

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

Kroger Co. of Michigan,
Petitioner,

v

MTT Docket No. 16-002784

City of Howell,
Respondent.

Tribunal Judge Presiding
Marcus L. Abood

FINAL OPINION AND JUDGMENT

INTRODUCTION

Petitioner, Kroger Co. of Michigan appeals ad valorem property tax assessments levied by Respondent, City of Howell, against Parcel No. 4717-25-102-001 for the 2016 and 2017 tax years. H. Adam Cohen and Jason C. Long, Attorneys, represented Petitioner, and Dennis L. Perkins, Attorney represented Respondent.

A hearing on this matter was held on February 7, 2018. Petitioner’s witness was John R. Widmer, Jr. and Respondent’s witness was Josephine Lentine.

Based on the evidence, testimony, and case file, the Tribunal finds the true cash values (“TCV”), state equalized values (“SEV”), and taxable values (“TV”) of the subject property as follows:

Parcel Number: 4717-25-102-001

Year	TCV	AV	TV
2016	\$1,700,000	\$850,000	\$850,000
2017	\$1,800,000	\$900,000	\$900,000

PETITIONER’S CONTENTIONS

Petitioner contends the subject parcel is assessed separately from the improvements; the subject parcel is analyzed and valued separately from the improvements which are located on the parcel of land.

Petitioner’s appraiser considered all three approaches to value, but asserts that only the sales comparison approach was applicable for this tax appeal appraisal assignment.

Widmer describes his initial research which included publically available information regarding the subject sales history, the subject parcel, the overall condominium development and specific units. His appraisal report includes a highest and best use analysis and claims his report is consistent with *The Appraisal of Real Estate* (Chicago: 14th ed, 2013) published by the Appraisal Institute. Regarding the sales comparison approach, Petitioner contends the analysis of other Kroger store sales is relevant to the valuation of the subject parcel.

PETITIONER'S ADMITTED EXHIBITS

In support of its value contentions, Petitioner offered the following exhibits, which were admitted into evidence:

- P-1: Appraisal Report prepared by John Widmer.
- P-2: Assessment information, Parcel No. 4717-25-102-001.
- P-3: Assessment information, Parcel No. 4717-25-102-010.
- P-5: Unit areas and perimeter plan from Master Deed, Crossroads Town Center.
- P-6: Ground Lease, dated January 24, 2003.
- P-7: Ground Lease Amendment No. 1 dated December 10, 2004.

PETITIONER'S WITNESSES

Petitioner's witness, John Widmer, MAI, prepared an appraisal report for the subject property. He is primarily a commercial appraiser with nearly 30 years of valuation experience. He is licensed in the state of Michigan and designated through the Appraisal Institute. Based on his education and experience, the Tribunal accepted Mr. Widmer as an expert real estate appraiser.

RESPONDENT'S CONTENTIONS

Respondent asserts the June 2015 sale of units 1, 2, 3 and 8 in the Crossroads development for \$8,000,000 is a valid arm's length sale.¹ Further, Respondent points to the relevance of calculating a prorated value to each unit from the overall sale price by the former

¹ Tr., 112.

assessor.² However, Respondent relies on the subject's ground lease and stated income for the assessment of the subject's land.³

RESPONDENT'S ADMITTED EXHIBITS

In support of its value contentions, Respondent offered the following exhibits, which were admitted into evidence:

- R-1: Petitioner's Valuation Statement and Valuation Summary.
- R-2: Map of Crossroads Town Center.
- R-4: Property Tax Affidavit dated March 17, 2016.
- R-5: Property Record Card for Kroger Land Lease.

RESPONDENT'S WITNESS

Respondent presented testimony from its assessor, Josephine Lentine. She is the assessor for the city of Howell. She is currently a Michigan Advanced Assessing Officer ("MAAO", formerly known as a Level 3 Assessor). Based on her education and experience, the Tribunal accepted Ms. Lentine as an expert in mass appraisal and assessing.

FINDINGS OF FACT

1. The subject property is located at 108 West Highland Road, in the city of Howell, and within Livingston County.
2. The subject parcel code number is 4717-25-102-001 and is zoned Mixed Use Developmental (MXD).
3. The subject property is located within the Crossroads Town Center Condominium Development. The subject is further identified as Unit 1 of the development.
4. A ground lease exists between Crossroads Town Center, LLC and the Kroger Co. of Michigan for the subject parcel. The development comprises 10 units.⁴
5. The ground lease incorporates more than the subject parcel. In other words, the ground lease includes the "demised property" denoted in the ground lease agreement.
6. The ground lease required the landlord to construct buildings, driveways, sidewalks, signage, parking spaces, access points, grading, filling, compaction, parking lot maintenance, utilities, etc. to the entire condominium development.⁵
7. Regarding the sales history for the subject parcel, Units 1, 2, 3 and 8 were purchased from Viking Partners CTC LLC to Crossroads Town Station LLC for \$8,000,000 on June

² Tr., 113-114.

³ Tr., 120, 122 and 147-148.

⁴ Pet's Exh. P-1, 14 and Resp's Exh. R-1.

⁵ Tr., 137-138 and Pet.'s Exh. P-6.

- 30, 2015. A subsequent sale of an 80% transfer of multi-tenant investment property under a joint venture for \$6,400,000 occurred on March 18, 2016.⁶
8. The subject site has gross land area of 4.402 acres and net land area of 4.145 acres.
 9. The subject site is improved with an approximately 59,274 square foot building.
 10. The improvements located on the subject site are assessed separately under parcel number 4717-25-102-010. These improvements are not under appeal. The property record cards for the improvements located on the subject parcel do not include entries for land values.
 11. The subject property record cards include land values and building values. In testimony, Respondent claims this is a glitch in the assessing software that is beyond Respondent's control.⁷
 12. This tax appeal matter involves a singular property and not a "universe of properties" under the concept of mass appraisal.
 13. Petitioner submitted a valuation disclosure in the form of a narrative appraisal report prepared by John Widmer.
 14. In testimony, Petitioner's appraisal report conforms to the fundamental concepts and principles of *The Appraisal of Real Estate* (Chicago: 14th ed, 2013).
 15. Petitioner's appraisal report acknowledges the distinction between the subject parcel and the improvements. In other words, the scope of work section of the appraisal report identifies the appraisal assignment and necessary steps in the valuation of the subject parcel.
 16. Petitioner's appraisal report is based on the sales comparison approach for the subject parcel of land only. The initial comparative analysis included consideration of 10 vacant land sales located in Livingston County.⁸
 17. Petitioner's sales comparison write-ups include the land sale located at Highland Road (M-59) which is located just west of the subject property. This land sale is identified as sale 2.⁹
 18. Petitioner's sale 2 was analyzed and considered but was excluded from direct comparison to the subject property.
 19. Petitioner's appraiser invokes a hypothetical condition¹⁰ for the valuation of the subject land separately from the existing improvements. This hypothetical condition complies with the appraiser's invocation of professional standards.¹¹
 20. Petitioner's appraiser analyzed other Kroger sites to derive a land to building ratio.
 21. Petitioner's appraiser considered six methodologies for the valuation of the subject's parcel.¹²
 22. Petitioner's appraiser analyzed the 3-year sales history for the subject property.¹³

⁶ Resp's Exh. R-1, 21 and Tr., 39-40, 68-70.

⁷ Tr., 162-163.

⁸ Pet's Exh. P-1, 49.

⁹ Pet's Exh. P-1, A-35.

¹⁰ Appraisal Institute, *The Dictionary of Real Estate Appraisal* (Chicago: 6th ed, 2015), p 113.

¹¹ The Appraisal Foundation, *Uniform Standards of Professional Appraisal Practice* (Chicago: 2016-2017 edition), p 19.

¹² Pet's Exh. P-1, 8-9.

¹³ *Id.*, 11.

23. Petitioner's appraiser analyzed 18 Kroger properties in Michigan to derive a development density and a land-to-building ratio for the subject site.¹⁴
24. Petitioner's appraiser invokes an extraordinary assumption¹⁵ for the valuation of the subject parcel as 6.259 acres.¹⁶ This extraordinary assumption complies with the appraiser's invocation of professional standards.¹⁷
25. Petitioner's appraisal report addendum includes BS&A property record cards for the subject property, market statistical information from the Environmental Systems Research Institute ("ESRI"), and write-ups for 10 comparable vacant land sales.
26. Josephine Lentine is the assessor for the city of Howell. She is a Michigan Advanced Assessing Officer (MAAO) formerly known as a Level 3 Assessor.
27. Respondent's valuation disclosure is the subject property record cards for the tax years under appeal.
28. Respondent's assessor's assessment and valuation of the subject parcel is her first ground lease.¹⁸
29. Respondent's assessor did not make the prorated calculations for the \$8,000,000 purchase price of units 1, 2, 3 and 8. Likewise, the assessor did not confirm the proration with the seller or the former assessor.¹⁹
30. Respondent relies on an income approach based on the subject's lease rate of \$22,500 per month.
31. Respondent's lease rate was not analyzed or supported by any market lease rate data.
32. Respondent's determination of 1 percent for annual operating expenses is just an opinion.²⁰
33. The reference to an "MTT appraisal" within the subject property record card for the income approach was not supported by any documentary evidence.
34. In testimony, Respondent's expert admits she had no market support for the 8 percent capitalization rate in the income approach.²¹

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.²²

The legislature shall provide for the uniform general ad valorem taxation of real and tangible personal property not exempt by law except for taxes levied for

¹⁴ *Id.*, 23.

¹⁵ Appraisal Institute, *The Dictionary of Real Estate Appraisal* (Chicago: 6th ed, 2015), pp 83-84.

¹⁶ Pet's Exh. P-1, 10.

¹⁷ The Appraisal Foundation, *Uniform Standards of Professional Appraisal Practice* (Chicago: 2016-2017 edition), p 19.

¹⁸ Tr., 130.

¹⁹ Tr., 133-134.

²⁰ Tr., 148.

²¹ Tr., 154.

²² See MCL 211.27a.

school operating purposes. The legislature shall provide for the determination of true cash value of such property; the proportion of true cash value at which such property shall be uniformly assessed, which shall not . . . exceed 50 percent. . . .²³

The Michigan Legislature has defined “true cash value” to mean:

The usual selling price at the place where the property to which the term is applied is at the time of assessment, being the price that could be obtained for the property at private sale, and not at auction sale except as otherwise provided in this section, or at forced sale.²⁴

The Michigan Supreme Court has determined that “[t]he concepts of ‘true cash value’ and ‘fair market value’ . . . are synonymous.”²⁵

“By provisions of [MCL] 205.737(1) . . . , the Legislature requires the Tax Tribunal to make a finding of true cash value in arriving at its determination of a lawful property assessment.”²⁶ The Tribunal is not bound to accept either of the parties' theories of valuation.²⁷ “It is the Tax Tribunal's duty to determine which approaches are useful in providing the most accurate valuation under the individual circumstances of each case.”²⁸ In that regard, the Tribunal “may accept one theory and reject the other, it may reject both theories, or it may utilize a combination of both in arriving at its determination.”²⁹

A proceeding before the Tax Tribunal is original, independent, and de novo.³⁰ The Tribunal's factual findings must be supported “by competent, material, and substantial evidence.”³¹ “Substantial evidence must be more than a scintilla of evidence, although it may be substantially less than a preponderance of the evidence.”³²

“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

²³ Const 1963, art 9, sec 3.

²⁴ MCL 211.27(1).

²⁵ *CAF Investment Co v Michigan State Tax Comm*, 392 Mich 442, 450; 221 NW2d 588 (1974).

²⁶ *Alhi Dev Co v Orion Twp*, 110 Mich App 764, 767; 314 NW2d 479 (1981).

²⁷ *Teledyne Continental Motors v Muskegon Twp*, 145 Mich App 749, 754; 378 NW2d 590 (1985).

²⁸ *Meadowlanes Ltd Dividend Housing Ass'n v Holland*, 437 Mich 473, 485; 473 NW2d 636 (1991).

²⁹ *Jones & Laughlin Steel Corp v City of Warren*, 193 Mich App 348, 356; 483 NW2d 416 (1992).

³⁰ MCL 205.735a(2).

³¹ *Dow Chemical Co v Dep't of Treasury*, 185 Mich App 458, 462-463; 462 NW2d 765 (1990).

³² *Jones & Laughlin Steel Corp*, *supra* at 352-353.

³³ MCL 205.737(3).

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

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 the only valuation method that directly reflects the balance of supply and demand for property in marketplace trading.”³⁷ 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 valuation approach employed, the final valuation determined must represent the usual price for which the subject would sell.³⁹

As noted in the Findings of Fact, Respondent’s documentary and testimonial evidence has inconsistencies and deficiencies beyond the reach of the Tribunal. First, while not exclusively relied upon, there was no market analysis for the proration of the June 2015 sale price to units 1, 2, 3 and 8 or the analysis of market conditions from that sale date to the relevant tax days under appeal. The proration of a sale price to 4 units (out of a development of 10 units) as allegedly developed by the former assessor was not supported by any market evidence.⁴⁰ Second, cogent testimony was lacking for the details of a sales study or the subject records compiled by the prior assessor.⁴¹ References to the former assessor as well as county sales studies are not the equivalent of a comparative analysis specifically applied to the subject property. The alleged land sales study amounted to the sale of the part of the subject

³⁴ *Jones & Laughlin Steel Corp*, *supra* at 354-355.

³⁵ MCL 205.737(3).

³⁶ *Meadowlanes*, *supra* at 484-485; *Pantlind Hotel Co v State Tax Comm*, 3 Mich App 170, 176; 141 NW2d 699 (1966), *aff’d* 380 Mich 390 (1968).

³⁷ *Jones & Laughlin Steel Corp*, *supra* at 353 (citing *Antisdale v City of Galesburg*, 420 Mich 265; 362 NW2d 632 (1984) at 276 n 1).

³⁸ *Antisdale*, *supra* at 277.

³⁹ See *Meadowlanes Ltd Dividend Housing Ass’n v Holland*, 437 Mich 473, 485; 473 NW2d 636 (1991).

⁴⁰ The former assessor, Gladys Niemi, was not listed on Respondent’s witness list and was not present at the hearing.

⁴¹ Tr., 106.

development.⁴² Moreover, the excuse of a BS&A software glitch does not negate Respondent's responsibility to maintain and defend the property records, assessments and tax roll for their unit of government. Third, testimony merely identifying a generic income approach with unsupported elements did not result in persuasive conclusions. The income approach was not supported by customary market income elements such as lease rates, expenses, capitalization rates. In other words, the subject's lease rate was not applied to other market leases or lease rates. Further, the complexity of the subject lease agreement was tied to the entire development and not exclusively to unit 1 of the development. The subject lease rate encompasses more than the subject site. No analysis was rendered for the lease rates tied to the other units within the condominium development. For these reasons, Respondent's prorated valuation and income approach are given no weight or credibility in the determination of market value for the subject property.

Petitioner's development and communication of a sales comparison approach is logically supported in valuation practice and theory. Said differently, the analysis of the subject parcel in the context of a commercial development was supported by market data and market concepts. It is known that land and improvements exist at the subject property. However, Petitioner's appraiser was engaged to value the land separately from the improvements. The logic of this engagement flows from the fact that the land is assessed separately from the improvements.⁴³ Again, the appraiser has formally acknowledged this as a hypothetical condition which is meaningful in relation to market data to create credible results. Cross examination of Petitioner's appraisal report only helped to further strengthen and support Petitioner's analysis.

More specifically, Petitioner's appraiser analyzed the subject site to the market for a land-to-building ratio supported by market data (Kroger properties in Michigan). In turn, Petitioner gave sound reasoning for the subject site in the highest and best analysis and conclusion. Next, Petitioner researched, analyzed and adjusted 10 comparable sales to the subject property. The adjustments were explained and the adjusted prices per acre were reconciled to arrive at conclusions of value for 2016 and 2017.

⁴² Tr., 164-176. Knowing the difference between mass appraisal and the valuation of a single property did not add persuasion to Respondent's lack of market support from land sales studies or an income analysis. The subject property as "its own study" without market support is not logical in valuation practice or theory.

⁴³ Any reference to "alternate facts" in this appeal is nonsensical and quite insulting to obvious and blatant facts on the record.

The Tribunal accepts Petitioner's overall analysis and methodology but questions the slight disconnect between the appraiser's testimony and documentary evidence towards a final reconciliation.⁴⁴ The appraisal report relies on a statistical reconciliation by giving no weight to noted outliers. Only under examination did the appraiser determine that most weight was given to sales 7 and 9.

"Even when adjustments are supported by comparable data, the adjustment process and the indicated values should reflect judgment. Small inadequacies can be compounded when several adjustments are added or multiplied, and thus seemingly precise arithmetic conclusions derived from adjusted data might contradict the appraiser's judgment. The sales comparison approach is not formulaic. It does not lend itself to detailed mathematical precision. Rather, it is based on judgment and experience as much as quantitative analysis."⁴⁵

The appraiser's write-ups and grid analysis provide a basis for a meaningful reconciliation of sales 7 and 9. Sale 7 is zoned general business and is developed with a hotel. Sale 9 is zoned as a non-residential planned unit development ("PUD") and is developed with retail space. Petitioner's sales comparison adjustment grids indicate larger adjustments (over 30%) to sale 7 for 2016 and 2017. Therefore, a reasoned and reconciled determination is attainable from these two sales with greater weight given to sale 9 (recent sale, similar zoning, fewer adjustments) for the market value of the subject property.

The Tribunal finds that Petitioner was able to show that the subject's real property was over-assessed for the tax years under appeal. The extensive Findings of Fact not only focus on Petitioner's detailed evidence, but on Respondent's insufficient evidence. As such, and in light of the above, the Tribunal finds that Petitioner has succeeded in meeting its burden with competent evidence on the issue of true cash value, assessed value, and taxable value. Petitioner has provided credible testimonial and documentary evidence for the 2016 and 2017 tax years at issue. As such, the Tribunal finds Petitioner's sales comparison approach is the most reliable and sufficient evidence to arrive at an independent determination of value.

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

⁴⁴ Tr., 97-98 and Pet.'s Exh. P-1, 56 and 58.

⁴⁵ Appraisal Institute, *The Appraisal of Real Estate* (Chicago, 14th ed, 2013), p 394.

JUDGMENT

IT IS ORDERED that the property's state equalized and taxable values for the tax year(s) at issue are MODIFIED as set forth in the Introduction section of this Final Opinion and Judgment.

IT IS FURTHER ORDERED that the officer charged with maintaining the assessment rolls for the tax years at issue shall correct or cause the assessment rolls to be corrected to reflect the property's true cash and taxable values as finally shown in this Final Opinion and Judgment within 20 days of the entry of the Final Opinion and Judgment, subject to the processes of equalization. See MCL 205.755. To the extent that the final level of assessment for a given year has not yet been determined and published, the assessment rolls shall be corrected once the final level is published or becomes known.

IT IS FURTHER ORDERED that the officer charged with collecting or refunding the affected taxes shall collect taxes and any applicable interest or issue a refund within 28 days of entry of this Final Opinion and Judgment. If a refund is warranted, it shall include a proportionate share of any property tax administration fees paid and penalty and interest paid on delinquent taxes. The refund shall also separately indicate the amount of the taxes, fees, penalties, and interest being refunded. A sum determined by the Tribunal to have been unlawfully paid shall bear interest from the date of payment to the date of judgment, and the judgment shall bear interest to the date of its payment. A sum determined by the Tribunal to have been underpaid shall not bear interest for any time period prior to 28 days after the issuance of this Final Opinion and Judgment. Pursuant to MCL 205.737, interest shall accrue (i) after December 31, 2009, at the rate of 1.23% for calendar year 2010, (ii) after December 31, 2010, at the rate of 1.12% for calendar year 2011, (iii) after December 31, 2011, through June 30, 2012, at the rate of 1.09%, (iv) after June 30, 2012, through June 30, 2016, at the rate of 4.25%, (v) after June 30, 2016, through December 31, 2016, at the rate of 4.40%, and (vi) after December 31, 2016, through June 30, 2017, at the rate of 4.50%, (vii) after June 30, 2017, through December 31, 2017, at the rate of 4.70%, and (viii) after December 31, 2017, through June 30, 2018, at the rate of 5.15%.

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

APPEAL RIGHTS

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

A Motion for reconsideration must be filed with the required filing fee within 21 days from the date of entry of the final decision.⁴⁶ Because the final decision closes the case, the motion cannot be filed through the Tribunal's web-based e-filing system; it must be filed by mail or personal service. The fee for the filing of such motions is \$50.00 in the Entire Tribunal and \$25.00 in the Small Claims Division, unless the Small Claims decision relates to the valuation of property and the property had a principal residence exemption of at least 50% at the time the petition was filed or the decision relates to the grant or denial of a poverty exemption and, if so, there is no filing fee.⁴⁷ A copy of the motion must be served 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.⁴⁸ Responses to motions for reconsideration are prohibited and there are no oral arguments unless otherwise ordered by the Tribunal.⁴⁹

A claim of appeal must be filed 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."⁵⁰ A copy of the claim must be filed with the Tribunal with the filing fee required for certification of the record on appeal.⁵¹ The fee for certification is \$100.00 in both the Entire Tribunal and the Small Claims Division, unless no Small Claims fee is required.⁵²

By Marcus L. Abood

Entered: March 26, 2018

⁴⁶ See TTR 261 and 257.

⁴⁷ See TTR 217 and 267.

⁴⁸ See TTR 261 and 225.

⁴⁹ See TTR 261 and 257.

⁵⁰ See MCL 205.753 and MCR 7.204.

⁵¹ See TTR 213.

⁵² See TTR 217 and 267.