2008.

IT IS FURTHER ORDERED that Respondent shall submit, within 21 days of the entry of this order, a bill of costs as billed for the preparation of the appraisal for tax years 2007/2008.

IT IS FURTHER ORDERED that Petitioner shall have 14 days from the submission of the bill of costs to protest the amount of costs.

This Opinion and Judgment, with the exception of the award of costs to Respondent, resolves all pending claims in this matter and closes this case.

MICHIGAN TAX TRIBUNAL

Entered: April 1, 2010

By: Stuart Trager, Tribunal Judge